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Criminal Law -- Polygraph Examination Results Admissible in Post-Conviction Hearings

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cover, however, a more faithful interpretation of the language of the Code would keep cover as a choice, not as an integral determinant of damage measurement.

Pre-Code law favored a method for calculating damages that could be applied in all cases.[66] Perhaps this policy of uniformity should also help determine the direction of post-Code decisions. An interpretation of section 2-713's "learned of the breach" to mean that an aggrieved buyer who does not cover would also "learn" of the breach at the end of the same time period he would have had to procure cover would serve a dual purpose. It would reconcile section 2-713 with the basic policy of allowing a buyer a "commercially reasonable time" before taking any action and, in contrast to *Cargill*, would be more likely to yield the same amount in damages as when the buyer covered. In this way, the courts would be upholding an important traditional purpose of damage measurements while resting their decisions on Code considerations and policies.

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Criminal Law—Polygraph Examination Results Admissible in Post-Conviction Hearings

Despite the widespread use of and reliance upon the polygraph or "lie detector"[1] in nonjudicial and pretrial investigations,[2] courts have regarded the polygraph with suspicion. Polygraph examination results have been barred from most courts in the United States[3] on the ground that such

66. *See* text accompanying notes 24-26 *supra*.

1. The polygraph, commonly called a "lie detector," is designed to monitor and measure certain physiological responses of a person who is answering a set of "yes" or "no" questions. The device consists of three basic parts: (1) a "pneumograph tube" which is fastened around the subject's chest to record respiration; (2) a blood pressure cuff to record pulse and blood pressure; and (3) electrodes fastened to the hands or fingers through which an imperceptible electric current passes in order to record galvanic skin response. The instrument produces an electromechanical recording of unconscious physiological changes theoretically produced by internal stress caused by an examinee's conscious insincerity. The polygraph examiner's expert opinion regarding his examinee's sincerity is based on his analysis of the recording and other circumstances of the examination. *See generally* 3A WIGMORE ON EVIDENCE § 999 (J. Chadbourn rev. 1970 & Supps. 1975 & 1977).

2. *See, e.g.*, People v. Reagan, 395 Mich. 306, 313, 235 N.W.2d 581, 584-85 (1975) (Michigan Supreme Court took judicial notice of investigative usefulness of polygraph).

3. *E.g.*, Marks v. United States, 260 F.2d 377 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); People v. York, 174 Cal. App. 2d 305, 344 P.2d 811 (1959). *But see* United States v.

evidence has not gained "general scientific acceptance,"[4] the traditional test for admission of such evidence originally set forth in *Frye v. United States*.[5] Michigan has joined the majority of jurisdictions in barring polygraph evidence from use at trial.[6] In a case of first impression, however, the Michigan Supreme Court in *People v. Barbara*[7] held that, in ruling on a post-conviction motion for a new trial, the judge may in his or her discretion weigh the results of a polygraph examination.[8]

Movant Joseph Barbara, Jr., was accused of having extorted money from Delores Lazaros by threatening the lives of her son and imprisoned husband.[9] In fear of movant's threats, Lazaros informed no one of the incident until her husband, Peter Lazaros, returned from prison.[10] The authorities were informed at that time and, following testimony at the trial by both Peter and Delores Lazaros, Barbara was convicted.[11]

Following a number of unsuccessful appeals,[12] Barbara moved for a new trial, asserting that newly discovered evidence showed that Peter Lazaros had given perjured testimony.[13] Movant offered two new witnesses and testimony regarding the results of polygraph examinations passed by one of the two new witnesses;[14] although the trial court barred the polygraph

Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) (rejected nonadmissibility); Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 313 N.E.2d 120 (1974) (special exception made when defendant agrees in advance to take a polygraph test and submit the tests irrespective of results).

4. *See* text accompanying notes 27-29 *infra*.

5. 293 F. 1013 (D.C. Cir. 1923).

6. As recently as 1968, the Michigan Supreme Court in People v. Frechette, 380 Mich. 64, 155 N.W.2d 830 (1968), reaffirmed its opposition to the use of polygraph evidence at trial, stating, "There can be no doubt at present that in this jurisdiction the results of lie detector tests are inadmissible." *Id.* at 68, 155 N.W.2d at 832.

7. 400 Mich. 352, 255 N.W.2d 171 (1977).

8. *Id.* at —, 255 N.W.2d at 197-98.

9. *Id.* at —, 255 N.W.2d at 173.

10. Delores Lazaros alleged that while her husband was imprisoned, movant came to her home, raped her and extorted money from her. *Id.*

11. *Id.*

12. Barbara's initial appeal asserted that the behavior of witnesses Peter and Delores Lazaros in injecting extraneous and prejudicial matters into their testimony in the presence of the jury deprived movant of his right to a fair trial by an impartial jury. The Michigan Court of Appeals rejected Barbara's claim on appeal, 23 Mich. App. 540, 179 N.W.2d 105 (1970), and the Michigan Supreme Court denied leave to appeal, 383 Mich. 803 (1970). The United States District Court granted movant's writ of habeas corpus, *see* 400 Mich. at —, 255 N.W.2d at 173, but was reversed by the Court of Appeals for the Sixth Circuit. Barbara v. Johnson, 449 F.2d 1235 (6th Cir. 1971), *cert denied,* 405 U.S. 922 (1972).

13. 400 Mich. at —, 255 N.W.2d at 173.

14. One of Barbara's new witnesses, a cousin of Peter Lazaros, testified that Lazaros told him his wife was not raped and that Lazaros admitted making up the story to get out of prison. The witness had successfully taken a polygraph examination. He came forward with his testimony after he learned that movant had been sentenced to a long prison term. *Id.* at —, 255 N.W.2d at 173-74.

evidence it permitted a special record of the tests to be made.[15] Barbara's motion for a new trial was denied[16] on the grounds that Michigan law prevented the admission into evidence of polygraph examination results in a post-conviction proceeding and that the testimony did not constitute newly discovered evidence sufficient to warrant a new trial.[17]

On appeal[18] the Michigan Supreme Court reaffirmed its view that polygraph evidence is inadmissible at trial,[19] but rejected the trial judge's assumption that he had no discretion to consider the polygraph evidence in a post-conviction motion for a new trial, even if he was satisfied with the reliability of the polygraph machine and the proficiency of the polygraph operator.[20] The court reasoned that such discretion was permissible because a motion for a new trial requires lesser standards of proof than a trial itself.[21]

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15. *Id.* at —, 255 N.W.2d at 174.

16. The hearing judge conceded that Peter Lazaros' cousin's testimony discredited the testimony of Peter Lazaros, but concluded that it did not discredit the testimony of the complainant, Delores Lazaros. The court attributed Barbara's conviction to the complainant's testimony, as the alleged offense took place while Peter Lazaros was in prison, and concluded that the new evidence was not sufficient to render a different result probable on retrial. *Id.*

The discovery that testimony introduced at trial was perjured, however, may be grounds for ordering a new trial in Michigan. *Id.* Barbara contended that the polygraph results he offered would have facilitated his demonstration, and the hearing judge's determination, that Peter Lazaros committed perjury. Specifically, if the jury would believe his new witness, then the credibility of both Peter *and* Delores Lazaros would be impeached. *Id.* at —, 255 N.W.2d at 174-75. In this context it should be noted that when newly discovered evidence is positive as to the accused's innocence, the technical rules of evidence may be relaxed. *See, e.g.*, State v. Jones, 89 S.C. 41, 44, 71 S.E. 291, 292 (1911); State v. Laper, 26 S.D. 151, 157-58, 128 N.W. 476, 479 (1910).

Although movant offered the result of his own favorable polygraph examination, the Michigan Supreme Court held that the offer was merely duplicative of Barbara's denial of guilt and, therefore, not new evidence. 400 Mich. at — n.2. 255 N.W.2d at 175 n.2.

17. 400 Mich. at —, —, 255 N.W.2d at 174, 199. The purpose of a post-conviction hearing for a new trial based on newly found evidence is, as its name suggests, an action to determine whether, in the interests of justice, new evidence is of sufficient importance to entitle a party to a new trial. Four basic requirements must be met before a court will grant a new trial because of newly discovered evidence. Movant must show that: (1) The evidence itself, not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) the evidence is such as to render a different result probable on a retrial of the cause; and (4) the party could not with reasonable diligence have discovered and produced it at trial. People v. Clark, 363 Mich. 643, 647, 110 N.W.2d 638, 640 (1961).

18. The Michigan Court of Appeals denied Barbara leave to appeal, but the Michigan Supreme Court granted leave. No. 15815 (Mich. Ct. App., docketed March 23, 1973), *appeal granted*, 391 Mich. 761 (1974).

19. The *Barbara* court cited two reasons for its refusal to reject the *Frye* rule: (1) The field of polygraphy is still challenged forcefully on theoretical grounds; and (2) the results of polygraphy have yet to achieve a predictable level of consistency among examiners, despite significant progress in recent years. 400 Mich. at —, 255 N.W.2d at 186 (citing Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 429, 313 N.E.2d 120, 125 (1974)).

20. *Id.* at —, 255 N.W.2d at 199.

21. Justice Coleman, in his dissenting opinion, contended that the majority's "argument that a motion for a new trial requires lesser standards of proof than a trial itself and, therefore, we should experiment with an admittedly unreliable source of evidence, is unpersuasive." *Id.* at —, 255 N.W.2d at 202 (Coleman, J., dissenting).

Characterizing a new trial hearing as a "preliminary procedure" in which a defendant's guilt or innocence is not at issue,[22] the *Barbara* court noted that a judge may use certain data, such as affidavits, which would be inadmissible at trial, to assist in rendering his decision.[23]

The *Barbara* court then held that judges hearing post-conviction motions for new trials may in their discretion consider the results of polygraph examinations provided that the results of the test are offered on the defendant's behalf, the test was taken voluntarily, the examiner's qualifications, the quality of the equipment and the procedures employed are approved, the test results are considered only with regard to the general credibility of the new witness, and all knowledge of the test is barred from the trier of fact in a new trial.[24] The court emphasized that its limitations on the permissible use of the polygraph in court kept its holding "well within the limits prescribed by the state of the art" and avoided "prematurely considering those policy questions which inevitably accompany use of such evidence at trial."[25] A two-fold advantage to limited admission of polygraph evidence was acknowledged by the *Barbara* court. The test results could assist the defendant in demonstrating, and the judge in determining, that a newly discovered witness is credible without casting the polygraph in a decisive role. In addition, the courts would have the opportunity to establish a "track record" of polygraph reliability under strictly controlled conditions.[26]

The historical roots of *Barbara* can be traced back to *Frye v. United States*,[27] which marked the first attempt to introduce polygraph evidence in court. In that case defendant sought to introduce an expert to testify at trial about the results of a systolic blood pressure deception test,[28] a forerunner to the modern polygraph. In excluding the evidence, the *Frye* court said:

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22. *Id.* at —, 255 N.W.2d at 197.

23. *Id.* at —, 255 N.W.2d at 199. The court conceded, though, that "experimentation would be unwise when an individual's life or freedom might hinge directly on the effect at trial of a questionable device." *Id.* at —, 255 N.W.2d at 198.

24. *Id.* at —, 255 N.W.2d at 197-98.

25. *Id.* at —, 255 N.W.2d at 198.

26. *Id.* One of the strongest contentions against the admission of polygraph evidence has been its scientifically unsubstantiated reliability. *See* Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694 (1961). For a thorough discussion of case law and scientific information concluding that the polygraph is highly accurate, see Note, *The Emergence of the Polygraph at Trial*, 73 COLUM. L. REV. 1120 (1973).

27. 293 F. 1013 (D.C. Cir. 1923).

28. A systolic blood pressure deception test simply recorded blood pressure and pulse. The modern polygraph records not only blood pressure and pulse but also respiration and galvanic skin reflex or electrodermal response. *See* J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE 1-3 (1966).

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*[29]

Academic criticism has since been leveled against the *Frye* standard of general scientific acceptance on the ground that it is an unnecessarily strict test for the admission of scientific evidence, amounting in effect to a rigorous rule of judicial notice.[30] *Frye*, however, has long been adhered to by the great majority of jurisdictions, and remains today the leading case on the subject.[31] The *Frye* standard was first enunciated in Michigan in *People*

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29. 293 F. at 1014 (emphasis added).

30. An expert witness offering scientific testimony usually applies a general scientific principle (conscious deception causes internal stress which, in turn, produces unconscious physiological changes) to specific data or evidence (abnormal blood pressure, respiration or galvanic skin response) in an effort to reach a conclusion relevant to the issues of the particular case (witness credibility). The validity of the principle underlying the technique may be so widely accepted, as in handwriting analysis, fingerprinting and ballistics, that judicial notice of it will be taken by a court without the necessity of establishing a foundation through expert testimony. *See* United States v. Ridling, 350 F. Supp. 90, 94 (1972); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility In a Perjury-Plagued System*, 26 HASTINGS L. REV. 917, 941 (1975). Although critics of the *Frye* rule concede that the general acceptance standard is appropriate for taking judicial notice of scientific assertions, they do note believe it is a proper standard for gauging the admission of scientific evidence. "Any relevant conclusions [from scientific evidence] which are supported by a qualified expert witness should be received unless there are other reasons for exclusion." MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 203, at 491 (2d ed. E. Cleary 1972) (footnote omitted) [hereinafter cited as MCCORMICK]; Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 9. *See also* Kaplan, *The Lie Detector: An Analysis of its Place in the Law of Evidence*, 10 WAYNE L. REV. 381, 386 (1964).

31. *See* MCCORMICK, *supra* note 30, § 207, at 506. Although *Frye* has been followed in the vast majority of jurisdictions, the *Barbara* court cited two federal cases and one state case that have called the *Frye* rule into question: United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970) (sub silentio substitution of a different rule for *Frye*); United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) (substitution of a more lenient test than *Frye*); Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 313 N.E.2d 120 (1974) (special exception to the *Frye* rule created when defendant agrees in advance to take a polygraph test and submit the tests irrespective of results). The *Barbara* court called these cases "anomalies." 400 Mich. at —, 255 N.W.2d at 186; *cf.* People v. McLaughlin, 3 Mich. App. 391, 393, 142 N.W.2d 484, 485 (1966) (fact of polygraph examination admissible at trial without objection).

Although no appellate court has specifically rejected *Frye,* in United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972), the District Court for the Eastern District of Michigan rejected the *Frye* court's conclusion. The *Ridling* court declared that the scientific basis for the polygraph examination was well established and directly relevant to that case (a perjury case). *Id.* at 93, 95.

The complete requirements established by the *Ridling* court for the admission of polygraph evidence in trials are:

v. Becker.[32] The *Becker* court held that the admissibility of polygraph evidence would be contigent upon "testimony offered which would indicate that there is at this time a general scientific recognition of such tests."[33] Michigan courts have relied on the *Becker/Frye* holdings and the subsequent failure of the polygraph to gain general scientific approval in barring the admission of polygraph evidence in most judicial contexts.[34] Although courts in other states have allowed opposing parties to stipulate before the test is administered that the results could be admitted into evidence,[35] the courts in Michigan have denied this option.[36] Given Michigan's historical intolerance for use of polygraph evidence in almost any judicial context, the impact of the supreme court's decision in *Barbara* in favor of limited admission of such evidence becomes all the more significant.

Prior to *Barbara*, the Michigan courts had twice confronted the issue whether polygraph evidence could be used to aid in the evaluation of witness credibility in a new trial hearing.[37] In both cases the Michigan Court of Appeals relied on the *Becker/Frye* rule in denying the admission of such

1. The parties will meet and will recommend to the Court three competent polygraph experts other than those offered by the defendant. 2. The Court will appoint one or more of the experts to conduct a polygraph examination. 3. The defendant will submit himself for such examination at an appointed time. 4. The expert appointed by the Court will conduct the examination and report the results to the Court and to the counsel for both the defendant and the government. 5. If the results show, in the opinion of the expert, either that the defendant was telling the truth or that he was not telling the truth on the issues directly involved in this case, the testimony of the defendant's experts and the Court's expert will be admitted. 6. If the tests indicate that the examiner cannot determine whether the defendant is or is not telling the truth, none of the polygraph evidence will be admitted.

Id. at 99.

32. 300 Mich. 562, 2 N.W.2d 503 (1942).

33. *Id.*; *accord*, People v. Frechette, 380 Mich. 64, 68, 155 N.W.2d 830, 832 (1968); People v. Davis, 343 Mich. 348, 370, 72 N.W.2d 269, 281 (1955).

34. Results of polygraph examination or any reference to them are inadmissible evidence in: (l) Competency hearings, People v. Liddell, 63 Mich. App. 491, 495, 234 N.W.2d 669, 672 (1975); (2) presentence reports, People v. Allen, 49 Mich. App. 148, 152, 211 N.W.2d 533, 535 (1973); (3) sentencing proceedings, People v. Towns, 69 Mich. App. 475, 478, 245 N.W.2d 97, 99 (1976); and (4) civil proceedings, Stone v. Earp, 331 Mich. 606, 610, 50 N.W.2d 172, 174 (1951).

35. *See, e.g.*, State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); State v. Freeland, 255 Iowa 1334, 125 N.W.2d 825 (1964); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972); State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

36. Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951); People v. Levelston, 54 Mich. App. 477, 221 N.W.2d 235 (1974).

37. People v. Alexander, 72 Mich. App. 91, 249 N.W.2d 307 (1976); People v. Sinclair, 21 Mich. App. 255, 175 N.W.2d 893 (1970). The court in *Barbara* also cited two cases from other jurisdictions, United States v. Stromberg, 179 F. Supp. 278 (S.D.N.Y. 1959), and State v. Scott, 210 Kan. 426, 502 P.2d 753 (1972), in which the issue whether polygraph evidence could be used to buttress the credibility of the *defendant* in a new trial hearing had been considered. 400 Mich. at — n.45, 255 N.W.2d at 197-98 n.45. Both courts denied the admissibility of such evidence on the ground that it was merely cumulative and inadmissible at trial. 179 F. Supp. at 280; 210 Kan. at 434, 502 P.2d at 760.

evidence. In *People v. Sinclair*,[38] defendant, following his conviction for armed robbery, moved for a new trial based on newly discovered evidence after an inmate at a state prison signed an affidavit stating that he, and not defendant, had committed the crime in question.[39] A police administered polygraph test indicated that the affiant's confession was a fabrication.[40] Statements by the judge hearing defendant's motion revealed that he gave weight to the test results in denying Sinclair's motion for a new trial.[41] The court of appeals, citing *Becker*, held that it was error to admit or to consider the test results in the hearing for a new trial and remanded for rehearing.[42] The *Sinclair* court, unlike the *Barbara* court, failed to note any procedural differences between a trial and a hearing following a motion for a new trial that might warrant distinguishing *Sinclair* from previous decisions on the polygraph.

Defendant in *People v. Alexander*[43] was convicted of armed robbery and moved for a new trial based on newly found evidence.[44] In support of his motion, defendant offered two new witnesses and was prepared to offer polygraph evidence presumably supporting his innocence.[45] The hearing judge refused to admit testimony that would lay a foundation for the admission of the polygraph examination results and subsequently denied defendant's motion for a new trial.[46] The court of appeals affirmed and, deferring to the supreme court's pending decision in *Barbara*, said, "Until changed by the Supreme Court polygraph results are inadmissible."[47] If defendant's test results were offered to buttress the credibility of at least one of the new witnesses,[48] then *Barbara* overrules sub silentio the court of

38. 21 Mich. App. 255, 175 N.W.2d 893 (1970).

39. *Id.* at 256, 175 N.W.2d at 894.

40. *Id.* at 257, 175 N.W.2d at 894.

41. The trial court made the following remark in the new trial hearing:

> "They did put Mr. Todd on a polygraph to determine whether or not there was any substance to his story. Although the results of a polygraph are not admissible in a proceeding in court, nevertheless, it was the conclusion of the polygraph operator and the police that this was a fabrication on the part of Mr. Todd merely to wipe off an offense for Defendant Sinclair."

Id. (quoting trial court).

42. *Id.* at 258, 175 N.W.2d at 894-95 (citing People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942)).

43. 72 Mich. App. 91, 249 N.W.2d 307 (1976).

44. *Id.* at 97, 249 N.W.2d at 308. Alexander's newly found evidence consisted in part of a new witness, a friend of defendant, who allegedly knew who committed the robbery for which Alexander was convicted. *Id.* at 93-94, 249 N.W.2d at 308-09.

45. *Id.* at 97, 249 N.W.2d at 309-10. It is unclear from the court's opinion in *Alexander* whether the polygraph test results were offered to support the testimony of defendant, of the new witnesses, or of both.

46. *Id.* at 97, 249 N.W.2d at 310.

47. *Id.*

48. If the polygraph evidence was offered only to buttress defendant's own credibility, that evidence was cumulative under the court's opinion in *Barbara*. *See* note 16 *supra*.

appeals' holding in *Alexander*.[49]

The *Barbara* decision constitutes a limited victory for advocates of a more liberal rule for the admission of polygraph evidence. The Michigan Supreme Court, in deciding *Barbara*, apparently reassessed the counterbalancing factors traditionally advanced for excluding polygraph evidence at trial. Few critics of the polygraph today would contend that the opinion of a qualified polygraph expert has no probative value in assessing the sincerity of his examinee.[50] Even prior to *Barbara* the Michigan Supreme Court went so far as to take judicial notice of the fact that the polygraph is a useful investigative device.[51] In the past, however, the probative value of the polygraph has been outweighed by judicial fear of the prejudicial effect of such evidence upon the trier of a defendant's guilt or innocence.[52] Because of the polygraph's misleading reputation as a "truth teller," courts have demanded that the opinion of a polygraph expert be almost infallible because the trier of fact will invariably think it so.[53] By barring the results of a polygraph examination from the trier of fact in a new trial, and by strictly limiting the admission of such evidence to new trial hearings in which new witness credibility is a central issue, *Barbara* minimizes the prejudicial effect of polygraph evidence while maximizing its probative value. Relevant evidence is presumably yielded through admission of polygraph evidence in this judicial context. The question remains, however, whether the probative value of the polygraph, even without its prejudicial effect on the jury, is still sufficient to warrant the time-consuming procedures mandated for court-approved admissibility.[54]

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49. *Barbara* does not overrule the court of appeals decision in *Sinclair* because the polygraph evidence in the new trial hearing was unfavorable to defendant. *See* text accompanying note 24 *supra*.

50. *See* MCCORMICK, *supra* note 30, § 207, at 507.

51. People v. Reagan, 395 Mich. 306, 313, 235 N.W.2d 581, 584-85 (1975).

52. MCCORMICK, *supra* note 30, § 207, at 507; *see, e.g.*, United States v. Stromberg, 179 F. Supp. 278, 280 (S.D.N.Y. 1959) (admission of polygraph evidence at trial would be tantamount to overturning the jury system); People v. Davis, 343 Mich. 348, 372, 72 N.W.2d 269, 282 (1955) ("The tremendous weight which such tests would necessarily carry in the minds of a jury requires us to be most careful regarding their admission into evidence and we should not do so before its accuracy and general scientific acceptance and standardization are clearly shown."); People v. Leone, 25 N.Y.2d 511, 518, 255 N.E.2d 696, 700, 307 N.Y.S.2d 430, 435 (1969) ("We are all aware of the tremendous weight which such tests would necessarily have in the minds of a jury.").

53. MCCORMICK, *supra* note 30, § 207, at 507. Courts in Michigan had likewise barred the results of polygraph examinations from new trial hearings because of the presumed prejudicial effect of such tests on the judge. *See, e.g.*, People v. Allen, 49 Mich. App. 148, 211 N.W.2d 533 (1973); People v. Sinclair, 21 Mich. App. 255, 175 N.W.2d 893 (1970); *cf.* People v. Towns, 69 Mich. App. 475, 245 N.W.2d 97 (1976) (error for sentencing judge to have knowledge of polygraph examination results).

54. To lay a proper foundation for the admission of polygraph evidence in a new trial hearing in accordance with the *Barbara* court's requirements, the polygraph examiner, his

Barbara constitutes a new limitation on the scope of the *Frye* rule in Michigan. Although the court reaffirmed its support of *Becker/Frye* with respect to the admission of polygraph evidence at trial,[55] the exclusionary barrier of general scientific acceptance first raised in *Frye* was not applied with respect to new trial hearings. Demonstrated probative value, as opposed to demonstrated scientific approval, now appears to be the standard for the admission of polygraph evidence in Michigan new trial hearings based on newly found evidence.[56] *Barbara* is itself a conservative refinement of the holdings of those few courts that have admitted polygraph evidence at trial.[57] While the polygraph's usefulness in gauging witness credibility is employed in such cases, *Barbara*'s implementation alone succeeds in eliminating the instrument's prejudicial effect on the jury.

The new trial hearing has been designated the appropriate judicial "lab" for testing the polygraph's reliability,[58] but the *Barbara* court's characterization of the new trial hearing as a preliminary procedure is misleading. While such a hearing may be merely a proceeding preliminary to trial, it may also, in effect, be the defendant's final attack on the conviction. The judge ultimately determines whether the new trial hearing is a preliminary or final proceeding because he is the trier of the sufficiency of the evidence[59] and is not himself shielded from the prejudicial effect of the test results. The *Barbara* court implicitly recognized this problem by limiting the admissibility of polygraph evidence to test results favorable to the defendant.[60] One can only speculate what effect a defendant's omission in providing such test results will now have on the hearing judge's discretion to grant or to deny a motion for new trial.[61]

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equipment and the procedures employed must be approved by the court. Furthermore, the examinee may be subjected to a second, and conceivably a third, polygraph test upon the request of the prosecutor or the court. 400 Mich. at —, 255 N.W.2d at 197-98. These procedures may be too involved to provide a conclusion the judge could make on the basis of his own powers of observation. *See* United States v. Urquidez, 356 F. Supp. 1363, 1365-67 (C.D. Cal. 1973). *But cf.* Tarlow, *supra* note 30, at 958 (the objection that admission of polygraph evidence would require prolonged adjudication in each case is a "minor" one).

55. 400 Mich. at —, 255 N.W.2d at 186; *see* note 19 and accompanying text *supra*.

56. *Cf.* United States v. Zeiger, 350 F. Supp. 685, 687-88 (D.D.C.), *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972) ("*Frye* has been interpreted to demand general acceptance among the experts that current polygraph techniques possess a degree of reliability which satisfies the court of its probative value."); Tarlow, *supra* note 30, at 945-46 (the interpretation of *Frye's* "general acceptance" as "reliable enough to have probative value" would appear close to the traditional standard for the admission of scientific evidence).

57. *See* note 31 *supra*.

58. 400 Mich. at —, 255 N.W.2d at 198-99; *see* text accompanying notes 18-23 *supra*.

59. *See, e.g.*, People v. Sinclair, 21 Mich. App. at 258, 175 N.W.2d at 895.

60. 400 Mich. at —, 255 N.W.2d at 198; *see* text accompanying note 24 *supra*.

61. New trial hearing judges in Michigan may now come to expect defendants to submit polygraph examination results with their new witnesses Failure to provide such results may improperly influence the judge in the same manner as the judge's knowledge of a defendant's

Permitting limited admission of polygraph evidence in a hearing upon a motion for new trial is a novel compromise between the strict evidentiary standard of general scientific acceptance and the liberal rules of relevant evidence. *Barbara* preserves the sanctity of the trial from a "questionable device," but permits the court to test the utility of the polygraph under strictly controlled conditions. If the polygraph fails to demonstrate its reliability in gauging witness sincerity within the confines of new trial hearings, the *Barbara* court has limited adequately the effect of its decision through the numerous conditions imposed on the permissible use and purpose of such evidence.[62] Conversely, if the polygraph succeeds in demonstrating its reliability in assessing witness credibility, the *Frye* standard of general scientific acceptance should be satisfied and the door properly opened to the general admission of polygraph evidence for impeachment purposes.

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Labor Law—*Shopping Kart*: The Need for a Broader Approach to the Problems of Campaign Regulation

In accordance with its authority under the Labor Management Relations Act to regulate union election campaigns,[1] the National Labor Relations Board has developed a complex set of election standards to protect employee "freedom of choice"[2] in voting for or against union representation. The Board conceives of free choice not simply as an uncoerced

refusal to submit to a polygraph examination. *Cf.* People v. Towns, 69 Mich. App. 475, 245 N.W.2d 97 (1976) (improper for trial court to induce defendant to take polygraph test prior to sentencing even though court told defendant that refusal to take the test would not affect the sentence); People v. Allen, 49 Mich. App. 148, 211 N.W.2d 533 (1973) (improper to ask defendant if he were willing to take a polygraph test).

62. *See* text accompanying note 24 *supra*.

1. Section 9(c)(1) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 159(c)(1) (1970), states in part, "[I]f the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." The Supreme Court interpreted a similar provision under § 9(c) of the National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 453 (1936), to give the Board authority to promulgate regulations necessary to conduct a fair election. Southern S.S. Co. v. NLRB, 316 U.S. 31, 37 (1942); NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940).

2. Hollywood Ceramics Co., 140 N.L.R.B. 221, 223 (1962).