

1 VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY

2 COMMONWEALTH OF VIRGINIA

3 v.

4 STEPHEN MATTESON EPPERLY,

5 Defendant

6
7 Stenographic report of all the testimony, together with the
8 motions, objections and exceptions on the part of the respective parties,
9 the action of the Court in respect thereto, and other incidents of the
10 trial of the case of Commonwealth of Virginia v. Stephen Matteson Epperly,
11 Defendant, tried at Pulaski, Virginia, on 11-17-80, before the Honorable
12 R. William Arthur in the Circuit Court of Pulaski County, Virginia.

13
14
15 APPEARANCES:

16 EVERETT R. SHOCKLEY, ESQUIRE

17 Attorney for the Commonwealth

18 R. DAVID WARBURTON, ESQ., AND R. GLENNWOOD LOOKABILL, ESQ.

19 Counsel for the Defendant

20 STEPHEN MATTESON EPPERLY

21 The Defendant, in person and by Counsel

22
23 Reported by:

24 Miss Elinor E. Williams
25 Court Reporter
26 780 S. 4th Street, Apt. 1
Wytheville, Virginia 24382

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		DIRECT	CROSS	RE-DIRECT	RE-CROSS
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2	(11-17-80)				
3					
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5	John Russell	9			
6	John Hall	12			
7	Robert H. Edwards	16	36	54	55
8	B. F. Shearwood	58	70, 90	90	96
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1 COURT: Let the record show that we are reconvened in a pre-trial hearing
2 in the case of Commonwealth v. Epperly. Gentlemen, I understand that you're
3 making a joint motion that this hearing be conducted in camera?

4 MR. WARBURTON: Yes, sir.

5 COURT: Commonwealth's attorney?

6 MR. SHOCKLEY: Yes, sir.

7 MR. WARBURTON: On behalf of the Defendant, we'll ask that it be held in
8 chambers, Your Honor.

9 COURT: Mr. Epperly, do you have any objection to having this hearing in
10 chambers?

11 MR. EPPERLY: No, sir.

12 COURT: Rather than open court?

13 MR. EPPERLY: I'd prefer to have it in chambers.

14 COURT: All right, now, what motion are we considering?

15 MR. WARBURTON: Do you have any evidence?

16 MR. SHOCKLEY: Yes, we have, I think, three things of major importance
17 for the Court to consider today. First of all, the Commonwealth would like the
18 Court to review the sufficiency of the bond posted by the Defendant's parents.
19 We have some matters to offer before the Court on that. Also, the Defendant,
20 prior to obtaining counsel, having counsel appointed for him, voluntarily took
21 a polygraph examination, which was administered by Mr. Sherwood of the Virginia
22 State Police in Wytheville. The Defendant, of course, Mr. Sherwood will be
23 here today to testify, I don't think he's here yet, but the results showed
24 deception when he was asked if he had killed Gina Renee Hall. The Commonwealth
25 here today has various evidence that it wants to offer and sincerely ask the
26 Court to allow it to introduce the results of the polygraph examination into

1 evidence. Those are the two motions that we have.

2 MR. WARBURTON: Your Honor, on that particular issue of the polygraph, I
3 have a written notice in limine regarding that polygraph for the Court to
4 consider. In addition, I have a motion in limine regarding certain allegedly
5 scientific tests done with trained dogs that I'd like the Court to review. As
6 to the order of how you want to take those three issues, that's up to the Court.

7 COURT: Let's take the bond first.

8 MR. SHOCKLEY: All right, sir. Judge, this matter, of course, is not set
9 to be heard until 11:00, we subpoenaed -.

10 COURT: Well, if you're not ready to proceed on it -.

11 MR. SHOCKLEY: Well, I don't know that it's absolutely necessary, if the
12 Court deems that it is, Mr. Deeson, Arthur Deeson (phonetic spelling) out of
13 Radford, apparently at the Defendant's parents' request, made an appraisal of
14 their home. I have it here in writing signed by Mr. Deeson, with photographs
15 of the house, and he has placed a fair market value on the house at sixty-
16 three thousand two hundred fifty dollars (\$63,250.00). I don't even think we
17 necessarily need to put Mr. Deeson on, although he was subpoenaed, I submit
18 to the Court that that valuation is just utterly ridiculous. Moreover, Mr.
19 Terwilliger here, last week, made a check at the court records in the city of
20 Radford. There are four (4) deeds of trust of record against the house. We
21 do not have the deeds of trust themselves. On the bond that was signed by the
22 Defendant's parents, a copy of which is here, they deduct from the fair market
23 value, mortgage and deeds of trust showing thirteen thousand dollars (\$13,000.00),
24 leaving a balance of fifty thousand dollars (\$50,000.00), \$50,250.00. Again,
25 after we checked the court records, we found four (4) deeds of trust, three (3)
26 of which were held by First and Merchants National Bank in the City of Radford,

1 one of which was held by First Federal in Radford. I placed calls to all of
2 these places, requesting that they send me a statement of the pay-off, and
3 we've received that in writing from First and Merchants, and I do not have the
4 one from First Federal, they either did not promptly get it in the mail, or
5 what, it would only boost the pay-off by about twelve hundred dollars (\$1200.00).
6 But the balance owing to First and Merchants alone is right at twenty thousand
7 dollars (\$20,000.00), seven thousand dollars (\$7,000.00) more than recited by
8 the Defendant's parents in the bond. We have Mr. (inaudible) also summonsed
9 for examination on these if you gentlemen have objection, we can cross-examine,
10 or examine him, on these deeds of trust.

11 COURT: Gentlemen, can we obviate this problem by having somebody else
12 go on the bond with the parents? Do you have such a person?

13 MR. WARBURTON: Yes, sir.

14 COURT: If you'll do that, why take the time to go through all this. That
15 would be the simplest way to -.

16 MR. WARBURTON: It may take a day or two, Your Honor, would it be possible
17 for the current bond to succeed through whatever days it takes, with due
18 diligence for us to secure another party?

19 MR. SHOCKLEY: Judge, we've gone through this before, and I would ask that
20 the Defendant be held in custody until such time as the bond is actually posted.
21 We've run into this problem before.

22 COURT: What problem?

23 MR. SHOCKLEY: People like in the case of -.

24 COURT: Oh, you mean other cases?

25 MR. SHOCKLEY: Yes, sir. Other cases.

26 MR. WARBURTON: Your Honor, at the moment, there's no evidence as far as

1 I know, that Mr. Shockley can proffer that there's been any problem with the
2 bond as far as leaving the Commonwealth of Virginia, or any untoward or any
3 illegal acts committed by the Defendant while he's been bonded for the last
4 week and three days. It would appear to me that the bond is sufficient,
5 amounts is the only thing in question, it's not a question of custody to protect
6 the citizens of this Commonwealth.

7 MR. SHOCKLEY: Again, it's beside the point, I submit to the Court. The
8 Court has set a bond which, you said on the bench one day, is this bond unfair,
9 or whatever, and at a bond hearing, you refused to lower it from \$50,000.00,
10 and if we're going to have \$50,000.00 as the figure, we ought to have \$50,000.00
11 worth of property to secure it.

12 COURT: Well, it's hard to argue with that logic. If you can get someone,
13 I gather from what you say you can get someone right away, maybe even today, or
14 tomorrow, certainly. But I will order that the Defendant be held until this is
15 done.

16 MR. WARBURTON: Would you ask him if we could have a day to check these
17 figures and see if they're correct?

18 MR. SHOCKLEY: Again, Judge, I don't know what type of bond or amount
19 would be posted, but I'd ask the Court to review that, I don't even think we
20 would need a, well, I would submit to the Court possibly a further appraisal
21 would, with all due respect to the Defendant and his parents, I don't see how
22 on earth that house could be worth \$63,000.00.

23 MR. WARBURTON: I can explain that very quickly if the Court will allow
24 me. The property is not just the house we're talking about. The house is
25 appraised at forty something, I believe. It's a large old rambling house. It's
26 got about nine (9) or ten (10) rooms. And the two lots next to it, see, this

1 is zoned Commercial, I assume Commonwealth checked this out, but this is zoned
2 Commercial, that side of the street, on Second Street, is zoned Commercial,
3 from Wirt Street all the way down, down for a couple more blocks. The property,
4 I went there to pick up the appraisal myself, Mr. Deeson, I didn't tell him
5 what it was for or anything else until he had completed his figures, I told him
6 it was for a bond, he didn't know what type of bond or anything else, but he
7 did the figures just at the Epperlys request, no knowledge of what they were
8 for. The two lots are commercial lots. Right down behind it, there's
9 commercial enterprises only about a block and a half or so from the Court House.
10 And the appraisal is based upon these being zoned Commercial. Also, there is
11 room there for two other dwellings under the zoning laws of the City of Radford.
12 So, it's quite, I mean, they'd been offered \$70,000.00 two years ago, for the
13 property, for the house and the two lots, or the adjoining lots. It's a very
14 long frontage, and it's clearly worth that as zoned Commercial. No doubt
15 about it, he was on the light side when he appraised it. His first reaction
16 was to put it right close to \$70,000.00. He thought, well, he'd better be on
17 the conservative side, not knowing what the bond was for, what the appraisal
18 was for, and the commercial lot's definitely valued at, a Seven-Eleven Store
19 there or anything else there, sold as a commercial lot, the lot would bring
20 considerably more than the residential lot. He had to take that into consider-
21 ration. He called the zoning people while I was in his office. So that's the
22 reason for that appraisal. In fact, it's a little bit on the light side. Of
23 course, with commercial zoning.

24 MR. SHOCKLEY: And I'd point out that the Commissioner of Revenue's
25 office in Radford has that property appraised as of the 1979 appraisal at 100%
26 of value -.

1 MR. WARBURTON: Isn't it 1977?

2 MR. LOOKABILL: As residential property.

3 MR. SHOCKLEY: As thirty-four thousand five hundred dollars (\$34,500.00)
4 in that area.

5 MR. LOOKABILL: For 1980, it's thirty-eight five (\$38,500.00).

6 MR. SHOCKLEY: And that includes both parcels of land as well.

7 MR. LOOKABILL: Well, that's as residential. But see, the fact is that
8 it's zoned Commercial. They've apparently appraised it as residential property,
9 but it's zoned Commercial.

10 COURT: Well, I know Mr. Deeson, and I know he has a reputation of being
11 a competent, conservative real estate man and appraiser. And unless some
12 evidence is introduced to show that he's just, for some reason or other, made
13 an egregious error in this case, I see no reason to question his figures. But,
14 his own figures show, and the letter from the bank shows that we don't have
15 fifty thousand dollars (\$50,000.00) net assets, and so, I will -.

16 MR. SHOCKLEY: May I also offer this into evidence, please, this -?

17 COURT: Well, I -.

18 MR. WARBURTON: I object to the entry of this, Your Honor, since it is
19 hearsay.

20 COURT: Well, if you object, I'll, can't let it in if it is hearsay.

21 MR. SHOCKLEY: Well, we're not here trying the merits of the matter, Your
22 Honor, and it's inconceivable to me that the rules of evidence in a hearing
23 in chambers on bond are as stringent as they would be in a court room, trying
24 the merits of a criminal case.

25 MR. WARBURTON: We're dealing with a man's liberty. I certainly hope
26 they would be as stringent.

1 COURT: All right, now, what's the next issue?

2 MR. SHOCKLEY: Well, is the Court of the opinion then that the bond is
3 insufficient at this time?

4 COURT: I've ruled that it is.

5 MR. SHOCKLEY: All right, sir. We need about \$20,000.00 more to --

6 COURT: And until whatever it takes to overcome the liens against it and
7 to show a net equity of \$50,000.00. And that Mr. Epperly will be held until
8 this is done. All right, now, what's the next issue?

9 MR. WARBURTON: Well, I'd urge the polygraph issue be taken up next, Your
10 Honor.

11 MR. SHOCKLEY: I'd ask the Court to take up the dog issue.

12 COURT: Well, what difference does it make? We'll take up whichever one
13 you all are ready in. Do you have some reason you don't want to --?

14 MR. SHOCKLEY: The polygraph will take some time and witnesses, the dog
15 we can handle, I think --.

16 COURT: Well, what about the law of the polygraph? Regardless of witnesses.
17 Do you want me to be the first Court in Virginia or one of the first in the
18 nation to admit a polygraph test?

19 MR. SHOCKLEY: These are some things we have here today for you, yes, sir.

20 COURT: All right. Well, let's take up the dogs, then, if it won't take
21 too long.

22 MR. WARBURTON: Your Honor, I have a motion in limine regarding the dogs,
23 also.

24 COURT: Let me get out my book on evidence.

25 MR. WARBURTON: Your Honor, it would appear to me that the Commonwealth,
26 assuming it proffers evidence, would have the burden of showing that it is

1 admissible, rather than our showing that it's inadmissible, although I've
2 offered the motion in limine, so I don't know who is the leading party, actually,
3 in this case, the decision on inclusion or not of the dog evidence.

4 COURT: Well, I'd say since you made the motion to suppress, that you
5 should go forward with it.

6 MR. WARBURTON: Okay. Your Honor, my preliminary comment is that I'm
7 dealing from relative ignorance since I am unable from your prior ruling,
8 despite a proffer from Mr. Shockley that he would give me whatever reports
9 he has on the dogs. I'm unable to assess the evidence itself. All I can do
10 is speculate on what it is. My understanding is that the Commonwealth had,
11 at their behest, a gentleman and several dogs come in from out of state, I
12 believe it was from up-state Pennsylvania, at a time after the alleged disa-
13 ppearance of, the actual disappearance of Miss Hall, the alleged death and
14 murder of Miss Hall, come and take the dogs from the Davis home on Claytor
15 Lake through some route, the end result being that the dogs showed up at the
16 home of Mr. and Mrs. Q. B. Epperly on Second Street in Radford. That is the
17 extent of my knowledge about the activities of the dog. I talked informally
18 with Mr. Shockley who mentioned to me that he intended to introduce evidence
19 regarding the dogs about the time he brought up the issue of whether the dog
20 and the trainer would be in Florida or not, regarding when we could set the
21 dates. I assume from those (inaudible) he intends to submit evidence to
22 the Court, regarding the activities of the dog and persons who saw the dog
23 do whatever the dog did.

24 COURT: All right. Now, what authority do you have one way or the
25 other?

26 MR. WARBURTON: Assuming I'm correct on what Mr. Shockley intends to

1 offer, my research reveals that there is no case whatsoever in the State of
2 Virginia, Commonwealth of Virginia, regarding the admissibility of evidence
3 of bloodhounds or other tracking animals. The closest I have been able to
4 come up with is a majority view in about seventeen (17) states that would
5 allow such evidence given certain restrictions and conditions precedent, and
6 seven (7) or eight (8) states which absolutely do not allow it. The closest
7 you've got between the Virginias is the State of North Carolina which decided
8 in 1965 that such evidence, under certain circumstances, is indeed admissible.
9 My argument will start with the position that this ought not to be allowed
10 in the Commonwealth of Virginia, or anywhere else for that matter, because
11 it has not been scientifically proven reliable. Should the Commonwealth
12 accede to that burden, I would urge to this Court that the circumstances of
13 which I'm aware regarding these dogs do not allow any finding of reliability,
14 that being that the tracking done was ten (10) days after the alleged
15 disappearance of Miss Hall, actual disappearance of Miss Hall, the alleged
16 death and murder of Miss Hall, and ~~that there were either two (2) or three (3)~~
17 ~~rains in between the 29th of June which is the day the Commonwealth alleges~~
18 ~~this crime to have occurred, and the day that the dogs tracked.~~ Again, to
19 recapitulate, I would state that there's no reliability possibility in this
20 case to start with, even if it had been done the next day. It's too subjective.
21 But in this instance, it was done ten (10) days later after a few rains, I
22 believe the Judge can take judicial notice of the fact that if a dog has any
23 talent whatsoever, that that is extremely diminished by rain and time, and I
24 would say it is too remote for consideration by the Jury in this case.

25 MR. SHOCKLEY: Judge -, are you through, Mr. Warburton?

26 MR. WARBURTON: Yes, sir.

1 MR. SHOCKLEY: Okay. As Mr. Warburton stated, this dog was brought in
 2 from northern Pennsylvania. ~~The dog's owner, trainer and operator is Mr.~~
 3 ~~John Preston, who is a former State Trooper with the Virginia State, or, excuse~~
 4 ~~me, Pennsylvania State Police.~~ Mr. Preston did as Mr. Warburton said
 5 approximately ten (10) days after the disappearance of Gina Hall, scented the
 6 dog, and the dog went from where her car was abandoned, over a railroad
 7 trestle, through the back side of Radford, and went and sat on the front
 8 stoops of Stephen Epperly's house. This matter has been considered by the
 9 Supreme Court of this State. There's no written opinion because they denied
 10 the Writ of Error. Mr. Preston, just last year, the man with the dog, testified
 11 in Pittsylvania County on a murder case, in the case of Commonwealth v. Dean
 12 Franklin Wade. This matter was appealed to the Virginia Supreme Court and
 13 I think it's Record No. 800542, I have here the petition submitted by the
 14 Defendant and also the required brief by the Commonwealth Attorney, and also
 15 a certified copy of the Order denying the Writ of Error.

16 COURT: This is one of the assignments of error? The direction of -?

17 MR. SHOCKLEY: Yes, sir. And I also have for your reading, I don't have
 18 copies to hand around, but I'll give you the cite. It's evidence of trailing
 19 dogs by, excuse me, by dogs in criminal cases, and this is ALR, 18 ALR
 20 12.21, or 12.20, yeah, 12.21. And as Mr. Warburton said, it goes through
 21 several cases, one of which is not Virginia, and I'd say about two-thirds say
 22 yes under most circumstances, or under some circumstances, and then there's
 23 a few that flat out say no. But Virginia has had the chance to consider this
 24 and I do have the briefs by both the State and the Defendant, if you care to-.

25 MR. WARBURTON: Assuming -.

26 MR. SHOCKLEY: And also in, excuse me, Mr. Warburton.

1 MR. WARBURTON: Certainly.

2 MR. SHOCKLEY: Mr. Russell here has informed me that in the Wade case,
3 it was seventeen (17), was that seventeen (17) or fourteen (14)? Fourteen (14)
4 days the dog was used after the death in this particular case, and they did
5 have the body of the decedent.

6 MR. WARBURTON: Your Honor, assuming the objection is timely, I don't
7 believe that a denial of writ of error is precedent, or can be precedent, in
8 any Court of criminal jurisdiction in this state. It's not an affirmation out
9 of the trial court, as an opinion would have been. It is unfortunate the
10 Supreme Court did not accept the writ and rule on this particular question of
11 law, given the fact that Virginia has not spoken, but I just want to make a
12 timely objection to the introduction of the fact that any unrelated case, a
13 writ had been denied. I'd been aware of this particular case, although I
14 don't have the materials you have in front of you right now, the petition for
15 Writ of Error and the brief in opposition.

16 COURT: Well, of course, you're right that the refusal of an appeal is
17 not the same as a ruling by the Court on the issues involved, and it's not
18 binding, on this Court, but for whatever it's worth, it appears that this
19 issue of tracking dogs was one of the assignments of error in the Wade case,
20 and that in its wisdom, the Supreme Court saw fit not to grant a Writ on that
21 issue. But aside from this case, I think the great weight of authority in
22 this country is that such evidence is admissible, and that the weight of the
23 evidence is for the Jury. It's a weight question rather than an admissibility
24 question. And I shall admit, I shall deny your motion to suppress the evidence
25 insofar as the tracking dog, or dogs, is concerned.

26 MR. WARBURTON: I assume, Judge, the issue, foundation and reliability

1 must still be proved, I assume?

2 COURT: Oh, yeah, whatever foundation and groundwork that's required
3 must be laid in the trial, but at this stage, I will deny the motion to
4 suppress. Now, that brings us next to the lie detector tests?

5 MR. WARBURTON: Your Honor, again I have offered the Motion in -, but
6 let me first state, -.

7 COURT: All right.

8 MR. WARBURTON: Your Honor, first I'd like to except to the ruling
9 covering the dogs.

10 COURT: Yes.

11 MR. WARBURTON: Regarding the polygraph, I assume from the Court's
12 comment earlier to Mr. Shockley that the Court's aware of the long line of
13 absolutely consistent decisions in this State that polygraph evidence is
14 certainly not admissible in a criminal trial. The basis of that ruling by
15 the Supreme Court deals with the reliability of the tests, deals with the
16 (inaudible) of the operator, and the circumstances in which the test is
17 taken. It also deals with the prejudice to the Defendant if such tests are
18 admitted. In addition, I would like the Court to be aware that myself and
19 Mr. Lookabill were not Counsel in the case at that time, and there was no
20 Counsel of record because this was all pre-indictment. Mr. Shockley has
21 shown me and I have a copy of a waiver of rights, it's called written
22 Miranda, signed by the Defendant, and a consent form to take a polygraph,
23 which does not in any way consent to the introduction of that evidence at
24 trial. I and my partner came into the case three (3) months later, and
25 would have, of course, counseled our client not to take the polygraph, but
26 that's immaterial. I want the Court to be aware that my client did not have

1 the services of an attorney as he does now, at the time of the polygraph.
2 Also note for the record that I have received a copy of the State Police report
3 regarding the polygraph test, two (2) pages.

4 COURT: All right, sir.

5 MR. SHOCKLEY: Again, I don't know how much I went into it to begin with,
6 but on the polygraph, I believe it was administered July 2, 1980, by Mr. Frank
7 Sherwood of the Virginia State Police, in Wytheville, and again, as per the
8 report that Mr. Warburton has referred to, when asked the critical question,
9 did you kill Gina Renee Hall, and of course, the Defendant answered no, Mr.
10 Sherwood, and he will be in to testify in a few moments, indicated in his
11 report that deception was noted. I'd like to give a little introductive
12 statement about some law. Polygraphs were first struck down as admissible in
13 the case of United States v. Fry, that was a 1923 case, and we will offer
14 evidence today as to the advancements in technology since 1923. Fry involved
15 a case where the Defendant was the one who offered that particular case, excuse
16 me, the results of the polygraph. I believe it was a murder case, and in that
17 particular case, the Court rejected the polygraph, the Defendant went to
18 prison and sat there three (3) years, at which time someone confessed to the
19 murder. Since that time, it seems as though Courts, as you all know, have
20 just automatically it seems like rejected the polygraph. There are a few
21 states now that, several states now, that admit it upon concurrence of counsel
22 before the test is taken. I believe New Mexico is one state that has gone
23 completely out on a limb and admits it, even without stipulation. I don't
24 know of any other state that has gone quite that far. Now, Virginia's last
25 case rejecting the polygraph was the case of Skinner v. Commonwealth, 212
26 Virginia 260, I had that Xeroxed here, and on page 262, the Court states in

1 Lee, which was the first case of Virginia denying the polygraph admissibility,
2 we hold that the results of a lie detector test were not admissible in
3 evidence. Then, in Barber, 1965, we refuse to retreat from that position
4 expressed in Lee, on the ground that lie detector tests have not yet proved
5 scientifically reliable. And the last sentence, I think, is a key one in
6 this particular issue here today. Since Defendant, again this was a situation
7 where the Defendant offered the polygraph results, since the Defendant has
8 not produced any compelling reason for us to change our position, we hold that
9 the trial court properly excluded the evidence of the results of the lie
10 detector test. I have that underlined there in red. My point being by that
11 wording, in Skinner, the latest Virginia case, is that the Supreme Court of
12 Virginia is open-minded and is not close-minded. Some cases you read, they
13 seem to absolutely reject the polygraph without any ifs, ands or buts, and
14 this particular case of Skinner, the Supreme Court seems to be open-minded
15 and upon proof of its reliability, they would accede to its admissibility.
16 I would encourage the Court not to make a decision today. We have rather
17 voluminous materials that we would like to offer to the Court and copies for
18 defense counsel, and I would like the Court to put a little thought into this
19 and do some thinking and some research itself. I think it's a situation
20 that needs to be checked into, and again, I have two or three witnesses I'd
21 like to offer here today on these matters, and would like your patience in
22 considering this testimony.

23 COURT: All right.

24 MR. SHOCKLEY: I'd like Mr. Russell first to testify, please.
25
26

1 JOHN RUSSELL

2 having first been duly sworn by the Court, testifies as follows:

3
4 DIRECT EXAMINATION

5 BY MR. SHOCKLEY:

6 Q. State your name, please.

7 A. John Russell.

8 Q. And where do you work, Mr. Russell?

9 A. I work for the Virginia State Police Bureau of Criminal Investigation,

10 Q. And are you an attorney?

11 A. I am. Licensed attorney in the State of Virginia.

12 Q. And you went to, I believe, the University of Richmond Law School?

13 A. I graduated from (inaudible).

14 Q. All right. Now, I had asked you to do some research for me, save
15 me a little time in this particular matter of polygraph, and have you had an
16 occasion to go to the Supreme Court records in Virginia in Richmond and pull
17 the file on the Skinner case? Skinner v. Commonwealth?

18 A. I've pulled the record, the complete record before the Supreme Court
19 in both the Skinner and Lee case, and portions of the record dealing with
20 polygraphs, I have copies, certified copies which are certified by Mr. Lucy,
21 the Clerk of the Supreme Court.

22 Q. Now, Mr. Russell, the main thing that I wanted to ask you about with
23 respect to the Skinner case. As to Skinner, I'd like for you to, and it
24 should be evident, maybe from the records that you have here, would you just
25 summarize -.

26 MR. WARBURTON: Your Honor, there's no call for summarization here. The

1 Court can read the case. I don't want Mr. Russell to get into areas of
2 stating a legal opinion on this. He's not an expert on this, and certainly
3 couldn't be qualified to do so in front of the Court, the Court's the expert -.

4 COURT: Well, just point out to me the pages that you think are -.

5 MR. SHOCKLEY: Mr. Russell, mostly what I wanted you to point out to the
6 Judge was what evidence was admitted at the trial level in Skinner, for the
7 record, that the proponent of the polygraph offered as its reliability.

8 MR. RUSSELL: The proponent in Skinner introduced three (3) witnesses -.

9 MR. WARBURTON: Your Honor, again, this ought to come from the
10 Commonwealth Attorney, not the witness.

11 COURT: Well, it will be helpful to me. I'm not going to have time to
12 do all the research for you gentlemen.

13 MR. SHOCKLEY: Well, Judge, you know, I haven't had the time to check
14 into it -.

15 COURT: Well, it will be helpful to me, and I'll permit him to.

16 A. I'll try to do so objectively, Your Honor. In Skinner, there were
17 three (3) witnesses produced in Court in the record. Two were employees of
18 the Wackakut (sp) Corporation, a private corporation that as part of its
19 dealings, it mentions polygraph exams. The examiner of the Defendant
20 testified, and one of the officers of the corporation testified, and then the
21 Police Chief from Portsmouth, I believe, City of Virginia Beach, testified
22 to the fact that the City of Virginia Beach and several private corporations
23 used polygraph as a means of screening employee applicants. Nothing was
24 produced, according to the record, as to, and it is pointed out by the Judge
25 in there, as to the reliability of the polygraph in criminal cases. And the
26 Lee case, which was the earlier case in Virginia, they have, the only witness

1 presented was the State Police Investigator to have mentioned the polygraph.
2 His qualifications were not even, were not put into evidence. according to
3 the record and two newspaper articles from the Roanoke Times were introduced,
4 saying to the effect that polygraphs were being used by the Virginia State
5 Police and certain other private corporations. But as far as -.

6 Q. Well, let me ask you this, now, in summary, has there been any
7 expert testimony produced on a trial level in either of these cases? In
8 other words, an expert who testified on behalf of the proponent of the
9 polygraph?

10 A. Well, they had the Wackakut officer who was, would be qualified as
11 an expert, but nothing was introduced insofar as to scientific reliability,
12 only to the extent of its use, as I say, but not to its reliability.

13 COURT: Who offered the evidence in the Lee case?

14 A. The Defendant offered it in both cases.

15 COURT: Okay.

16 Q. Your Honor, I might make, I don't know, I think the cases I'm
17 referring to are since 1971, but there have been two or three cases across
18 the United States, and I cannot recall which ones they are, I have some
19 Xeroxed materials, but I checked all through Criminal Law Reporter this
20 week-end, and there's been two or three decisions where state Supreme Courts
21 have said that the Defendant has a due process right to introduce the results
22 of a favorable polygraph test, but I would throw that out in light of Skinner
23 and Lee. They're not, you know, hanging their hat on due process. That's
24 all the questions I have for Mr. Russell, if you'd care to ask him.

25 MR. WARBURTON: We have no questions, Your Honor.

26 COURT: What was the holding in the Lee case?

1 A. In both cases, the trial judge denied the admissibility on a Writ
2 of Error, the Supreme Court upheld that, on the basis of lack of scientific
3 foundation.

4 Q. I hope that's evident again here, Judge, in this last sentence on,
5 that I've underlined for you in this case of Skinner.

6 (Witness stands aside)

7

8

JOHN HALL

9

having first been duly sworn by the Court, testifies as follows:

10

DIRECT EXAMINATION

11

BY MR. SHOCKLEY:

12

Q. State your name, please.

13

A. John Hall.

14

Q. Where do you live, Mr. Hall?

15

A. Coeburn, Virginia.

16

Q. And where are you employed?

17

A. I am employed with State Farm Insurance Company.

18

Q. You have your own agency?

19

A. Right.

20

Q. How long have you been an agent with them?

21

A. Almost eighteen (18) years.

22

Q. I believe you're a graduate of VPI, are you not?

23

A. Yes, I am.

24

Q. Did you used to play on the football team there?

25

A. Yes, I did.

26

Q. Now, of course, your daughter's been missing since June 29 of this year?

1 A. Yes, she has.

2 Q. Do you know the Defendant, Steve Epperly?

3 A. Yes.

4 Q. Have you had conversation with him in the past?

5 A. Since June?

6 Q. Yes, since your daughter disappeared.

7 A. Yes, we've had conversation since then.

8 Q. More than one?

9 A. Once.

10 Q. Once? Did you have an occasion in July of this year to go to Mr.
11 Epperly's house?

12 A. Yes, I did.

13 Q. In the City of Radford?

14 A. Yes, I did.

15 Q. Who all was present when you were there?

16 A. Family members were present, and Mr. and Mrs. Epperly were there,
17 and a friend of mine by the name of Bill Cranwell was with me, and Steve
18 was there.

19 Q. At the time you went to the Epperly house, were you aware that Mr.
20 Epperly had taken the polygraph examination?

21 A. Yes, I was.

22 Q. Were you aware of the results of that examination?

23 A. Yes, I was.

24 Q. All right. Did you hear Mr. Epperly make any comments about the
25 polygraph examination while you were there?

26 MR. WARBURTON: Your Honor, I'll object at this point. I don't know

1 where Mr. Shockley's going, but this sounds a whole lot more like trial
2 testimony than it does on the issue of, legally, than admissibility of a
3 polygraph test.

4 Q. Your Honor, we have several things, several points we want to
5 advance to the Court in favor of the admissibility of the polygraph, and
6 I'm about ready to ask him the question that I think is of key importance,
7 and as soon as I ask this one question -?

8 COURT: What was your last question?

9 Q. I believe it was something to the effect, did you hear Mr. Epperly
10 make any remarks about the polygraph examination, and particularly with
11 reference to its admissibility in trial?

12 A. He made a remark about the polygraph test.

13 Q. Uh-huh.

14 A. He had signed an agreement or something of some form that, he made
15 the statement at that time that I had, he said, I have signed this paper and
16 I think he was directing his question more to Bill Cranwell than to -.

17 MR. WARBURTON: Your Honor, I will object, if the witness thinks that
18 something happened, I don't think it's competent evidence.

19 COURT: Well, he was saying he thinks the Defendant directed his statement
20 toward Mr. Cranwell, but I don't think it makes a whole lot of difference to
21 whom he directed the statement if it's relevant. You just tell what you
22 heard, regardless of to whom it was directed.

23 A. He said -.

24 Q. Let me see, now, we're going to have to use names instead of pronouns.
25 Who's he? The defendant?

26 A. The Defendant, Steve Epperly, made the statement in the presence of

1 the group, that he had signed a statement and it pretty much said that we
2 could use, or he said, they can use the polygraph test against me.

3 Q. All right, that's what I wanted to bring out.

4 MR. WARBURTON: We don't have any questions. I'm ready to strike all
5 that. I don't see what relevance that has to the legal issue at hand.

6 Q. Judge, when the Defendant took the polygraph examination, and when
7 Mr. Sherwood testifies, I will produce the release form that he signed, and
8 again, for what it's worth to the Court, when the Defendant took the polygraph
9 test and for some time after that time, until he consulted Counsel, he himself
10 was of the impression that the test results were admissible at trial.

11 MR. WARBURTON: Your Honor, that's irrelevant.

12 COURT: Well, I was going to say, that's very interesting, but I don't
13 know that that has anything to do with the legal issues before the Court now.
14 Well, it's on the record and I'll accept it for whatever it's worth, but
15 frankly, I don't see that it has much relevance.

16 MR. WARBURTON: Your Honor, may I have a ruling on the Motion to -.

17 COURT: Motion denied.

18 MR. WARBURTON: I except.

19 Q. You all have any further questions of Mr. Hall?

20 MR. WARBURTON: No, sir.

21 (Witness stands aside)
22
23
24
25
26

ROBERT H. EDWARDS

having first been duly sworn by the Court, testifies as follows:

DIRECT EXAMINATION

BY MR. SHOCKLEY:

Q. Would you state your name, please?

A. Robert H. Edwards.

Q. Mr. Edwards, what is your occupation, please?

A. I'm the Assistant Director for the Forensic Laboratory in Richmond.

Q. And you're employed by the Commonwealth of Virginia?

A. Commonwealth of Virginia, yes, sir.

Q. How long have you been so employed?

A. For seven (7) years.

Q. And have you had experience with polygraphs?

A. Yes, sir, I have.

Q. Do you consider yourself an expert in the field of polygraph examinations?

A. Yes, sir, I've been qualified as an expert.

Q. Have you testified in Courts for the Commonwealth?

A. Yes, sir, I have.

Q. Mr. Edwards, would you tell us some of the background and training that makes you an expert in the field of polygraph examinations?

A. I've been employed in the Criminal Justice System in the State of Virginia for going on twenty-two (22) years now. My career has involved being with the Virginia State Police as a Criminal Investigator, I was trained while with the Department of State Police as a polygraph examiner, I have

1 worked with the Division of Justice and Crime Prevention Agency for the
2 Commonwealth of Virginia, and while in that capacity, I served as an advisor
3 to various police departments in establishing polygraph programs within their
4 police departments. I'm a graduate of Baxter School of Lie Detection, at the
5 time it was in New York. I serve on the State Polygraph Advisory Board which
6 is responsible for setting rules and regulations and governing the polygraph
7 industry in the State. I -.

8 Q. You have a Bachelor's Degree?

9 A. Yes, sir, I have a Bachelor's Degree in the Administration of Justice
10 and Public Safety, and I should have a Master's Degree by the end of this year.

11 Q. All right, sir, this Board that you say you're on for the State,
12 would you explain that in a little more depth? Isn't there some new legislation,
13 or relatively new legislation about polygraph examination and qualification?

14 A. Yes, sir, I'm a member of the American Polygraph Association, which
15 is about two thousand (2,000) examiners throughout the world that qualify to
16 belong to that, or who are asked to belong to it. The American Polygraph
17 Association has been one of the leaders in trying to establish procedures
18 for states to utilize in governing the polygraph industry. And the, and
19 Virginia has gone along with some of the recommendations made by the American
20 Polygraph Association, such as setting criteria that should be used, and
21 licensing polygraph examiners for the State.

22 Q. Is Your Honor familiar with the legislation of 1975 that went into
23 effect governing the registration, licensing and training of poly-, it's
24 entitled Fifty-Four (54), and I'll point that out to you, I can do it now or
25 do it later.

26 COURT: What's the section?

1 Q. I'm not sure of the exact section. Would you explain to the Court,
2 please, roughly or basically how the polygraph examination works?

3 A. Yes, sir. The test starts with the examiner giving a pre-test
4 examination which consists of getting all the information he can possibly get
5 from the police officers concerning the facts of the case, and then he goes
6 into it a great extent with the subject that he is going to test, trying to
7 get additional information from this person where there are any discrepancies
8 between the subject that's being tested and the police officials. During this
9 pre-test interview, the examiner should make an effort to convince the subject
10 that the polygraph instrument really works. If a person is innocent and he's
11 taking the test, he is not familiar with it, only what he reads in the news-
12 papers, and he's concerned about the test being inaccurate, even though he
13 knows he's innocent. The test could be rendered inconclusive if the
14 examiner doesn't really convince that person that the test really works. The
15 same applies to a person who is guilty, unless the examiner can convince the
16 person that the device really works, then the test there can be rendered
17 inconclusive. During this time, the examiner is trying to evaluate the person
18 to determine if he is a good subject to administer a test to. He's trying to
19 determine if he's under any drugs, or maybe what his education level is,
20 some information of this type. But primarily, he's trying to develop the
21 most precise information that he can so that he can formulate very precise
22 and direct questions that can be asked during the test where a person really
23 can't rationalize out of it. So that part of the test probably would take
24 half an hour, forty-five (45) minutes, or longer, depending on the nature of
25 the case. After the polygraph pre-test is given, then the examiner formulates
26 his questions and attaches three (3), or it's basically three (3) attachments

1 that he places on the body. The first is a pneumograph which monitors the
2 respiratory system, he places a galvanic skin response attachment to the
3 fingers or the palm of the hand, and a cardio cup which is applied to the arm
4 which monitors the cardio system. Now, from this he gets three (3) tracings
5 on his graph paper and is able to evaluate each of the three components of
6 the polygraph test by coming up with responses in each of these three
7 categories, then he's able to render an opinion. Now, each of the three
8 categories, if one traces the research back into polygraph, he'll find
9 somewhere around in the early 1800's, research began to be done on the various
10 components, to determine which were the more reliable in detecting lying or
11 truthfulness, and so each of these components evolved probably from the mid-
12 1800's up until maybe 1923, 24, 25, and at that particular point, these three
13 were determined to be the most reliable and then they were placed into one
14 component, I think in 1926, by a Leonard Keeler. He, at that particular point
15 in time, developed what we now know as the polygraph device, containing these
16 three components.

17 Q. What advancements, if any, have been made in polygraph technology
18 and testing and procedures, and so forth, say in the last, well, since the
19 1920's that you mentioned?

20 A. Well, there's been an awful lot of research that has gone on
21 concerning these three components in the polygraph test. There have been some
22 other categories that some scientists have recommended be utilized in
23 conjunction with the polygraph. Recent studies have shown that this really
24 isn't that reliable, and the three basic components that are in a polygraph
25 are the most reliable and they have stuck with this. There is a recent device
26 that's being marketed called a voice stress analyzer, and three former members

1 of the CIA developed this device to determine deceptions through the voice,
2 I have recently been engaged in research through the Advisory Board capacity
3 that has found this to be very unreliable when compared to the polygraph. So,
4 really, the basic polygraph, there's been an awful lot of studies done
5 concerning the polygraph and the three components that I have mentioned, and
6 these three have been reliable consistently throughout the field of polygraph
7 work from the mid-1800's all the way up to the present day, and these are the
8 usual ones that the field is sticking with.

9 Q. Now, have you brought to the Court today certain studies that have
10 been conducted on the reliability of polygraph examinations?

11 A. Yes, sir.

12 Q. What have you brought with you, please?

13 A. Well, I'd like to mention one that I think is extremely important
14 to the polygraph field, and for the Court to perhaps review. It was published
15 in the Journal of Forensic Scientists, and if I might mention, the Journal of
16 Forensic Science is, this is published by the American Academy of Forensic
17 Science. The American Academy of Forensic Science is made up of a variety of
18 disciplines within the forensic science field, including pathology, toxicology,
19 psychiatry, you know, the fire arms, (inaudible) documents, this is more or less
20 the Journal that is the Bible, if I can use that term, for the field of Forensic
21 Science, and all the research pertinent, or most of the research pertinent to
22 that field is published in this Journal.

23 Q. Now, what you've presented to the Court, the defense attorneys and
24 myself is an article by Stanley Abrams, is that correct?

25 A. Yes, sir. That's correct.

26 Q. Who is Mr. Abrams?

1 A. Mr. Abrams is a clinical psychologist. At the time, he was with
2 the Kaiser Foundation and Mental Health Clinic in Portland, Oregon.

3 Q. What is the Kaiser Foundation? You'll have to excuse our, my
4 ignorance, anyway.

5 A. I'm really not sure what that is. I think it's a research center
6 in Portland, Oregon, but I stand to be corrected on that.

7 Q. And this article that you have copies of was in this Journal of
8 Forensic Science?

9 A. Yes, sir.

10 Q. In 1973?

11 A. That's correct.

12 Q. Are you familiar with this article?

13 A. Yes, sir, I am.

14 Q. And if you would, please, would you just, it's several pages long,
15 here, would you relate to the Court the substance of the article and the
16 import?

17 MR. WARBURTON: Objection, Your Honor.

18 COURT: All right. Notice of the objection is well taken in a normal
19 hearing, but this is, this will be a help to me. I doubt if I'll have time
20 to read this whole article that's been proffered and so I'll permit this as
21 a help.

22 A. Dr. Abrams, in an attempt to evaluate the reliability of the polygraph,
23 rather than conducting specific tests and research himself, did a research of
24 the literature and studies that had already been conducted in the field of
25 polygraph since the 1800's, and he quotes probably sixty-six (66), approximately
26 sixty-six (66) scientific studies that have been conducted up through 1972.

1 He starts with studies that are most pertinent in the scientific field
2 beginning about 1917, and then, in the study, he reports that a scientist
3 by the name of Benusi did research in the respiratory system. He found and
4 did most all of his research, Benusi's research, was done in the respiratory
5 system, and he found that that was extremely reliable in detecting truthfulness
6 and deception. He mentions studies done by William Marston, again about 1914,
7 and Marston's results was primarily done with the cardio system, and he found
8 that in evaluating suspects and with the cardio alone, that he was able to
9 detect about 96% accuracy in determining suspects, whether they were guilty
10 or innocent. Just with the one component of the cardio system. Additional
11 researchers have done follow-up work in the respiratory system with Benusi's
12 work in the respiratory, and they have found that the respiratory component
13 by itself, they can prove reliability in the category of about 79% to 80% of
14 the cases. And the study mentions a lot of in-between scientists who have
15 done work that has been fairly consistent with these two individuals. A
16 scientist by the name of Liken in 1959 did a study on the GSR, galvanic skin
17 response. He did extensive studies with that, and he found that that was
18 a stronger indication of deception than any of the other two. And he was
19 able to produce in some of his studies, 100% accuracy in determining truthfulness
20 and deception using this component. Leonard Keeler, as I mentioned
21 earlier, about 1926, put all three of these components together and did a
22 series of research, and all of it tended to fall in the 88% to the 96%
23 accuracy category, depending upon the type test he gave. Now, I mentioned
24 that because the tests that have been done throughout the history of polygraph
25 fall in two categories. One is a laboratory setting, and one is actual field
26 testing. All of them up to this particular point can be broken down in those

1 two categories. The field, the laboratory testing has always been less
2 accurate, proven less accurate than the actual field test.

3 Q. What's the difference between the two?

4 A. An actual field test is where you're dealing with a person accused
5 of a crime, or suspected of a crime, and the test is a full-fledged polygraph
6 examination. The laboratory test, many, many of these tests deal with just
7 someone selecting a card, chosen off the street, and the examiner tries to
8 determine who has which card. There have been a lot of studies set up in
9 that capacity. Some have had more intensity than others. Some have used
10 only one component for the polygraph, maybe the GSR, or the respiratory
11 system or the cardio system. All have been highly reliable, I think, from
12 if you figure in the 80% category to the 90% category, even in the, even in
13 the laboratory setting, but field tests have always proven much higher.

14 Q. Well, why would that difference be?

15 A. Well, a person really has nothing to lose. The polygraph theory
16 is based on the device being of some threat. Someone has something to lose
17 or something to gain by taking the polygraph test, and when you're asking a
18 person off the street to come in and paying him \$5.00 to take a test and
19 give him a series of cards, he chooses one card, the device really isn't a
20 threat to that particular individual, so there's less response and the tests
21 fall more into inconclusive categories.

22 Q. You're saying that someone who actually has something to lose would,
23 a test on that person would be more reliable than on a laboratory subject?

24 A. Very much so, yes, sir.

25 Q. Well, are you completed with this article, or did you -?

26 A. No, sir, it goes on, if I can mention, I think probably the most

1 important part of this study to be of the polygraph examiner. All of us have
2 researched, well, if I can go back a little bit on Marston, his work was so,
3 taken so well in the field that the National Committee, the Psychological
4 Committee of National Research asked that more study be done related to the
5 polygraph in about 1917, and I know that goes back a long time, but the
6 Harvard University undertook this project, and a Reverend Summers, who is
7 head of the Psychological Department there at Harvard, conducted over 6,000
8 examinations. Fifty (50) of them were actually, were actual field test
9 examinations, and he came up with a 98% to 100% accuracy of the polygraph
10 using all three categories, and he said the reason he probably did not have
11 100% in all areas was because of the laboratory environment, which I've
12 already mentioned. That, to me, was a pretty phenomenal study. Now, more
13 important to me, and more relevant to me, is work that's been done and studies
14 that have been done on actual cases by actual police departments, and that
15 have been actually studied, researched and reported. Reed and Enbar, who are
16 leaders in the polygraph field and published several books concerning
17 polygraph, were able in the study to verify only three errors out of 4,093
18 individuals they tested up until the time that this particular article was done.

19 MR. WARBURTON: What page are you on?

20 A. I'm on page 319.

21 MR. WARBURTON: Thank you.

22 A. A scientist by the name of Trevillo reported the findings of nine (9)
23 police departments, totalling over 7,622 examinations, and of these, only
24 3.2% of them classifies as indefinite. They took down the cases that they
25 called and were able to verify, and they found that -.

26 Q. Let's stop here just a second. You're talking about the cases where

1 they said truth and/or deception?

2 A. No, where a call was made, and they were later able to verify the
3 cases.

4 Q. Okay.

5 A. And the departments that he reviewed, nine (9) departments, he found
6 that of 94% of, I mean, I'm sorry, 64% of the ones that they were called
7 deceptive, the cases were confirmed through confessions. So of the cases
8 that these nine departments, in 7,000 cases, there were called deceptive,
9 64% of them were verified through confessions. He reported that the Seattle
10 and Chicago police departments reported an error rate of 3.3 in the Seattle
11 department, and 2% known error in the Chicago Police Department. He did
12 additional works in the Chicago Scientific Crime Laboratory, in that particular
13 instance, he examined 1127 cases. Forty percent (40%) he diagnosed guilty
14 and he found only an inaccuracy rate of 2%, and in 85% of those cases, he was
15 able to verify as being correct. That goes on and on with approximately the
16 same verification rate in several other police departments, including the
17 Wichita Police Department, the Texas Department of Public Justice, Northwestern
18 University, the Michigan State Police Department. The verification rates in
19 all these police departments fell in the same category, and in all the
20 literature that Abrams searched, these approximately 66 research studies that
21 were done, he found that the accuracy rate was about 95%, and that inaccuracies
22 were, fell in the, somewhere less than 2%, and the rest of it fell into the
23 inconclusive category, where the examiner was not able to make or render an
24 opinion based on the chart analysis. I took this study and went back in the
25 cases that I have done myself, and I found a correlation rather relevant.
26 In my work since November of 1968, I have conducted 1,955 examinations. Of

1 those 1,955 cases, I reduced that down to 485 cases that were of a specific
2 nature, where they involved a single issue, such as, did you rob the ABC store
3 last night? Dealing with one matter, one particular case which most of the
4 criminal cases fall into. A non-specific case I referred to as a pre-employment
5 examination, or some type of a screen in a department store where there were
6 a lot of steps involved, who's involved in stealing a variety of items. So,
7 the 485 cases were the ones that I was really interested in. What I found
8 that was so revealing, 121 of these cases, I called the person deceptive, out
9 of 485 cases, only 121 did I call deceptive. Out of the 121, I was able with
10 no effort at all, to verify 98 of those cases as being correct calls. Either
11 the person was convicted in court with other evidence, or in most instances,
12 the person confessed to the crime, either during the polygraph or at a later
13 point, in the investigation. That was 81% of the deceptive calls, I was able
14 to verify that my findings were correct. The other 19%, I never knew about.
15 There was no indication there were any wrong calls in this 19%, I just didn't
16 know one way or the other. Now, on the truthful side of this, 335 of those
17 485 cases, I called the party truthful, and I was able to verify 58% of these
18 cases. I had less contact with the people I called truthful. The police
19 department usually went on about their business and, conducting an investiga-
20 tion elsewhere, and there was no additional contact with the person. I had
21 29 inconclusive cases, where I just couldn't tell one way or the other.

22 Q. Forty-nine (49) out of how many?

23 A. Twenty-nine (29) out of 485, and that's a 6% inconclusive percentage.
24 I had no known incorrect calls. So, my data that I developed, parallels the
25 data that had been found by Dr. Abrams in reviewing other police agencies
26 concerning the reliability of the polygraph test. As far as I'm concerned in

1 my own mind, I have verified his report that he has produced in this particular
2 case by personal examinations. There has been, since 1973, there has been an
3 additional study that I think has had a profound impact on the field of
4 polygraph. This study was funded by a grant from the National Institute of
5 Law Enforcement and Criminal Justice. It is published by the U.S. Department
6 of Justice through the printing of the U. S. Government. And the study was
7 done by Dr. David Raskin and Dr. Gordon H. Barlin, who are both professors in
8 the Psychology Department at the University of Utah. They did an extensive
9 background into about eight (8) areas dealing with the polygraph. They set
10 up two examinations in an experimental category, one involved testing inmates
11 at a British Columbia Penitentiary in Canada to determine if a person who was
12 already convicted of crimes, or maybe had an extensive background of a criminal
13 nature, if that person could be tested satisfactorily. They set up another
14 experiment dealing with people coming off the streets. He advertised in the
15 newspaper and paid the people to come in off the street, and he gave them
16 rewards if they could give truthful determinations on the test, after they
17 were set up in some particular marked crime scene and they were guilty, they
18 would give them rewards if they could in fact produce truthful results. He
19 did extensive research also dealing with actual cases. He worked with other
20 police departments and he worked with the University and actually tested field
21 test examinations. Not only did he test the suspects in experimental, he also
22 researched the theories as part of the polygraph. There are three or four
23 basic theories dealing with polygraph examinations, and he tested those
24 techniques to determine if he could come up with which technique was the most
25 reliable. He tested the three components, or he actually tested more than
26 that, but he tested the three that we've mentioned, the respiratory, the cardio,

1 and the GSR, functions of the polygraph, to determine which one of these were
2 the most productive, or if there were others which could be added to determine
3 if they were more productive. He, his study and research, paralleled that
4 found by Dr. Abrams. He found that the Baxter technique is perhaps the most
5 reliable technique to be used in the polygraph field. He found that probably
6 the GSR, which is the galvanic skin response, would be the most productive
7 component of the polygraph, and he came up with those examiners that did
8 numerical evaluations of their charts versus those who did not, to determine
9 if there was any correlation between people who actually had a numerical
10 evaluation of the charts, and he found that those examiners that utilize the
11 numerical evaluations of charts are much more accurate than those that did not
12 use the numerical evaluation in charts. So his study was extremely extensive,
13 and what he recommended was, or what his conclusion was, that the polygraph is
14 90% accurate, whether it be, the median was 90%, whether it be field test or
15 laboratory examination, and field tests were somewhere in the area of 95%
16 accurate, and the laboratory examinations were about 81% to 85% accurate, so
17 that made the mean average about 90%.

18 Q. But the field test was actually -?

19 A. The field test being the more accurate, yes, sir.

20 Q. In actual situations?

21 A. Right. Actual situations.

22 Q. All right.

23 A. And he recommended, well, he states, if I can quote from the conclusion,
24 that polygraph examinations can be highly accurate in determining truth and
25 deception regarding specific issues in criminal investigations. Again, he
26 narrowed it down to a specific issue. In order to obtain maximum accuracy,

1 polygraph examinations should employ control questions tests, or guilt
2 knowledge tests, when applicable. And again, the Baxter technique uses the
3 control questions theory. The polygraph recording should include respiration,
4 galvanic skin response, and the cardio, and under Virginia law, we have
5 established in the rules and regulations governing polygraph, that these three
6 components be included in the polygraph, and they were in there, have been
7 there ever since it's been in existence. The American Polygraph Association
8 has recommended that, even before this report came out. Examiners should be
9 given formal training in numerical scoring of polygraph charts. I have that
10 study, that background. The Baxter theory teaches the numerical evaluation
11 as do most good polygraph schools at this particular time. Given this, then,
12 he claims that there should be a 90% or higher rate of accuracy in polygraphs.
13 Now, that doesn't mean that there would be ten percent errors. There is the
14 factor, also, of inconclusive to be built in, plus then you have a lesser
15 response, a lesser chance of the actual inaccuracies of the polygraph. So
16 there has been an extreme amount of scientific research done in the field of
17 polygraph. There have been a lot of negative articles written that are
18 primarily based on opinions. An individual writes a report dealing with his
19 opinion, rather than a scientific evaluation of the polygraph. And there
20 has been, I feel, an extensive amount of research done of polygraph, and
21 maybe even more so than some in other disciplines of forensic science.

22 Q. Are you personally of the opinion that if the polygraph examination
23 is conducted by a qualified expert and the appropriate pre-test interviews,
24 and proper procedures are followed, are you of the opinion that they are a
25 reliable tool?

26 A. Yes, sir, I am. Very much so. I think the work that I have done

1 personally as one examiner, certainly proves that out, to my complete
2 satisfaction.

3 Q. All right, Sir. Mr. Edwards, you said you were the Assistant
4 Director, is that right, or what was your exact title again?

5 A. Assistant Director of the Forensic Laboratory.

6 Q. Is that the entire State, or one location, or -?

7 A. That's the entire State.

8 Q. The entire State? I see. So then are you familiar with other types
9 of forensic sciences, ballistics, serology, on down the line?

10 A. Yes, sir, from a management standpoint. I'm not an expert in those
11 categories.

12 Q. Are you aware of any that are routinely accepted as evidence that
13 are not 100% accurate?

14 MR. WARBURTON: Well, I'll object. This is getting into the area of
15 legal conclusions. He's also stated that he's only aware of the other tests
16 from a management standpoint. He doesn't have the ability to speculate on
17 whether they're reliable or not. It's a management area in which he's been
18 involved, in addition to which, I believe he'd be stating a legal conclusion,
19 which is not -.

20 COURT: Well, if he knows, if he's familiar with the figures on reported
21 accuracy of other tests, I'll permit him to state that.

22 A. Well, I'm aware, Your Honor, at the lab, that there are many tests
23 that we perform that are introduced as evidence in Court, that would not be
24 of 100% conclusive, to indicate the person, yes, definitely did do whatever
25 he was charged with doing. Just like, I can give an example, well, let's take
26 paint analysis from a hit and run case, where traces of paint are left on the

1 victim's car and paint may be removed off of a suspect vehicle. We, in the
2 lab, can do an analysis of that paint. Quite often we can say, yes, conclusively,
3 it was the paint off that individual's car. Then in other instances, we can
4 come back and say that the paint on the suspect vehicle matches the components
5 of the paint, traces of paint found on the victim's vehicle; however, there
6 may be who knows how many other cars manufactured by General Motors or whoever,
7 that would have the same paint on that car. So it is not 100%, in those
8 instances, conclusive that the paint off the suspect's vehicle was on the
9 victim's, but certainly, it is some chain of evidence in there someplace that
10 seems to indicate, yes, well, the paint was of the same nature found on the
11 car. I think it applies in many of the disciplines in the lab. We can
12 conclusively say in many instances, yes, but many times, we can only say, well,
13 this is another bit of information that is helpful in the prosecution.
14 Serology, for instance, in blood and hairs. In those categories, we can't say,
15 yes, this hair actually, or this blood actually came from this particular
16 person. We can say out of a population of so many, there would be so many
17 people with this type blood found, and I don't know what those percentages
18 are, but it is not in every instance conclusive that the blood is absolutely
19 the same. Now, there may be some that, some instances where it would be, from
20 those people who are knowledgeable in it. And I think, my correlation with
21 that to polygraph is that the polygraph, I haven't said and do not intend to
22 say, that it is completely infallible, and I don't think any report that you
23 would find or research would say the same thing, but I would say that there
24 is some correlation between this and some of the other forensic disciplines.

25 COURT: Do you have an opinion as to why so many other scientific tests
26 have historically been admitted into criminal trials, while the polygraph has

1 almost without exception been excluded?

2 A. Well, if I might go back a little bit, and I'm sure Your Honor is
3 familiar with the Fry case in 1923. In that particular case, Fry was charged
4 with murder, and William Marston, who had been working with the cardio test,
5 just that one component by itself, had been doing a lot of research and had
6 gotten a lot of publicity concerning it. The defense attorneys employed
7 Marston to test their client, and in that particular case, the Defendant was
8 found by Marston to be innocent of committing the murder. The Court held that
9 enough scientific data had not been developed to determine the scientific
10 reliability of the instrument, so it was thrown out of Court. However, and
11 the client was convicted of murder. However, three years later, after serving
12 three years in the penitentiary, the real murderer came forward and confessed,
13 and they released Fry. Now, the Court seemed to go back to the Fry case to
14 throw the evidence out. The -.

15 COURT: Well, in that case, the operator was shown to have proved to have
16 been correct.

17 A. That's correct.

18 COURT: Why did it have the opposite effect, instead of -?

19 A. I don't know. It had the other effect completely. Probably in our,
20 or my time frame, the study that did the most, the most detrimental study to
21 the polygraph was the Moss hearings, where there was some concern that
22 polygraph was being used inappropriately by unethical examiners in the Federal
23 government. They were testing pre-employments for employees in sensitive
24 positions. Moss' secretary, I believe, was tested and some questions involving
25 and concerning her sexual preferences were asked. Moss got very up-set and
26 he had hearings on the polygraph, and he had some studies done on the polygraph.

1 As a result of these hearings, which were extensive, they just about did away
2 with polygraph in the Federal government. He had one fellow by the name of
3 Coobis, who is quoted in the Forensic Science Journal. Coobis did studies for
4 the Moss Committee, and at the time, he was with Fordham University, and he
5 employed five (5) polygraph examiners who had three (3) months training and no
6 experience, and he set up a laboratory situation involving a mock crime where
7 he was trying to, he had one person commit a crime, he had one that was a
8 look-out, and he had one that was innocent. And these examiners were supposed
9 to determine what each person did in this particular crime. Now, he came up
10 with 78% accuracy, and Moss said that wasn't accurate enough and there was a
11 lot of publicity, and that report was the most detrimental there had been to
12 polygraph, and so it was not used. Now, ironically, Coobis himself said that
13 some of the examiners, after they became familiar with the technique, got a
14 little experience in evaluating charts, had as much as 98% accuracy, in the
15 same report. But it just hasn't caught on. I think some courts probably had
16 been concerned in some of this literature, that it may have too much impact
17 on the juries, is probably another reason, but I think the criminal justice
18 system is missing a real valuable aid, like any of the other forensic sciences.
19 We live in a scientific community in the criminal justice system now, a program
20 that is involved around scientific evidence, and this is one component, in my
21 opinion, that has been overlooked.

22 Q. Are you familiar with the polygraph examination that was conducted
23 on this individual Defendant?

24 A. No, sir, I'm not familiar with this one.

25 Q. You're aware that one was conducted?

26 A. I've been told that there was a test.

1 Q. Have you seen or talked to Mr. Sherwood about this matter?

2 A. No, I have not.

3 Q. Have you seen the charts that were produced at the polygraph?

4 A. No, I have not.

5 Q. I assume that those charts would be here later today. As an expert,
6 would you be willing to examine them, if the Court deemed it necessary, and
7 put your conclusion on whether or not the test results indicate truthfulness
8 or deception?

9 A. Yes, sir, I would.

10 COURT: Can you do that? Just by looking at the papers? Without ever
11 having seen the Defendant?

12 A. Yes, sir.

13 COURT: And the testing process?

14 A. That, I think is important, and should be brought out. Probably one
15 thing again that hurt the polygraph, if I can follow up on your comment, was
16 the study done that, that was inconclusive. It was done in a military setting
17 where scientists claimed that the polygraph examiner really wasn't evaluating
18 his charts in determining if a person was guilty or not. What he was really
19 doing was sizing him up during the pre-test interview and he was reaching a
20 conclusion just like a panel of people or a Judge or a Jury would reach a
21 conclusion. He was through gestures or whatever, he would reach an opinion
22 that the person was truthful or guilty. Extensive research has been done in
23 this category in very recent years, where examiners were given charts, confirmed
24 charts of other tests, without any case information at all, and they were
25 asked to evaluate these charts. And studies have gone no lower than 86% same
26 conclusions, and they'd gone up to 100%, paralleling those charts, reviewing

1 all the charts that had been done. And if Mr. Sherwood has conducted a proper
2 examination, then there should be no reason why it could not be evaluated and
3 the same results reached, yes, sir.

4 Q. Yes, sir.

5 A. I do that all the time. I supervise two other polygraph examiners
6 for over twelve (12) months so they can get their license. During that twelve
7 month period of time, I knew nothing of the case information, they were located
8 in other police departments away from the laboratory, I supervised these two
9 examiners for over a twelve month period of time until they could be licensed.
10 Before they would render an opinion, they wrote their opinion down, I did not
11 see their opinion, they brought the charts to me, I evaluated the charts, and
12 in 100% of the cases, we came up with the same determination, either a person
13 was truthful, there was insufficient data to render an opinion, or the person
14 was deceptive. And in many of these cases, I do not have the percentages, but
15 in many of them, the cases were confirmed that all conclusions were correct.

16 COURT: Are those the only three reports that are made? Truthful,
17 deceptive, or insufficient?

18 A. Yes, sir, insufficient.

19 Q. Why do you use the word deceptive instead of just lying? All
20 these reports say deceptive, which has always suggested to me, well, the
21 subject is probably trying to deceive me, but they never come right out and
22 say, I think he's telling a lie.

23 A. That's just the terminology that's used in the field. That's lying,
24 as far as I'm concerned. Yes, sir. Lying.

25 Q. Okay. Just a couple more questions. For what it's worth, would you
26 be willing to conduct a polygraph on this Defendant?

1 A. Yes, sir, I think I could do that.

2 Q. All right. Now, as to the inaccuracies, let's confront that situation,
3 where you have situations where, you know, the polygraph apparently had been
4 wrong in that small percentage, two (2) or three (3) percent, as you testified
5 to. Have there been any studies to determine whether or not those inaccuracies
6 usually go against somebody, or whether they go in favor of somebody? Do you
7 understand my question?

8 A. Yes, sir. I've done an awful lot of reviewing the literature, and
9 I believe it's pointed out in both of the studies that I pointed to the Court,
10 that they fall just about fifty-fifty. Just about fifty-fifty.

11 Q. All right, sir. What are the causes of the errors in those cases?

12 A. The reports have not pointed out the causes of the errors that I
13 recall.

14 Q. I see. Answer these gentlemen's questions, if you would, please.

15

16

CROSS EXAMINATION

17

BY MR. WARBURTON:

18

19

20

Q. Mr. Edwards, you have gone over your qualifications. You've been
employed by the Criminal Justice System for twenty-two (22) years, I believe
you indicated. Has that always been on the prosecutorial side, sir?

21

22

23

24

25

26

A. Yes and no. From an employment standpoint, it has been. I also have
a private business that I have. The laboratory does not offer the polygraph
at this particular time because it's a duplication of effort by the State
Police. And being, you know, as a private examiner, I do give polygraph tests
for defense attorneys, and I also give them for, on a commercial basis, to
other clients.

1 Q. Your Bachelor's Degree is in the Administration of Justice from
2 what -?

3 A. Yes, sir.

4 Q. From what school?

5 A. Virginia Commonwealth University.

6 Q. And you'll have your Master's Degree, I believe, from the same school,
7 is that right?

8 A. That's correct. I have (inaudible) Concern of Polygraph from George
9 Washington University, VCU, other universities and colleges throughout the -.

10 Q. You teach in the Criminal Justice Academies throughout the state?

11 A. I have. I'm not doing it now, because of my Master's work.

12 Q. Okay. This State Polygraph Advisory Board and the other Boards you've
13 indicated your membership, these are groups, I assume, of like-minded
14 individuals?

15 A. The make-up of the Board consists of former, or State Police Officer
16 who was a former polygraph examiner, he's not actively involved, and there
17 are other examiners from the private industry, and I'm from the Lab, yes, sir.
18 There are one police examiner, one from the Lab, and the rest are all private
19 polygraph firms.

20 Q. These Boards on which you are a member, do they make policy statements
21 about the polygraph examination, whether it should or should not be used more
22 extensively? To the best of your knowledge?

23 A. Not to my knowledge. I don't know that they have been. We have been
24 in an advisory capacity to the Department head -.

25 Q. What Department head is that?

26 A. The Department of Commerce that regulates, actually regulates individual -.

1 Q. This legislation that you indicated came in 1975, was any of the groups
2 on which you serve instrumental in securing that legislation? Do you know?

3 A. I was not a member at the time, but I think it's, I would say yes,
4 that they were.

5 Q. Do you know whether or not any of these Boards on which you serve have
6 paid lobbies in Richmond?

7 A. This one does not.

8 Q. How about the rest of them?

9 A. That's the only one I serve on, is the Polygraph Advisory Board.

10 Q. All right. Are you aware of any attempts at the moment to suggest
11 or influence legislation in the General Assembly regarding polygraphs or
12 admissibility in civil and criminal trials?

13 A. At the present time?

14 Q. Yes, sir. Or in the past couple of years?

15 A. Yes, sir, I was involved in legislation that prohibits the use of
16 polygraph and asking personal, unrelated questions involving sex.

17 Q. Have you testified before any Committees in the General Assembly?

18 A. Yes, I have.

19 Q. Regarding polygraph?

20 A. No, sir.

21 Q. You never spoke with the General Assembly or any members about
22 polygraph, is that correct?

23 A. Not that I recall. Not on a Committee level.

24 Q. Okay. Going on to your statements about how polygraph works. My
25 understanding of the initial work, you maintain should take from half an hour
26 to forty-five minutes in the pre-test interview, is that correct?

1 A. That's dependent upon the nature of the case. I'm saying that it
2 would take a minimum of that in any case.

3 Q. Well, my understanding of your testimony is that period of time is
4 used for two main purposes, one is to get what you call control mechanism, and
5 the other is to convince the subject that the system works?

6 A. I think the main, I think the thing I said, the main purpose is to
7 get the concise information from the police and from the suspect so that the
8 concise questions can be formed, where a person cannot rationalize out of it,
9 or he fully understands the nature of the case, or fully understands the
10 question. If you're dealing with a, say a child, involving a sex case. You
11 know, sexual intercourse might mean one thing to you, the child might, if you
12 ask him if he understands what sexual intercourse is, yes. So tell me about
13 it, and it's not even related to a sex case. He don't understand it. So you've
14 got, during this period of time, you're trying to evoke the information to be
15 sure that the person, that you're communicating with the person, and that he
16 does understand the device works, that if he is innocent, he's going to show
17 innocent, and if he's lying, it's going to show that he's lying. And in a
18 pre-test interview, that's the main purpose of this.

19 Q. Okay, so in this average half hour to forty-five minutes, then, two
20 efforts are made, one, to establish lines of communication, and the other is
21 to convince the subject that the machine itself does work, or produce the
22 result which is intended?

23 A. I think that's safe to say, yes, sir.

24 Q. You've testified in Court before, am I correct?

25 A. Yes, that's correct.

26 Q. Would you compare and contrast the efforts of a polygraph examiner

1 in a pre-test interview with that of the attorney's job in developing testimony
2 from a witness, would it not be the same, sir?

3 A. I've never been involved as an attorney in trying to do that, I'm not
4 sure.

5 Q. You've been a witness yourself?

6 A. Yes.

7 Q. You've had examination, cross examination and by an attorney from
8 each side?

9 A. Right.

10 Q. Would it not be fair to say that the pre-test interview involves
11 somewhat the same kind of tactics and techniques in preparing for the polygraph
12 as there would be tactics and technique in eliciting the information in the
13 trial?

14 A. I wouldn't think so.

15 Q. How are they different?

16 A. Well, I'm not sure what an attorney would do, I'm not sure of the line
17 he'd be following, but I think he would be trying to -.

18 Q. Well -.

19 A. He'd try to extract information concerning the case facts, but I don't
20 think the polygraph examiner, he's trying to also determine what is true, well,
21 I guess there is some -.

22 Q. I'm not suggesting anything but the objectivity. In a court room,
23 obviously, you'd have adversaries who would try to develop the evidence to
24 appear one way or another, and I'm not suggesting that it would be different
25 with a polygraph, but it would be different -.

26 A. It is different.

1 Q. Because the polygraph examiner's trying to be objective. What I'm
2 getting at is there are certain techniques, there's a little bit of one's
3 personal style involved in a pre-test interview to elicit the information, that
4 the polygraph examiner is trying to get?

5 A. Oh, I think definitely, the more experience, that probably, the
6 polygraph has shown that the more experienced the examiner, the more, the better
7 he is at it, so -.

8 Q. But there would be a style or a technique in the pre-test interview,
9 am I correct?

10 A. I would think so.

11 Q. It would differ from person to person, I assume?

12 A. Sure.

13 Q. Just as Mr. Shockley might have different techniques in court than
14 I would?

15 A. I would think so.

16 Q. Now, to pick up on the effort to convince a subject that the polygraph
17 works, your statement, I believe, was that if the subject doesn't believe in
18 the machine, then the test would be inconclusive ?

19 A. No, I think I said it could be inconclusive.

20 Q. How, then, does anyone besides the subjects themselves, know whether
21 that person is convinced the machine is reliable?

22 A. I don't think anyone ever knows.

23 Q. You also made a comment that the test could be reliable if the subject
24 is a fit person to take the polygraph. Are you dealing there with mental
25 capacity, or are you dealing there with anomalies of a medical nature, or what?

26 A. Well, I think you're trying to determine if there's any discomfort of

1 the party, on the person, if the person is under the influence of any drugs,
2 you're trying to determine that, because you can go into a polygraph test and
3 waste an awful lot of time and the test wind up being inconclusive, when really,
4 you could have determined perhaps in the beginning that it was not, that you
5 shouldn't even have taken the test, come back the next day, or come back a week
6 later, or whenever. The person may have been up all night. Maybe he has a
7 job that he works midnight shift on, so he comes in totally exhausted, and he
8 sits in a chair to take a polygraph test, and he's more interested in going
9 home, in a psychological sense, he's more interested in going home and getting
10 some rest than he is in taking a polygraph test, particularly if he's innocent,
11 and he knows he's innocent, so the test then becomes of a lesser nature in a
12 psychological sense.

13 Q. These particular things that you've just finished mentioning, they
14 would be somewhat obvious then to the examiner, but this type of information
15 would not show up on these tracing devices, am I correct?

16 A. It would show up, not in the form that the guy was tired, it would
17 show up an inconclusive test. There would be no response to the technique,
18 you know, there'd be nothing in the test that one could read to interpret as
19 being truthful or lying. It would just be a straight bland test.

20 Q. Further on, then, from the pre-test interview to the actual test
21 itself, one word I picked up on that you used was, the examiner formulates
22 questions. Here again, I'm going to ask you if it's fair to assume that the
23 examiner's personal style and technique has an awful lot to do with how the
24 questions are formulated, am I right?

25 A. Well, the examiner, in order to give the polygraph test properly, has
26 got to word the questions so the person cannot rationalize out of them and so

1 that there's no double questions, he can be lying to part of it and telling the
2 truth to part of it, he's got to be right on target, and the party has to
3 understand the question, he has to be sure of that. Now, what technique is
4 utilized, that is, you know, that might vary. But it all boils down to the
5 same thing. Each examiner has got to come up with a set of questions that are
6 relevant to the issue and only to that issue, and make that clear.

7 Q. You wouldn't deny, then, that in a polygraph examination, that an
8 examiner might ask a question, upon further reflection, decide that it might
9 not have been an appropriate question and rephrase the question several times
10 in order to elicit several answers, am I right? To fine tune the question as
11 he goes along?

12 A. No, sir. Well, yes, that can happen, but, in Virginia, each question
13 has to be reviewed with the subject before the test begins. That is a
14 regulation that we require, it's in the law that it be done in that fashion,
15 and so, prior to the test being given, each question is reduced to writing, it
16 is reviewed with the subject taking the test. Now, the questions may be worded
17 in a couple of ways so that you don't get the same pattern going over again and
18 repeating the same question. The question may be turned around, but they are
19 reviewed in the exact form that they're going to be asked, each question. Now,
20 you might run several tests on an individual, and between each test, you may
21 want to add a question, you may want to take a question out. But, before you
22 go on with that, the new questions are again reviewed with that person, and
23 it's reviewed when it's taken out, so he always knows in advance what that
24 question is going to be, the exact way it's going to be worded. There are no
25 surprise questions, and that's the technique. There were techniques that used
26 surprise questions, hidden questions, and changing the questions, and a non-

1 review technique, and (inaudible) study there, which I don't think anyone
2 argues with this particular area, it's an unreliable technique. It creates
3 false positives. The person doesn't know whether you're going to ask him
4 about the murder or about his sex life last night. The minute you open your
5 mouth, you get a response. A very unreliable technique. And as a result of
6 that, we on the Board prohibit that type of testing in Virginia.

7 Q. The next word you used in describing the actual testing environment
8 was the examiner evaluates the answers?

9 A. He evaluates the charts.

10 Q. I'm sorry. I didn't remember that. An evaluation, I assume,
11 necessarily presumes that there'd be some subjective analysis?

12 A. That's correct.

13 Q. Which would vary from examiner to examiner?

14 A. I think the studies have shown that, yes, sir. Within the reliability
15 range that I have quoted so far.

16 Q. And then the end result would be an opinion by an examiner, am I
17 correct?

18 A. That's correct.

19 Q. Or someone who's picked up the charts and made also a second opinion?

20 A. That's correct.

21 Q. Which necessarily presumes again that it's subjective?

22 A. That's correct.

23 Q. And also subject to variability between examiners?

24 A. That's correct.

25 Q. You also mentioned time and time again as we go through this
26 literature that you proffered to us certain things being more reliable, most

1 reliable, you never said least reliable. I assume there are some lesser
2 reliable tests, am I correct?

3 A. Well, I think in any areas of our lives, there are more reliable,
4 least reliable and less reliable, there are taller, shorter and medium, also.

5 Q. Going through your literature, and just pulling figures out as I see
6 them, 74% accuracy, 79% accuracy, 99% accurate.

7 A. That's right.

8 Q. You cited some yourself, as you were going through that dealt with
9 95%, 98%, 96%, 79%, 88%, 85%, it's impossible, I assume, other than taking all
10 these numbers and adding them up, dividing them by the numbers you put in, to
11 come up with some figure to the accuracy of polygraph, am I right?

12 A. It's been done. Dr. Abrams does that in this study right here.

13 Q. And he comes up with a mean figure of 90, am I correct?

14 A. Ninety-five (95).

15 Q. I'm sorry, 95. But you'll admit it is an extreme variability in just
16 the predictability of this test?

17 A. It wasn't on field tests, also.

18 Q. Are you telling us that field tests are all within two (2) or three (3)
19 percent, ever since it's ever been done?

20 A. With the three components, I think you'd find it's fairly close to
21 that, in most of the studies, anyway.

22 Q. Cardio cuff, you described as measuring medically something to do with
23 heart rate?

24 A. The systolic and diastolic stroke of the heart.

25 Q. Basically blood pressure test?

26 A. That's correct.

1 Q. But of a continuing nature?

2 A. That's correct.

3 Q. Respiratory tests, you gave a, pneumo -?

4 A. Pneumograph.

5 Q. Pneumograph? P N E U M E R -?

6 A. P H E, I think, that is, it's the respiratory system.

7 Q. What exactly does that measure, if you can tell us?

8 A. It measures the -.

9 Q. Rate of respiration?

10 A. Rate of respiration, the magnitude of the respiration.

11 Q. Does it measure volume?

12 A. Volume.

13 Q. The galvanic skin response is a meter attached to the middle finger,
14 is that the back of the hand?

15 A. It's attached to the surface of the skin, it can be placed on the toes,
16 the palm, the finger tips.

17 Q. Mostly commonly it's done on the finger tips and the palm? And it
18 measures some kind of skin response that's been related somehow -?

19 A. It has a very limited amount of electrical current that flows through
20 this, and the conductivity of the skin, the sweat glands cause it to, the flow
21 of the current into the system, to vary, which gives a reading on the chart.

22 Q. You all putting those together, you gave a figure of 88% to 96%
23 accuracy?

24 A. Depending whether it's field nature or experimental.

25 Q. Now, you have stated also, I believe, a total, from this second report
26 that you gave, 95% accuracy, 2% inaccuracy, 3% inconclusive. I believe -.

1 A. Dr. Abrams report?

2 Q. I'm sorry, Dr. Abrams report, and I believe you stated the inconclusive
3 3% was based on the opinion of the examiner, that it was inconclusive?

4 A. Right.

5 Q. Okay. Would it also be fair to say that the opinion of the examiner
6 found 2% inaccuracy and 95% accuracy?

7 A. I'm sorry, would you say that again?

8 Q. In other words, Judge Arthur asked you if there are any more than
9 three areas in which you can classify results, other than conclusive, inconclu-
10 I'm sorry, accurate, inaccurate, and inconclusive, those are the three areas?

11 A. Right.

12 Q. Is that correct or not correct?

13 A. Yeah, the test, the results of the test fall in three categories.

14 Q. Accurate, inconclusive and inaccurate?

15 A. No, it will fall lying, truthfulness or inconclusive.

16 Q. Truthfulness, inconclusive, and deception, if we can use the words
17 of art. Where to put any set of graphs would be up to the opinion of the
18 examiner, am I correct?

19 A. That's correct.

20 Q. Where it falls, and I assume that any good examiner would testify
21 that if he's scared of it, he puts it in the inconclusive category, right?

22 A. No, sir, he would not. Not a good examiner. A good examiner uses
23 the numerical evaluation, and if he's got, comes up with a score somewhere
24 around a plus six (6), the person is truthful, if it's in the minus six (6)
25 category, it's deceptive or lying, and if it's in between, then it's inconclusive.

26 Q. So when we add up these points -.

1 A. It depends on which school he goes to as to as to what the numerical
2 evaluation is.

3 Q. So when we add these up, we're dealing with straight mathematics,
4 $2 + 2$, but where do we assign the value of +1 and -1 depends on the opinion of
5 the examiner?

6 A. On the examiner, exactly right.

7 Q. Now this -.

8 A. Based on the amount of the response shown in the chart.

9 Q. In other words, your words, sir, you say you've done almost two
10 thousand (2,000) examinations in the last twelve (12) years, only four hundred
11 and eighty-five (485) of which were useful to you in evaluating -.

12 A. I didn't say that. I didn't say that.

13 Q. You're evaluating single issues. Why don't you wait until I finish
14 the question, please.

15 A. Okay.

16 Q. All right. In those 485, you testified 121 were deceptive by your
17 call, in other words, by your opinion, am I correct?

18 A. I said 485 cases were of a specific nature.

19 Q. Right.

20 A. Which normally is a criminal case.

21 Q. Uh-huh.

22 A. Now, 121 of those I called deceptive, that's correct.

23 Q. And you said by your call, you're saying by, expressly of your opinion -.

24 A. That's right.

25 Q. They were, 121 cases showing deception as to some critical issue?

26 A. That's correct.

1 Q. Now you also testified that 98 of those 121 were verified as being
2 correct by conviction or confession?

3 A. That's correct.

4 Q. You would admit, would you not, that conviction of a crime does not
5 necessarily mean that a person is guilty, does it?

6 A. I assume it does.

7 Q. You assume it does, there's no way in your mind someone can be
8 convicted and not be guilty?

9 A. I've never known it to happen. From my personal knowledge.

10 Q. And then, of course, as to the other 19% of your own experience, you
11 have no results on it?

12 A. That's correct.

13 Q. Okay. You know of no incorrect calls? In other words, as far as you
14 know, your opinion has not been directly questioned? On any polygraph that
15 you've ever given, is that right?

16 A. I've never known any of them to be incorrect.

17 Q. The other question I wanted to ask you, going through the literature,
18 you suggested that the negative articles, those articles that don't agree with
19 your personal opinion that polygraphs ought to be used, if I can quote you, are
20 based on opinions?

21 A. No, I think I answered the Judge to say something to the effect that
22 there are reports out that are of a negative nature, but many of them involved
23 a person who has an opinion and he writes an article around that without a
24 scientific experiment, without a valid scientific study. There have been
25 scientific studies, and I think I quoted Mr. Coobis, who worked for the Moss
26 people, the Moss case.

1 Q. Is it fair to say, though, that throughout the literature, and
2 throughout polygraph examinations in general, that we are dealing with opinion
3 as to the reliability and as to whether they should be admitted?

4 A. We're dealing with opinion and reliability in a lot of the forensic
5 sciences, including the polygraph.

6 Q. You are strongly committed to the introduction of polygraphs in
7 criminal trials, sir?

8 A. Yes, I am, within the reliability framework of the studies done, yes,
9 I am.

10 Q. Given a proper foundation, then, it's your opinion that it should be
11 used in every possible case?

12 A. Yes, sir, I see nothing wrong with it.

13 Q. And you've been firmly committed to that position for how long, sir?

14 A. Oh, at least ten (10) years.

15 MR. SHOCKLEY: Any more questions?

16 Q. I asked Mr. Lookabill if he had any. He may.

17 COURT: Is one of the problems here that there's more opinion involved
18 in a polygraph test than there is, say, in a ballistics test?

19 A. In a ballistics test, you have a picture of grooves and and you can
20 sort of look and see that.

21 COURT: Right. You have an opinion, but -.

22 A. Right.

23 COURT: It's pretty clear most of the time.

24 A. You do have that in ballistics. You question documents, you know, as
25 to whether (inaudible), it's an opinion.

26 COURT: Handwriting?

1 A. Yes, sir, handwriting.

2 COURT: And --.

3 A. That type evidence is --.

4 COURT: I guess fingerprints is --.

5 A. Psychiatric evaluations or reports are opinions of an individual
6 based on a lot of tests that they have done, they're all opinions.

7 COURT: But that's probably part of the problem in this field, wouldn't
8 you say? That it's because of the opinion nature of it, it's all opinion,
9 really, in the polygraph?

10 A. Yes.

11 COURT: And the Courts just haven't brought themselves up to accept that
12 opinion in a criminal case. That's, I imagine, the real hurdle that has to
13 be overcome, isn't it?

14 A. That's, yes, sir, I think that's probably correct. And I'm saying
15 there is enough scientific data that's developed, given, tests given under
16 proper conditions, and proper tests, it's extremely valuable, and Dr. Abrams
17 points out that it's even more valuable than any of the psychiatric evaluations
18 and so forth that are done, and he spells it out in that particular report.
19 He even mentions ballistics. I don't know that much about ballistics to
20 compare it to polygraph, so I really can't --.

21 COURT: Now, reference has been made to the statute, before we forget it,
22 what is the, what kind of statute is it? License and Polygraph Examiners, is
23 that what it is?

24 A. Yes, sir.

25 COURT: Definitions, rules and regulations, licenses, automatic
26 qualifications for certain examiners, approval of schools to teach courses of

1 instruction, submission of fingerprints, instrument to be used. Director,
2 let's see, the Director of the Department of Professional and Occupational
3 Regulation.

4 A. Yes, sir, that's now the Department of Commerce.

5 COURT: He shall make and publish rules and regulations not inconsistent
6 with the laws of Virginia which are necessary to carry out the provisions of
7 this chapter. Licenses, on and after January 1, 1976, all polygraph examiners
8 must be licensed. Automatic qualification for certain examiners, certain of
9 them, I take it that's grandfather. Director shall establish rules and
10 regulations of the approval of schools to teach the required course of
11 instruction. Each applicant for licensing shall submit his fingerprints. A
12 examiner shall use an instrument which records permanently and simultaneously
13 the subject's cardio-vascular and respiratory patterns as minimum standards,
14 but such an instrument may record additional physiological changes pertinent
15 to the determination of truthfulness. This doesn't require the finger, the
16 perspiration -?

17 A. No, it doesn't. It does not require that.

18 COURT: Thing?

19 A. No, sir. I don't believe, published in there, are the rules and
20 regulations. I have those here if you would like to take a look at that,
21 establishing the, what a person must meet to be a polygraph examiner.

22 COURT: All right, gentlemen, is there anything else?

23 MR. SHOCKLEY: Judge, I have one more witness, Mr. Sherwood, that I'll
24 call on the actual testing of this Defendant.

25 MR. WARBURTON: I don't believe it would be possible at this stage,
26 Your Honor.

1 MR. SHOCKLEY: I think it would, if nothing else to get into the
2 procedures followed and his training and so on and so forth.

3 MR. WARBURTON: I think the Court has to rule on whether or not a
4 polygraph itself would be admissible in light of the Supreme Court's prohibition
5 against it before the Court could get into whether this particular one could
6 come in.

7 MR. SHOCKLEY: Well, I would say, Your Honor, that the Court would have
8 to consider, if not the results, the procedures followed, and we want to get
9 on the record the training of Mr. Sherwood, the procedures he followed, and so
10 on and so forth, and certainly the Court has got to look to the individual
11 test, you know, to -.

12 COURT: I think so. I think we'd have to do that.

13 MR. LOOKABILL: Your Honor, assuming that we get everything according to
14 procedures outlined and the statute and otherwise, that at this stage, I see
15 is irrelevant. It's admissible, I know there's groundwork to be laid prior to
16 its use before a Jury, and I also think at this stage why that would be even
17 necessary.

18 COURT: Well, how's it going to do any harm? I'm not trying the case.
19 I'm not the trial fact. The Jury's the trial fact, and they're not going to
20 know what Mr. Sherwood says unless I admit the Court into evidence. I don't
21 see how we can stop here with a scientific discussion, the generalities, by
22 an expert witness who knows nothing at all about the case that we're trying,
23 and say, well, we're not going to hear the man who actually administered the
24 test. I think it's appropriate to hear Mr. Sherwood and I'll give him an
25 opportunity to testify.

26 MR. SHOCKLEY: Your Honor, I don't know if the Grand Jury is still in

1 there or not, I think it's time we --

2 COURT: They've gone to lunch.

3 MR. SHOCKLEY: They have? And I don't know what your position would be
4 at this time. I welcome Mr. Edwards, either during lunch or afterwards, or
5 whatever, to examine the charts that Mr. Sherwood has with him, if the Court,
6 you know, deems that necessary.

7 COURT: Of course, Mr. Edwards already knows what Mr. Sherwood's findings
8 are now, and it's going to affect him, subconsciously, at least.

9 MR. SHOCKLEY: You know, he would have to answer that, I suppose.

10 MR. WARBURTON: Your Honor, to me it smacks of the Amazing Preston. We're
11 going to seal Sherwood's answer in an envelope and ask Mr. Edwards to go ahead
12 and fill his answer and see if they're the same. I don't think it's appropriate
13 to do it at any rate.

14 MR. SHOCKLEY: I had one more question that I wanted to ask of him which
15 was brought up.

16 RE-DIRECT EXAMINATION

17 BY MR. SHOCKLEY:

18 Q. Mr. Edwards, in cross examination, you said something to the effect,
19 and correct me if I'm wrong, that, of course, you have to have a proper subject.
20 You've got to have one who's not intoxicated, not overly tired, and so on and
21 so forth. Now, you indicated, I thought, something to the effect that the
22 charts themselves would reflect that, is that true or not?

23 A. If you have an inconclusive test, you can pretty much assume that
24 that is the case, there is a problem there with the person. A chart can come
25 out a couple of different ways to make it inconclusive. A person is extremely,
26 extremely nervous, you can't balance the computer input. The charts are just

1 erratic. You just have to throw those out. That's a person who could be very
2 excitable about, gosh, I know I'm innocent, and this thing is going to show
3 that I'm not. Or, it could mean extreme use of some amphetamine, drug, so the
4 body is extremely up. A very flat chart would indicate that the person
5 perhaps is, has some mental problem, perhaps, or even that he was up all night
6 and he's just not capable of responding. He could be on some downer drug, or
7 some other drug that produced this limited response, so the responses are not
8 of a magnitude that can be evaluated.

9 Q. All right. As to, we talked about opinion, and how, you know, the
10 examiner reaches an opinion. What does the examiner base his opinion on? The
11 charts themselves, isn't it?

12 A. Yes, the charts themselves. Right. From the master test.

13 Q. And they are mechanically recorded, is that right? Or is that
14 electronically recorded or whatever?

15 A. Yes. Yes.

16 Q. And would those, on a polygraph machine, would those charts accurately
17 reflect the responses and so on of the skin, the respiration, the heart beat?

18 A. Yes, sir.

19 Q. That's all I have.
20

21 RE-CROSS EXAMINATION

22 BY MR. LOOKABILL:

23 Q. I'd like to ask a couple of questions. Have you looked, if you looked
24 at these charts, you'd be looking at them at the same time you looked at the
25 questions? Do you grade the responses separately -?

26 A. He tells me, he tells me which are the relevant questions and which

1 are the control questions, you know, I don't need to know what the question is.
2 I can measure the responses and say the response here is (inaudible), or
3 there's no response, or the response (inaudible). I don't need to have the
4 questions.

5 Q. So then would it be possible to look at Mr. Epperly's chart right now
6 without knowing the exact questions and give an indication the response as to
7 whether it would be at least positive or negative?

8 A. Yes. I see no reason that could not be done.

9 Q. Let me just ask a couple more questions. If Mr. Epperly were asked
10 the question prior, or during the examination, by the examiner, if he said, do
11 you think I'll ask you any questions that we have not gone over, what effect
12 would this have upon the examinee?

13 A. If there were an outside, that's an outside question, outside issue
14 question, and if there was a significant response to that, and a lack of
15 response to control or relevant questions, then you would assume that there is
16 another issue that's bothering him. Maybe he's afraid he's going to ask him
17 about something else that he may have done that's more embarrassing to him or
18 more a threat to him than whatever he's being tested for. This is what we
19 call an outside issue question.

20 Q. The question you would ask the person being examined, about whether
21 he believes in the result of the polygraph, how can you tell that his response,
22 yes or no, is there any other way to -?

23 A. If he believes in the polygraph?

24 Q. Yes, if he believes the -?

25 A. I don't ask the question if he believes in the polygraph test.

26 Q. Believes in the accuracy of it, or the results of it?

1 A. No, I don't ask. That's not a question on a test, it's a --

2 Q. Is that ever asked by the examiner?

3 A. I don't know.

4 Q. Do you know it?

5 A. Not to my knowledge. It's not a Baxter technique, and it's not my
6 technique.

7 Q. Does the person's attitude toward polygraph, he thinks, what is it, a
8 joke, you know, there's no, whatever the results are, it doesn't bother me, I
9 don't think it's accurate, I don't think it will give any reliable results,
10 does this have an effect upon the results?

11 A. Well, I think I said that earlier, that a person will respond, the
12 theory of the polygraph is, a person will respond to that which threatens his
13 well-being the most, and you take away the threat of being discovered, and
14 you've certainly taken away some of the response that you expect with the charts,
15 and I'm assuming that what you're saying, the person is joking, he thinks it's
16 a joke, that nothing can be done with it, anyway, then you're certainly taking
17 away some of the threat to him.

18 Q. Then the threat is the thing that will normally make it more accurate?

19 A. The threat of being discovered, yes. Something that will have some
20 effect.

21 Q. At least, according to the researchers and writers, I assume?

22 A. Yes.

MR. WARBURTON:

23 Q. What would happen in that particular situation, if you were dealing
24 with somebody who did not believe in the accuracy or the test was insignificant
25 to them? In other words, what would the results of the charts be in a
26 situation like Mr. Lockabill was asking you about?

1 A. It would be insufficient response to numerically grade the charts,
2 make it inconclusive.

3 COURT: All right.

4
5 B. F. SHEARWOOD

6 having first been duly sworn, testifies as follows:

7 DIRECT EXAMINATION

8 BY MR. SHOCKLEY:

9 Q. State your name, Sir?

10 A. B. F. Shearwood.

11 Q. Where do you live, Mr. Shearwood?

12 A. Wytheville.

13 Q. And where are you employed?

14 A. Virginia State Police.

15 Q. How long have you been employed by them?

16 A. Just over twenty-five (25) years.

17 Q. And what is your capacity with them now, sir?

18 A. Special (inaudible).

19 Q. And what are your functions and duties with the Virginia State
20 Police?

21 A. General investigative duties and (inaudible) polygraph examiner.

22 Q. How long have you had experience with polygraphs, how long have you
23 been a polygraph examiner for the State Police?

24 A. Since the spring of 1961. I say spring, I'm not sure, but I think
25 it was April, along about April of 1961.

26 Q. So you have been doing polygraph work for the State for about nineteen
(19) years?

1 A. Yes, sir.

2 Q. All right, sir, would you tell the Court, please, briefly, your
3 educational training background?

4 A. I graduated from high school and had one (1) year of college in
5 Forestry, and attended the National Training Center of Lie Detection in New
6 York. Since then, I've attended some refresher courses at the National
7 Training Center and also the Baxter School of Lie Detection, and the retraining
8 within our own department, you know, the yearly retraining program within our
9 own department.

10 Q. I see.

11 A. And I'm a member of the American Polygraph Association which is the
12 professional organization of polygraph examiners throughout the world.

13 Q. I see, sir. Were you employed as a polygraph examiner on July 2 of
14 this year?

15 A. Yes, sir.

16 Q. And on that particular date, did you administer a polygraph examina-
17 tion to the Defendant, Stephen Matteson Epperly?

18 A. Yes, I did, sir.

19 Q. Before you administered the test, did you have the Defendant sign
20 any type of form consenting to taking the polygraph test?

21 A. Yes, sir.

22 Q. Do you have those forms with you?

23 A. I sure do.

24 Q. Judge, we'd like to introduce those into evidence. I have an extra
25 copy for my file. I've given Mr. Warburton a copy. Do you need to keep the
26 originals of these?

1 A. I'd rather keep the original, if I may.

2 Q. Could I request that copies be made and submitted of record?

3 COURT: Yes, sir.

4 MR. WARBURTON: You don't need to do that for me.

5 Q. What?

6 MR. WARBURTON: You don't need to keep the originals out for me. I've
7 seen them.

8 Q. Do you also have a waiver of right form?

9 A. Yes, sir.

10 Q. Were both of these signed by the Defendant?

11 A. Yes, sir, they were.

12 Q. Mr. Shearwood, you mentioned the Baxter method, excuse me, that you
13 attended the Baxter School, or the training seminar on the Baxter system of
14 polygraph examinations, is that correct?

15 A. Yes, sir.

16 Q. Is that the system that you use, or do you use another type of system?

17 A. No, I use the Baxter zone comparison. I might say that when I went
18 to polygraph, through my initial polygraph training at the National Training
19 Center of Lie Detection, Mr. Baxter and Mr. Arthur were partnerships in the
20 school. Since that time they have separated. Mr. Arthur now runs the National
21 Training Center of Lie Detection, and Mr. Baxter has his own school.

22 (Portion of conversation inaudible due to malfunction of recorder. On
23 tape counter from 182-191.)

24 A. - - -the crime that you are testing for. The (inaudible) lie
25 questions are the control questions, as we call them, and the neutral questions
26 are, of course, completely neutral questions, is your first name John, do you

1 live in Tazewell County, this type of thing.

2 Q. Now, how many different graphs were used in this particular polygraph
3 examination?

4 A. As I recall, there are seven (7).

5 Q. Excuse me, you misunderstood my question.

6 (Portion of conversation inaudible to malfunction of recorder. Tape
7 counter from 200-207.)

8 Q. So then, on the charts that are made, you have three (3) prongs that
9 are each registering independently of the other?

10 A. Yes, sir.

11 Q. I see. Do you keep a permanent graph of those?

12 A. Yes, sir.

13 Q. And from those graphs, is that on what you base your opinion as to
14 whether or not the person is truthful or deceptive?

15 A. Yes, sir.

16 Q. How many polygraphs do you think that you have conducted since you've
17 been doing this type of work?

18 A. I'm certain it's in excess of two thousand (2,000). I don't know how
19 many, I couldn't say, but my guess would be right much in excess of 2,000.

20 Q. I see, sir.

21 A. That would be allowing myself only a hundred (100) a year, and I'm
22 sure I do more than that.

23 Q. Do you use any type of numerical categorization on the graphs? Do
24 you understand?

25 A. I don't know.

26 Q. In other words, the graphs make a picture?

1 A. Yes.

2 Q. Hills and valleys and so on. Do you somehow numerically -?

3 A. Grade those?

4 Q. Grade them, yes?

5 A. Yes.

6 Q. And would you explain to the Court how that works, please?

7 A. You have from a 0 to 1, 2, or 3 on the truthful side, or 0 to 1, 2, or
8 3 on the deceptive side, and this is comparing your relevant questions with
9 your irrelevant, or control questions, I don't mean irrelevant, but your
10 control questions. The relevant against the control.

11 Q. I understand. Are you saying, then, that as to truthfulness or as
12 to deception, you might reach a, 3 would be a very definite truthfulness, and
13 a 2 would be, or, I don't understand what you mean.

14 A. All right. You, of course, you are dealing with the action of the
15 respiratory system, the GSR, and the heart, there are three.

16 Q. Yes, sir.

17 A. You would have a numerical evaluation for each of the tracings, so
18 on each chart, you have 2 points to grade the relevant question, on the
19 breathing, 2 points to grade on the GSR, and 2 points to grade on the cardio-
20 vascular tracing.

21 Q. Well, when you grade, you mentioned to me some time ago about a 9, or
22 a -9, how does that work?

23 A. If we, on two charts, on the You Phase, dealing with direct, Did you,
24 type questions, which we speak of as a You Phase type examination, if I get a
25 total of 9 or more on the deceptive side, it's indication of deception, if it's
26 9 or more on the truthful side, it would be truthful.

1 Q. So minus 9 to plus 9 would be inconclusive, then, is that correct?

2 A. A minus 9 to a plus 9 would be inconclusive.

3 Q. Is this the range that most polygraph examiners would use?

4 A. Using the Baxter zone comparison technique.

5 Q. Uh-huh. Do others use any larger numbers or smaller numbers?

6 A. I am told in the other techniques they use a numerical grading system,
7 but I can't explain them to you. I'm not familiar with them. But I'm told
8 that these are being used, and I might say that I think that all the techniques
9 are going to this grading system so that these can be computerized.

10 Q. All right. Now, before you administered the test on this Defendant,
11 was he given a pre-test interview?

12 A. Yes, he was.

13 Q. And was anyone other than this Defendant interviewed about the matters
14 that you were going to examine him on?

15 A. I talked to Trooper Hall prior to talking with Mr. Epperly.

16 Q. And you got evidence from Trooper Hall and then you interviewed Mr.
17 Epperly and got information from him?

18 A. Right.

19 Q. And from these two interviews, did you formulate your questions that
20 you were going to ask?

21 A. Yes, sir.

22 Q. Before you, you know, hooked up the mechanisms of the machine and
23 everything on this Defendant, was he informed of the questions that were going
24 to be asked of him?

25 A. Yes, we went over each question before any of the attachments were
26 put on him, we went over the control questions. Then he was asked to get in

1 the chair where we conduct the test, and then I went over the relevant
2 questions with him, at that point. At the time we reviewed the relevant
3 questions, he had the pneumo-tube around his chest and the cardio cup on his
4 arm.

5 Q. Uh-huh. Were these questions were asked of him and so on before you
6 began making your charts or whatever?

7 A. We reviewed every question verbatim and he was asked if he understood
8 the questions. He replied that he did. He was asked if any questions there
9 were confusing in any way, and he was also asked if there were any questions
10 there that he objected to my asking, and he said that he did not.

11 Q. Now, when you conduct any person, or, excuse me, examine any person
12 on the polygraph, do you first try to determine whether or not they're capable
13 of taking the polygraph, like sobriety, fatigue, things of this nature?

14 A. No, I don't have, some people use some type of a test for this
15 purpose, but I do not.

16 Q. Well, I'm saying, from your own looking at the person, do you realize
17 that the person is drunk, or -?

18 A. Oh, if the person's obviously drunk, or if a person's obviously
19 spaced out on drugs or something like that, of course, I will not under any
20 conditions start a test.

21 Q. Was there anything at all on this particular day before you examined
22 the Defendant that would have led you to believe he was somehow not capable
23 of being subjected to this examination?

24 A. No, Mr. Epperly was in good physical condition (inaudible due to
25 malfuction of recorder) under excellent conditions.

26 Q. I see, sir. And you say you have the charts with you here today to

1 produce before the Court if they care to see them? After you completed the
2 test, well, let me ask you this, as far as the question goes, "Did you kill
3 Gina Renee Hall", is that a question that was asked of the Defendant?

4 A. That was on the You Phase type, also, well, at first, I believe the
5 first two charts that I ran were what we call an exploratory type of test.
6 When I discussed this with Trooper Hall, he was not totally convinced in his
7 mind just exactly what he wanted to find out, and I went to the exploratory
8 type test first to determine involvement as far as Mr. Epperly was concerned.
9 And that was one of the questions that was asked on the exploratory, and as a
10 result of the exploratory test, I went to the You Phase test, dealing with
11 Did You type questions.

12 Q. I see. How many times was the Defendant asked that, did you kill her
13 type question?

14 A. I don't know. I believe it was, he was asked that one time on each
15 of the exploratory charts and twice on each of the You Phase charts.

16 Q. Well, how about a total of how many times?

17 A. It was eight times, yes, eight times that question was asked.

18 Q. All right.

19 A. And with some variation of the wording (inaudible due to malfunction
20 of recorder).

21 Q. And did you form an opinion after you completed the test as to the
22 results of the test?

23 A. Yes, I did.

24 Q. And what was your opinion as to the results?

25 A. My opinion was that Mr. Epperly attempted deception on the relevant
26 questions.

1 Q. What do you mean, he attempted deception?

2 A. He was not telling the truth.

3 Q. Okay. That's a question the Judge had earlier as to the exact meaning
4 that you all put on deception. Can you tell us the numbers that you placed
5 upon the charts, you know, you talked about the minus 9 and plus 9, can you
6 tell us numerically what type of evaluation you put on his charts?

7 A. I'd have to look at the charts.

8 Q. Well, if you would, please.

9 A. Now, the You Phase charts are the only ones that are actually graded.
10 I have a minus 18, which, on three (3) charts, which is a deceptive -.

11 Q. Is it a maybe deceptive or clearly deceptive?

12 A. Clearly deceptive. On true charts, anything above thirteen (13),
13 13 or above, is deceptive, deception, on the minus side. Of course, the same
14 would be true on the plus side, plus fifteen (15) or more would be truthful.

15 Q. All right. Your Honor, we would offer these charts into evidence.
16 Again, I think they should be part of the record. I don't know how we could
17 go about copying them, and I don't know what your policies are with regard to
18 keeping the actual chart, but I would like them made part of the record
19 somehow.

20 A. I might say here, sir, that under Virginia law, I'm required to keep
21 these for one year, so for that reason, I'd like to keep them in my possession
22 if I may.

23 Q. Is there any way you could make copies of those charts?

24 A. Oh, sure.

25 Q. Would you -?

26 A. A Xerox.

1 Q. Do you have a machine at Wytheville --? Okay.

2 A. I'd have to put them in in, you know, small sections, and put them
3 together.

4 Q. Can you do that?

5 A. That'd be no problem.

6 MR. WARBURTON: Your Honor, I object to the introduction of these into
7 evidence. The issue before the Court today appears to be the reliability, not
8 the actual test.

9 COURT: Well, you understand, all the exhibits that I've received here
10 today are just pertinent to this hearing that we're having. It's obvious, I
11 suppose, that they're not being received for the purposes of the trial itself.
12 I'll ask you, if you will, to make copies of those charts, please, sir.

13 (Short discussion pertaining to number of copies to be made.)

14 COURT: All right, I overrule your objection on it, Mr. Warburton. You
15 may examine.

16 Q. If you would, I think there ought to be some showing here, well, a
17 demonstration if you can, I'd like the Judge to see the charts, and I'd like
18 you to point out to him how the reaction is made, and how you determine if
19 there is X number of points for or against the Defendant, and how you come to
20 the conclusion that there is deception. Can you demonstrate that to the Court?

21 A. Possibly. This is the first chart here. This is one of the
22 exploratory, the first exploratory type test. We start off with question 13,
23 which is simply, is your last name Epperly, to which he answered yes. Then
24 question 25 was asked, do you believe me when I promise you that I will not
25 ask you a question we haven't gone over word for word, which he replied, yes.
26 The plus sign means a yes answer, the negative signs mean a negative or no

1 answer. Then question 39 was asked regarding the abduction and death of Gina
2 Hall, do you intend to answer truthfully each question about that, and there
3 was obviously a tremendous rise in blood pressure here, a change in the dicrotic
4 notch, a tightening thereon, and the GSR here, which the contacts, two contacts
5 on the fingers measuring the resistance build-up in the body tissues, there is
6 a noticeable change there, not too much noticeable in the breathing, other than
7 a baseline arousal there.

8 Q. And you say an obvious change, can you show him what is normal,
9 supposedly, that you compare it to?

10 A. All right, this would be normal, across like this. This is not
11 normal. This would be normal, this is not normal. This is normal. This again
12 is not normal.

13 COURT: Those above this line?

14 A. No -.

15 COURT: Not normal?

16 A. No, in the rise, blood pressure change here, get rise in blood pressure,
17 what I say is not normal. And 46 here is a control question. Of course, we
18 ask control questions to give a person a chance to relief, and, of course, this
19 is what he does here, there's relief present in this deep breath we're having,
20 indicates relief, and also, relaxation here in the blood pressure indicates
21 relief. And question 43, do you know for sure what has happened to Gina Hall,
22 and I'm getting a tremendous increase in pressure here, this is what we call
23 double balance here, and also, this goes to the top and it's against the stops,
24 and this is a manual movement here where I move it down manually. Then again
25 right here, in the breathing, there's very little, well, there's no reaction
26 at all in the breathing there on question 43. Question 47 again is a control,

1 during the first sixteen (16) years of your life, do you remember lying to
2 someone in authority, to which he replies no, and there's total relaxation to
3 that, and this is another manual movement of the GSR here. Then I asked
4 question 44, on June 29, did you kill Gina Hall. A whole lot of change here,
5 this double, well, a triple bounce here, really, and then this blood pressure
6 increase here. Also, the GSR very active there, and again, not too much in
7 the breathing. Question 48 is a control, between the ages of 17 and 22, did
8 you ever do anything that is now an unrepented crime, to which he answers no,
9 and this is a movement on his part, he apparently, he flexed his muscles or
10 something here, moved his hand or something, causing this movement here. And
11 then I asked question 45, do you know where Gina Hall is at this time, to
12 which I'm getting tremendous change in blood pressure and this double bounce
13 here. In the GSR, I'm getting quite a lot of change, but again, not too much
14 in the breathing up here. Then 26A is not shown on here, I do not use question
15 26; I use a question that I numbered 26A, is there something else you are
16 afraid I will ask you a question about, even though I told you I would not,
17 to which he answered no, and there is a, there is complete relaxation on that,
18 indicating to me that he was not particularly concerned about that. Then I
19 asked 44J, again that's not on here, and that's, are you holding back any
20 information regarding any pills or medication you've taken in the last eight
21 hours, and I am getting something from that. Now, I asked him about medication
22 and he told me that he had taken no medications at all in the last eight hours,
23 that may or may not be a good reaction, and on the second chart, this likewise
24 is an exploratory type examination. Of course, the first relevant question
25 again is regarding the abduction and death of Gina Hall, do you intend to
26 answer truthfully each question about that, and I'm getting again a tremendous

1 increase in blood pressure and restriction of the aortic notch in here, and
2 this double bounce in here.

3 MR. WARBURTON: I believe this is cumulative. We've already gone through
4 most of the --.

5 COURT: I think so. You explained the chart and how you read it, what
6 the marks mean, and so on. I don't think we need to go through all of these
7 charts. Thank you, sir.

8 Q. Let's see, now again, I'd ask the Court to allow us to make copies
9 of those waiver forms so we can give the originals back to Mr. Shearwood.

10 COURT: All right.

11 Q. There are copies. We can go ahead and enter these forms and I'll
12 make copies for my file. I'd like to get copies of those before you go, if
13 you would.

14 A. All right.

15 Q. If you'll answer these gentlemen's questions now.

16

17

CROSS EXAMINATION

18

BY MR. WARBURTON:

19

Q. Mr. Shearwood, you've been a polygraph operator since 1961?

20

A. Yes, sir.

21

Q. And that was at the, after going through the Baxter School, is that
22 correct?

23

A. Yes, sir. The National Training Center of Lie Detection, it was at
24 that time.

25

Q. I understand. At any rate, you were trained in the Baxter Zonal
26 Comparison Method?

1 A. Yes.

2 Q. At that time, that's the only test you've ever used?

3 A. Yes. Well, no. No. This Zone Comparison has been developed after
4 I went through school. This was not in existence at the time I went through
5 school. This has come about since then.

6 Q. When was that?

7 A. A very, very short time after I finished school. I would say certainly
8 within a couple of years after I finished school is when he came up with his
9 Zone Comparison Technique and this first (inaudible).

10 Q. So it's been fifteen (15) years, anyway, you've been in the Zonal
11 Comparison testing, is that true?

12 A. Yes, I'd say at least that.

13 Q. Now, you, I assume, have an understanding of the medical background
14 on GSR, breathing, and the cardio cup?

15 A. Nothing more than what we were given in school, which was very limited.

16 Q. Okay. So, basically, all you know is that it works, you don't know
17 how, is that correct?

18 A. I would not venture to explain to a Jury the physiology or psychology
19 of it.

20 Q. And you estimate you've given 2,000 or more polygraphs?

21 A. Yes, sir.

22 Q. These, can we assume, almost all were done Baxter method?

23 A. I would say 90% or better were handled using the Baxter method, yes.

24 Q. Also safe to say you don't know any other method to use?

25 A. No, I can't say that I would be comfortable with another method at
26 all.

1 Q. Now, going into this particular test one more time, it's my under-
2 standing is that you talked with Trooper Hall first, is that correct?

3 A. Yes.

4 Q. The information you gathered from him was to be used to compare and
5 contrast Steve's answers, is that correct?

6 A. Beg your pardon?

7 Q. The information you got from Trooper Hall was to be used to compare
8 and contrast it with Steve's answers?

9 A. No. My interview with Trooper Hall was to find out what had happened.
10 I had, until these tests were brought to me, I had absolutely no knowledge of
11 this or had not heard of this at all. Until that time. And my interview with
12 him was to find out, to get the case background. Find out what had happened.

13 Q. How long did you talk with Trooper Hall?

14 A. Thirty (30) minutes, or more, perhaps.

15 Q. He indicate to you his suspicions of guilt or innocence?

16 A. I don't know that at that time he had any suspicions, Mr. Warburton.
17 I really don't think he did.

18 Q. He didn't express any to you?

19 A. No. Not that I recall.

20 Q. Didn't express a desired result of the test?

21 A. Pardon?

22 Q. He did not express a desired result from the test?

23 A. No.

24 Q. And then you talked with the Defendant for how long before you hooked
25 up the machines?

26 A. I would say thirty (30), possibly forty-five (45) minutes.

1 Q. Okay. That discussion led you to believe that he was capable of
2 taking the test?

3 A. Yes, sir. And to find out, you know, get a history, his background
4 and his actions and so forth, leading up to and during this talk. We talked,
5 discussed this particular case.

6 Q. Okay. In that period of time before you hooked him up to the machine,
7 your intention was merely to get some information, is that correct?

8 A. Yes, sir.

9 Q. Is there anything else you were trying to do at the time?

10 A. No. Just to get as much information -.

11 Q. Trying to make the Defendant comfortable?

12 A. Right. Get his, establish a rapport with him.

13 Q. And I assume over your years of experience in doing polygraphs, you've
14 developed somewhat of a technique which is personal to you, on how to establish
15 a rapport?

16 A. Yes.

17 Q. How to make the subject comfortable?

18 A. Yes, sir.

19 Q. And that you would do that different than another polygraph operator?

20 A. Well, perhaps it would be. The end results may be the same, but I
21 probably would go about it different, than some of the others.

22 Q. It is a matter of technique, though, right?

23 A. Right.

24 Q. During this pre-test talk, is there any effort made one way or the
25 other to educate the subject about the polygraph machinery?

26 A. I explained to him what the instrument was, what the components were -.

1 Q. Went through all three, cardio cuff, and GSR -?

2 A. Yes, and what I was going to do, and informed him that there would be
3 several charts run, and made him aware of what was going on, and certainly told
4 him that any time he had any questions, I wanted him to ask.

5 Q. Uh-huh.

6 A. Because I wanted him to know what was going on at all times.

7 Q. Other than the equipment that's attached to his body, does he see the
8 rest of the equipment?

9 A. It's all on top of the desk. All visible.

10 Q. Is there any technique to convince him that the machine is reliable
11 itself, to convince him that this will clear him if he's innocent, convict him
12 if he's guilty?

13 A. I told him that if he was telling the truth, I would find out, and if
14 he were not telling the truth, I would find out.

15 Q. But you didn't spend any time trying to convince him -.

16 A. No.

17 Q. That the machine did work, what it's supposed to do or what it purports
18 to do?

19 A. No.

20 Q. No time at all on that?

21 A. No.

22 Q. Okay. The questions that you went over, this is, my understanding of
23 your first testimony was that you informed Steve of each of the questions before
24 you asked him, but he had the cuff and the pneumo-whatever it is on?

25 A. He had the pneumo-tube around his chest and the cuff on the arm, on
26 his arm when we discussed the relevant questions. Now, when we discussed the

1 control questions, the control questions we go over first.

2 Q. Uh-huh.

3 A. And he was not attached to anything at that time.

4 Q. Pardon me. I'm talking about when you discussed the questions without
5 seeking answers. When you said, these are the questions I'm going to ask you -

6 A. This is what I'm talking about.

7 Q. Okay.

8 A. When we discuss the control questions, there is nothing on his body.

9 When we discuss the relevant questions, and the irrelevant questions, like, is
10 your last name Epperly, and do you live in the City of Radford, and these type
11 questions, now, he did have the pneumo-tube around his chest and the cuff was
12 on when we went over these questions.

13 Q. Now, is this making readings on a graph?

14 A. No. No.

15 Q. You just happened to have had it on?

16 A. No, I just put these, this is routine. I put these on before I, we
17 discuss or review the relevant questions.

18 Q. Then why do you not have the GSR equipment on?

19 A. All right. After we go through the relevant questions and the neutral
20 questions, then I put the GSR on. This is the last thing I do before the test.

21 Q. Why is it you don't have it on when the other equipment is on?

22 A. It's just merely routine. No particular reason for it.

23 Q. Would that perhaps differ from other polygraph operators, sir?

24 A. I don't know. This is my routine. It probably would be different
25 with others.

26 Q. Now, you also mentioned that two of the charts were exploratory. How

1 many charts in all -, is that the way you break it down, by charts?

2 A. Yes.

3 Q. Seven (7) charts, does that mean you asked the questions seven different
4 times?

5 A. Yes.

6 Q. But two of them were exploratory, the other five you would call what?

7 A. Two were exploratory, three were the You Phase type examination, and
8 two were what we call probing peak attention tests.

9 Q. Right. Now, if you would bear with me. Exploratory, how does that
10 differ from the You Phase questions?

11 A. Exploratory is where you mix issues. In the exploratory, I ask the
12 questions, as I recall, do you know for sure what happened to Gina Hall on
13 June 29, did you kill Gina Hall, and, do you know where Gina Hall is at this
14 time.

15 Q. Okay -.

16 A. Three (3) specific issues.

17 Q. Okay.

18 A. Now, in the You Phase, I'm dealing strictly with, did you kill, and
19 regarding the death of Gina Hall, did you kill.

20 Q. And then the last category, which I've forgotten already -?

21 A. Is probing peak attention.

22 Q. All right. Now, how are those questions different from the first two
23 tests?

24 A. This is a type of test that I very rarely run because I've had very
25 little confidence in it, and this certainly didn't add to my confidence in
26 this type test. This is a test that is used when you're trying to find objects,

1 weapons used in commission of a crime, or instruments of a crime, or anything
2 of this sort. I was asking him, there are two charts asking him, I asked him
3 these questions, if you killed Gina Hall, did you dismember her body? If you
4 killed Gina Hall, did you hide her in an abandoned building? If you killed
5 Gina Hall, did you hide her in the weeds? If you killed Gina Hall, did you
6 put her body in the river? If you killed Gina Hall, did you hide her on the
7 railroad right of way? If you killed Gina Hall, did you put her body in
8 Claytor Lake? If you killed Gina Hall, did you bury her in the sand? And, if
9 you killed Gina Hall, did you put her in another vehicle? And on these
10 questions, this series of questions on these two tests, I got reactions on, in
11 three of these different categories. And again, this, to me, this is the least,
12 one of the least reliable types of examinations and this didn't increase its
13 reliability with me at all.

14 Q. Okay. Now, if I understand correctly, the difference between the
15 first category, the exploratory, and the second category is that you change
16 the nature of the question, even though the answer elicited is intended to be
17 the same?

18 A. Right. On the exploratory, I try to determine his involvement.

19 Q. Did you, as opposed to, -.

20 A. On the exploratory, there was enough indication there to indicate to
21 me that he may be involved and that I should go to the You Phase type examination.

22 Q. You read the results as soon as the graph is completed? You read the
23 results and decide whether or not to go on with different questions, is that
24 correct?

25 A. Yes.

26 Q. I assume that you, Mr. Shearwood, and no one else, formulated the

1 questions, am I correct?

2 A. Yes.

3 Q. And that is done by your own personal technique, also?

4 A. Right.

5 Q. Another polygraph operator may ask different questions?

6 A. Right.

7 Q. Trying to elicit the same information?

8 A. I'm sure it would be different. The wording would be different.

9 Q. You didn't have any help -?

10 A. No.

11 Q. Other than background from Austin Hall or anyone else connected with
12 this?

13 A. No.

14 Q. You yourself -.

15 A. At the time the questions were formulated, only Steve and I were in
16 the room.

17 Q. Okay. You yourself, then, at the end of the exploratory runs, each
18 of the two, make a professional decision whether to continue?

19 A. Yes, sir.

20 Q. Also how to rearrange the questions?

21 A. Yes, sir.

22 Q. And then you rewrite the questions for the second phase?

23 A. Yes.

24 Q. The You Phase, and you ran five of those, do the questions change
25 internally there?

26 A. Beg your pardon?

1 Q. In the five (5) runs you, I'm sorry, three (3), You Phase runs, -?

2 A. Three (3), three, I'm sorry.

3 Q. All right, three (3) You Phase runs, did the questions remain the
4 same, or -?

5 A. Yes.

6 Q. They were internally consistent?

7 A. They were internally consistent.

8 Q. But they were different from the exploratory questions?

9 A. Right.

10 Q. Then, this third mode, your Peak Response, those questions, pardon
11 me. Those questions are not directly related to any of the prior two runs?

12 A. No.

13 Q. Those were original questions again?

14 A. Right.

15 Q. You, I assume, as the operator of the polygraph, make the decision on
16 whether to use this Peak method as a third mode?

17 A. Right.

18 Q. Or what questions to ask?

19 A. Right. This is what we call a Probing Peak Attention, where you're
20 just kind of stabbing in the dark, trying to find something. There is a Known
21 Solution Peak Attention, but of course, in this case, we did not use it.

22 Q. (Inaudible) polygraph tests, and that was your three type, probable
23 lie, known lie, and neutral. Can you give me an example of a probable lie
24 question that you might ask me, for example?

25 A. Yes. If I were testing you, say, for a burglary of a service station,
26 I would ask you, Mr. Warburton, on such-and-such a date, did you burglarize

1 this service station?

2 Q. And why is that called a probable lie?

3 A. Because I don't know whether you did or not. As far as I'm concerned,
4 if you answer no, it's a probable lie, because I don't have any idea whether
5 you did or not.

6 Q. Do I guess correctly that you presume the person's not telling the
7 truth, by calling it a probable lie?

8 A. If I get a, when I ask a question that will elicit a no answer, I have
9 to assume it's a probable lie until the case is verified, or until I know the
10 true results.

11 Q. Externally, from the results on the graph?

12 A. Right.

13 Q. In other words, you're convinced it's a lie until you know something
14 outside the graphs?

15 A. Right.

16 Q. Okay. A known lie and or a control question. Could you give me an
17 example of one of those you might ask me?

18 A. Well, between ages 13 and 19, did you ever take anything that did not
19 belong to you?

20 Q. And assuming I said yes?

21 A. Then I would change this, because I would have to have a no answer.
22 I'd change the question until I got a no answer.

23 Q. Okay. A neutral question then would be what, sir?

24 A. Is your last name Warburton? Do you live in Pulaski County? Were you
25 born in July, that type of thing.

26 Q. Now, dealing with what you call relevant questions, those dealing with

1 the ultimate issues in this case, particularly, did you murder Gina Renee Hall,
2 is that a probable lie, a known lie, or a neutral question?

3 A. Now, run that by me again?

4 Q. Can you classify the question you asked several times, did you murder
5 Gina Renee Hall, is that a probable lie, a known lie, or a neutral question?

6 A. This is a probable lie.

7 Q. Okay. So it's presumed that the subject will lie until you know
8 something outside of the polygraph, is that correct?

9 A. Right.

10 Q. So until you find something out, outside the polygraph, you assume
11 that a negative answer is a lie?

12 A. Right. If there are reactions to it.

13 Q. (Inaudible).

14 A. Right.

15 Q. That doesn't cloud your thinking at all?

16 A. What?

17 Q. That doesn't cloud your thinking into seeing a reaction when there
18 may not really be one?

19 A. No, I try to be as open-minded about it as I can. I don't, I don't
20 form any opinion at all during the test.

21 Q. Now, when you're scoring the test, I am totally lost now, you said
22 you grade them numerically, 0 up to a positive 3 for truth, and negative 3 for
23 deception on three different modes, making a possibility of plus 9 or minus 9.
24 That's it, right? There's nothing, there's no plus 10?

25 A. Uh-huh. No. Oh, yes, there's plus 10.

26 Q. How do you get that on three different modes if you only go up to 3?

1 I don't understand.

2 A. Say you have a 0, that's completely neutral.

3 Q. Uh-huh.

4 A. Then you, then I have a question deception, deception or then, say
5 anything over here, T question or true question, or T or a double T, or from
6 assuming that this center line is 0, this has a numerical value of 1, this has
7 a numerical value of 2, and this has a numerical value of 3. Likewise, these
8 also, and you, from the reaction on the chart, you come up with whichever
9 numerical evaluation is proper for that individual reaction. On the -.

10 Q. Now, is that a judgmental application of what you see on the graph?
11 It's not a measurement with a ruler to see -.

12 A. No, no.

13 Q. How far the thing jumps?

14 A. No.

15 Q. All right. And you assign it a value, either plus or minus, and up
16 to 3 in each category?

17 A. Right. Right.

18 Q. How do you get up to like minus 13 then? I don't understand.

19 A. You have, on the You Phase test, you have two (2) relevant questions,
20 question number 33 and question number 35. Now, on question 33, you have a
21 pneumographic recording, a GSR recording -.

22 Q. Right. Okay.

23 A. And a cardio recording.

24 Q. That would give you the possibility of 9 -?

25 A. Nine (9), right. And you have the same thing on 35. So you, whereas
26 you add your, where if you had a deceptive reaction on two or more of these,

1 and a truthful answer, truthful reaction on the other, you would simply deduct
2 the truthful reaction from the deceptive reaction, and on your total chart,
3 come up with a numerical value.

4 Q. Then a question on which someone scored either a plus 18 or a minus 18
5 merely means that they were asked more than once?

6 A. Yes.

7 Q. It doesn't make any difference how strong their response was to an
8 individual question -?

9 A. Yes, it does. The strength of the reaction will depend on whether it's
10 a double D, a D, or a question D.

11 Q. And also your judgment?

12 A. And my judgment, yes. Of course, in the scoring, I mean, in the
13 interpretation of the charts, it's strictly my judgment.

14 Q. Okay. Now, dealing with a situation, and with particularity, the
15 graphs that you showed the Court, show some variation along the lines dealing
16 with everything but respiration. I assume you'd testify as an expert that you
17 can detect deception with one of the modes showing a basically flat response,
18 is that correct? The pneumo didn't do anything.

19 A. In some cases, the pneumo won't.

20 Q. Okay. Would it be safe to say it's more difficult, or it stretches
21 your judgment more, when you do not have a concurrence of all three modes?

22 A. It's ideal when you have a concurrence of all three modes. It's ideal
23 when you have a total reaction to your relevant questions and absolutely nothing
24 in the control questions, or vice versa, but again, this does not always happen.
25 You have these extreme reactions which you have to deal with.

26 Q. Again, more specifically with my question, Mr. Shearwood, in a situation

1 such as the one you had before you, where you had two responses that you could
2 see some axialization of the chart and one which remains flat, that complex
3 situation stretches your judgment more, am I correct?

4 A. Somewhat, yes.

5 Q. At one point along the graph, you indicated that muscle tension or
6 relaxation -?

7 A. One physical move, maybe.

8 Q. Okay. Made the chart jump.

9 A. No, made the pen jump in the cardio tracing.

10 Q. Uh-huh. That, I assume, is from your recollection, or are you
11 diagnosing that cause from the chart?

12 A. No, I indicated this to be a movement at the time. I indicated this
13 on the chart.

14 Q. I see. You yourself noticed the movement, so you wrote it on the
15 chart?

16 A. Right.

17 Q. Movements that you do not detect for whatever reason, then, would not
18 be on that chart whatsoever?

19 A. Right.

20 Q. Assuming you're watching everything, it's conceivable that you could
21 not notice some physical response which would affect that which has nothing to
22 do with truth, is that true? Truth or deception, am I correct?

23 A. I'm not sure I understand.

24 Q. If all the things that require your attention during a polygraph
25 examination -?

26 A. Yes.

1 Q. Is it conceivable that there was a physical movement that would affect
2 any one or all of the three that escaped your attention?

3 A. I'm inclined to say no. I don't like to flat out say no to that, but
4 I'm inclined to say no.

5 Q. The chart that you showed us I would estimate is in the neighborhood
6 of thirty-five (35) to forty (40) inches long. Over what period of chrono-
7 logical time does that cover?

8 A. That's about six (6) minutes. This chart moves at six (6) inches per
9 minute. So it's about five (5), about five (5) minutes, I'd say, really, its
10 about five (5).

11 Q. The occurrence several times that I recall on the graph of the pin
12 being moved, you said, by your own hand -?

13 A. It was on, I believe it was on two (2) occasions.

14 Q. Do you note that also, or do you diagnose that from the curve that's
15 on the graph?

16 A. I denote that on the chart.

17 Q. Okay. Is there a physiological reaction which can cause that, sir?

18 A. No, a movement of the fingers would show an abrupt change like that,
19 but again, any abrupt change, the GSR is a smooth flowing tracing, and any
20 abrupt movement is, I mean any abrupt change in it is usually a movement, which
21 is very readily noticeable.

22 Q. As to scoring, do you run the whole thing and then score it?

23 A. Yes.

24 Q. Or do you score it as you go along?

25 A. No. After the test is completed, then go over the charts and -.

26 Q. The effect that answers have on your determination of what to ask in

1 the next graph -?

2 A. Okay.

3 Q. Then is only from one graph to another?

4 A. Right.

5 Q. You do not change your questions, or your method of questioning
6 throughout one graph?

7 A. No.

8 Q. Because of the early answers?

9 A. Oh, no.

10 Q. Have any effect the way he answers. You do, though, see, personally
11 see this graph as it traces past?

12 A. Well, yes, I'm watching that and watching the person being tested all
13 at the same time.

14 Q. Does that build your confidence as you go along, as you notice, the
15 first three questions seem to be hitting paydirt, does that build your
16 confidence, sir?

17 A. No. It doesn't make any difference to me whether it's deceptive or
18 truthful. Personally, I'd rather they were all truthful, because it's less
19 work for me.

20 Q. Yes, sir. Does it build your confidence in the reliability of the
21 machine?

22 A. No. My confidence in the reliability of the machine is very high.

23 Q. Does it build your confidence that you'll be able to make some
24 conclusion, that you'll be able to state an opinion?

25 A. Well, yes, it does this. Either truthful or deceptive. I don't
26 particularly like inconclusive examinations. I much prefer it be deceptive or

1 truthful. I'd prefer all truthful, but --.

2 Q. Sure. How many, if you can give us, out of this 2,000, percentage that
3 you have found truth, percentage that you have found deception, and percentage
4 that you have found to be inconclusive. Can you give us that? Qualified guess?

5 A. I would say it would probably be in the neighborhood of, and this is
6 a guess now --.

7 Q. Yes.

8 A. I'd say about sixty (60) percent truthful, five (5) percent inconclu-
9 sive, five, six, seven (5; 6, 7) percent inconclusive, and the balance deceptive.

10 Q. You made mention of the fact that you don't like inconclusive results,
11 does that cloud your thinking at all, in other words, do you try to make a call
12 one way or another, and only when you're befuddled, do you call it inconclusive?

13 A. No. Only when you absolutely cannot make any call from the chart, do
14 you call it inconclusive, and this is brought about by these extremely nervous
15 people usually.

16 Q. It's safe to say the polygraph is not for everyone, is that right?

17 A. That's right.

18 Q. The term that you used, making a call, sounds somewhat like an umpire,
19 is that a word apart in your field, sir?

20 A. I don't use the word making a call, I use the word making a determina-
21 tion. I think we've been using the word call here this afternoon. Generally,
22 I use the word determination rather than call.

23 Q. That's an application of your individual opinion, is that right?

24 A. Right.

25 Q. You make those for every polygraph that you've ever given?

26 A. Yes, sir.

1 Q. From the beginning, that is, the information that you garner, through-
2 out the test, that is, the questions that you use and how you change your line
3 of questioning during the interview, and how you evaluate the results, all of
4 that deals with your specific expertise, when out in the field, it all involves
5 your judgment and opinion, is that correct?

6 A. Yes, sir. That's correct.

7 Q. Would it also be fair to say that any other polygraph operator would
8 do things differently, without a doubt?

9 A. Differently, basically, it would be the same. There would be different
10 techniques used, yes.

11 Q. Different opinions, in certain cases?

12 A. Right.

13 Q. Differences in opinion on how to change the questions?

14 A. And the question wording, in fact.

15 Q. Differences in evaluation and formulation of an opinion?

16 A. Perhaps. I don't think there'd be much, regardless of the type of
17 training a person has, I doubt very seriously that they would disagree with
18 my charts, or that I would disagree with theirs. Very rarely has this happened.

19 Q. This is -, pardon me.

20 A. We have, there at Wytheville where I work, both of my immediate
21 supervisors are trained polygraph examiners, and if I had any unique charts,
22 any troublesome charts, any charts that I think need a second opinion, I go to
23 them with this as a means of quality control, and I feel very fortunate in
24 having these people available for this purpose.

25 Q. Sometimes two or three heads can be better than one on a polygraph?

26 A. Yes, that's right.

1 Q. Would you call this a science, sir?

2 A. Yes, I would.

3 Q. Would you call it an exact science, sir?

4 A. No more than medicine or some of the other sciences, no, sir. It's
5 not infallible.

6 Q. Now, just a few more questions. Mr. Lookabill has some, also. The
7 organizations to which you're a member, are they active in attempting to procure
8 legislation?

9 A. The American Polygraph Association is, yes, sir.

10 Q. Okay. Legislation dealing with the admissibility or in honor of
11 polygraph examinations?

12 A. Yes, they have been very active in trying to establish the foundation
13 for the admissibility of polygraph. This has been primarily in federal courts.

14 Q. Uh-huh.

15 A. And -.

16 Q. Many of us are members of organizations that may or may not project
17 our views exactly. Do you share those views?

18 A. Yes, I do. Ten years ago, I did not, but today I do.

19 Q. Can you give me an estimate of when your thinking went through its
20 largest metamorphosis?

21 A. Within the last ten years, I would say, progressively, I can't say
22 when -.

23 Q. Sure, I understand that. Would it be safe to say that you are firmly
24 committed to the principal that polygraph results ought to be admissible into
25 Court?

26 A. Not without certain safeguards, and I think this is the type safeguard

1 that is proper.

2

3

CROSS EXAMINATION

4

BY MR. LOOKABILL:

5

Q. When you indicate, this is the type of safeguard, what do you mean?

6

A. The type of hearing that we're having right now, establish the facts.

7

Q. Do you have any problems yourself with these, this graph, this examination being admitted in this case?

8

A. No.

9

Q. I think Mr. Warburton's covered everything, the two or three other questions that I had, so I have no further questions at this time.

10

11

RE-DIRECT EXAMINATION

12

BY MR. SHOCKLEY:

13

Q. Mr. Shearwood, these little brochures that you have here are obviously preprinted, you don't make these yourselves?

14

A. No.

15

Q. The State Police don't make these?

16

A. No. They're put out by Mr. Baxter.

17

Q. Okay, now, the terminology on here, like, first of all, the questions are numbered, 33 and 29 and so on, you have probable lie question formulation, is that your terminology, or is that the terminology of Mr. Baxter?

18

A. Mr. Baxter.

19

Q. So, when you use the term probable lie, neutral, or control question, I think are the three categories that you placed them in, these are not your -?

20

A. No. No, I use relevant, irrelevant and control.

21

1 Q. Uh-huh. That's your terminology?

2 A. That's my terminology.

3 Q. But Mr. Baxter here has, I believe, quoted on, What's HFB stand for?

4 A. I don't know. That's his filing designation, each one of those.

5 Q. The probable lie terminology, is that Mr. Baxter's?

6 A. That's Mr. Baxter's.

7 Q. I see. Now, on your little chart that you draw here, 1, 2, and 3
8 positive, 1, 2, and 3 negative, and a 0, and you say that there's some subjective
9 judging on your part as to what to assign the answer to a given question, is
10 that correct?

11 A. Yes, sir.

12 Q. Do you have certain guidelines to, you know, certain formula that you
13 apply to determine whether to give it a 1, 2, or 3? Plus or minus?

14 A. Yes, certainly, I have certain rules and regulations that you use.

15 Q. Are these the ones that polygraph examiners use? I mean, are these
16 regulations or suggestions or guidelines that are put up again by Mr. Baxter,
17 or by the American Polygraph Association?

18 A. No. These are taught by the polygraph school. These are rules, these
19 are taught for chart interpretation.

20 Q. What I'm getting at is, do you just pull out the charts and say, well,
21 I think that's a 3 or a 1 or -?

22 A. No, no. You have certain guidelines. Say, question B, this is not a
23 deceptive reaction per se, this is leaning towards deception.

24 Q. Uh-huh.

25 A. The D is a good solid reaction, but not an outstanding reaction. Of
26 course, a double D is an outstanding, a real tremendous reaction.

1 Q. Now, when you try to put 1, 2, or 3 on these things, do you look at
2 the height, the degree of the jump in the arms, or what are you looking at?

3 A. Well, you're looking at, you're looking at everything and trying to
4 apply all the rules that apply to this specific tracing.

5 Q. Is there a little formula that you go by, like maybe five or six
6 criteria, you say, well, let's see, I've got to look at the height, I've got
7 to look at the frequency, I've got to look at a, so on and so forth, are there
8 a little checklist of things that you go down to look at and to assign a value
9 to it?

10 A. I don't have a checklist, no.

11 Q. When you talk about guidelines or regulations, how are those -?

12 A. These are rules and regulations that govern the chart interpretation
13 taught in each school. Each school teaches different rules of chart interpre-
14 tation. They all come to the same conclusion, but they go at it in different
15 ways.

16 Q. I see. Now, you mentioned plus 9 and negative 9 as being the range,
17 and something above that would be truthful, something below it would be
18 untruthful, something in between it would be inconclusive. Is that correct?

19 A. Anything from a, from a plus 9 to 0 and on up to a minus 9 would be
20 inconclusive.

21 Q. Right.

22 A. And above these points would be -.

23 Q. Truthful or deceptive?

24 A. Truthful or deceptive.

25 Q. Now, you said that on -?

26 A. On two charts.

1 Q. All right. Now, you said on the test as to Mr. Epperly, that he
2 scored negative 18?

3 A. Uh-huh. On three (3) charts.

4 Q. Three charts? What would have been the possible range of scores there
5 on the test administered to him?

6 A. You mean the maximum?

7 Q. Yeah, in other words, you've got three charts you're working with,
8 what would have been the most negative factor, what would have been the most
9 positive factor?

10 A. If each of the tracings had been given a double D, he could have had
11 as much as 48.

12 Q. Uh-huh.

13 A. A maximum of 48.

14 Q. One way or the other?

15 A. Right.

16 Q. And you say 9 is the range, 9 plus, 9 negative. Is 9, is that again
17 a number assigned by the school?

18 A. Yes, sir. Uh-huh. Using this technique.

19 Q. And again, the one thing that --

20 A. Now, when you say 9, you're dealing with two (2) charts, when I say
21 48, I'm taking into consideration three (3) charts. So, and if, dealing with
22 three (3) charts, we have a plus 13, or a minus 13, and above for three (3)
23 charts.

24 Q. You just lost me there.

25 MR. WARBURTON: Thirteen (13) is the threshold when there's three (3)
26 charts, I believe.

1 A. Anything from plus 13 to minus 13 on three (3) charts.

2 Q. On three (3) charts, I see.

3 A. Is inconclusive. Anything 13 and above on either side is either
4 truthful or deceptive.

5 Q. With the fact that the respiration graph that you mentioned was
6 somewhat stable, would that have a bearing upon the numbers assigned to your --?

7 A. Yes, it would.

8 Q. Evaluation?

9 A. Yes, it would. Because when it's, that would be stable, you would
10 have a 0, and on the others, you may have a 1 or a 2 depending on the kind of
11 reaction.

12 Q. Are there tests administered anywhere in the country to your knowledge
13 that may rely solely on the GSR or possibly the cardio-vascular thing, reaction,
14 or one of the other, are there polygraph tests today that use just one or two,
15 as opposed to three?

16 A. The law in every state that requires licensing, requires the utiliza-
17 tion of at least two of the tracings. Virginia requires at least two (2).

18 Q. Uh-huh.

19 A. And I don't know of anybody that uses just one. Now, there is --.

20 Q. Are there some that use just two?

21 A. I don't know of any, personally. There may be, but I don't know of
22 them.

23 Q. Most of the ones you're familiar with use all three?

24 A. Three or more.

25 Q. I see.

26 A. They can, some of them use body movement, another channel on that,

1 the body movement, you know, switching and turning in their chairs. They'll
2 use other things that they can add to it, but the three is the basic instrument.

3 Q. Why do you have seven (7) charts as opposed to one or two?

4 A. Well, the law requires you have a minimum of two. This is -.

5 Q. On the You Phase, how many did you have, was it three (3)?

6 A. Three (3).

7 Q. This is where you asked him point-blank, did you kill her?

8 A. Right.

9 Q. Do you know where she is, and so on?

10 A. No.

11 Q. That's not the You Phase?

12 A. Now, that's on the exploratory.

13 Q. All right.

14 A. On the You Phase, I'm asking him question 33, on January 29, did you
15 kill Gina Hall, on question 35, on June, I said on January, on June 29, did you
16 kill Gina Hall, and on 35 is, on June 29 regarding the death of Gina Hall, did
17 you kill her? These are the same questions, but they were worded differently.
18 And both of, you have to do this because both of them, if he's lying to one,
19 you want him lying to both, this is why you have to word it -.

20 Q. You wanted a second and third test to check the first one? Now, the
21 physical movement Mr. Warburton has alluded to was somebody may scratch their
22 nose or jump in their chair or something like that, can you say that you
23 recorded on the charts one such movement by him, are the graphs produced by
24 such a movement different from a physiological response of -?

25 A. Right. The movement on the chart, movements are much different than
26 physiological responses.

1 Q. Did you detect any other type of movements in there on the charts?
2 The other markings appear to be that of the reactions of the machinery?

3 A. Right.

4 Q. Now, you mentioned something about the last ten years, you've built
5 up your confidence in the admissibility, can I just ask you why? Is there
6 anything that's happened in the last ten years?

7 A. Yes. There has been, the groundwork has been laid in several cases
8 in federal court admitting polygraph over objection. I guess Mr. F. Lee Bailey
9 has probably done this more than any other attorney in the United States, and
10 I was reading a case in which the groundwork was laid, just last night, this was
11 a case dealing with Captain Ernest Medina and there are other federal cases
12 in federal court, where it has been admitted over objection, and since this is
13 being done, this gave me the feeling that perhaps we have reached a point that
14 it should be admitted. That's just my opinion, but I, as I said before, I
15 think there should be certain safeguards, and I'm sure the Court's aware of
16 certain safeguards relative to the admissibility of it.

17 Q. That's all we have.

18
19 RE-CROSS EXAMINATION

20 BY MR. WARBURTON:

21 Q. Let me ask you just two questions about this. You referred to a piece
22 of paper filed with the Court called an Agreement to Submit to a Polygraph
23 Examination. Mr. Epparly signed this three times at your request, sir?

24 A. Yes. I asked him, when I explained this to him, that the polygraph
25 must be a voluntary examination. If anyone had told him that he had to submit
26 to this, they were wrong, and I said, this is an agreement for me to give you

1 this test. I want you to read this, and if it meets with your approval, I'd
2 like you to sign your full name on this line where I've checked there. And if
3 you notice, he signed, I believe he signed it Stephen M. Epperly.

4 Q. Right.

5 A. And then I asked him again, I said, I handed it back to him and asked
6 him again, I said, I need your full name, and again, he did not sign his full
7 name, and I handed it back to him the third time and he --

8 Q. Let me ask you another question. You gave the Defendant copies of this
9 at his request?

10 A. I believe I did. I believe I did.

11 Q. Didn't he have to ask you several times?

12 A. No. We were over there in the basement of the court house, I did not
13 have recording equipment over there at the time, and I had to go into the
14 Sheriff's Office and get one of the secretaries, Sheriff's secretaries, to go
15 upstairs and use the Circuit Court recording equipment.

16 Q. But you admit there was some difficulty with him securing a copy of
17 the documents that he --?

18 A. Not Epperly.

19 Q. Okay. I'll leave it alone. Thank you.

20 MR. SHOCKLEY: Judge, you have any questions?

21 COURT: I think not.

22 MR. SHOCKLEY: Sam?

23 MR. LOOKABILL: I think not.

24 COURT: Anything else?

25 MR. SHOCKLEY: Judge, I do have, for what it's worth, and I don't cite
26 this as authority, but I offer this newspaper clipping, it is out of a Kentucky

1 newspaper, and I can't even tell you what paper it is, but it's on a recent
2 trial court that admitted the polygraph, and I'd just like to admit that, too.

3 MR. WARBURTON: I will need to voice my objection. First because it's
4 seriously (inaudible), unidentified, and I don't think it's proper. Those
5 three reasons.

6 COURT: Frank, you mentioned that the Federal courts have admitted this
7 kind of evidence now. Do you know what Federal courts?

8 A. I've got a (inaudible) put out by the American Polygraph
9 Association on court cases. It seems to me there is one of the Federal courts
10 in Oregon, and a military court dealing with Captain Ernest Medina, it was
11 admitted, and there are some other cases. I can't think of the style of the
12 cases, but it seems to me there were other --

13 COURT: All right. Let's go off the record.

14 (Off record.)

15 COURT: All right, let the record show Counsel for the Defendant have
16 filed two motions in limine. One having to do with evidence concerning tracking
17 dogs that the Commonwealth intends to use. I have ruled on that motion and
18 have denied the motion to suppress. The second motion has to do with polygraph
19 examination evidence which the Commonwealth has proffered. The Court has taken
20 that motion under advisement. ~~There's a motion filed for the Defense,~~
21 ~~this is a motion for change of venue, and on this motion, the Court has ruled~~
22 ~~that we will undertake to impound a Bristol County jury on the opening day set~~
23 ~~for the trial, which is December 8, 1980, and after a bona fide effort is made~~
24 ~~to impound a jury free from exceptions then if we fail in that effort, the~~
25 ~~Court will rule on the motion for change of venue.~~

26 (All parties present move to open Court for Arraignment.)

1 COURT: All right, Gentlemen, let us proceed with the arraignment in the
2 case of Commonwealth v. Epperly.

3 CLERK: In the Circuit Court of Pulaski County, Virginia, in the Common-
4 wealth of Virginia, County of Pulaski, to-wit: The Grand Jury of the Common-
5 wealth of Virginia, in and for the body of the County of Pulaski, and now
6 attending its Circuit Court, the September term, 1980, upon their oath do
7 present that Stephen Matteson Epperly, on or about the 29th day of June, 1980,
8 in the said County of Pulaski, did unlawfully, feloniously and maliciously,
9 kill and murder Gina Renee Hall, in violation of Section 18.2-32 of the 1950
10 Code of Virginia as amended, against the peace and dignity of the Commonwealth.
11 How do you plead to this charge?

12 EPPERLY: Not guilty.

13 COURT: Mr. Epperly, do you desire a jury trial?

14 EPPERLY: Yes, sir.

15 COURT: All right. A jury will be impaneled and the case is set for
16 trial on ~~December 1, 1980~~. All right, thank you, Gentlemen.

17 AND THESE WERE ALL THE PROCEEDINGS HAD AT THIS TIME.
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NOTICE

I, Elinor E. Williams, Court Reporter, do hereby certify that the evidence in the foregoing case was recorded electronically by me and has been duly transcribed at my direction, all of said proceedings having been heard before the Honorable R. William Arthur, Judge of the Twenty-seventh Judicial Circuit Court in Pulaski County, Virginia, on November 17, 1980.

I further certify that on this 5th day of March, 1981, I delivered the original and two copies of this transcript to the Clerk of the Circuit Court of Pulaski County.

Elinor E. Williams
Court Reporter

CERTIFICATE

I, Elinor E. Williams, Court Reporter, whose name is signed to the foregoing notice certify that I delivered a copy of said notice to Everett P. Shockley, Esq., attorney for the Commonwealth, Pulaski County, Virginia, and that I mailed copies thereof to Max Jenkins, Esq. and R. Keith Neely, Esq., counsel for Stephen Epperly, on the 5th day of March, 1981.

In Witness Whereof, I have hereunto affixed my signature on this 5th day of March, 1981.

Elinor E. Williams
Court Reporter

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CLERK'S CERTIFICATE

I, Gerry J. Atkinson, Clerk of the Circuit Court of Pulaski County, Virginia, do hereby certify that the foregoing stenographic copy and report of the testimony and other incidents of the trial in the case of Commonwealth v. Stephen Matteson Epperly, Defendant, was filed with me as Clerk of said Court on the day of March, 1981.

Clerk of the Circuit Court of
Pulaski County, Virginia