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ARTICLE

## **Polygraph examination in the work of the special services. Differences between examinations performed for procedural and operational purposes**

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**Abstract**

The article deals with carrying out polygraph tests in Poland for the use of special services within the framework of their operational and reconnaissance activities and for investigative purposes. The authors point out the differences between tests carried out for operational purposes and tests carried out for the purposes of a criminal trial. They answer the question about the legalisation of polygraph tests within operational and reconnaissance activities.

**Keywords**

polygraph tests, operational and reconnaissance activities, detection of deception, special services

The polygraph was developed in the United States with the aim of using it for investigative purposes<sup>1</sup>, a practice that has been carried out around the world for more than 100 years<sup>2</sup>. During the World War II, also in the USA, polygraph examination began to be used to protect the most closely guarded state secrets, such as the implementation of the Manhattan Project to create the American atomic bomb<sup>3</sup>. After the war, tests were carried out to select German volunteers pledging to work for Allies in their home countries and in the denazified Germany occupied by the Western Allies<sup>4</sup>.

Nowadays, although the polygraph is much more often used for purposes other than investigative (procedural), most of the literature, especially legal literature, deals only with the latter purposes. In Poland, the number of polygraph examinations performed since the beginning of 21<sup>st</sup> century for investigative (procedural) purposes constitutes a small percentage of all polygraph examinations performed by experts from state institutions, as well as by private experts<sup>5</sup>. The article omits the issue of the use of polygraph for commercial purposes and in business, but it can be estimated that the number of such examinations in Poland, in contrast to, for example, Russia or Ukraine<sup>6</sup>, is relatively small.

Furthermore, it can be considered that in recent years the number of polygraph examinations performed in Poland for investigative purposes as part of criminal process has not exceeded several hundred per year<sup>7</sup>. At the same time, such tests

<sup>1</sup> See: J.A. Larson, *Modification of the Marston Deception Test*, “Journal of the American Institute of Criminal Law and Criminology” 1921, vol. 12, pp. 390–399; idem, *The Cardio-Pneumo-Psycho-gram and its Use in the Study of the Emotions, with Practical Application*, “Journal of Experimental Psychology” 1922, no. 5 (5), pp. 323–328. <https://doi.org/10.1037/h0074785>.

<sup>2</sup> See: J. Widacki, *Historia badań poligraficznych* (Eng. History of polygraph examinations), Kraków 2017, p. 84 et seq.

<sup>3</sup> Ibid., p. 102.

<sup>4</sup> Ibid., p. 103.

<sup>5</sup> Cf. J. Widacki, *Polygraph Examination in Criminal Cases. Current Polish Practice. A Critical Study*, “European Polygraph” 2012, vol. 6, no. 4 (22), pp. 249–256. After 2012 the number of such examinations in criminal trial cases has remained essentially unchanged.

<sup>6</sup> J. Widacki, *50th Annual Seminar of the American Polygraph Association, Chicago, Illinois, 30 August – 5 September 2015*, “European Polygraph” 2015, vol. 9, no. 3, pp. 161–163. See also: M. Widacki, *Polygraph examinations in Russia*, “Internal Security Review” 2022, no. 27, pp. 329–351. <https://doi.org/10.4467/20801335PBW.22.061.16952>.

<sup>7</sup> No such statistics are kept in Poland, and the last attempts to establish the number of tests actually performed were between 2003 and 2012. See: M. Widacki, *Badanie poligraficzne w sprawach karnych w latach 2003–2012. Ocena praktyki polskiej* (Eng. Polygraph examination in criminal cases 2003–2012. An evaluation of Polish practice), (dissertation (unpublished), Katowice 2019). According to the study, a total of 784 polygraph examinations were carried out in Poland between 2003 and 2012 – on the orders of common and military prosecutor’s offices, of which 531 examinations were

as part of recruitment procedures are carried out by practically all Polish special services and some law enforcement. The number of these examinations is not known, but it is much higher than the number of examinations performed for trial purposes.

The special services also use polygraph examinations for operational purposes, in particular to check the loyalty of personal sources. This is common practice in various countries, including Israel, the USA, Belarus<sup>8</sup>, and more recently Ukraine<sup>9</sup>. The number of such tests is classified information.

As mentioned, polygraph examinations carried out for investigative purposes, as part of the criminal process, are today perhaps a broad, but nevertheless only a marginal part of all polygraph examinations performed. But it is these examinations that most of the known and available literature, both forensic and legal, is concerned with.

Due to the fact that the issue of polygraph examinations is usually viewed through the prism of examinations carried out for the purposes of a criminal trial, many misunderstandings arise in relation to examinations carried out for other purposes, especially operational ones. These relate to the examination technique, its methodological rigors and legal objections.

Polygraph examinations carried out for the purpose of trial are primarily subject to general procedural rigors. The purpose of criminal proceedings, which is outlined in the Act of 6 June 1997 – Code of Criminal Procedure, is to detect the perpetrator of an offence and hold him or her criminally responsible and, at the same time, to prevent an innocent person from incurring this responsibility (Article 2 § 1 of the Code of Criminal Procedure). A polygraph examination carried out in the context of a criminal trial is therefore intended to indirectly serve these very purposes by providing evidence to be evaluated by the court (Article 7 of the Code of Criminal Procedure). The direct legal basis for the use of the polygraph in the trial is the legislation, namely Articles 192a and 199a of the Code of Criminal

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carried out in Poland for trial purposes between 2005 and 2011 (jointly on the orders of common and military prosecutor's offices), which amounts to an average of approx. 76 examinations per year. See also: J. Widacki, *Polygraph Examination in Criminal Cases...*

<sup>8</sup> Cf. В. Князев, Г. Варламов, *Полиграф и его практическое применение*, Москва 2012 (V. Knyazev, G. Varlamov, *Poligraf i yego prakticheskoye primeneniye*, Moskva 2012).

<sup>9</sup> А.Б. Лисенко, Д.О. Алексеева-Процюк, В.О. Шаповалов, *Проведення поліграфологічних досліджень для виявлення осіб, причетних до шпигунської та диверсійної діяльності, і подальшого їх контролю. Методичні рекомендації*, Київ 2022 (A.B. Lysenko, D.O. Alyeksueyeva-Protsyuk, V.O. Shapovalov, *Provedennya polihrafologichnykh doslidzhen' dlya vyavlennya osib, prychetnykh do shpyhuns'koyi ta dyversiynoi diyal'nosti, i podalshoho yikh kontrolyu. Metodychni rekomendatsiyi*, Kyiv 2022).

Procedure, applied taking into account the conditions set out in Article 171(5)(2) of the Code of Criminal Procedure. Moreover, these examinations are performed by an expert appointed, in the form of a decision, by the trial authority (Article 193 of the Code of Criminal Procedure).

Article 192a of the Code of Criminal Procedure makes it possible to subject to polygraph examinations for the purpose of eliminating persons – with their consent – who have not yet been granted trial status (i.e. they are neither witnesses nor suspects) and may not receive such status at all in this trial.

Article 199a of the Code of Criminal Procedure allows both suspects (defendants) and witnesses to undergo polygraph examinations with their consent. Moreover, this provision excluded the application of Article 199 of the Code of Criminal Procedure, which provides that statements (...) *made to the expert (...) by the accused regarding the alleged act cannot constitute evidence*. Thus, in this respect, the expert performing polygraph examinations was specifically privileged over other experts.

Article 171(5)(2) of the Code of Criminal Procedure, the content of which reads: (...) *it is inadmissible to use (...) technical means influencing the mental processes of the person being interrogated or aimed at controlling the unconscious reactions of his/her body in connection with the interrogation*, precludes the use of a polygraph. Therefore, from the content of this article and Article 199a of the Code of Criminal Procedure, it follows that the polygraph examination cannot be part of the interrogation. It is an independent activity, an expert opinion performed by an expert. The jurisprudence of the Supreme Court not only shares this point of view, but also explains in detail how the ‘connection with the interrogation’ is to be understood<sup>10</sup>:

**The expression ‘in connection with interrogation’ used by the legislator in Article 171(5)(2) of the Code of Criminal Procedure should be understood to mean that the prohibition in question concerns not only the procedural act of interrogation itself, but also activities remaining in direct relation with interrogation.** This prohibition therefore covers interrogation with the participation of an expert or the independent use of a polygraph by the interrogating authority. This prohibition also applies to the examination carried out by an expert, which may be a substitute for interrogation. Pursuant to the wording of Article 171(5)(2) of the Code of Criminal Procedure, it must be considered inadmissible to carry out an examination immediately before or immediately after interrogation, when it could affect the freedom of expression

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<sup>10</sup> Decision of the Supreme Court of 29 I 2015, ref. no. I KZP 25/14.

of the interrogated person, constitute a kind of pressure or threat from his/her point of view<sup>11</sup>.

It should be added that the restrictions imposed by the Supreme Court case law, in particular the prohibition of combining a polygraph examination with an interrogation, the performance of the examination in the form of an expert opinion by an expert, and consequently the prohibition of combining the functions of the interrogator and the examiner, are not dictated by the concern for a better quality of the examination and thus for its higher efficiency, but by the concern to ensure the realisation of the procedural guarantees to which suspects (defendants) and witnesses under examination are entitled.

Of particular relevance in determining the type of evidence that a polygraph examination provides are: a 1976 Supreme Court judgment stating that it is 'ancillary evidence'<sup>12</sup>, as well as the aforementioned 2015 Supreme Court judgment, from which it follows that 'ancillary evidence' is the same as 'indirect evidence'<sup>13</sup>, with all its consequences.

If, in the light of the provisions of the Code of Criminal Procedure, as interpreted by the Supreme Court, the polygraph examination must be carried out by an expert as part of an expert opinion, further obligatory procedural requirements necessarily arise. This is because the provisions of Article 192a–201 of the Code of Criminal Procedure concerning the expert and the expert's opinion apply here. The result of the examinations carried out within the framework of the expert opinion is to be an oral or written opinion containing conclusions, the formal requirements of which are set out by the Code of Criminal Procedure in Article 200 and *a contrario* in Article 201.

Modern techniques of polygraphic examinations performed for procedural purposes<sup>14</sup>, according to professional standards, allow to include the examined person in one of two categories of persons:

- 1) who respond in the usual way to critical questions in tests by being dishonest, i.e. by lying or withholding information relevant to the case (the content of the critical questions); this is generally referred to as DI (deceptive indicated);

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<sup>11</sup> Ibid.

<sup>12</sup> Judgment of the Supreme Court of 25 IX 1976, ref. no. II KR 171/76.

<sup>13</sup> Decision of the Supreme Court of 29 I 2015, ref. no. I KZP 25/14.

<sup>14</sup> According to the American Polygraph Association (APA) recommendations, tests with a diagnostic value of more than 90% should be used, which in most cases means the use of single-question or multi-question tests. See: *Contemporary standards in polygraph examination*, M. Gołaszewski (ed.), series: "Biblioteka Przeglądu Bezpieczeństwa Wewnętrznego", no. 4, Warszawa 2013, p. 57.

- 2) who respond as one would normally respond to critical test questions, i.e. answer truthfully and not withhold anything; this is generally referred to as NDI (non-deceptive indicated).

It is also possible that the expert is unable to assign the subject to either of the two categories described and considers the test result inconclusive (INC).

The different testing techniques have their own criteria for numerical evaluation of records, indicating numerical values for the individual responses. The sum of these allows one to conclude that the subject reacts either as a sincere person or as a non-sincere person, or the numerical values of the reactions make one accept the test result as inconclusive.

It is clear that the techniques of polygraph examinations must be adapted to the different purposes of polygraph examinations. This is required by the APA standards, which divide examinations into those conducted for:

- evidentiary (for trial authorities):  $\geq 90\%$  accuracy (relevance) and  $\leq 20\%$  inconclusive results,
- confrontational (two experts examine two or more subjects presenting contradictory versions of an event such that one of the persons is lying):  $\geq 86\%$  accuracy (relevance) and  $\leq 20\%$  inconclusive results,
- detection (investigation):  $\geq 80\%$  accuracy (relevance) and  $\leq 20\%$  inconclusive results,
- screening (proof): the level of accuracy confirmed by scientific studies is significantly higher than the statistical chance. When a problematic issue arises, additional recognized and more precise tests are required<sup>15</sup>.

This already shows that in process evidence research, a limited number of tests with a high relevance coefficient can be tested on the subject, so that classic techniques (e.g. relevant-irrelevant test, Peak of Tension test) can only play a secondary, supporting role in this case. In operational research, they can be used on a par with the more precise techniques of control questions. These techniques, by virtue of their design, mostly use multi-question tests, allowing many different unrelated issues to be raised during a polygraph examination. In other words, they allow a much larger number of critical questions, interchangeably called relevant questions, to be asked than in control question or zone comparison tests<sup>16</sup>. Consequently, during an operational polygraph test, a larger pool of questions of interest to the service

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<sup>15</sup> Ibid.

<sup>16</sup> On the topic of polygraph examination techniques, see in more detail: J. Konieczny: *Badania poli-graficzne. Podręcznik dla zawodowców* (Eng. Polygraph examination. Handbook for professionals), Warszawa 2009, pp. 58–128. See also: *Kryminalistyka* (Eng. Forensic science), J. Widacki (ed.), Warszawa 2018, pp. 440–445.

can be screened out with less accuracy (which should be borne in mind). On this basis, it may be concluded that an operational and reconnaissance examination – depending on its purpose – may be similar in methodology to a procedural examination (the service is interested in checking only a few issues). However, it may differ when it is part of some operational combination or involves a desire to raise as many issues with the subject as possible<sup>17</sup>. At this point, it should be noted that, due to the fact that the questions are asked during the pre-test interview (the first stage of the polygraph examination), the weight of the answers given to them and the associations made by the examined person is different than during a casual conversation as part of a routine meeting with a service officer.

The result of a polygraph examination performed for trial purposes provides, as already mentioned, indirect evidence, and therefore the court assesses this evidence in the context of other evidence, applying the directives of Article 7 of the Code of Criminal Procedure, i.e. in the light of all the evidence carried out, taking ‘into account the principles of correct reasoning and indications of knowledge and life experience’.

On the assumption that the polygraph examination is intended to provide evidence, the diagnostic value of the examination is important, which is relevant both for recognizing the evidential admissibility of such an examination and for understanding the expert’s opinion. This is why it is so important to determine this value, both through experimental studies and analysis of practice. These have been described in detail in the literature<sup>18</sup>.

Without knowledge of the diagnostic value of the polygraph examination, as well as the diagnostic value of its individual techniques, the phrase used in the opinion that the examinee reacts or does not react ‘as people usually react...’ would be incomprehensible. Assuming that a correctly performed polygraph examination, after discarding inconclusive results, gives approx. 90% of accurate

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<sup>17</sup> Cf. A. Ginton, *A non-standard method for estimating accuracy of lie detection techniques, demonstrated on a self-validating set of field polygraph examinations*, “Psychology, Crime & Law” 2013, vol. 19, no. 7, <https://www.tandfonline.com/doi/abs/10.1080/1068316X.2012.656118>. <https://doi.org/10.1080/1068316X.2012.656118>.

<sup>18</sup> See: e.g. J. Widacki, *Wartość diagnostyczna badania poligraficznego i jej znaczenie kryminalistyczne* (Eng. Diagnostic value of a polygraph examination and its forensic significance), Kraków 1977; J. Widacki, F. Horvath, *An experimental investigation of the relative validity and utility of the polygraph technique and three other common methods of criminal identification*, “Journal of Forensic Sciences” 1978, vol. 23, no. 3, pp. 596–601; S. Abrams, *Polygraph validity and reliability: a review*, “Journal of Forensic Sciences” 1973, vol. 18, no. 4, pp. 313–326; L. Saxe, D. Dougherty, T. Cross, *The Validity of Polygraph Testing. Scientific Analyses and Public Controversy*, “American Psychologist” 1985, vol. 40, no. 3, pp. 355–356; *Meta-Analytic Survey of Criterion Accuracy of Validated Polygraph Techniques*, “Polygraph” 2011, no. 40.

indications, then the phrase ‘as usually...’ should be understood as: ‘as would be the reaction of nearly 90% of respondents answering critical (related) questions insincerely (i.e. by lying or withholding the information they have)’.

Polygraph examinations carried out by the services outside the criminal process can be divided into those carried out as part of operational and reconnaissance activities (personal source examinations), pre-employment examinations and officer examinations (screening). Such examinations have a different purpose from those carried out as part of a criminal trial. As a general rule, the aim is not to obtain evidence, but to get a maximum of service-relevant information. In the operational activities of counterintelligence (and intelligence) services, this is not, by definition, a procedural objective, but to obtain or confirm information that will not be confirmed in the future during a trial, or even if it is, it will be on the basis of other evidence. The basis for carrying out such activities is therefore not the Code of Criminal Procedure, but the laws relating to the service that performs the investigation and the internal regulations issued on the basis of the laws.

The examinations carried out as part of a recruitment procedure, which is conducted as part of an administrative procedure, are subject to legal and practical consequences, which also concern the examination itself and its rigors. This issue deserves a separate study, all the more so as polygraph examinations performed as part of recruitment procedures are carried out in all special services and some police forces, making them the most common form of polygraph examinations performed in Poland.

The purpose of operational tests, on the other hand, is to obtain new information or to confirm information already possessed, which is important in the performance of tasks related to the protection of state security.

The situation is different only if the operational activities are undertaken as a prior in principle to the evidentiary activities and it is likely that the result of the examination will be disclosed at a later trial for evidentiary purposes. In that case, all procedural rigors under the Code of Criminal Procedure would have to be maintained, in particular all guarantees to which a suspect is entitled in a criminal trial. This, moreover, applies to all operational and reconnaissance activities assumed to be usable at trial<sup>19</sup>. Otherwise, the procedural guarantees would become a fiction, as they could be circumvented by operational and reconnaissance activities.

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<sup>19</sup> Cf. W. Daszkiewicz, *Taktyka kryminalistyczna a procesowe gwarancje jednostki i prawa obywatelskie* (Eng. Forensic tactics and procedural guarantees of the individual and civil rights), “Państwo i Prawo” 1985, no. 3. See also: Z. Doda, *Commentary on the judgment of the Supreme Court of 12 March 1987, I KR 43/87*, “Państwo i Prawo” 1989, no. 44, p. 151.



Acts relating to the services<sup>20</sup> give powers to carry out operational and reconnaissance activities. Some of them are regulated in detail (e.g. activities covered by the collective term: operational control). Others are only mentioned (e.g. control of phone records or logging on base stations or the use of cooperation with persons who are not officers) and some are not even mentioned by name (e.g. operational search), this being left to internal regulations established on the basis of the general power to carry out operational and reconnaissance activities, clarifying the provisions of the act. It seems that in the future all permissible methods and means of operational work should be regulated in detail in the act, similarly to what was done with operational control<sup>21</sup>. The ordering of these could be done on a similar basis as with *the Act of 24 May 2013 on means of direct coercion and firearms*.

The legal basis allowing for the polygraph examination of personal sources are Article 21(1)(1) and (2), Article 36(1)(3) and (4) and, by analogy, Article 46(2) of *the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency* (hereinafter: the ABW and AW Act). The first of the cited provisions gives the ABW the authority to conduct operational and reconnaissance activities. The second allows it to use personal sources of information (referred to in the Act as persons who are not officers) in the course of these activities. These are persons who are not officers, but who assist in the performance of the Agency's statutory tasks and may receive remuneration for this, and are entitled to compensation for damages incurred in connection with their tasks or their heirs. They are therefore treated similarly to officers. Consequently, the provisions of Article 46 of the ABW and AW Act apply to them by analogy. Such persons may be subjected to polygraph (psychophysiological) examinations similarly to officers, both at the commencement of cooperation and later – for control purposes. It seems that in order to avoid doubts and ambiguous legal interpretations, these matters should be precisely and unambiguously regulated in the future law on operational and reconnaissance activities.

A person subjected to polygraph examinations as part of operational and reconnaissance activities, primarily a personal source, does not have the procedural status of a witness, suspect or defendant. Therefore, none of the code procedural guarantees for a suspect (defendant) or a witness apply to him or her. The examination

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<sup>20</sup> With regard to the Internal Security Agency, this is *the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency*.

<sup>21</sup> Attempts to draft a law on operational and reconnaissance activities have been made for a long time. See: *the Draft Law on Operational and Reconnaissance Activities* (print no. 353 of 7 II 2008) or the subsequent attempts by some circles to create a 'code of operational work'.

itself is not an expert opinion performed in a trial, but as part of operational and reconnaissance activities. The examination is not performed by a forensic expert, but by an expert with qualifications specified by the service within which he or she is conducting the examination. Therefore, the provisions of the Code of Criminal Procedure concerning experts do not apply to him/her. His/her examination report is to meet the requirements set out by the service, in a way that takes into account the purpose of the examination, and not the requirements provided by the Code of Criminal Procedure for an expert opinion. As the examination carried out in the framework of operational and reconnaissance activities is not an expert opinion in the procedural sense, but part of the implementation of the operational procedure, the person examined in this procedure cannot be interrogated, but at most questioned.

First of all, unlike in a criminal trial, in an operational examination the person under examination does not have to give formal consent to the examination (submission of a written statement). He or she only has to give actual consent, without which a polygraph examination is not possible. After all, the examinee must sit still during the examination, allow the polygraph sensors to be placed on his or her body, answer test questions, etc.

Unlike an examination conducted for procedural purposes, which cannot be carried out 'in connection with an interrogation' (which, according to the cited Supreme Court judgment, also means being carried out immediately before or after an interrogation), an operational examination can be combined with the questioning of the examined person by the officers conducting him or her as a personal source. Moreover, one can imagine a situation in which the operational need would justify an exceptional interruption of the examination at some stage and an additional questioning. However, it should be borne in mind that this makes the examination incompatible with the methodology and reduces its diagnostic value (effectiveness). However, this is not what is most important in this type of examination. What matters most is what the researcher reveals at the examination.

Such a procedure is not permissible in a procedural examination, due to the prohibition on combining examination with interrogation. In an operational examination, it is permissible and sometimes even advisable. Indeed, while in polygraph examinations performed for procedural purposes, i.e. for the purpose of obtaining evidence, the outcome of the examination is crucial, in operational examinations it is often more important what the examined person (usually a personal source) says before the examination or during the discussion of questions during the pre-test interview.

In an operational examination, the role of the expert performing the examination is also different. While in a procedural examination he has

the status of an expert (with all the consequences), which he cannot combine with the role of an investigator, in an operational examination these roles are not clearly separated, and their possible separation may be due to practical, sometimes tactical reasons, but not to the order of a legal provision. The polygraph examination expert in operational activities combines the role of an expert and the role of an investigator from the procedural examination. The examination itself, on the other hand, is not an expert opinion, but de facto operational activity. For this reason, in many countries, including the U.S., one of the requirements for police polygraph examiners is operational or investigative experience<sup>22</sup>.

Polygraph examinations are an extremely useful tool in the work of the special services, both intelligence and counterintelligence. They are carried out by these services in many countries, even those where their use in the criminal process is prohibited (this is the case in many countries in Western Europe, belonging to the European Union or NATO). This is confirmed, for example, by the participation of experts from these countries in the annual APA seminars held in the United States.

The optimal use of polygraph examinations in the operational work of the special services requires good cooperation between experts and officers of the operational divisions. For this, more comprehensive knowledge of such examinations, their possibilities, and their limitations, is needed among operational staff as the persons ordering the tests.

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<sup>22</sup> It should be borne in mind that in the US procedure, the criminal trials only begins before the court. In the USA, the police investigation, unlike in most European countries, is not part of the criminal process and includes both those activities that in continental Europe (in the UK the legal system is identical to that in the USA) belong to the trial and those that are of an operational nature. In the US criminal trial, evidentiary actions are carried out only before the court. In the investigation, only evidence is secured. Hence the prevalence of the use of polygraph examinations in police investigations and the uniqueness of admitting such evidence before a court.

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