

Perspectives

Summer 2006

Will the Antelope Decision Kill the Polygraph?

Erik L. Fox, Ph.D., JD
Sharper Future, San Diego, California

Abstract

This article examines the impact of full sex history polygraph testing for sex offenders in light of the United States v. Antelope (2005) ruling. It provides a review of the facts of the Antelope case, along with a general overview of the U.S. legal system. Discussion includes the appellate process, case law, and precedent, as well as how court decisions impact lower courts in the same geographic region and beyond. The specific decision making process of the Ninth Circuit Court of Appeals in Antelope is examined as it relates to McKune v. Lile (2002). There are new laws that impact treatment and child abuse reporting that serve to complicate matters. Recommendations include legislative changes and immunity contracts within the context of their limitations.

Background

There is a buzz about sex offenders like never before. New laws are being passed, court cases are being filed, talk radio hosts are pontificating, and GPS satellite receivers are being attached to offenders' ankles. The pendulum has swung and "sex offenders" are the current political hot potato. This controversy covers a lot of territory and the decision by the Ninth Circuit Court of Appeals regarding the case of United States v. Antelope adds to the mix.

What does it mean to the rest of the country that three federal judges in the state of Washington decided that Lawrence Antelope in Montana had his fifth amendment rights violated? The collision between psychology and the law challenges many professionals in both fields. Many lawyers do not understand confidentiality as it applies to therapists, and many therapists do not understand the law as it applies to treatment participants entangled in the justice system. More recently, with the U.S. v. Johnson decision, we can see that even different Circuit Courts do not see eye to eye on issues related to polygraphy or even what the fifth amendment really means. In US v. Johnson, The 2nd Circuit Court of Appeals (the law of the land in New York,

Connecticut, and Vermont) states that a polygraph condition is acceptable if the defendant retains the right to challenge any incriminating statement as violations of his 5th amendment rights at a later proceeding. The 2nd Circuit Court therefore does not see the right to "silence" as part of the 5th amendment. Many argue that it would be too late at that point to protect oneself from prosecution.

To review the facts of the Antelope case: Mr. Antelope ordered a child pornography video from undercover Federal agents over the internet. He pleaded guilty to possession of child pornography and received a sentence of five years' federal probation. At his sentencing, he challenged three issues including the periodic and random polygraph examinations, which included disclosure of his sexual history, as a term of his probation (United States v. Antelope, 2005). The judge, who apparently did not understand how confidentiality would apply, told Mr. Antelope that he thought the use of any polygraph information would be privileged between Mr. Antelope and his counselor. The information could not be privileged in the state of Montana because all 50 states have some form of mandatory child abuse reporting requirements in order to qualify for funding under the Child Abuse Prevention and Treatment Act (1996). At the same time, the treatment provider needed to obtain a complete sexual history from Mr. Antelope in order to comply with the requirements of being a certified sex offender treatment provider in the state of Montana. Having knowledge regarding what the offender has done in the past, the progression of his crimes, the number of victims, and the nexus with substance abuse, sadistic behavior, etc. can be important in assessing risk, developing a specific treatment plan, making a medication evaluation and managing risk. Therefore, many in the treatment community have been adamant about keeping the polygraph requirement without modification and have discounted or been unaware of the perplexing constitutional limitation.

Mr. Antelope appealed the original sentencing decision (Appeal #1) and, while awaiting the result from the appellate court, he refused to take the polygraph as required by the treatment program. He was returned to court for failing to comply with probation. The judge re-imposed

Continued on page 8

probation and added six months of electronic monitoring to his conditions. He also warned Mr. Antelope that he would return to prison unless he complied with the polygraph conditions Mr. Antelope appealed this new order (Appeal #2). While waiting for a decision on appeal #1 and #2, he again refused to take the polygraph exam 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 (Appeal #3). The three appeals made it to the higher Ninth Circuit Court of Appeals and were heard together along with other issues. Because there were sentencing issues on appeal, 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. Mr. 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. Mr. Antelope appealed (Appeal #5). Appeal #4 and #5 resulted in a decision from the Ninth Circuit on the fifth amendment grounds (United States v. Antelope, 2005).

The Legal System

Treatment providers may be saying, “My patients had their cases heard in State Court and Mr. Antelope was in Federal Court so this does not apply.” Others may say, “Antelope was in the Ninth Circuit and I live in the 1st Circuit so there is no applicability here.” In order to understand the ramifications of Antelope, it is necessary to be aware of how our legal system is setup. State Courts decide most issues related to state laws but must do so in a way that is congruent with Federal laws and the U.S. Constitution. Although Mr. Antelope committed a Federal crime and was convicted in Federal court, the issue of his fifth amendment rights is applicable even if he were convicted in a state court. The U.S. Supreme Court recognized that the fifth amendment applies to all of the states through the fourteenth amendment (Malloy v. Hogan, 1964). States cannot impose laws that limit any Federal rights, just as states cannot pass laws that would allow something otherwise illegal under Federal regulations. In a recent example, a California

law that allowed medical marijuana by prescription was overturned as violating Federal law (United States v. Oakland Cannabis Buyers’ Coop, 2001). So state laws can be appealed to the highest state court, usually called the State Supreme Court, and then may be further appealed to the U.S. Supreme Court as long as there is a Federal issue in the case.

The first level of the Federal Court system is the District Court, where the trial is heard and where sentencing is given. There are 94 districts in the United States and its territories and each may have multiple locations. All trials will take place in one of these district courts. Mr. Antelope pled guilty and was sentenced in a Federal District Court. Montana, which represents one district, has five trial court locations throughout the state. District Courts are grouped in Circuits based on geographic location. Thirteen federal circuits cover the 50 States, the U.S. territories, and Washington D.C. The Ninth Circuit is the largest, covering 40% of the United States, and has 28 active judgeships. It consists of nine states (California, Oregon, Washington, Nevada, Idaho, Arizona, Montana, Hawaii, and Alaska) and two territories (Guam and the Northern Mariana Islands). An appeal from a district court will be heard by the corresponding Circuit Court of Appeals. The Antelope case was heard by the Ninth Circuit Court of Appeals since Montana is geographically within the Ninth Circuit. Many cases result in a published *opinion*, summarizing the case and explaining how the Court made their decision. These opinions then become part of *case law* and will influence future rulings. Case law from the Circuit Court will then apply or have precedent over all the district courts and state courts within that circuit. The U.S. Supreme Court opinions apply to all state and Federal courts because it is above all courts. *Precedent* is the legal principal that a court’s decisions must be followed by all lower courts within its authority. One Circuit Court does not have authority over other Circuits, but their decisions create case law and precedent that strongly influence future rulings.

Appealing a Circuit court decision means taking it to the U.S. Supreme Court. The Ninth Circuit is reputed to be the most overturned Circuit Court and it has made some extremely controversial rulings. Did the Ninth Circuit Court err in the Antelope case? Will the case go to the United States Supreme Court and be overruled? For the U.S. Supreme Court to overturn a circuit court of appeals decision, a series of steps must occur. Because the number of judgeships in a Circuit Court is generally large, only a random selection of judges hears a case. In the Antelope case, the Ninth Circuit Court ruling

came from three judges randomly selected from the 28. The first step of an appeal in the Antelope case would be to ask for an *en banc* hearing. This can consist of all the judges in the Circuit Court, but because the Ninth circuit is so large, an *en banc* appeal consists of 11 judges instead of the entire 28. If an *en banc* decision were to be appealed, it would then go to the United States Supreme Court. There will be neither in the Antelope case because none of the parties appealed the decision. Presumably, Mr. Antelope was satisfied with the Court's decision and would have no reason to appeal and presumably, the Government recognized the limited chances of winning a further appeal and chose not to do so. Appeals are extraordinarily costly in both time and money. The original complaint in the Antelope case was filed by the United States on November 15, 2000. Five years later, after serving a 24-month and then a 10-month prison term. After countless appeals on numerous issues, the Court is still involved in this case.

Although the Antelope decision did not make it to the U.S. Supreme Court, we can hypothesize how the Supreme Court would have ruled based on case law and precedent. Not wanting to be overturned in its decisions, the Justices in the Ninth Circuit Court looked at how the U.S. Supreme Court would likely rule. Therefore, if the same facts arose in a different circuit, or even through a state court appeal that eventually made its way to the U.S. Supreme Court, we could expect the same outcome. In the Antelope case, the judges used case law from many cases and one of those cases, *McKune v. Lile*, decided by the Supreme Court in 2002, had very similar facts. The ultimate ruling in the Antelope case hinged on the Lile decision. Mr. Lile, a convicted rapist, was ordered into an in-prison sex offender treatment program. When told he would have to provide a detailed sexual history (including crimes for which he had not been convicted) and then take a polygraph examination to confirm his answers, he refused. Additionally he would have had to acknowledge responsibility for the rape for which he had been convicted. During the rape trial, Mr. Lile testified that the sexual intercourse with the victim was consensual. Therefore taking responsibility for the rape would automatically subject him to a possible charge of perjury. He was told that if he failed to comply with the polygraph and treatment requirements he would be transferred to a potentially more dangerous maximum-security unit of the prison, he would lose most of his visitation rights, his earnings, his work opportunities, his ability to send money to his family, and access to his personal television. Mr. Lile refused and claimed that his fifth amendment rights were being violated. The

nine Supreme Court Justices examined the case and ultimately ruled that the consequences imposed on Mr. Lile were not severe enough to compel self-incrimination. The court found that his sentence was not extended, his ability to be paroled or to receive good time credit was not limited and ultimately the restrictions imposed would be within the expectations of prison life. Although the restrictions sound severe, and the thought of being moved to a more dangerous maximum-security unit would likely scare most into submission, the Court did not find that to be enough.

The issue centered on whether Mr. Lile was "compelled" to testify against himself. The fifth amendment to the U.S. Constitution states that no person "shall be *compelled* in any *criminal case* to be a witness against himself" [italics added]. Providers may argue that the polygraph and treatment conditions for sex offenders are not part of a criminal case. However, the U.S. Supreme Court has already ruled in *Minnesota v. Murphy* (1984) that the protection from the fifth amendment applies in any proceeding where the answers might incriminate someone in a future criminal proceeding. The Supreme Court looked closely at the language of "compelled" and stated that the consequences of choosing to remain silent must be closer to physical torture than *de minimis harms* as that was the intent of the constitution (*McKune v. Lile*, 2002). However, as the Antelope Court reviewed the reasoning in the Lile decision, they found that the Supreme Court was divided in its opinion. Four of the nine Justices in the Lile decision dissented and felt that the consequences imposed on Mr. Lile were enough to qualify as compelling him to testify against himself. They stated that the sanctions imposed on Mr. Lile were in fact severe and that even if they were not, the policy judgment stated by the majority did not justify "the evisceration of a constitutional right" (*McKune v. Lile*, 2002, p. 2036). Four other Justices disagreed and felt that the consequences to Mr. Lile were not compelling. They stated that "The compulsion inquiry must consider the significant restraints already inherent in prison life and the State's own vital interests in rehabilitation goals and procedures within the prison system" (*McKune v. Lile*, 2002, p. 2027). These Justices also note that Mr. Lile's term of incarceration was not extended. This left Justice O'Connor in the middle. She ultimately agreed with the majority but wrote a separate opinion. She stated that she was troubled that the Court failed to "set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination" (*McKune v. Lile*, 2002, p. 2022). Although she also did not believe the

Continued on page 10

penalties in the Lile case created a compulsion, she also acknowledged that more severe penalties would qualify as compulsive. This rationale makes it clear that the Supreme Court would likely find that Antelope's penalties were compelling. The Antelope court agreed, stating that although Justice O'Connor's concurrence does not delineate the limits of the self-incrimination clause's protections, it makes clear that the Court would likely conclude that the penalty Antelope faced for not participating in SABER (Sexual Abuse Behavior Evaluation and Recovery Program) was constitutionally impermissible (United States v. Antelope, 2005).

A further complication to all of this is that the makeup of the Supreme Court has changed with the passing of Chief Justice William Rehnquist, and the retirement of Justice Sandra Day O'Connor. If facts similar to the Antelope case make it to the Supreme Court, how will the Justices align themselves? Even without O'Connor and Rehnquist on the Court, there remain at least four Justices who would find the Antelope facts compelling. Justices Alito and Roberts are arguably more conservative than their predecessors so it is not as clear today how the high Court might rule.

Implications for Assessment and Treatment

What does all of this mean then for the treatment provider? Is the polygraph going to become unusable? Does it really make a difference anyway? Research has shown that offenders' self-report regarding their sexual history is significantly limited compared to polygraphed disclosures (Hindman and Peters, 2001). Many concerns arise when offenders are not being truthful in treatment: How can professionals devise treatment plans appropriately? How can one know if treatment is complete or when treatment conditions can change? Offenders themselves recognize the benefits of the polygraph in their treatment programs. In a study done by Kokish, Levenson, and Blasingame (2005), the majority of clients found that polygraph testing was a helpful part of treatment. In fact, 72% of the participants reported that the polygraph requirement helped them to be more honest in their lives and that it had a positive effect on their relationships. Alternatively, we may put greater meaning to offenders' admissions than we ought to. Finding the most useful information and using it to further the goals of protecting the community is vital. Perhaps there are mediating variables that can be discovered through the polygraph that can serve as treatment targets. So how can the polygraph continue to be useful in light of the Antelope decision?

One solution proposed in the Lile case was to provide the defendant immunity from prosecution. The majority in the Lile case did not like that idea because they saw it as allowing offenders to circumvent total responsibility for their actions and that it would support the false impression that society does not consider their crimes to be serious. The dissent argued that immunity would be a way to further the treatment goals and preserve one's Constitutional rights. If immunity were offered, then the Court could punish the offender for refusing to disclose his history as there would be no threat of incrimination (*McKune v. Lile*, 2002). In fact, that is exactly what the Court ultimately did in the Antelope case. Once the Ninth Circuit Court of Appeals sent the case back to the District Court for re-sentencing, Mr. Antelope was given immunity, but also told he must fulfill the requirements of the treatment program. This would include a complete sex history and subsequent polygraph examination (J. Rhodes, personal communication, August 24, 2005). Finally, Mr. Antelope will receive treatment and hopefully this will serve to protect the community. What kind of precedent is Montana setting by providing immunity for Mr. Antelope?

However, obtained immunity is really "limited immunity." Mr. Rhodes, one of Mr. Antelope's attorneys, has acknowledged that the immunity provided to Mr. Antelope only applies to cases in the state of Montana (J. Rhodes, personal communication, August 23, 2005). It is possible that a participant might have lived most of his life in another state than the one where he is receiving treatment, and any grant of immunity in the treating state would not require another state to honor that immunity agreement. This would be a serious consideration in regions where interstate relocation is more common. Mr. Rhodes stated, "An attorney has to look at these issues on a case by case basis" (J. Rhodes, personal communication, August 24, 2005). While one might guess that Mr. Antelope has not lived much outside the state of Montana, will this be the next issue taken to the courts? There are 58 counties in the state of California, and only one has an immunity agreement regarding the polygraph and sex offenders. Even within that one county, the same issues of limited immunity complicate matters. If the district attorney for a county agrees to provide immunity, it is not a binding agreement on any other county. Some suggest a statewide sex offender management board to direct legislation, although that would still leave the state boundary lines limiting immunity. Is it possible that one state would keep the information confidential from another state?

Perhaps the solution lies in confidentiality. Legislation

could change the specific requirements regarding mandated reports. One possible solution would be to provide some limits on mandated reporting if the information were to be obtained in the course of treatment. The solution is multifaceted in that it would take away the argument against immunity because charges could still be brought forward from a different source such as law enforcement or a victim stepping forward and at the same time, the information would be available to the treatment program to help identify and manage risk. We already have similar laws in place for attorneys in most states. Attorney-client privilege allows the attorney to gain information in order to advise the client but does not prevent that same information from coming forward from an independent source. How can we recognize the importance of the communication to serve the interests of our legal and judicial system but at the same ignore the interests of treatment and ultimately the safety of the community? In fact, laws seem to be going in the opposite direction.

California's Child Abuse and Neglect Reporting Act was modified on January 1, 2001, creating a requirement to report suspected child abuse even when all identifiable information about the victim was unknown. The specific Penal Code is as follows:

11167 (a) Reports of suspected child abuse or neglect pursuant to Section 11166 shall include the name, business address, and telephone number of the mandated reporter; the capacity that makes the person a mandated reporter; the child's name; and the information that gave rise to the reasonable suspicion of child abuse or neglect and the source or sources of that information. If a report is made, the following information, if known, shall also be included in the report: the child's address, present location, and, if applicable, school, grade, and class; the names, addresses, and telephone numbers of the child's parents or guardians; and the name, address, telephone number, and other relevant personal information about the person or persons who might have abused or neglected the child *The mandated reporter shall make a report even if some of this information is not known or is uncertain to him or her.* [Italics added] (Calif. Penal Code)

It is the code's last sentence that creates the quandary. The mandated reporter is required to make the report even when there is nothing known about the victim at all; just knowing that there is a victim is enough. But if there is nothing identifiable what can be investigated? Admittedly, not much, but the polygraphed individual has a valid argument that his admission could be tied to old dropped allegations or charges and ultimately could end up with him being prosecuted. This stringent reporting requirement certainly does not apply to all states but providers need to review the laws in their states carefully. The fact is that many providers in California may still not be aware of how the reporting law has changed. There remains significant confusion among providers and likely some inconsistency in how the law is being followed, but how do those trying to comply with the reporting requirements garner the information from the polygraph without requiring a report? Montana now provides some protection through case law that protects participants revealing information during treatment. This protection is limited, though, because it is protection through state law. If the participant committed a Federal crime or abused a child on land governed by Federal law such as an Indian Reservation there would be no protection unless there were to be an equivalent Federal law.

If practicing in a state that does not require making a report without identifying information, then you may choose not to ask for it. You may design your sex history questionnaire's questions to find out about sexual history behavior without any names or identifying information. Therefore, history can be obtained without a fifth amendment issue but caution should be taken regarding the confidentiality of that information. Many treatment programs may have an open release with parole or probation. Because information regarding past crimes is for treatment purposes, then there really is no reason to give those specifics to law enforcement. It may relate to risk, and the need for greater supervision, but risk levels or safety concerns can be communicated to probation or parole without providing the specifics of past unadjudicated criminal behavior. Obviously, the drafting of all legal documents including informed consents and releases of information require great care.

Where does this leave Californians and others in states that have similar strict reporting requirements? California has more sex offenders than any other state. Part of the reason behind their voluminous numbers is that California was the first to begin requiring registration in 1947, while many other states did not

Continued on page 12

begin similar requirements until the 1990's (California Attorney General, n.d.). While the establishment of a state management board regarding sex offenders could guide legislation (and practical application of these issues), it is certainly not a quick or guaranteed solution. Many believe that working creatively within the current guidelines is essential. Asking questions regarding past criminal behaviors in a way that does not trigger a report may be one solution, but professionals must guard against colluding with the offender. The use of cognitive distortions, denial and many other defense mechanisms may have served the offender well in avoiding responsibility. Treatment providers need to find a balance in obtaining the offender's history while encouraging the offender to take responsibility for it.

Sexual history questionnaires are quite detailed, and ask about every imaginable behavior one can think of including questions regarding sex with animals, fetishes, obscene phone calls, voyeuristic behavior, exposing oneself, pornography use, masturbation habits, paraphilic interests, sexual thoughts, sexual fantasies, and more. Instead of asking about past sexual contact with children that may necessitate a mandated child abuse report, questions could ask about masturbation habits. Knowing how often one masturbates to the thoughts or fantasies of children, when that masturbation behavior began and how recently it has occurred is valuable data for the treatment provider that should not trigger a child abuse report but at the same time gives valuable information that can be used in treatment.

Sex offenders are a diverse population, and there may be significant crossover in the type of offenses they commit. Someone incarcerated for indecent exposure may also have raped or molested a child. A unique study by Abel et al. (1987) demonstrated startling statistics about how diverse sex offenders' behaviors are. With a Federal Certificate of Confidentiality, the authors obtained the histories of sex offenders, and found that 29.2% of the rapists had committed an act of exhibitionism and 29.7% of child molesters were exhibitionists. Dr. Abel went to great lengths to obtain a Federal certificate to protect the identities of his participants. He also took extreme measures to protect the list of participants, sending it out of the country as a protection against any future subpoena. The participants watched a 30-minute video explaining the steps taken to protect their confidentiality and ensure their truthfulness to the questions. Without knowledge of the extent of ones' sexual history or proclivity

towards certain behaviors, treatment programs cannot target these critical issues. This would leave offenders without needed support or relapse prevention strategies to reduce their risks in a particular area.

Treatment providers need greater information regarding perpetrators, and we know that self-report is unreliable. Communities are fearful, and this fear is fueling increasing public demand for information. The accessibility of the internet has prompted most states to allow individuals to look up the photograph and address of most sex offenders, and a national Federal website is on its way. Despite controversy as to whether public notification really reduces or increases risk, most states are continuing to focus on this to the detriment of treatment.

Mr. Antelope stood up against the system and demanded that his fifth amendment rights be considered. The treatment community also stood firm and expressed the need for the polygraph as part of a thorough assessment. As the dust has settled, Mr. Antelope is still going to take the polygraph, but treatment providers must find creative ways to obtain the same information within the context of new restrictions. There are many arguments and limitations concerning some of the possible solutions. While limited immunity is a tool that has its drawbacks, there are undoubtedly many other strategies that have yet to be identified. Those working within the containment model can utilize their expertise, resources, and creativity to come up with ways to manage the problems faced here. Ideally, treatment is one component of the containment model, which also includes supervision or some form of law enforcement, polygraphers, and victims' advocates. California has legislation pending that would establish a sex offender management board of experts to guide and solve issues such as those presented here. We are not without solutions and the polygraph is not dead. What remains is a mandate to protect the community, reduce risk, and do so in a way that does not violate the constitution.

(For references, see www.ccoso.net/newsletter)