

Around the State: News to Muse

Niki Delson, LCSW – Educational Committee co-chair

Clinical Polygraph and the Antelope Decision

Ninth Circuit Court of Appeals

Post conviction sex offender polygraph testing (PCSOT) is an effective and important management and treatment tool that can help lower sexual and general criminal recidivism during supervision and treatment [1]. Further, PCSOT dramatically increases disclosure of relevant historical information, allowing for more precise targeting of treatment interventions [2-4]. Demonstrable benefits during supervision and treatment suggest that offenders whose treatment includes PCSOT may be less likely to reoffend after treatment and supervision ends. Therefore, available evidence suggests that PCSOT improves community safety. (CCOSO Position Paper)

Clinicians utilize PCSOT to gather data about a client's sexual history, to manage compliance with treatment and probation rules or to answer a specific question. The Antelope decision of the Ninth Circuit Court of Appeals focuses on the use of PCSOT in gathering sexual histories.

Facts of the Case: Antelope (Montana) was convicted of possessing child pornography, receiving an initial sentence of five years probation. As part of his supervision, he was ordered to participate in a treatment program that required disclosure of a detailed sexual history without assurance of immunity. He was asked to provide names of any prior victims which would be forwarded to the appropriate agency as required by the mandatory reporting law. He repeatedly refused to do so, citing fear of self-incrimination. In response, the government has twice revoked his probation and sent him to prison.

Appellate Court Issue: Issue(s): To decide whether the government's actions violated his Fifth Amendment right against compelled self-incrimination. *As a general rule, countervailing government interests, such as criminal rehabilitation, do not trump this right. Thus, when "questions put to [a] probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution," he may properly invoke his right to remain silent. "*

Held: That Antelope's privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with disclosure requirements.... *"Because the government and district court have consistently refused to recognize that the required answers may not be used in a criminal proceeding against Antelope, . . . we hold that the revocation of his*

probation and supervised release violated his Fifth Amendment right against self-incrimination."

Implications: Treatment providers are also mandatory reporters. Any information gained from of sexual history disclosure for PCSOT must be referred to the appropriate receiving agency (CPS, Law Enforcement, Probation) Any requirement that the sex offender provide victim identifying information without a prosecutorial immunity agreement violates an offenders Fifth Amendment guarantee against self incrimination.