EXHIBIT 12

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Taking the Fifth; Hawkins, Antelope, and Jacobsen, and How They Affect ATSA

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In 1973, in the Multnomah County Circuit of Oregon, Judge John C. Beatty, Jr. was the first judge to order the use of the polygraph in the management of convicted sex offenders and today, almost 40 years later, the post-adjudication polygraph has reached celebrity status among treatment providers and supervising officers. Regardless of its tenure and popularity not everyone is a fan; a small fraction of sexual offenders have assumed that the polygraph will violate their Fifth Amendment rights and have taken subsequent legal action. The number of appeals filed by probationers is even smaller and of these only two (Antelope, Jacobsen) have reached their objective. In a third ruling, the Washington State Supreme Court ruled that an inmate (Hawkins) could not be forced to take a sexual history polygraph examination as part of his SVP evaluation. How these three rulings affect ATSA and its members is the focus of this article.

Hawkins

In 1993, Jake Hawkins was convicted of attempted rape in the second degree by forcible compulsion. While incarcerated, he successfully completed a 13-month sex offender treatment program. On February 21, 2006, the State submitted a petition

alleging that Hawkins was an SVP based on the criteria set forth in (*Revised Code of Washington*) RCW 71.09.020(18). At the probable cause hearing, Dr. Christopher North testified "to a reasonable degree of scientific certainty," that Hawkins was likely to reoffend. The trial court then found probable cause to believe that Hawkins was an SVP; he was detained and ordered to have another evaluation conducted by Dr. North. As part of that evaluation, North requested that Hawkins submit to a sexual history polygraph examination. Hawkins refused. The State sought, and the trial court granted, an order compelling him to submit to the polygraph examination. He appealed and, in an unpublished opinion, the Court of Appeals affirmed the trial court's order. Hawkins then successfully argued to the Washington Supreme Court that RCW 71.09.04(4) prohibits the state from compelling respondents to SVP commitment proceedings to submit to polygraph examinations. In re Detention of Hawkins 169 Wash.2d 796, 238 P.3d 1175 Wash., 2010 is a published opinion.

Antelope

Larry Antelope ordered a child pornography video over the internet from undercover federal agents. He pled guilty to possession of child pornography and received a sentence of five years' federal probation in Montana. At sentencing, Antelope raised a Fifth Amendment challenge to "mandatory periodic and random polygraph examinations" but was told by the district judge that the "use of that information . is, I think, subject to the privilege between the counselor and the patient." He appealed his sentencing a total of five times before the Court considered his appeal ripe, possibly due to his subsequent incarceration during his appeals.

Antelope appealed the original sentencing decision (Appeal #1) in November 2000. While awaiting the result from the appellate court he refused to take the polygraph as required by the treatment program and was returned to court for failing to comply with probation. The judge re-imposed Antelope's probation, added six months of electronic monitoring to his conditions, and warned Antelope that he would return to prison unless he complied with the polygraph conditions. Antelope appealed this new order (Appeal #2). While waiting for a decision on Appeal #1 and #2, he refused to take the polygraph exam again and was returned to court. This time the judge heard testimony that Mr. Antelope refused to complete a sexual history autobiography assignment and a full disclosure polygraph that would verify his full sexual history. The Court sentenced him to 30 months in prison and he appealed for a third time. The three appeals made it to the higher Ninth Circuit Court of Appeals and his complaints about the Fifth Amendment were heard along with other issues that applied to sentencing. The Ninth Circuit Court sent the case back down to the lower court to be re-sentenced and did not consider the three appeals based on the Fifth Amendment. The lower court changed the 30-month sentence to 24 months followed by 30 months of supervised release, along with the same polygraph requirement. Antelope appealed again (appeal #4) because his sexual history polygraph requirement still remained. After serving his prison term, he entered the treatment program and refused to take the polygraph once again. He was taken back to court and sentenced to an additional 10 months in prison and 26 months of supervised release.

Antelope appealed again, for the fifth time. In an unpublished opinion *(United States v. Antelope, 2005)* the Ninth Circuit Court found that government's actions violated

Antelope's Fifth Amendment right against compelled self incrimination and reversed earlier judgment. "Because the Constitution does not countenance the sort of government coercion imposed on Antelope, and because his claim is ripe for adjudication, we reverse the judgment of the district court."

The Antelope decision was not the first court ruling on post-conviction sex offender polygraph, but it was the first ruling in favor of a sex offender on probation. Also, and most importantly from a legal standpoint, Antelope is an unpublished opinion; some court systems, such as the California state court system and the federal Court of Appeals for the Second, Seventh, and Ninth Circuits—forbid attorneys to cite unpublished cases as precedent.

Jacobsen

In October 2009 in Yavapai County, Arizona, Ryan Jacobsen pled guilty to three counts of Luring a Minor for Sexual Exploitation and was subsequently sentenced to probation. His subsequent probation conditions included: "Defendant shall submit to any program of psychological or physiological assessment at the direction of the Probation Officer, including but not limited to Abel testing and/or the polygraph and/or the penile plethysmograph, to assist in treatment, planning, and case monitoring" and he was asked to complete several forms. One was a consent to participate which included a waiver of confidentiality that noted his probation officer would be fully informed of his issues and progress. It also noted: "I understand that distressed polygraphs cannot and will not be used in court or for probation revocation or treatment termination."

When he entered a treatment program the polygraph was discussed and Jacobsen asked his counselor what the consequence would be if he exercised his right against self-incrimination and refused to answer questions in the polygraph. He was told that a refusal to answer any question for any reason would constitute a failure of the polygraph. His treatment provider gave him a 15-page questionnaire to fill out before taking a sexual history polygraph test. Jacobsen declined to answer some questions he felt were incriminating and could be used against him.

Jacobsen's attorney approached the trial court with a motion to preclude the polygraph and the questionnaire and the trial court responded by issuing an order "granting Defendant immunity according to A.R.S. § 13-4066." Jacobsen stated that the immunity given by that law was insufficient, but after further argument, the trial court ruled that A.R.S. § 13-4066 provides a probationer with adequate Fifth Amendment protection as to information or statements elicited during sex offender treatment and declined to give him any further immunity.

The Appeals Court ruled in favor of Jacobsen, holding that "a waiver of the privilege against self-incrimination may not be made a condition of probation." The state then petitioned the Arizona Supreme Court (*Jacobsen v. Superior Court and State of Arizona*, Supreme Ct. No. CV-10-0309-PR) and Jacobsen's attorney invited me (Blackstone) to write an amicus brief for the Arizona Supreme Court.

That brief described differences between forensic (single-issue) testing and utility (multiple- issue) testing and how utility testing has become the norm for sex offender testing. "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 . . . 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.” In the brief I also described the quality control mechanism and how it is a necessity if a state wants to optimize its use of the polygraph. The Arizona Supreme Court accepted the brief and in April 2011 the state filed a motion to withdraw its petition for review. That motion was granted one day before oral arguments were scheduled to begin. This leaves the appellate opinion in place, making it illegal in Arizona to compel people to waive their privilege against self-incrimination as a condition of probation.

Jacobsen v. Antelope

Many would say that to compare Hawkins to Antelope and Jacobsen would be comparing apples to oranges, and I agree, so let’s compare apples to apples. The relevant similarities of the Antelope and Jacobsen cases end with the fact that both probationers refused when told that they had to take sexual history polygraph tests as part of their treatment. The major differences were 1) Antelope learned of the polygraph during the plea bargain while Jacobsen was told after sentencing, 2) Antelope actually

served time due to his refusal to comply with his sentence and Jacobsen did not, 3) the Antelope ruling was not published and the Jacobsen ruling was a published opinion, and 4) the Antelope ruling held “the government’s actions violated his Fifth Amendment right against compelled self-incrimination” while the Arizona Court of Appeals ruled on Jacobsen: “that a waiver of the privilege against self-incrimination may not be made a condition of probation” and should be an element of the sentence. A non-lawyer summation would be:

The Court felt that Antelope should not have been punished for exercising his Fifth Amendment rights and the Court felt that Jacobsen should have been notified of an expected waiver of those rights before his sentence.

What do these cases mean to ATSA?

Hawkins.

As it is a published opinion, the Hawkins ruling is important to all professionals working in the civil commitment arena; it can be cited in all court systems, as a precedent and it should, in my opinion, be a warning to all professionals, whether they are in the SVP arena or in a prison, or in the community, that a person cannot be forced to take a sexual history polygraph when the outcome may be used in pending adjudication. As a polygraph examiner I find it preposterous to consider testing anyone against their will. This is because the polygraph is a means of determining certainty, certainty about their answer and certainty about the objectivity of the examiner and the outcome of a ‘forced’ examination would be very questionable. With one exception, the idea of giving a

person a sexual history test prior to sentencing or prior to an SVP trial is unethical. The only exception is if this is done with concurrence from that person's attorney.

Antelope.

I was not involved in the Antelope case and may well be wrong, but it is my opinion that an open channel of communication between Antelope, the polygraph examiner, his treatment provider, and his probation officer might have saved a good deal of time and money. For example, I have seen several convicted sex offenders who at first did not want to take a sexual history test and the treatment provider was flexible, after discussing this with me. Instead I saw these offenders for maintenance tests and after some time they requested a sexual history test to prove that they were 'ready' for after-care.

Jacobsen.

When Ryan Jacobsen agreed to a plea bargain and was sentenced to probation, he was not told that he would be required to take a possibly incriminating sexual history polygraph test. It was not until after sentencing, when he signed a list of probation conditions, that he was told about the polygraph. This is why the appeals court ruled in Jacobsen's favor "a waiver of the privilege against self-incrimination may not be made a condition of probation". The polygraph should have been introduced when the plea was offered. When he asked his treatment provider what would be the consequence of refusing to answer questions he was told "failure of the polygraph." I have no further knowledge of the actual discourse between Jacobsen and the treatment provider, but if

“failure of the polygraph” is another way of saying “you will be deceptive” then that is untrue.

Summation

The polygraph is currently used by the U.S. government and to some degree all U.S. states during the management and treatment of convicted or committed sex offenders. It is used in Federal and State prisons, during Federal probation and during state probation and parole. It is also used in civil commitment; in the Federal program and in 19 of 20 states with civil commitment statutes. Despite the popularity and tenure of the polygraph, each of these user groups has its own policy regarding polygraph. For example, the protocol for introducing polygraph into sex offender treatment varies; per jurisdiction and even within a jurisdiction.

Hawkins, Antelope, and Jacobsen remind us that Fifth Amendment rights apply to all citizens, regardless of the jurisdiction. Hawkins reminds us that we have the Fifth Amendment to prevent forced self-incrimination; Antelope suggests that a sex offender should not be incarcerated for refusing to waive those rights; and Jacobsen suggests that the polygraph should be introduced prior to sentencing. ATSA and its members must remember that probation and parole are alternates to prison, and the acceptance of the parameters of that alternate is the Court’s offer and the individual offender’s option. Treatment providers and polygraph examiners are not *arms of the court (U.S. v. Saxena)* and to act otherwise jeopardizes the rationale of treatment and the objectivity of the polygraph examiner.

In the Robert Bolt play “A Man for All Seasons” Sir Thomas More, then Chancellor of England (1529-1532), argued with his son-in-law William Roper about his willingness to “knock down every law in England” in pursuit of the devil.

And when the last law was down and the Devil turned round on you, where would you hide, Roper, the laws all being flat?

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