

EXHIBIT 11

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Jacobsen v. Arizona

An amicus curiae brief re: the petitioner Ryan Jacobsen

IN THE SUPREME COURT OF ARIZONA

RYAN LEE JACOBSEN,

Petitioner,

vs.

THE HONORABLE THOMAS

LINDBERG, Judge of the SUPERIOR

COURT OF THE STATE OF ARIZONA,

In and for the County of Yavapai,

Respondent Judge,

STATE OF ARIZONA,

Real Party in Interest.

SUPERIOR COURT NO. P1300CR20090452

COURT OF APPEALS NO. 1CA-SA 10-0098

BRIEF *AMICI CURIAE* OF KENNETH EUGENE BLACKSTONE

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TABLE OF AUTHORITIES

1. Ansley, N., (1998), Question Formulation, *Polygraph*, 27-3, 181-183
2. Ansley, N., (2008), Development of Deception Criteria Prior to 1950, *Polygraph* 37-1,17-25
3. Barland, G.H. & Raskin, D.C. (1975). An evaluation of field techniques in detection of deception. *Psychophysiology*, 12,321-330
4. Barland, G.H. (2010) private communication.
5. Blackstone, K.E., Post Conviction Polygraph in the Community and Court: Raising the Bar on PCSOT Examiners, *The Forensic Examiner*, Vol. 17, No. 3, Fall 2008,72-79
6. Blackstone, K.E., (2011) Polygraph, Sex Offenders, and the Court; What Professionals Should Know About Polygraph . . . and a Lot More. – in press
7. Burtt, H.E. (1921a). The inspiration/expiration ratio during truth and falsehood. *Journal of Experimental Psychology*, 4(1),52-76
8. Burtt, H.E. (1921b). Further technique for inspiration/expiration ratios. *Journal of Experimental Psychology*, 4,106-11
9. Benussi, V. (1914). Die atmungssysteme der luge (The respiratory symptoms of lying). *Archiv fuer die Gesamte Psychologie*, 31, 244-273. English translation printed in 1975 in *Polygraph*, 4 (1), 52-76.
10. Cannon, W.B., *Bodily Changes in Pain, Hunger, Fear and Rage: An Account of Recent Researches into the Function of Emotional Excitement*, Appleton, New York, 1915
11. Cook, T.D. & Campbell, D.T. (1979) *Quasi-experimentation: Design and Analysis Issues for Field Settings*. Boston: Houghton Mifflin.
12. Cutrow, R.J., Parks, A., Lucas, N. & Thomas, K. (1972). The objective use of multiple physiological indices in the detection of deception. *Psychophysiology*, 9,578-588.
13. Darrow, C.W. (1935). "Emotion as Relative Functional Decortication: The Role of Conflict, *Psychology Review*, 42:566-578
14. Handler, Mark, Honts, Charles R. (2007) Psychophysiological Mechanisms in Deception Detection, *Polygraph*, 36-4, 221-232
15. Handler, Mark, Rovner, Louis & Nelson, Raymond (2008) The Concept of Allostasis in Polygraph Testing, *Polygraph*, 37-3, 228-233
16. Harris, J.C., Horner, A., McQuarrie, D.R. (2000) An Evaluation of the Criteria Taught by the Department of Defense Polygraph Institute for Interpreting Polygraph Examinations. Johns Hopkins University, Applied Physics Laboratory, SSD-POR-00-7272.

17. Heslegrave, R.J. (1981) A Psychophysiological Analysis of the Detection of Deception: The Role of Information, Retrieval, Novelty, and Conflict Mechanisms. Dissertation University of Toronto
18. Honts, Charles R., Raskin, David C. & Kircher, John C. (1985) Effects of Socialization on the Physiological Detection of Deception. *Journal of Research in Personality*, 19, 373-385
19. Horn, David G., 2003, The Criminal Body-Lombroso and the Anatomy of Deviance, Routledge 2003, page 122
20. Krapohl, Donald (2008) private communication
21. Krapohl, Donald, J. (2009) Numerical Evaluation and Wise Decisions, *Polygraph*, 38-1, 57-71
22. Kugelmass, SI, Lieblich, Il, Beh-Ishai, A., Opatowski, A., & Kaplan, M. (1968). Experimental evaluation of Galvanic Skin Response and blood pressure change indices during criminal interrogation. *Journal of Criminal Law, Criminology, and Police Science*, 59(4), 632-635
23. Landis, C. & Gullette, R. (1925). Studies of emotional reactions: III. Systolic blood pressure and inspiration-expiration ratios. *Journal of Comparative Psychology*, 5, 221-253
24. Lazarus, R.S. (1966). Psychological Stress and the Coping Process. New York: McGraw-Hill.
25. Marston, William, The Lie Detector Test, (Richard R. Smith, 1938) (reprinted 1989 by American Polygraph Association)
26. Nakayama, M. (1984). Suppression of respiration on the critical item and the rebound component. Reports of the National Institute of Police Science, 40, 32-37. Abstract in English
27. Patrick, C.J. & Iacono, W.G. (1991) A comparison of field and laboratory polygraphs in the detection of deception. *Psychophysiology*, 28(6), 632-638
28. Podlesny, J.A., Truslow, C.M. (1993). Validity of an expanded-issue (Modified General Question) polygraph technique in a simulated distributed-crimes-roles context. *Journal of Applied Psychology*, 78(5), 788-797
29. Raskin, David C. & Hare, Robert D. (1978) Psychopathy and Detection of Deception In a Prison Population. *Psychophysiology*, 15(2), 126-136
30. Raskin, D.C., & Honts, C.R. (2001) The comparison question test. In M. Kleiner (ed.) Handbook of Polygraph Testing. Academic Press: London.
31. Selye (1975). "Confusion and controversy in the stress field". *Journal of Human Stress* 1: 37-44
32. Senter, Stuart, Weatherman, Dan, Krapohl, Donald & Horvath, Frank, (2010) Psychological Set or Differential Salience: A Proposal for Reconciling Theory and Terminology in Polygraph Testing, *Polygraph*, 39-2, 109-117
33. Slovenko, R. (2002) Psychiatry in Law/Law in Psychiatry. Taylor & Francis

34. Wakamatsu, T., Yoshizumi, K. (1968). Study on respiratory wave during polygraph examination. Reports of the National Research Institute of Police Science, 21 (3), 158-164 Abstract in English
35. Wigmore, John H. (1935). Wigmore on Evidence, 2nd Ed., § 875
36. Wisconsin Department of Corrections 'Supervision of Sex Offenders' A Handbook for Agents, 2nd Edition 2008

QUALIFICATIONS OF AMICUS

I am a licensed and practicing forensic polygraph examiner and president of Blackstone Polygraph, Incorporated at 2971 Flowers Road South, Suite 110, Atlanta, Georgia, 30341. I hold a B.A. degree in Sociology and Psychology and have undergone graduate-level training in clinical psychology, forensic science, and criminal justice.

Within the polygraph profession, since 1980, I have practiced both in a law enforcement setting and as a private examiner and since 1991 have been an independent private examiner. I was the first examiner in the state of Georgia to conduct post-conviction sex offender testing in tandem with a treatment provider; since 1991 I have conducted a minimum of five thousand examinations on convicted sex offenders and have appeared as an expert witness on polygraph examination of convicted sex offenders and civilly committed persons in a number of courts of law in the state of Georgia and in other states. I was contracted to oversee the use of the polygraph by the Georgia Department of Corrections in their prisons and by the Georgia State Board of Pardons and Paroles to oversee their implementation of the polygraph into the parole of sex offenders. I am now contracted to examine convicted sex offenders for the Georgia Department of Corrections and for the Georgia State Board of Pardons and Paroles.

Within the polygraph profession, I have published a book entitled the Polygraph, Sex Offenders, and the Court and a number of peer-reviewed scientific papers on the use of the polygraph. I have served on the board of directors of several professional organizations, and have provided instruction in a number of venues, including the American Polygraph Association, the American International Institute of Polygraph, Eastern Kentucky University, and the American College of Forensic Psychology, regarding the use of the polygraph during sex offender management and during civil commitment.

INTEREST OF AMICUS

I have been invited by Yavapai County Deputy Public Defender Robert K. Gundacker, the attorney for the petitioner, Ryan L. Jacobsen, to write a brief on the matter of post-conviction sex offender testing. I am not being paid for this input. My interests in this case include improving the quality of polygraph data being produced in the management of sex offenders and ensuring the maintenance of higher standards of practice in the same field and my primary concern is the fact that these standards are being ignored by polygraph examiners who conduct these examinations and the professionals who quote the outcome.

Decisions are to be made by the Court and this brief will assume that the Court is interested in evidence that is fit for the Court and will center on the proven

principles and standards of forensic quality testing and suggest methods of maintaining those standards.

SUMMARY OF ARGUMENT

As it now stands the state of Arizona may or may not order Mr. Jacobsen to undergo polygraph testing as part of treatment and supervision and that decision is the province of the Court and not mine. I do, however, have a definite and well-founded concern that while the polygraph may be considered in the treatment and supervision of convicted sex offenders such as Mr. Jacobsen there are neither provisions in Arizona law that recognize the polygraph examination as a complex tool with a standardized protocol nor do any laws offer a means of maintaining these standards to ensure optimal testing. The key purpose of this brief is to aid the Court by explaining the differences between forensic testing and the utility testing common in sex offender testing and how safeguards can be established and maintained during the treatment and supervision of sex offenders in the state of Arizona.

Note: To keep this brief within limits I have eliminated detailed information on polygraph fundamentals and that information is available upon request.

ARGUMENT

A BRIGHT LINE BETWEEN FORENSIC TESTING AND THE UTILITY TESTING COMMON IN SEX OFFENDER TESTING

1. Over a century ago Dean Wigmore hypothesized that if “there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it” (Wigmore) (Slovenko). Dean Wigmore’s prophesy has yet to prove itself and it often seems that the law has been running away from the polygraph. In my opinion this has less to do with the validity of the polygraph procedure and more to do with the fact that polygraph organizations and experts have failed to draw a bright line between what is *forensic testing* and what is *utility testing*. To confuse one function of the polygraph with another is a mistake; to judge one application of the polygraph based on another application’s performance is also an error; to equate forensic testing with utility testing is like comparing lightning and lightning bugs.
2. Even though the principles are scientifically proven, the techniques are standardized, and the instrument remains the same, the accuracy of the polygraph application varies. The direction of variance, among other things, is determined by the examiner’s agenda and subsequent approach. These approaches can be divided into two groups – **forensic** and **utility**. The

forensic approach can be identified as “diagnostic” or “single-issue” testing that is fit for the Court and the *utility approach* is a blanket term I use to cover any other form of testing. While it is the least accurate, the utility approach has become the norm for testing convicted sex offenders.

3. The most obvious differences in these two approaches are **accuracy** and **purpose**. The forensic or “diagnostic” test is always more accurate than the utility or “screening” test and the primary objective of the forensic examiner is to produce a valid outcome or “diagnosis” while the primary objective of the utility examiner is to generate disclosures. Any polygraph report should identify the examination as either **forensic** or **utility** and whether the examiner chooses to conduct a forensic test or a utility test is a matter of choice.
4. The validity of the forensic examination has been scientifically proven while the utility test is without any scientific foundation. However, the utility test is popular in sex offender treatment and supervision for several reasons, the main one being that the polygraph instrument, even when used in a less than optimal fashion, will encourage respondents to make disclosures*. Other reasons for popularity are convenience, the appearance of economy, and the appearance of “covering more issues”.

*How disclosures actually relate to treatment success is unknown.

5. In a situation when an examiner faces multiple known or unknown issues the examiner who is concerned with accuracy will take the *forensic approach* and test about one single issue. Basic polygraph schools teach an examiner facing multiple issues to prioritize; review data and select a primary target issue based on consequence and on the clarity of the issue. However, the examiner may ignore accuracy and reliability, take the *utility approach*, and conduct a multi-issue screening test that includes questions about all issues the treatment provider or supervising officer wants to visit.
6. The basic idea of any standardized test is that the responses are subsequent to a controlled and therefore identifiable stimulus and not the result of some outside influence or contamination. In the diagnostic test, which has a protocol designed to prevent contamination, the stimulus is identifiable and in the utility test, which actually invites contamination, it is not. However, examiners tend to borrow from proven diagnostic (forensic) protocols, loosely apply them to experimental utility tests, and present the outcomes of this extrapolation as if they were scientifically based outcomes.

**FORENSIC TESTS HAVE A KNOWN ERROR RATE WHILE
UTILITY TESTS DO NOT. NOTE: ALL STUDIES SHOWN BELOW
RELATE TO FORENSIC TESTING**

1. Scientists have approached the problem of assessing the accuracy of single issue comparison question tests (CQT) in two venues: (a) laboratory studies; and (b) field studies. a. Laboratory research is an attractive venue because the scientist can control the environment. Moreover, with regard to credibility assessment studies, the scientist can know with certainty what the ground truth is (who is lying and who is telling the truth). There are pros and cons to laboratory research. From a scientific viewpoint, random assignment to conditions is highly desirable because it discourages extraneous variables that might contaminate the results of the experiment. However, laboratory research in general and credibility assessment in particular, has been criticized for a lack of the emotion generated in “real-life” situations. In Table 1 below, I have displayed the results of 9 high quality laboratory studies which indicate that even absent this emotion the CQT is a very accurate discriminator of truth tellers and deceivers. Over all of these laboratory studies, the CQT correctly classified about 91 percent of the subjects and produced approximately equal numbers of false positive and false negative errors.

Table 1 – 9 high quality laboratory studies of CQT

Study	Guilty				Innocent			
	n	% correct	% incorrect	% Inc.	n	% correct	% incorrect	% Inc.
Driscoll et al (1987)	20	90	0	10	20	90	0	10
Ginton et al (1982)	2	100	0	0	13	85	15	0
Honts et al (1994)	20	70	20	10	20	75	10	15
Horowitz et al (1997)	15	53	20	27	15	80	13	7
Kircher & Raskin (1988)	50	88	6	6	50	86	6	8
Podlesny & Raskin (1978)	20	70	15	15	20	90	5	5
Podlesny & Truslow (1993)	72	69	13	18	24	75	4	21
Raskin & Hare (1978)	24	88	0	12	24	88	8	4
Rovner et al (1979)	24	88	0	12	24	88	8	4
Means	247	80	8	12	210	84	8	8
Percent Decisions		90	10			92	8	

The above table was taken from Chapter 1; "The Comparison Question Test" (Raskin, Honts) of the Handbook of Polygraph Testing (Kleiner, 2002)

b. Another approach to studying psychophysiological credibility assessment is to conduct field studies. In this approach, polygraph tests conducted in actual cases are examined. While "real-life" field studies are attractive because of the realism, field studies can be the subject of numerous problems, the main one being the inability to determine ground truth in many cases. There have been numerous field studies, however I have found only four field studies that met the criteria for meaningful field studies of psychophysiological credibility assessment tests. The overall accuracy of these field decisions for the CQT was 86.5 percent with a significantly

higher number of false positives. (False positive errors mistakenly conclude a truthful person was deceptive, as opposed to false negative errors, in which a deceptive person is mistakenly called truthful). It is important to note that the studies shown in Table 2 reflect the findings of independent (secondary) evaluations. Independent evaluation is a desirable practice from a scientific view point, because it eliminates possible contamination (e.g. knowledge of the case facts, and the overt behaviors of the subject during the examination) that might be included in the decisions of the original examiners. However data from numerous studies clearly indicates that the original examiners are more accurate than the independent evaluators and it is my opinion that the original examiner is more likely to note subtle or distorted reactions, while the independent examiner looks for 'text-book' responses and is unable to look beyond what looks like a distortion in the same text-book.

Table 2 – High quality field studies of CQT

Study	Guilty				Innocent			
	n	% correct	% incorrect	% Inc.	n	% correct	% incorrect	% Inc.
Honts (1996)	7	100	0	0	6	83	0	17
Honts & Raskin (1988)	12	92	0	8	13	62	15	23
Patrick & Iacano (1991)	52	92	2	6	37	30	24	46
Raskin et al (1989)	37	73	0	27	26	61	8	31
Means	108	89	1	10	82	59	13	29
Percent Decisions		98	2			75	25	

The scientific data concerning the validity (the accuracy and error rate) of the polygraph can be summarized as follows:

High quality scientific research from the laboratory and the field converge on the conclusion that, when properly conducted, the CQT is a highly accurate discriminator of truth tellers and deceivers. The research results converge on an accuracy estimate that exceeds 90 percent.

2. **Scientific studies on CQT are on single-issue forensic testing. There is no science behind utility tests. Data is sometimes quoted on utility testing of sex offenders, but these figures reflect the unsubstantiated disclosures that are generated, not the accuracy of the examination. For disclosures to be used as proof of the value of a utility examination, that data should be validated.**

THERE ARE ACTIONS THAT CAN BE TAKEN BY THE COURT TO ENSURE PROPER MAINTENANCE OF STANDARDS AND CONTROLS DURING SEX OFFENDER TESTING.

1. Arizona is now one of 23 unlicensed states in the United States; none of the existing licenses have a quality control mechanism and, with or without a polygraph license, states and department policies typically quote the standards of the American Polygraph Association (APA) and expect the APA to maintain the quality of examinations given convicted sex offenders.
2. At present the APA “certifies” examiners after they attend a 40-hour class. Within a relatively brief period of time a large number of examiners will go from basic school, to these schools, to being an “expert” in post conviction testing.
3. I have been a member of the APA since 1987. According to its constitution the standards of the APA are mandatory for its members, but there is no mandatory quality control program to assure that those standards are followed. The APA refuses to mandate quality control; possibly because this is what examiners and potential members shy away from. The federal polygraph program is proof that this lack of quality control is not because quality control is impossible.

4. In 2008 the federal government had twenty-seven polygraph programs (military, intelligence, and investigation) and about 660 federally certified examiners in total. One hundred percent of the polygraph examinations conducted by the federal government go through a first-line quality control and some programs have a 100% second-level review, but for all programs there is some sampling of all cases reviewed at the second level. Every federal polygraph program undergoes a thorough independent quality assurance inspection every two years (Krapohl, 2008).
5. As a full member, officer, and board member of the National Association of Polygraph Specialists in Sex Offender Testing/ Monitoring (NAPS) I can state that mandatory quality control is not something that polygraph examiners will voluntarily flock towards. Founded in 1993, NAPS founders recognized the need for experienced examiners and quality control in the highly sensitive area of post-conviction testing of sex offenders. Several years later, the APA promised NAPS a specialty program of its own for examiners in this arena that would follow NAPS standards which, on its face, made the NAPS organization seem unneeded. Sadly, the APA has not imposed these regulations and parameters and NAPS is now dormant, possibly because examiners do not want to undergo the requirements of experience and quality control that are mandated by NAPS.

6. The state of Arizona could easily install a mandatory quality control program that would both optimize the examinations conducted and be of no added expense to its citizens. As further proof of how easy this would be I would like to volunteer my professional services in this quest.

CONCLUSION

I have shown in this brief that to equate forensic testing with utility testing is like comparing lightning and lightning bugs. Forensic polygraph has safeguards which keep its error-rate below 10 per cent, while utility tests, such as the ones popular in sex offender management, actually invite errors. A 'false positive' can result in a waste of resources while investigating unfounded concerns and it can unfairly hamper the otherwise honest sex offender who is trying to rebuild his life while a 'false negative' can allow recidivism that could have been stopped before anything happened.

The state of Arizona and any state choosing to use post conviction polygraph as a factor in the management of convicted sex offenders should be concerned that the outcome of utility tests are un-reliable and it should also manage the polygraph examiners who conduct these sensitive examinations. Any professional should be concerned when optimal work is not being done in their area of expertise and considering the sensitivity of this area, my concern is in capital letters.

CERTIFICATE OF COMPLIANCE

I certify that with the exception of two data tables and Exhibit A the attached brief:

Uses proportionately spaced type of 14 points or more, is double spaced using a roman font and contains 6,330 words (inclusive of certificate of compliance and the certificate of distribution).

Date

Kenneth E. Blackstone
Amicus

CERTIFICATE OF DISTRIBUTION

TWO COPIES of the foregoing delivered this _____ day of _____, 2011 to:

Yavapai County Superior Court
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By _____