The Polygraph Paradox: Florida’s Conflicting Approaches Toward the Admissibility and Use of Polygraph Results

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I. INTRODUCTION

Lie detection is not a new concept. In fact, it has been said that more
than 4000 years ago the Chinese would try the accused in the presence of
a physician who, listening or feeling for a change in the heartbeat, would
announce whether the accused was testifying truthfully. Still others
believed that dunking, a hot-iron-on-the-tongue, and other truth revealing

1. W. Thomas Halbleib, Note, United States v. Piccinonna: The Eleventh Circuit Adds
   Another Approach to Polygraph Evidence in the Federal System, 80 KY. L.J. 225, 229
techniques would uncover suspected liars. Today, we rely on polygraph machines to serve this function. Although great strides have been made in the area of lie detection since the days of dunking and hot-iron-on-the-tongue tests, many argue that the polygraph is nothing more than a nervousness calculator which operates under assumptions and theories which are no more accurate than the tests of ancient times. As a result, the theory of lie detection has remained a controversial and much debated topic. To further complicate matters, courts are faced with the responsibility of having to decide whether polygraph results are worthy of admissibility when used in nontrial contexts such as suppression hearings, prison disciplinary hearings, and probation revocation hearings. In Florida, the concern over the admissibility of polygraph results is not a new issue. However, it remains a controversial and unsettled area of law in all courts. Florida precedent holds that polygraph results are inadmissible for purposes of determining guilt at trial. Nevertheless, many Florida courts have allowed polygraph results to be admitted upon the agreement of the parties and as a condition of probation. In addition, many Florida courts allow the polygraph to be used in civil trials for investigative purposes. As a result,

2. Id. at 229-30. In addition to dunking and hot iron tests, Halbleib notes that native Americans are said to have required a suspected liar to chew rice and then spit it out. Id. at 230. If the rice stuck to the accused gums, he was pronounced a liar. Id.
4. Cassamassima, 657 So. 2d at 908.
5. As defined in Barron’s Law Dictionary “polygraph” is:
[A]n electromechanical instrument that simultaneously measures and records certain physiological changes in the human body which it is believed are involuntarily caused by the subject’s conscious attempts to deceive the questioner. Once the machine has recorded the subject’s responses to the questions propounded by the operator, the operator interprets the results and determines whether the subject is lying.
7. See, e.g., Davis v. State, 520 So. 2d 572, 574 (Fla. 1988); Jones v. State, 453 So. 2d 226, 227 (Fla. 5th Dist. Ct. App. 1984).
9. When the polygraph is used for investigative purposes, it is usually done in the context of an employment setting. Thus, since no criminal conviction is involved, the decision whether to require submission to polygraph testing is a matter left to the discretion of the employer. See generally Swope v. Florida Indus. Comm’n, 159 So. 2d 653 (Fla. 3d Dist. Ct. App. 1964) (addressing the distinction between public and private employees in terms of discharge for failure to take a polygraph). But see Farmer v. City of Ft. Lauderdale, 427 So. 2d 187, 190 (Fla.) (holding that the unreliability of polygraph results precludes the
court decisions in Florida concerning the admissibility and use of polygraph results are diverse, inconsistent, and apparently irreconcilable.

This article will address these inconsistencies and their impact on the future of polygraph admissibility in Florida courts. Beginning with Part II, this Note provides a brief overview of the development of the law concerning the admissibility of scientific evidence, specifically the polygraph, along with the current approach used by Florida courts in addressing this issue. Part III presents a discussion on the use of polygraph testing as a condition of probation and its effect on the probationer’s constitutional rights, specifically, his right against self-incrimination. In Part IV, the basic principles underlying the polygraph’s operation are examined along with the many factors involved in obtaining an accurate polygraph reading. Recommendations for achieving consistent and reliable results are discussed in Part V, and Part VI concludes with a discussion concerning the issues that arise when polygraph results are admitted in Florida courts.

II. A LOOK AT THE LAW

A. Background

As early as 1923, beginning with the seminal polygraph case, Frye v. United States, and continuing through the present day, the issue of polygraph admissibility has remained an issue fraught with controversy, uncertainty, and peril. At the forefront of this quandary is the divergence of opinion regarding the reliability of polygraph results along with the fact that such results have yet to enjoy general acceptance within the scientific community. In 1989, the Eleventh Circuit countered the trend of per se dismissal of a police officer for failure to take the test, cert. denied, 464 U.S. 816 (1983).

10. 293 F. 1013 (D.C. Cir. 1923). Under Frye, in order for evidence to be admissible, it must be based on principles which are sufficiently established to have gained general acceptance in the scientific community. Id. at 1014.

11. Id. at 1013-14. This landmark case is known for the promulgation of the “Frye Rule of per se inadmissibility,” more commonly known as the “Frye test” or “general acceptance approach.” In Frye, the results of a systolic blood pressure test were held inadmissible based on a lack of recognition and general acceptance within the scientific community. Id. at 1014. Although the results of polygraph testing were not at issue in Frye, Florida courts apply this approach when considering the admissibility of scientific evidence and have required, in terms of the polygraph, that the party seeking to introduce the evidence make a preliminary showing that the underlying methodology of such evidence is generally accepted within the relevant scientific community. Accord Delap v. State, 440 So. 2d 1242, 1247 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984); Kaminski v. State, 63 So. 2d 339 (Fla. 1952). See generally Mark R. Kapusta, Daubert Versus Flanagan Comparing Standards for the
inadmissibility of polygraph results with its decision in United States v. Piccinonna. As a result of Piccinonna, the Eleventh Circuit became the first in the federal system to follow an approach to polygraph evidence that had been adopted more than a decade earlier by the Massachusetts Supreme Judicial Court. Under the Piccinonna approach, the results of polygraph testimony are admissible to impeach or corroborate the testimony of a witness at trial.

More recently, in Daubert v. Merrell Dow Pharmaceuticals, the Supreme Court of the United States expressly rejected Frye's stringent general acceptance test and adopted a more flexible approach based on the Federal Rules of Evidence. The Court reasoned that the Frye test had

Admissibility of Scientific Evidence in Florida State and Federal Courts, FLA. B.J., Dec. 1994, at 39; see also Fed. R. Evid. 702 (to be admissible, scientific knowledge must have sufficient reliability or trustworthiness and there should be proof that the principle supports what it purports to show, i.e., that it is valid).

12. 885 F.2d 1529 (11th Cir. 1989).

13. The approach adopted by the Piccinonna court first appeared in Commonwealth v. Vitello, 381 N.E.2d 582 (Mass. 1978), abrogated by Commonwealth v. Mendes, 547 N.E.2d 35 (Mass. 1989). Interestingly enough, the Massachusetts Supreme Judicial Court overruled Vitello in Commonwealth v. Mendes, 547 N.E.2d 35 (Mass. 1989), which was decided less than three months after the Eleventh Circuit decided Piccinonna. It should be noted that under Vitello, the use of the polygraph for purposes of impeachment or corroboration was limited to the testimony of the defendant, whereas in Piccinonna, the use of the polygraph was broadened to include impeachment or corroboration of the testimony of any witness at trial. For additional discussion on the Vitello and Piccinonna opinions, see Halbleib, supra note 1, at 259.


15. 113 S. Ct. 2786 (1993).

16. Id. at 2794. In Daubert, an action was brought by parents and their minor children who were born with serious birth defects, alleging that the birth defects had been caused by the mother's ingestion of Bendectin, a prescription antinausea drug distributed by Dow. Id. at 2791. The plaintiffs sought to introduce the testimony of a scientific expert who had compiled data which indicated that Bendectin could cause birth defects. Id. This testimony was excluded by the district court because it was based upon principles which were not sufficiently established to have gained general acceptance in the relevant scientific field. Id. at 2792. These principles were based upon conclusions drawn from animal cell studies, live animal studies, and chemical structure analyses. Daubert, 113 S. Ct. at 2791. The Ninth Circuit affirmed, citing the Frye decision. Id. at 2792. The United States Supreme Court vacated the Ninth Circuit's decision and expressly rejected Frye's general acceptance test. Id. at 2799. In issuing the opinion of the Court, Justice Blackmun characterized the general acceptance test as a rigid requirement which was "at odds with the 'liberal thrust' of the Federal Rules and their general approach of relaxing the traditional barriers to 'opinion testimony.'" Id. at 2794. For further discussion on the Daubert and Frye opinions, see Kapusta, supra note 11, at 38-40.
been superseded by rule 702 of the *Federal Rules of Evidence*, which had become effective some fifty years after the *Frye* decision.\(^\text{17}\) It would seem likely that Florida courts would follow in the footsteps of the *Daubert* decision since *Florida Statutes* section 90.702 is virtually identical to Federal Rule 702.\(^{18}\) Nonetheless, in *Flanagan v. State*,\(^\text{19}\) the Supreme Court of Florida rejected the approaches advocated by both the *Piccinonna* and *Daubert* courts and reaffirmed its commitment to the *Frye* "general acceptance" test for the admissibility of scientific evidence.\(^\text{20}\)

In Florida, polygraph results have been held inadmissible to prove the guilt or innocence of a defendant since 1952.\(^\text{21}\) However, Florida courts have allowed polygraph results to be admitted upon the stipulation of both parties.\(^\text{22}\) In addition, many Florida courts have advocated the use of periodic polygraph examinations as part of a probationer’s sentence.\(^\text{23}\)

\(^{17}\) *Daubert*, 113 S. Ct. at 2794. Under the *Daubert* approach, federal judges ruling on the admissibility of expert scientific testimony must engage in a two-part analysis. First, the judge must determine whether an expert’s testimony reflects scientific knowledge based on whether their findings are derived by the scientific method and whether their work product amounts to good science. *Id.* Second, the judge must determine whether the proposed testimony is relevant and that it logically supports a material aspect of the party’s case. *Id.* at 2796. See generally FED. R. EVID. 702 (providing that scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence may be admitted in the form of an opinion from a qualified expert).

\(^{18}\) See Kapusta, *supra* note 11, at 39.

\(^{19}\) 625 So. 2d 827 (Fla. 1993).

\(^{20}\) *Id.* at 828. Regardless of the United States Supreme Court decision in *Daubert*, the Florida Supreme Court in *Flanagan* stood firm on its position that the *Frye* test should be strictly adhered to when the admissibility of scientific evidence is at issue. As the court noted: “We are mindful that the United States Supreme Court recently construed Rule 702 of the Federal Rules of Evidence as superseding the *Frye* test. However, Florida continues to adhere to the *Frye* test for the admissibility of scientific opinions.” *Id.* at 829 n.2 (citations omitted). This is a particularly important point since Florida’s own rule regarding expert testimony was patterned after Federal Rule 702. See FLA. STAT. § 90.702 (1994) (providing that scientific knowledge is admissible in the form of expert testimony if it will assist the trier of fact).

\(^{21}\) See Kaminski v. State, 63 So. 2d 339 (Fla. 1952).

\(^{22}\) See Davis v. State, 520 So. 2d 572, 574 (Fla. 1988); Jones v. State, 453 So. 2d 226, 227 (Fla. 5th Dist. Ct. App. 1984) (holding that results of polygraph, absent consent by both parties, are inadmissible).

\(^{23}\) The courts of other jurisdictions have approved the use of the polygraph as a condition of probation despite the fact that the results of such a test are inadmissible at trial. See, e.g., People v. Miller, 256 Cal. Rptr. 587 ( Ct. App. 1989); Mann v. State, 269 S.E.2d 863 (Ga. Ct. App. 1980); State v. Sejnoha, 512 N.W.2d 597 (Minn. Ct. App. 1994). See generally State v. Victoroff, 770 P.2d 922 (Or. Ct. App. 1989) (holding that polygraph examinations are a valid condition of probation and results are admissible in any future court
fact, many Florida courts have required that a probation candidate agree to submit to these tests before probation will be granted. Thus, a direct conflict exists between Florida’s refusal to recognize the validity of polygraph results and its willingness to accept the results of such tests in certain situations.

B. Admissibility by Stipulation: A Whole New Evidentiary Question

The Supreme Court of Florida first rejected the admissibility of the polygraph over forty years ago in Kaminski v. State. In this case, the prosecution sought to introduce the results of a polygraph examination for purposes of rehabilitating a witness whose credibility had been shaken and upon whose testimony the State’s whole case depended. The court held, in response to the use of the polygraph for purposes of bolstering witness credibility, that such a mechanical device could not substitute “for the time-tested, time-tried, and time-honored discretion of the judgment of a jury as to matters of credibility.” The Kaminski decision, however, has not served to keep all polygraph evidence out of court. In Codie v. State, the Supreme Court of Florida changed its position and held that the results of a polygraph examination could be admitted upon the agreement of both parties. In Codie, the defendant agreed to submit to a polygraph examination after he was charged with two counts of robbery. Prior to administering the test, the State Attorney advised Codie that the results of these tests would be admitted into court regardless of whether he passed or

proceedings); Anne M. Payne, Annotation, Propriety of Conditioning Probation on Defendant’s Submission to Polygraph or Other Lie Detector Testing, 86 A.L.R. 4th 709 (1991) (discussing the use of the polygraph as a condition of probation and the defendant’s right against self-incrimination). But see, e.g., State v. Travis, 867 P.2d 234, 236 (Idaho 1994) (holding that the results of a polygraph examination are admissible in probation revocation hearing despite the fact that the results indicate that the defendant was deceptive in answering questions concerning whether he had been involved in sexual activity with minors).

25. Kaminski, 63 So. 2d at 339.
26. Id. at 341.
27. Id.
28. 313 So. 2d 754 (Fla. 1975).
29. Id. at 756.
30. Id.
failed. Since Codie failed the test, the results were admitted. In upholding both the trial and appellate court decisions, the supreme court concluded that the evidence was admissible against Codie since he had freely and voluntarily agreed to waive any objection to admissibility prior to the administration of the test. Thus, based on Codie, trial courts are given broad discretion to admit the evidence if the parties stipulate to the admissibility, scope, and use of the results prior to the administration of the examination.

Although the stipulation approach ensures that evidentiary objections will be avoided, it does not ensure that the results obtained from such an examination will be reliable and trustworthy. Furthermore, once the parties stipulate to the admissibility of polygraph evidence, they are bound by the results regardless of their effect. For example, in Butler v. State, the defendant was offered the opportunity to submit to a lie detector test as a means of proving his innocence in a series of rapes. A pretrial agreement was entered into whereby the State agreed not to prosecute if the results of the polygraph examination indicated that the defendant was telling the truth. On the other hand, if the results of the test were unfavorable, the results would be admissible at trial. The defendant passed the test and the State initially dismissed the charges. However, the defendant was

31. Id.
32. Id.
33. Codie, 313 So. 2d at 757.
34. For detailed discussion on Florida law concerning the admissibility of polygraph results through prior stipulation, see for example, Davis v. State, 520 So. 2d 572 ( Fla. 1988); Carron v. State, 427 So. 2d 192 (Fla. 1983); Farmer v. City of Ft. Lauderdale, 427 So. 2d 187 (Fla. 1983); Codie, 313 So. 2d at 754. These cases support the admission of polygraph results by agreement; however, the proposition that the polygraph is too unreliable to warrant its use in judicial proceedings in the absence of such agreement is maintained. See Delap, 440 So. 2d at 1242, wherein the court stated:

The use of a polygraph examination as evidence is premised on the waiver by both parties of evidentiary objections as to lack of scientific reliability. The evidence fails to show that the polygraph examination has gained such reliability and scientific recognition in Florida as to warrant its admissibility. The Florida rule of inadmissibility reflects state judgment that polygraph evidence is too unreliable or too capable of misinterpretation to be admitted at trial. However, the court does recognize that the parties may waive their evidentiary objection.

Id. at 1247.
35. 228 So. 2d 421 (Fla. 4th Dist. Ct. App. 1969).
36. Id. at 422.
37. Id.
38. Id.
39. Id. at 423-24.
later indicted on the same charge, and was found guilty despite his prior
agreement with the State.\textsuperscript{40} On appeal, the Fourth District reversed the
lower court’s ruling and held that the State was bound to abide by the
agreement that it had made with the defendant.\textsuperscript{41} The court reasoned that
such an agreement constituted a pledge of public faith and as such it should
not have been repudiated.\textsuperscript{42} However, in issuing its opinion, the court
noted that although the State is free to choose its procedures and weapons
of prosecution, it is a questionable situation when the State enters into
contracts where the decision to prosecute is removed “from the hands of the
traditional authority and delegate[d] to the conscience of a scientific
device—a device which may not be infallible.”\textsuperscript{43} Thus, although the court
remained convinced that polygraph results were unreliable for purposes of
determining guilt, it allowed the results to be admitted based on the prior
stipulation of the parties.\textsuperscript{44}

Similarly, in \textit{State v. Davis},\textsuperscript{45} the court was required to dismiss the
charges against a defendant after he passed a polygraph examination.\textsuperscript{46}
Here, as in But\textit{ler}, the defendant was offered the opportunity to submit to
a polygraph test in order to prove his innocence.\textsuperscript{47} In this case, however,

\textsuperscript{40} \textit{Butler}, 228 So. 2d at 424. In order to avoid its agreement with the defendant, the
State claimed that its approval of the agreement was not obtained by the court. \textit{Id.} Although
the court held that the polygraph results were inconclusive, it dismissed the State’s claim on
the ground that the State had been aware of the agreement and of the questions that would
be asked of the defendant. \textit{Id.} at 425. In addition, the State made no objection to the
administration of the test until after it was given. \textit{Id.}

\textsuperscript{41} \textit{Id.} at 424.

\textsuperscript{42} \textit{Butler}, 228 So. 2d at 424 (citing \textit{State v. Davis}, 188 So. 2d 24, 27 (Fla. 2d Dist. Ct.
App. 1966)).

\textsuperscript{43} \textit{Id.} at 425.

\textsuperscript{44} \textit{Id.}; see also \textit{Mullin v. State}, 571 So. 2d 1382 (Fla. 3d Dist. Ct. App. 1990). In this
case, the defendant entered into a plea agreement whereby she agreed to submit to a
polygraph examination in exchange for a waiver of the mandatory sentence and fine
associated with cocaine trafficking. \textit{Id.} at 1383. Based on hearsay testimony alone, the State
was able to show that the defendant had failed the polygraph examination. \textit{Id.} On appeal,
the decision of the trial court was reversed on the grounds that the hearsay testimony was
insufficient to sustain the trial court’s finding. \textit{Id.} at 1384. The court noted, however, that
had the State been able to legitimately prove that appellant had failed the polygraph, that
the minimum mandatory sentence would be appropriate. \textit{Id.} Thus, in this case, as in \textit{Davis}
and \textit{Butler}, the admissibility of the polygraph is not at issue. Rather, the focal point of these
cases centers on the existence of a plea agreement and the fact that polygraph results
obtained through a plea agreement are binding regardless of the outcome.

\textsuperscript{45} 188 So. 2d 24 (Fla. 2d Dist. Ct. App. 1966).

\textsuperscript{46} \textit{Id.} at 27.

\textsuperscript{47} \textit{Id.} at 25.
the defendant was willing to risk a plea of guilty to a lesser charge if the test indicated that he was untruthful.\textsuperscript{48} In return, the State agreed to dismiss the case if the result indicated that the defendant was telling the truth.\textsuperscript{49} Furthermore, both parties agreed that neither party would be bound if the results were inconclusive.\textsuperscript{50} After the administration of the test, the State sought to repudiate its agreement based on conflicting opinions between the first and second polygraph examiners.\textsuperscript{51} The first examiner opined that the defendant was telling the truth and the second examiner opined that the results were inconclusive.\textsuperscript{52} However, in accordance with the parties’ original agreement, the trial court quashed the indictment against the defendant based on the opinion of the first examiner.\textsuperscript{53} On appeal, the Second District held that the agreement by the State to dismiss the case against the defendant was a pledge of public faith, and was therefore binding and enforceable.\textsuperscript{54} Thus, the decision to dismiss the case against the defendant was affirmed.

Conversely, in \textit{Madrigal v. State},\textsuperscript{55} the State did not waive the defendant’s sentence despite its prior agreement.\textsuperscript{56} In this case, the defendant agreed to undergo several polygraph examinations in order to assist the State in a homicide investigation.\textsuperscript{57} After the examinations were administered, the State sought to repudiate its agreement based on the defendant’s failure to reveal to the polygraph examiner all that he knew.

\textsuperscript{48} \textit{Id.} A plea agreement was entered into whereby the State would reduce the defendant’s charge from first degree murder to manslaughter if the result of the polygraph was not in the defendant’s favor. \textit{Id.}

\textsuperscript{49} \textit{Davis, 188 So. 2d at 25.}

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Id. at 25-26.}

\textsuperscript{52} \textit{Id. at 26.}

\textsuperscript{53} \textit{Id.} The court decided to follow the opinion of the first examiner based upon the agreement entered into by the State and the defendant whereby both parties agreed to select the person that would administer the test, who in this case, was Deputy Gill. \textit{Davis, 188 So. 2d at 26.} Although Deputy Gill opined that the defendant was telling the truth, he later admitted that the results might not be accurate and that the opinion of the second examiner, Powell, might be correct. \textit{Id.} However, Powell testified that his findings were not based upon any reexamination of the defendant, but upon his disapproval of one of the techniques used by Gill. \textit{Id.} Nevertheless, the court held the agreement to be binding based upon the parties’ original choice of polygraph examiners. \textit{Id.}

\textsuperscript{54} \textit{Id. at 27.}

\textsuperscript{55} 545 So. 2d 392 (Fla. 3d Dist. Ct. App. 1989).

\textsuperscript{56} \textit{Id. at 393.}

\textsuperscript{57} \textit{Id.}
about the perpetrators of the homicide. In support of its position, the State claimed that the contract with Madrigal had been breached although it presented no evidence other than the opinion of the polygraph examiner to substantiate its conclusion. On appeal, the Third District Court of Appeal held that the State Attorney and the trial court were justified in concluding that the defendant had violated their agreement. Thus, the defendant’s sentence was upheld. Here, as in the Fourth and Second Districts, the Third District was not only willing to admit these results for purposes of determining the guilt or innocence of the defendant, but it relied on the validity of them in upholding the defendant’s sentence. More importantly, all of these courts were willing to admit and abide by the results of these examinations despite their failure to be recognized within the scientific community as being accurate, trustworthy, and reliable. Thus, based on the validity of the agreements entered into, these courts were willing to admit the results of the polygraph tests regardless of the negative impact that such results could potentially have on the lives of the defendants and irrespective of the standards for admissibility as set forth in Frye.

Likewise, many Florida courts have disregarded the Frye standard of admissibility in imposing polygraph testing as a condition of probation. This abandonment of the Frye standard is of particular importance in the context of the probationer since his very freedom is dependent on a favorable polygraph reading.

III. Ain’t Misbehavin’: The Polygraph as a Condition of Probation

The most recent Florida case to address the use of the polygraph as a condition of probation is Cassamassima v. State. In Cassamassima, the defendant was convicted of lewd assault on a child and was required to submit to a polygraph at six-month intervals as a condition of his probation. In a five-four en banc opinion affirming the lower court’s ruling, the Fifth District Court of Appeal held that a defendant may be required to

58. Id.
59. Id. In this opinion, neither the Madrigal court nor the State addressed the reasons why the polygraph examiner had concluded that the defendant was less than truthful in his responses. As such, it can only be inferred that the opinion of the examiner was enough to justify the court’s decision.
60. Madrigal, 545 So. 2d at 394-95.
61. Id. at 395.
63. Id. at 907.
take a polygraph at reasonable intervals and to respond to questions that concern noncriminal conduct so long as the results of the polygraph are not offered in evidence. The court reasoned that the polygraph condition was justified by the circumstances of the particular offense and on the information available to the court which suggested that polygraphs offer a "deterrent to reoffense." In holding that the polygraph is a valid condition of probation, the court vacated its earlier decision in Hart v. State where it struck the condition of mandatory polygraph testing from the probationer's sentence. In Hart, the defendant pled nolo contendere in a lewd act case and was sentenced to six years in prison and five years probation with submission to periodic lie detector tests as a condition of probation. On appeal, the court reasoned that such tests were unreliable for forensic use, and that it was an improper delegation of the trial court's fact finding

64. Id. at 911.
65. Id. The trial judge's opinion reads as follows:

   The Court imposes the special condition based on research which shows that this is a valid and effective deterrent to reoffend and is both valid and effective in dealing with denial that are critical in dealing with evaluation of rehabilitation of sex offenders and in large part because sex crimes, particularly with children, are secret crimes as to which it is very difficult to make an effective detection or an effective way to monitor whether we are having a violation of either the Community Control or the probation.

   A yes answer to either of those questions or a no answer which indicates deception would form the basis for a violation of community control or probation in this case.

Id. at 909.
66. 633 So. 2d 1189 (Fla. 5th Dist. Ct. App. 1994). See generally FLA. STAT. § 948.03 (1994) (providing that a probationer may be subject to a variety of requirements, such as mandatory drug or alcohol testing, so long as the condition is reasonably related to the offense, to the rehabilitation of the defendant, or to the protection of the public); see also Nichols v. State, 528 So. 2d 1282, 1284 (Fla. 1st Dist. Ct. App. 1988) (discussing permissible conditions of probation); Grubbs v. State, 373 So. 2d 905 (Fla. 1979). But see Gomez-Rodriqueq v. State, 632 So. 2d 709, 710 (Fla. 5th Dist. Ct. App. 1994) (holding that special condition that defendant refrain from consuming alcoholic beverages be struck as being unrelated to cocaine offense); Grate v. State, 623 So. 2d 591, 592 (Fla. 5th Dist. Ct. App. 1993) (striking condition that appellant not enter any bar or consume alcohol); Peterson v. State, 623 So. 2d 637, 638 (Fla. 5th Dist. Ct. App. 1993) (holding that no nexus exists between prohibiting appellant's consumption of dangerous substances and the appellant's offense of aggravated assault with a deadly weapon).
67. Hart, 633 So. 2d at 1189.
68. "Forensic" is defined as belonging to the courts of justice and indicating the application of a particular subject to the law. For example, FORENSIC MEDICINE is a branch of science that employs medical technology to assist in solving legal problems. BARRON'S LAW DICTIONARY 195 (3d ed. 1991).
authority to rely on the results of these tests to establish whether a crime had been committed.\textsuperscript{69} By reversing its decision in \textit{Hart}, the Fifth District Court of Appeal joined other Florida courts in assuming the validity of polygraph examinations despite general adherence to per se inadmissibility under \textit{Frye}.

In \textit{Hockman v. State},\textsuperscript{70} the Second District Court of Appeal also approved of the use of polygraph testing as a probationary condition.\textsuperscript{71} In this case, as in \textit{Cassamassima}, the defendant agreed to submit to regularly scheduled polygraph examinations as a condition of probation.\textsuperscript{72} However, as a result of three missed examinations, due to the defendant's inability to pay for the tests, the trial court held that the terms of probation had been violated.\textsuperscript{73} The Second District Court of Appeal reversed this decision, concluding that the State had never proved that the defendant had the ability to pay for the polygraph tests.\textsuperscript{74} Thus, the issue in this case was not

\begin{quote}
\textsuperscript{69} In \textit{Hart}, Justice Griffin urged that:

[\ldots] it is improper delegation of a court's fact-finding authority to rely upon some nervousness-calculator to establish whether a crime has been committed. That determination should be made after an accusation, proof through actual witnesses (not graph-readers) and an opportunity to cross-examine as to truth, present counter-witnesses, and otherwise defend.

\textit{Hart}, 633 So. 2d at 1189 (Griffin, J., concurring in part and dissenting in part). In determining the validity of polygraph results, the \textit{Hart} court relied on \textit{Davis v. State}, 520 So. 2d 572, 574 (Fla. 1988), and \textit{Jones v. State}, 453 So. 2d 226, 227 (Fla. 5th Dist. Ct. App. 1984) (holding that lie detector tests are unreliable for forensic purposes). However, later in the same opinion, Justice Griffin stated:

In concluding that the use of the polygraph has been effective in deterring sex offenders who victimize children, the trial court evidently has information and a frame of reference that we do not have \ldots. I do know that such criminals pose peculiar detection and recidivism problems for the criminal justice system. I also know that the sheer volume of perpetrators of such offenses seems to have overwhelmed our system's ability to effectively monitor and supervise these criminals during their probationary term.

Since offenders on probation for such sex crimes are already expected to report to their probation officer and answer questions such as the two framed by the court, the requirement of answering those questions in connection with a polygraph does not seem an impermissible burden if it serves any useful purpose.

\textit{Hart}, 633 So. 2d at 1190; see \textit{id.} at 1189 (listing the questions that may be asked of a sex offender during a polygraph examination).

\textsuperscript{70} 465 So. 2d 619 (Fla. 2d Dist. Ct. App. 1985).

\textsuperscript{71} \textit{id.} at 621.

\textsuperscript{72} \textit{id.} at 620.

\textsuperscript{73} \textit{id.}

\textsuperscript{74} \textit{id.}
whether submission to polygraph testing was a valid condition of probation, but whether the defendant had the money to pay for them. Although the appellate court reversed the lower court’s ruling, it did note that the use of the polygraph as a condition of probation was valid in the absence of any objection by the defendant. The court reasoned that since the defendant never contested the validity or imposition of the polygraph as a probationary condition, he effectively waived any error by the lower court in imposing the condition.

In Cassamassima, however, no waiver occurred since a timely objection had been made. Nevertheless, the court held that such a condition was proper and justified by the circumstances of that case and by the fact that Cassamassima did not intend to reject probation if the court insisted on the use of polygraph testing as a requirement of his probation. As a result, Cassamassima was faced with a situation in which he would have to choose between no probation at all or probation with the attached condition that he submit to periodic polygraph examinations. In this type of situation, it is not clear whether the defendant is able to make a clear and rational choice concerning his alternatives, primarily since his options are limited to either accepting the conditions as set forth by the court or incarceration. This take it or leave it situation renders the defendant’s decision making process one riddled with constitutional crisis. On the one hand, the defendant gains his freedom, but on the other hand he loses his rights with regard to any behavior that may be deemed as violating the terms of his probation. Thus, it appears that the probationer has little, if any, real choice in the matter.

75. Cassamassima, 657 So. 2d at 915 (referring to Hockman, 465 So. 2d at 619).
76. Id. On appeal, the court recognized that the appellant may have stipulated to the polygraph as a condition of probation as part of a plea negotiation or she may have simply failed to object to the condition at the time of its imposition. Id. Regardless, the appellant never objected to the condition in any subsequent proceeding. Id. See generally Payne, supra note 23 (discussing the use of the polygraph as a condition of probation).
77. Cassamassima, 657 So. 2d at 916 (Thompson, J., dissenting).
78. Id. at 913 (Harris, J., concurring specially with the opinion of Griffin, J.).
79. In addressing the issue of whether a probationer has a choice in accepting the terms of his probation, the Fifth District Court of Appeal held in Bentley v. State, 411 So. 2d 1361 (Fla. 5th Dist. Ct. App.), review denied, 419 So. 2d 1195 (Fla. 1982), in a unanimous, per curiam opinion:

When, at sentencing, the trial court proposes the conditions under which it will offer probation, the defendant should at that time seriously consider the matter and if he feels the conditions lade him with burdens too grievous to be borne, the defendant should forthrightly object to them at that time and place. ... If he feels the proffered probation with conditions is more onerous than the maximum confinement permitted by law, he should reject the tendered offer of
IV. THE POLYGRAPH AS A SPECIAL CONDITION OF PROBATION: IS THERE REALLY A CHOICE?

A. The Effect of the Probationer’s Waiver

In *State v. Heath*, the Supreme Court of Florida held that a probationer's agreement to accept probation effectively waives his Fifth Amendment privilege with regard to noncriminal conduct regardless of whether an express agreement to do so is made with the court. In *Heath*, the defendant challenged a requirement that he periodically answer questions from his probation supervisor regarding his whereabouts and conduct as violating his Fifth Amendment privilege against self-incrimination. In quashing this order, the supreme court recognized that probation itself would be impractical if the probationer was not required to respond to certain questions from his probation supervisor. However, the court also recognized that an implied waiver based on the acceptance of probation does not waive a probationer’s Fifth Amendment rights relating to “specific conduct and circumstances concerning a separate criminal offense.” In this instance, a probationer is free to assert a Fifth Amendment privilege, if appropriate. The problem with this approach, however, is that if a probationer asserts a Fifth Amendment privilege, it is likely that he will be drawing attention to the fact that he may be concealing prohibited conduct. Under this type of situation, the probation supervisor is free to increase the level of supervision of the probationer. Furthermore, an answer which

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proportion. This is not unfair because the predicament leading to his dilemma is a matter of his own making and the trial judge is acting for organized society. . . . If the trial court is adamant that the conditions are necessary, the defendant should either refuse probation or accept it as offered.

*Id.* at 1364.

80. 343 So. 2d 13 (Fla.), cert. denied, 434 U.S. 893 (1977).
81. *Id.* at 16.
82. *Id.* at 14-15.
83. *Id.* at 16.
84. *Id.*
85. *Cassamassina*, 657 So. 2d at 910 (citing *Owens v. Kelley*, 681 F.2d 1362, 1369 (11th Cir. 1982)).
86. *See Hart*, 633 So. 2d at 1190 (Griffin, J., concurring in part and dissenting in part).

As Justice Griffin explained:

A ‘false’ answer may not be a basis to violate the offender’s probation, but it certainly would offer a reasonable basis for the probation officer to enhance his supervision of the probationer and prevent further crimes. Or, perhaps, through investigation or more careful scrutiny, admissible evidence that the probationer
indicates deception may form the basis for a probation violation. As the
trial judge in \textit{Hart} noted, "[a] yes answer to either of [the] questions [asked]
or a no answer which indicates deception would form the basis for a
violation of community control or probation in this case."\textsuperscript{87} Thus, by
utilizing his constitutional right against self-incrimination, the probationer
is subjecting himself to further scrutiny and possible further punishment in
the form of increased supervision.

\textbf{B. The Right Against Self-Incrimination: A Contradiction in
Terms}

It is not surprising that the use of the polygraph as a condition of
probation has raised Fifth Amendment objections. However, as noted by the
\textit{Cassamassima} court, these objections have usually been rejected by the
courts on the ground that intrusion into the area of self-incrimination when
undergoing a polygraph examination is no greater than the requirement that
a probationer answer truthfully at all other times during a probation
inquiry.\textsuperscript{88} However, the use of a polygraph for these purposes cannot be
analogized with a questioning process in which the probationer is confronted
face to face with his supervisor. This is especially true since the polygraph
works by measuring physiological responses which may reveal dishonesty

\begin{quote}
\textit{Id.}\textsuperscript{87}. \textit{Cassamassima}, 657 So. 2d at 909. The probationer was required to undergo
polygraph testing at least once every six months for the first two years and then once every
year thereafter. \textit{Id}. During these examinations, the probationer was required to answer
whether he had been alone with a child since his last polygraph or since sentencing and
whether he had any manner of sexual contact with a child. \textit{Id.}; accord \textit{Hart}, 633 So. 2d at
1190 (Griffin, J., concurring in part and dissenting in part) (noting a false answer may not
be a basis to violate offender’s probation, but it would offer a basis for the probation officer
to enhance supervision).

\textit{Id.}\textsuperscript{88}. \textit{Cassamassima}, 657 So. 2d at 910 (citing Owens v. Kelley, 681 F.2d 1362, 1370
(11th Cir. 1982)). In further support of this proposition, the \textit{Cassamassima} court referred to
the United States Supreme Court’s holding in Minnesota v. Murphy, 465 U.S. 420 (1984),
wherein the Court explained that a “probationer may not refuse to answer a question just
because his answer would disclose a probation violation; he may only refuse to answer if a
truthful answer would expose him to prosecution for a crime different from the one of which
he was already convicted.” \textit{Id}. at 911 (citing \textit{Murphy}, 465 U.S. at 442-43).
\end{quote}
based on the nervousness of the subject rather than on an actual reading of untruthfulness. 89

V. TRUTH OFTEN REVEALS ITSELF, BUT NOT ALWAYS

In order to obtain accurate polygraph results, it is crucial that several conditions be met. Of these conditions, the subject’s testimony constitutes only one of the factors. The qualifications and prior experience of the polygraph examiner are crucial factors in the process since a large part of making an accurate reading relies on the subjective impressions of the examiner. 90 As the supreme court noted in Davis, factors which contribute to the results of a polygraph test are the skill of the operator, the emotional state of the person tested, and the fallibility of the machine. 91 In fact, it has been argued that the polygraph does nothing more than register physiological correlates of anxiety, which is not the same thing as consciousness of guilt or lying. 92 Thus, a fundamental problem with polygraph testing is its inability to make correct and consistent determinations of a subject’s truthfulness. 93 This predicament is of particular importance to the probationer since his continued freedom rests upon the accuracy and reliability of the polygraph in determining whether he has been truthful. In order to more thoroughly understand the many variables involved in a polygraph reading, it is necessary to discuss the basic principles of polygraph operation and how any one of the factors that contribute to this process may individually cause the reading to yield a different result.

A. Basic Principles of Operation

A polygraph operates based on certain assumptions, mainly that an individual will undergo physiological changes in blood pressure, respiratory

89. See infra text accompanying note 101.
90. See generally KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5169 (1978) (discussing the role of the examiner in the polygraph process); see also State v. Davis, 188 So. 2d 24, 26 (Fla. 2d. Dist. Ct. App.) (noting that testimony given by one polygraph examiner revealed that much of the outcome of a polygraph test depends upon the examiner), cert. denied, 194 So. 2d 24 (Fla. 1966).
91. Davis, 520 So. 2d at 573.
92. For an overview of how polygraph results may be unreliable for purposes of determining guilt or innocence, see 1 MCCORMICK ON EVIDENCE § 206 (John W. Strong ed. 1992). See also Halbleib, supra note 1, at 230-32 (discussing the mechanics of the polygraph technique and the role of the examiner in ensuring an accurate result).
It has been suggested that factors other than conscious deception can cause deviant responses from an examinee. For example, frustration, surprise, pain, shame, and embarrassment, as well as other responses incapable of analysis, can cause the examinee to respond in a manner which would trigger a negative response. In fact, studies have shown that examinees can successfully use countermeasures to create false negatives and thus clear themselves of suspicion. Alternatively, an examinee...
could tell the truth while thinking of something painful which could cause the truthful response to appear on a polygraph as a lie. In addition to these concerns, perhaps the most crucial component in the polygraph mix is the skill of the polygraph examiner. The examiner must subjectively interpret the graphs that are produced by the machine in order to determine whether the examinee has offered deceptive responses. In addition to graph interpretation, the examiner will also evaluate the examinee's demeanor, attitude, and responses to comments and questions. It is based on these subjective evaluations that the examiner is able to make preliminary judgments regarding the truthfulness of the examinee. Even if the scientific theory behind the polygraph is proven valid, the evidence obtained therefrom is of dubious value if the expert who interprets the results lacks the requisite skills. Thus, the use of the polygraph technique is dependent upon the ability, experience, education, and integrity of the examiner himself. Indeed as one author notes, "[a] properly tuned piano is an instrument upon which it is theoretically possible to play the 'Moonlight Sonata,' but whether we get that or 'Chopsticks' depends upon who is seated at the keyboard."

Based on these findings, it would seem that Florida courts would avoid using the polygraph for any purpose, particularly in the context of determining guilt. However, the courts that impose the polygraph as a probationary condition rationalize its imposition on the assumption that it will instill within the mind of the probationer a fear of detection, thus causing the

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at 233. Halbleib analogizes an examinee's ability to fool the polygraph with the poker player's ability to fool his opponents:

Any poker player knows that if his mouth goes dry, his voice trembles, his face blushes, and he begins to sweat every time he tries to bluff his way into a big pot, he probably will lose. Good players learn to control and manipulate these physiological signs to their benefit.

Halbleib, supra note 1, at 233.

102. Piccinonna, 885 F.2d at 1539 (Johnson, J., concurring in part and dissenting in part).

103. See Halbleib, supra note 1, at 232.

104. Id.

105. Id.


107. Halbleib, supra note 1, at 232.

probationer to refrain from further criminal conduct. However, the possibility still exists that the probationer will not fear detection or that even if he does fear detection that he will be able to control his emotions and/or responses so that he can escape suspicion. Moreover, even if the probationer is detected as being untruthful, this finding will be inadmissible against him in terms of criminal prosecution. Thus, it is questionable what real benefit, if any, is realized from such an exercise.

B. Psychological Deterrent or Waste of Time

In determining conditions of probation, it is the duty of the court to fashion such conditions so that they will serve the purpose of rehabilitating the defendant. Section 948.03 of the Florida Statutes establishes that probationers may be subject to a variety of requirements that would significantly interfere with their rights or liberties in other contexts “so long as the condition is reasonably related to the offense, to the rehabilitation of the defendant or to the protection of the public . . .”

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To deter certain types of behavior, any factor which would cause that behavior is not an absolute, but merely another factor for consideration. In the final analysis, it depends not on whether the polygraph machine works, but on whether the subject 'believes' that it works. It is society's belief that a person will fear being found out if a wrong is committed. This is a theory that is instilled early in life based on notions of morality and the norms of society. Thus, if the subject operates under these beliefs, the polygraph is much more likely to yield an accurate result.

Interview with Randolph Brachialarghe, Professor of Law, Shepard Broad Law Center, Nova Southeastern Univ., in Fort Lauderdale, Fla. (Aug. 23, 1995).


111. *Cassamassima*, 657 So. 2d at 912-13 (citing *Bentley*, 411 So. 2d at 1364).

112. *Cassamassima*, 657 So. 2d at 909 (citing Grubbs v. State, 373 So. 2d 905, 909 (Fla. 1979)). *See generally* FLA. STAT. § 948.03 (1994). In Larson v. State, 572 So. 2d 1368 (Fla. 1991), the court stated:

As a general rule, a condition of probation that burdens the exercise of a legal or constitutional right should be given special scrutiny. However, a defendant cannot successfully challenge every aspect of a prior order of probation simply because it infringes on some such rights. Most sentences and orders of probation have that effect, if only because they restrict liberty to some extent.

*Id.* at 1371; *accord* *Owens*, 681 F.2d at 1366 (holding that conditions of probation are not necessarily invalid simply because they affect a probationer’s ability to exercise constitutionally protected rights). See United States v. Tonry, 605 F.2d 144, 150 (5th Cir. 1979), in which the Supreme Court adopted a test to determine whether a condition of probation
The Supreme Court of Florida applied this rationale in *Biller v. State*, where it struck a condition of probation from the defendant's sentence on the ground that it was unrelated to the rehabilitation of the defendant. In that case, the defendant was prohibited from using or possessing alcoholic beverages as a result of his conviction for carrying a concealed firearm and a concealed weapon. The trial judge reasoned that the condition was rehabilitative in the sense that it would prevent the defendant from being in a position in which his judgment would be impaired. The Fourth District Court of Appeal acknowledged that there was nothing in the record suggesting any relationship between the defendant's behavior and the use of alcohol. Nevertheless, the district court upheld the challenged condition by concluding that it was within the trial judge's discretion to require the defendant to abstain from the use or possession of alcohol as a tool in the defendant's rehabilitation. In quashing this order, the Supreme Court of Florida stated that a special condition of probation will be upheld only if it has a relationship to the crime of which the offender is convicted, is related to conduct that is in itself criminal, or when it forbids conduct which is reasonably related to future criminality. The court concluded that a special condition of probation will only be upheld if the record supports at least one of the imposed pursuant to Federal Probation Act, 18 U.S.C. § 3651 (1987), is unduly intrusive on constitutionally protected freedoms: "Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement." *Tonry*, 605 F.2d at 150 (quoting United States v. Pierce, 561 F.2d 735 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978)).

113. 618 So. 2d 734 (Fla. 1993).
114. *Id.* at 735.
115. *Id.* at 734.
116. *Id.*
117. *Id.*
118. *Biller*, 618 So. 2d at 734.
119. *Id.* at 734-35. The *Biller* court based its opinion on the decision of the Second District Court of Appeal in *Rodriguez v. State*, 378 So. 2d 7 (Fla. 2d Dist. Ct. App. 1979), which held that constitutional rights of probationers are limited by conditions of probation which are desirable for purposes of rehabilitation. *Id.* at 734 (citing *Rodriguez*, 378 So. 2d at 9); see, e.g., *Stonebraker v. State*, 594 So. 2d 351 (Fla. 2d Dist. Ct. App. 1992); *Wilkinson v. State*, 388 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1980) (supporting the proposition that in order to be valid, special conditions of probation must be related to the crime for which the probationer was charged).
circumstances as stated above. In Biller's case, there was no connection between the use of alcohol and the crimes with which he stood convicted. Moreover, the use of alcohol by adults is legal. Therefore, since no nexus existed between the offense for which Biller had been convicted and the use of alcohol, the condition was stricken from his sentence. In Cassamassima, however, the court concluded that a direct relationship did exist between the administration of the polygraph and the future rehabilitation of the appellant. However, as Justice Thompson's dissent points out, no scientific evidence exists that would substantiate the polygraph as a deterrent against repeat offenders. In fact, as Justice Thompson noted, such a theory was speculative at best.

VI. RECOMMENDATIONS

Based on the questionable character of the polygraph in terms of reliability and accuracy, it is essential that at minimum, certain safeguards be implemented. These safeguards include standardizing the methods

120. Biller, 618 So. 2d at 735.
121. Id. at 734.
122. Id.
123. Id.
124. Cassamassima, 657 So. 2d at 910. Although the Cassamassima court held that the polygraph is a valid condition of probation, it did not offer any specific facts which would support the polygraph as being a successful deterrent against repeat offenders. The court did, however, rely on the Eleventh Circuit's decision in Owens, 681 F.2d at 1370, wherein the court held that such a condition "clearly is reasonably related to [the offender's] probation in that it deters him from violating the terms of his probation by instilling in him a fear of detection." Cassamassima, 657 So. 2d at 910.
125. Id. at 917.
126. Id. In a considerable dissent, Justice Thompson, writing on behalf of himself and Justice Sharp, reiterated the criteria set out in Rodriguez, 378 So. 2d at 7, which was adopted in Biller, 618 So. 2d at 734, in concluding that the polygraph examination is invalid as a special condition of probation because no nexus exists between the offense of lewd assault on a child and the condition of having to submit to polygraph testing. Cassamassima, 657 So. 2d at 916. As Justice Thompson observed:

It is incongruous to allow one probationer to consume alcohol (a drug) while on probation when the probationer was convicted of selling cocaine or PCP (drugs) based on the conclusion that there is no nexus between the crime and the condition of probation, and yet to compel another probationer to pay for a polygraph examination which is not related to the crime committed and which cannot be used as a basis for a violation of probation . . . .

Id.; see supra text accompanying note 119; see also cases cited supra note 66.
used by polygraph examiners as well as implementing quality control measures to assure that equanimity is achieved. Quality control measures may provide a source of feedback for examiners who may have become lax in their procedures and who may need updating on current techniques. This helps to ensure that the highest possible accuracy rates are achieved. However, even if quality control standards are met there is still a need for uniformity in the many variables that comprise the polygraph technique. This is a particularly problematic area since there has been little controlled research concerning these different variables. In the absence of any statistical data to support the individual controls, it is difficult, if not impossible, to reach a truly accurate result. To further complicate matters, even if a study did show that one variable produced a higher accuracy rate than a second variable, there is no way of knowing what it is about the first variable which caused this result. Thus, the process is imperfect and it can only be concluded that any result obtained therefrom is equally imperfect.

VII. CONCLUSION: TO BE OR NOT TO BE; THAT IS THE QUESTION

Although the polygraph has made progress in its journey toward judicial legitimacy, the journey is far from being over. Based on the imperfections of the process, the polygraph is really no more accurate than an elaborate guessing game. By allowing its use, for any purpose, within a judicial setting, courts are condoning an almost Russian roulette situation in which the consequences for the player could be grave. Moreover, by allowing the results of polygraph examinations to be admitted by stipulation, Florida courts are intensifying the confusion that already surrounds the issue of polygraph admissibility. The thrust of this argument lies in the fact that

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128. See supra text accompanying note 95.
130. Id.
131. Id. Jayne lists a few of the many variables involved in the polygraph technique: 1) instrumentation; 2) required documents; 3) pretest interview; 4) question formulation; 5) chart recordings; 6) chart interpretation; 7) report writing; and 8) policy guidelines. The author notes that many of these categories involve a subjective evaluation. Id. at *7. Ideally, quality control should be based on objective assessments and it is in this area that most disagreements concerning different techniques arise. Id. at *8.
132. See generally Halbleib, supra note 1 (discussing the polygraph’s odyssey toward judicial legitimacy).
the results of such an examination become no more scientifically valid or reliable by virtue of the parties stipulation than they did prior to such agreement.

Moreover, by allowing these results to be admitted, the door is left open to a virtual "Pandora’s Box"\textsuperscript{133} of potential issues that will need to be addressed by the courts.\textsuperscript{134} Thus, rather than adhering to a uniform system of admissibility, or inadmissibility as the case may be, the courts have allowed an accepted standard of per se "inadmissibility" to be reshaped into one that suits the needs of the parties in each individual case. Thus, the inevitable question becomes one of reconciliation. Specifically, how can the use of the polygraph as a condition of probation be reconciled with the broader view that the results of such a test are unreliable, unscientific, and inadmissible for purposes of determining guilt? This query has no answer, at least not yet. As a result, this area is left wide open to mixed interpretation and broad misapplication. As Justice W. Sharp pointed out in Cassamassima, "[t]he guilty can fool them and the innocent can flunk them."\textsuperscript{135} Thus, the potential exists for the guilty to be freed and the innocent to be punished. Although sentencing advocates recommend use of the polygraph when doing so fits the needs of their clients, there must be some assurance that offenders will be controlled in the community and that some rehabilitative benefit will be realized. At present, no such evidence exists. Based on this lack of clear and convincing evidence, it is apparent that a court of law should be the last place in which to rely on the results of such a questionable process.\textsuperscript{136} In the final analysis, if anything is

\begin{footnotesize}
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\item\textsuperscript{133} According to Greek mythology, Pandora was the first mortal woman, who in curiosity opened a box, letting out all human ills into the world. \textit{WEBSTER'S NEW WORLD DICTIONARY} 1025 (2d ed. 1986).
\item\textsuperscript{134} See Halbleib, \textit{supra} note 1, at 236-48 (discussing the issues of relevance, unfair prejudice, confusion of the issues, probative value, due process, and compulsory process with regard to polygraph admissibility). It is also of value to note that the United States Supreme Court held in Rock v. Arkansas, 483 U.S. 44, 62 (1987), that the Arkansas evidentiary rule categorically prohibiting the admission of hypnotically refreshed testimony did not pass constitutional scrutiny. Halbleib, \textit{supra} note 1, at 247-48. As a result, it is not a far fetched possibility that Florida courts may be faced with this issue to resolve at some future time. This is especially true in the context of prior stipulation. If Florida courts are willing to admit polygraph results based on the parties' stipulation, what is there to prevent these courts from ruling that hypnotically refreshed testimony may be admitted under the same circumstances?
\item\textsuperscript{135} Cassamassima, 657 So. 2d at 914 (Sharp, J., dissenting).
\item\textsuperscript{136} On behalf of the court, Justice Grimes stated in Flanagan, 625 So. 2d at 828, that: "a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its
\end{enumerate}
\end{footnotesize}
certain, it is that the search for truth is best left to the wisdom of judges and to the sensibilities of jurors.

_Terry Jane Feld_