EXHIBIT 13

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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

RYAN JACOBSEN,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI, and THE HON. THOMAS LINDBERG,

Respondent Judge,

STATE OF ARIZONA,

Real Party in Interest.

Supreme Court
No. CV-10-0309-PR

Court of Appeals
No. 1 CA-SA 10-0098

(Yavapai County Superior Court
Cause No. P1300CR20090452)

***AMICUS CURIAE* BRIEF OF THE OFFICE OF THE MARICOPA COUNTY PUBLIC DEFENDER**

I. Introduction

The Maricopa County Public Defender's Office, pursuant to Rule 31.25, Ariz. R. Crim. P., moves this Court for an order allowing the Maricopa County

Public Defender to file an *amicus curiae* brief in the above-captioned matter. The Maricopa County Public Defender's Office is the largest indigent defense law firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 50,000 cases, the overwhelming majority of which concerned defendants sentenced to probation.

The issue on appeal is one of statewide importance, is continuing in nature, and is dealt with on a daily basis by the Maricopa County Public Defender. The purpose of this amicus brief is to establish the widespread negative impact that would result from a reversal of the court of appeals' decision. The use of polygraphs urged by the Petitioner would force probationers to choose between revocation of probation or compelled incriminating admissions, an untenable situation which undermines their rights, fails to comport with constitutional guarantees, and will discourage some probationers from seeking treatment. Furthermore, implementation of the holding in *Jacobsen v. Lindberg* will not undermine the use of polygraphs or the ability of probation officers to promote sex offender programming and public safety. The court of appeals' decision is consistent with decisions in other jurisdictions which have held that probationers retain the right to invoke their protection against self-incrimination during polygraph examinations. Polygraphs continue to be used as an integral part of

treatment in those jurisdictions.

II. The holding in *Jacobsen v. Lindberg* is consistent with decisions by other jurisdictions regarding Fifth Amendment protection for statements made during polygraph examinations.

The decision by the Court of Appeals is clearly in accord with the laws of Arizona and this Court's decisions, and the current state of the law in Arizona is consistent with the law of other jurisdictions of the United States. The 9th Circuit Federal Court of Appeals came to the same conclusion as the Arizona Court of Appeals in a case with nearly identical factual background, *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005). There, the Court held in favor of the right of a sex-offender defendant on supervised release to flatly refuse on Fifth Amendment grounds to participate in a sexual history examination and a polygraph test, which were both part of court-ordered sex offender treatment. 395 F.3d 1128, 1131 (9th Cir. 2005).

In determining Antelope was entitled to refuse these tests, the Court noted that a Fifth Amendment claim has two elements: "(1) that the testimony desired by the government carried the [real and appreciable, not remote, unlikely, or speculative] risk of incrimination, . . . and (2) that the penalty he suffered [for refusing to answer] amounted to compulsion . . . ." *Id.* at 1134 (citations omitted). The Court held the risk that Antelope would incriminate himself was "real and appreciable" because he would not be able to withhold information regarding the

past offenses implied by his refusal to comply. *Id.* at 1135. The Court had no doubt that if Antelope made incriminating admissions they would be turned over to authorities and could be used against him; the danger was not "remote, unlikely, or speculative". *Id.* (internal quotes and citations omitted).

The government's purpose in imposing the penalty is the determining factor in deciding whether a "penalt[y] for the refusal to incriminate oneself" amounts to compulsion. *Id.* at 1137 (citing *McKune v. Lile*, 536 U.S. 24, 53 (2002) (O'Connor, J., concurring in 4-1-4 decision). "[P]enalties . . . that . . . appear, starkly, as government attempts to compel testimony" such as the revocation of Antelope's supervised release to sanction him "for his self-protective silence about conduct that might constitute other crimes" satisfy the compulsion requirement of the Fifth Amendment privilege analysis. *Id.* at 1137 (emphasis in the original). This is despite the fact that "the disclosures sought here may serve a valid rehabilitative purpose". *Id.* at 1138. The Court held "that Antelope's privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with [his treatment program's] disclosure requirements." *Id.*

The Third District California Court of Appeals ruled the same way over twenty years ago in another similar case. *People v. Miller*, 208 Cal. App. 3d 1311, 1315 (Ct. App. 1989). In that case, the defendant, who had pled guilty to

committing a lewd and lascivious act upon a child, appealed a condition of his probation sentence that required him to submit to polygraph examination as violative of his Fifth Amendment rights. *Id.* at 1313-14. The court held that a defendant with such a requirement must truthfully answer the polygraph questions unless he properly invokes the privilege, and that unless he is required to answer despite a proper invocation of the privilege, no violation of the Fifth Amendment right is suffered. *Id.* at 1315 (citing *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984)). "The mere requirement of taking the test in itself is insufficient to constitute an infringement of the privilege." *Id.*

In 1999, in *Ex parte Renfro*, a defendant convicted of indecency with a child argued that a requirement that he submit to a polygraph examination as a condition of probation violated his Fifth Amendment right against self-incrimination. 999 S.W.2d 557, 559 (Tex. App. 1999). Citing to *People v. Miller*, 208 Cal. App. 3d 1311 (Ct. App. 1989), the Texas court found that the requirement to take the test, did not, in of itself, violate the Fifth Amendment. *Id.* at 561. A violation would only occur if "he invokes the privilege, shows a realistic threat of self-incrimination and nevertheless is required to answer. . . ." *Id.*

A more recent Alaska Court of Appeals decision is also consistent with the law of Arizona on this issue. In *James v. State*, 75 P.3d 1065 (Alaska App. 2003), the court addressed the probation revocation of a sex offender who was rejected

from treatment for consistently invoking his Fifth Amendment right not to admit to the offenses for which he was convicted after a trial in which he maintained his innocence, and which he was appealing at the time his probation was revoked. The Alaska Court of Appeals held that the defendant had a valid Fifth Amendment privilege not to answer questions about the charges for which he was convicted, and that his probation could not be revoked for invoking the privilege. *Id.* at 1072.

Jacobsen v. Lindberg is in harmony with prior Arizona law and the federal and state decisions *supra,* all of which recognize the constitutional right of a probationer to refuse to answer incriminating questions in the course of a polygraph examination.

III. The Use of Polygraph Examinations in Sex Offender Treatment Has Not Abated in Jurisdictions Which Recognize a Defendant's Right Against Self-Incrimination and *Jacobsen* Will Not Cause Abandonment of the Polygraph in Arizona.

The State claims that the decision in *Jacobsen v. Lindberg* will have "a statewide chilling effect on the future use of polygraphs." (Petition for Review at 5.) One only has to look to the practices of states with similar court decisions to refute the State's contention. California is the most populous state in the country and has over 88,000 registered sex offenders. California State Sex Offender Board website, available at http://www.casomb.org/. Years after the decision in *Miller*, *supra*, many California county probation departments continued to incorporate polygraph examinations into sex offender treatment. Cal. Research Bureau,

Community Treatment and Supervision of Sex Offenders: How It's Done Across the Country and in California, at 28 (2004), available at http://www.library.ca.gov/crb/04/12/04-012.pdf. Some counties found that the development of guidelines regarding treatment and polygraph examinations helped to resolve disagreements among probation departments, prosecutors, and defense counsel based on legal uses of polygraph results. *Id.* at 29. Counties that did not require polygraphs as part of community supervision cited cost issues and the lack of standards in California for polygraph examiners and for test procedures. *Id.* at 29-30.

Texas has 43,000 registered sex offenders. *Use of the Polygraph in the Assessment and Treatment of Sex Offenders*, 3, Council on Sex Offender Treatment, available at http://www.dshs.state.tx.us/csot/csot_polygraphs.pdf. Since 1983, the Texas Council on Sex Offender Treatment, a regulatory agency of the Texas Department of State Health Services, has been charged with overseeing sex offender treatment programs. Council on Sex Offender Treatment website, *http://www.dshs.state.tx.us/csot/csot_tinfo.shtm*. Notwithstanding the holding of *Ex parte Renfro*, *supra*, the Council strongly supports the utilization of polygraphs in sex offender treatment. *Use of the Polygraph in the Assessment and Treatment of Sex Offenders*, *supra*, at 2. Moreover, Texas courts "routinely require sex offenders on community supervision to take and pass polygraph exams. . . ."

Leonard v. State, 315 S.W.3d 578, 580 (Tex. Ct. App. 2010).

More than three years after the decision in *James v. State, supra,* Alaska began the implementation of polygraph examinations in sex offender treatment. 2 *Alaska Data to Date*, The Sex Offender Monitor, Alaska Department of Corrections at 1 (Feb. 2007), available at http://www.correct.state.ak.us/corrections/sex_off_monitor/pdf/February%202007%20final.pdf. As proof of the success of the program, the Alaska Department of Corrections reported that the number of victims reported by probationers increased significantly after only one polygraph examination. *Id.* The Department expected that information and other data gleaned from polygraph results to contribute significantly to the development of state sex offender management policies. *Id.*

In 1983, an Oregon sex offender treatment program for convicted offenders became one of the first states to use polygraph examinations as part of the program. Jan Hindman & James M. Peters, *Polygraph Testing Leads to Better Understanding of Adult and Juvenile Sex Offenders*, 65-DEC Fed. Probation 8, 8 (2001). In 1994, an Oregon appellate court addressed the issue of the availability of Fifth Amendment protection to a probationer while undergoing a polygraph examination. *State v. Tenbusch*, 131 Or. App. 634, 641 and 644, 886 P.2d 1077, 1081 and 1083 (Or. App. 1994). The defendant in *Tenbusch* was placed on probation for sexually abusing his stepson. *Id.* at 636, 886 P.2d at 1078. A term of

his probation directed him to "submit to polygraph examinations about his sexual history, and about his compliance with probation, whenever directed by his Probation Officer or his sexual therapist." *Id.* After a polygraph which indicated he was untruthful about past offenses, the defendant admitted to his probation officer he had abused his stepdaughters. *Id.* at 636-37, 886 P.2d at 1078-79. The Oregon court found that the defendant's conditions of probation did not allow him to refuse to take the polygraph examination or to answer untruthfully. *Id.* at 644, 886 P.2d at 1082. However, the probation conditions did not compel the defendant to make incriminating statements because he had the right to invoke the protection of the Fifth Amendment. *Id.* at 644, 886 P.2d at 1083. As in *Jacobsen*, the Oregon court found that the constitutional protection of the Fifth Amendment was not self-executing but had to be claimed by the probationer. *Id.* at 642, 886 P.2d at 1081.

After the *Tenbusch* decision, Oregon sex offender programs continued to use polygraph examinations. A 2001 article in *Federal Probation* reviewed two decades of studies of Oregon sex offender programs and concluded that, "[t]oday, the Oregon treatment program that compiled the data is just one of many cognitive/behavioral programs that routinely use polygraph testing, both to validate self-reported histories of juvenile and adult offenders, and to help manage offenders during their terms of probation." Hindman, *supra*, at 14.

Polygraph examinations continue to be a viable option in the management of

sex offenders in Arizona and other jurisdictions. As the *Jacobsen* court noted, probationers may choose not to claim the exercise the right against self-incrimination during the test. *Jacobsen v. Lindberg*, slip. op. at 8, ¶ 8. This brief does not address ongoing concerns regarding the reliability of a polygraph examination but it is instructive to note that a Georgia study of sex offenders indicated that 10% of examinees actually made a false admission after an examination *incorrectly* indicated that the offender had been untruthful during the exam. *The Use of the Polygraph in Sex Offender Management*, 25-26, January 2009, Research Bulletin, New York State Division of Probation and Correctional Alternatives, available at http://www.dpca.state.ny.us/pdfs/sopolygraphresearchbulletin3.pdf. Reasons given for the false admissions included, demonstrating a commitment to treatment, avoiding getting into trouble or feeling pressured by the polygraph examiner. *Id.*

For those who do claim the privilege, the state can choose on a case-by-case basis to offer use immunity to gain a more full disclosure. *Id.* at 10, ¶ 10 (citing *State v. Eccles*, 179 Ariz. 226, 229, 877 P.2d 799, 802 (1994)). When treatment providers in Oregon first began to use the polygraph in the early 1980's, the prosecutor offered conditional immunity to the offenders for prior unreported sexual crimes. Hindman, *supra*, at 8. The prosecutor did so in recognition of

three perceived needs; one, full disclosure allowed pertinent and directed treatment; two, victimized children could be identified early; and, three, immunity provided credibility to defense attorneys which, in turn, encouraged guilty pleas, saving victims from the trauma of participating in a public trial. *Id.*

The importance to public safety of requiring use immunity for incriminating statements is evident when one considers that untreated sex offenders have higher recidivism rates than treated sex offenders.[1] Seth A. Grossman, *A Thin Line Between Concurrence and Dissent: Rehabilitating Sex Offenders in the Wake of McKune v. Lile*, 25 Cardozo L. Rev. 1111, 1116 (2004). A reversal of *Jacobsen* will result in a probationer facing a choice of admitting to incriminating conduct with the potential of additional imprisonment or rejecting probation. A rational probationer would choose to serve his present sentence rather than admit to new crimes and would eventually be released back into the community untreated.[2]

The *Jacobsen* decision was clear that it does not prohibit the use of

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[1] A study of 1400 sex offenders on probation in Minnesota found that five percent of probationers who completed treatment were re-arrested for sexual offenses compared to eleven percent of offenders who either failed to complete treatment or did not participate in treatment. Reagan Daly. *Treatment and Reentry Practices for Sex Offenders: An Overview of States*, 5. New York: Vera Institute of Justice, 2008, available at http://www.vera.org/download?file=1805/Sex_offender_treatment_with_appendices_final.pdf.

[2] The majority of convicted sex offenders will be placed on community supervision at some point either as a result of a suspended sentence or parole after release from prison. *Daly*, *supra*, at 1.

polygraphs; instead, it affirms the ability of a probation department to obtain non-incriminatory information as to a defendant's background and actions. *Jacobsen*, slip. op. at 8, ¶ 8. Moreover, as research and experience continue to refine the use of polygraphs for treatment purposes, the type of information sought by providers can change. A significant goal of treatment is to promote public safety by assessing the risk of re-offending. One of the first uses of the polygraph examination was to verify information provided by the offender as to past behaviors and preferences, which could then be used to develop a treatment plan specific to the offender. Kim English et al., Colo. Dep't of Pub. Safety, Div. of Criminal Justice, and the Office of Research Statistics, *The Value of Polygraph Testing in Sex Offender Management: Research Report Submitted to Nat'l Inst. of Justice* 14-15 (Dec. 2000), available at http://www.ncjrs.gov/pdffiles1/nij/grants/199673.pdf. Treatment was also facilitated by addressing an offender's minimization of the effects of the offense on a victim and denial of details of the offense, issues that could be addressed during a polygraph. *Id.* However, other studies have indicated that information from a sexual history, including number of past victims, minimization and denial are not statistical predictors of recidivism. *The Use of the Polygraph in Sex Offender Management*, *supra*, 25-26. Therefore, in 2003, providers in the Sixth Judicial District in Iowa, which have used polygraphs since 1995, shifted the focus of the

questioning in polygraph examinations away from "identifying the number of prior victims, confronting denial or addressing discrepancies in official records compared to offender admissions." *Id.* Instead, attention was directed to better predictors of re-offending such as sexual drive, the ability to self-regulate, access to prior victims and cooperation with supervision. *Id.* This type of non-incriminating information is fully available under the holding in *Jacobsen*, facilitating treatment and maintaining public safety.

IV. Conclusion

The Maricopa County Public Defender, *amicus curiae*, respectfully requests that this court not grant review of the opinion of the Court of Appeals of Arizona in *Jacobsen v. Lindberg* because the State's predictions that sex offender treatment providers will be discouraged from using polygraph examinations are without merit. Treatment providers may continue to utilize polygraph examinations to promote public safety while staying within the confines of an offender's constitutional protections.

RESPECTFULLY SUBMITTED this 12th day of November, 2010.

MARICOPA COUNTY PUBLIC DEFENDER

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CERTIFICATE OF RULE 31.19(c) COMPLIANCE

The *AMICUS CURIAE* BRIEF is double-spaced, uses a 14-point Times New Roman proportionally-spaced typeface, and contains 3092 words, according to the processing system used to prepare this brief.

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