

**Post-Conviction Polygraph in the Community and Court:  
Raising the Bar on PCSOT Examiners**

**Kenneth E. Blackstone, B.A.**

**President, Blackstone Polygraph Inc.**  
Member ACFEI, APA, ATSA,

### **About the Author**

A full member of the American Polygraph Association, the Georgia Polygraph Association and the Florida Polygraph Association, a professional member of the Association for the Treatment of Sexual Abusers, and a life member of the American College of Forensic Examiners -- Mr. Blackstone has been certified as a post-conviction examiner, as a forensic consultant and recognized as an expert witness regarding the proper use of polygraph in civil, clinical and criminal testing settings with a focus on sexual offenses and post-conviction testing. With over thirty years of experience as an examiner and expert witness, Mr. Blackstone's expertise is well respected.

Abstract:

An estimated quarter million sex offenders are currently under community supervision, the population continues to grow, and some sex offenders re-offend - making community safety a great concern of our society. Methods of sex offender management and treatment continue to improve and sex offenders often re-integrate into society successfully -- making impartiality and integrity among sex offender management professionals immensely important. These individual -- and often conflicting -- factors bring us to conclude that sex offender management is a significant component of correctional supervision in the United States.

In a majority of states a key element of sex offender management is a unique form of polygraph referred to as post-conviction sex offender testing (PCSOT). When jurisdictions use this tool the standards of the American Polygraph Association (APA) are automatically incorporated into mandates and policies. This author is concerned with the fact that APA standards do not demand the best possible post-conviction examinations and due to the imminent and irreparable consequence of this error we urge the American Polygraph Association and other organizations such as the American College of Forensic Examiners to raise the bar on PCSOT examiners.

Note: The opinions expressed in this paper are those of the author and are based on professional experience, APA definitions, and Court decisions.

Key Words: polygraph, error-rate, sex offender management, containment approach

Learning Objectives: “After studying this article, the reader should be able to.... 1) understand the use of post-conviction polygraph in sex offender management 2) understand the use of a containment approach to sex offender management 3) recognize the importance of higher standards in post-conviction polygraph testing 4) recognize the impact of post-conviction examinations, and 5) understand that forensic and clinical examiners who rely on post-conviction examinations can demand optimal examinations by encouraging higher standards

### **The Offender Population**

In 2005, the Bureau of Justice Statistics reported that 148,800 inmates were serving time in state prisons for rape and “other” types of sexual assault. Sex crimes, then, accounted for about 12 percent of incarcerated state offenders. Inmates in Federal and military prisons were not reported by crime type. (Bureau of Justice Statistics, 2005) Although a constellation of recent legislative changes and sentencing practices has increased the likelihood and length of incarceration for convicted sex offenders, “approximately 98 percent of all incarcerated sex offenders will some day return to the community for supervision.” (English, et al., 2002)

At year-end 2005, over 4.9 million adult men and women were under Federal, State, or local probation or parole jurisdiction. A 2005 survey estimated that 3 percent of these probationers were sex offenders, and parolees were not identified by crime type. (Bureau of Justice Statistics, 2005) By using the incarcerated sex offender rate of 12

percent we can estimate that 92,622 parolees had been convicted of sexual offenses, giving us a ballpark figure of 217,000 sex offenders in the community at the end of 2005.

### **Sex Offender Recidivism**

“What happened to nine-year-old Jessica Lunsford is every parent’s worst nightmare. In February 2005 she was abducted from her home in Florida, raped, and buried alive by a stranger, a next-door neighbor who had been twice convicted of molesting children. Over the past decade, several horrific crimes like Jessica’s murder have captured massive media attention and fueled widespread fears that children are at high risk of assault by repeat sex offenders.” (Human Rights Watch, 2007)

“Sex offender laws are predicated on the widespread assumption that most people convicted of sex offenses will continue to commit such crimes if given the opportunity. Some politicians cite recidivism rates for sex offenders that are as high as 80-90 percent.” (Human Rights Watch, 2007) Illinois State Representative John Fritchey described the atmosphere with “The reality is that sex offenders are a great political target, but that doesn’t mean any law under the sun is appropriate.” (Associated Press, 2006)

Opinions based on research do not agree with fear-based assumptions and political statistics. In fact, “(e)xisting research clearly indicates that sex offenders are, compared to other offenders, among the least likely to re-offend. (Langan and Levin, 2002) It also appears that when sex-offenders do re-offend their reoffense is seldom sexual in nature. Langan and colleagues (2003) researched 9,691 sex offenders released from prison in 1994 and found that only 12 percent of the re-arrests in the three-year post-release period involved a sex offense.”

A 2007 study conducted by the Minnesota Department of Corrections showed that after three years seven percent of 3,166 offenders had been re-arrested for a sex offense, six percent had been re-convicted, and three percent had been re-incarcerated. By the end of the follow-up period (an average of 8.4 years for all 3,166 offenders), 12 percent had been re-arrested for a sex offense, 10 percent had been re-convicted, and seven percent had been re-incarcerated. (Minnesota, 2007)

A 2007 study released by the Tennessee Bureau of Investigation monitored 506 sex offenders and 523 non-sexual offenders over a three-year period after their release from prison and local jails and compared their recommitment rates. Recombitment was defined as re-entry into the criminal justice system due to either a new arrest or a technical violation of supervision. This study “demonstrated a marked difference between the recidivism of sex offenders and offenders with other primary offenses who were released. The sex offender group showed a success rate of 44.1%, almost double the rate of the other release group. Only 28.1% of the sex offenders released were recommitted into the prison system while 51.6% of all other releases were recommitted.” (Tennessee, 2007)

Recidivism rates vary by jurisdiction, by study, and by definition of recidivism. Commonalities include a lower sexual than non-sexual re-offense rate and a remarkable success rate. While these studies can be interpreted as evidence that some sex offenders re-offend, they should remind us that some sexual offenders do not re-offend, making impartiality and professionalism of utmost importance in post-conviction sex offender testing.

## **Post-Conviction Polygraph**

In an effort to decrease recidivism and increase success, many jurisdictions use a multi-disciplinary “containment approach” towards sex offender management. “Empirical data are surfacing from many jurisdictions (using the containment approach) that reflect the value of this approach in reducing technical violations and new crimes.” (K. English, personal communication, May 22, 2007) In this model, offenders are required

1. To be supervised under general and special conditions of probation or parole
2. To participate in sex offender specific treatment, and
3. To undergo polygraph examinations during the evaluation process and periodically throughout the supervision period.

“The value of the post-conviction polygraph seems undisputed among those who use it, and those jurisdictions that now use it report that they could not get along without it. The polygraph has become an important asset in treatment and supervision, providing independent information about compliance and progress.” (DOJ, 2001)

“Using the polygraph to manage offenders in the community is not new. In 1966, Illinois Judge Clarence E. Partee used polygraphy to help him decide on probation applications (Partee, 1975); and in 1969, in Walla Walla, Washington, Judge (John C.) Tuttle developed a similar plan that required probationers to be periodically tested by polygraph to determine if they were complying with the conditions of supervision (Abrams and Abrams, 1993).” (English, et al., 1995) “In 1973, Judge John Beatty

initiated the first polygraph surveillance program in Oregon.” (Abrams, S. and Ogard, E., 1986)

With the development of the containment approach, the popularity of post-conviction polygraph has continued to spread into numerous states. While a 1994 national survey indicated that only 11 percent of probation and parole offices used polygraph as a monitoring tool (English, et al., 1995), today at least “thirty-five (35) states are using the post-conviction polygraph regularly, as part of community supervision. Most states (today) do not mandate polygraph testing in statute, and in general the practice varies by jurisdiction and is usually a result of agency policy and not by statute.” (K. English, personal communication, May 22, 2007)

### **Research and Standardization**

Governmental statutes and departmental policies typically incorporate the standards of the American Polygraph Association (APA) into their own; but “the integrity of polygraph testing has been attacked on two fronts: lack of process standardization and lack of validation research. Opponents of the polygraph argue that individual differences, such as body mannerisms of clients, amount of examiner experience in testing special populations, quality of examiner training, and various types of therapist/examiner partnerships bias the polygraph results. To some extent, however, all research is biased by these variables if not sufficiently controlled.” (Almeyer, et al., 2000)

Impressive research has been conducted on the specificity of the polygraph. In 1997 Forensic Research Inc. compiled the results of 80 research projects conducted since 1980, aimed at assessing the validity and reliability of polygraph testing. The 12 field validity studies conducted involved 2,174 exams and yielded a 98% accuracy rate

(average over studies). In a praiseworthy 2007 attempt to raise its standards, the APA identified seven test formats as “validated” per the following research criteria:

1. The research had to be published in full.
2. The research had to be replicated.
3. The published polygraph technique had to be identified by name or reported in sufficient detail so that the correct name for the technique could be determined.
4. When multiple techniques were reported, accuracy figures had to be available for each technique.
5. The accuracy figures had to be broken out separately for truthful and deceptive cases.
6. Ground truth criteria must have been independent of the polygraph results.
7. The testing and scoring technique must have been representative of field practices.
8. Field cases must have been randomly selected or, with laboratory studies, subjects must have been randomly assigned to either deception or non-deception conditions.
9. The formulation of decisions of deception or truthfulness on individual cases could not consider the results of other examinations on the same crime.
10. For laboratory data, programmed countermeasure cases were excluded.

While the Army Modified General Question Technique (MGQT), the Concealed Information Test (AKA Guilty Knowledge Test), Federal Zone Comparison Test (AKA Army ZCT), Reid Technique, Relevant-Irrelevant (RI) Screening Test, Test for Espionage and Sabotage (TES), and Utah Zone Comparison Technique all meet the

definition of “validated format” (Krapohl, 2007), they are not all applicable in post-conviction testing.

Under new research criteria, only one usable format, the Utah Technique, reaches an overall accuracy rate of over 90%. Research shows that the Utah Zone is correct in 92% of deceptive cases and in 89% of truthful cases, giving it an overall accuracy rate of 91%. These rates are without inconclusives and the Utah Zone has an inconclusive rate of 12%. “The Utah PLT (Probable Lie Test) was created by psychologists and founded upon known and proven principles of psychology and psychophysiology.” (Raskin and Honts, 2002), (Honts, Hodes, & Raskin, 1985), (Honts, Raskin, & Kircher, 1987), (Honts, Raskin, & Kircher, J.C., 1994), (Kircher & Raskin, 1988), Raskin & Hare, 1978)

This author considers it laudable how the APA has classified a polygraph examination as either evidentiary or investigative and has established different ‘acceptable error rates’ for evidentiary and for investigative testing, but this is where the praise ends. This is because these standards identify post-conviction sex offender testing as an investigative examination, and, per the current APA standards, the acceptable rate of error for an investigative/post-conviction examination is 20 percent while evidentiary exams are held to a higher standard of 10 percent.

### **Definitions**

Per APA Standards of Practice, 2007, an evidentiary examination is “A polygraph examination, the written and stated purpose for which, agreed to by the parties involved, is to provide the diagnostic opinion of the examiner as evidence in a pending judicial proceeding.” Per APA Standards of Practice, 2007, an investigative examination is “A

polygraph examination for which the examination is intended to supplement and assist an investigation and for which the examiner has not been informed and does not reasonably believe that the results of the examination will be tendered for admission as evidence in a court of record. Types of investigative examinations can include applicant testing, counterintelligence screening, and post-conviction sex offender testing, as well as routine multiple-issue or multiple-facet criminal testing.”

Based on the above definitions and the following observations, this author feels that post-conviction examinations should be considered evidentiary and, as a result, be held to a higher standard. Again, this author is not concerned with terminology but with the impact of a lower standard.

1. Because of the *Daubert* decision, *reasonable belief* that results will be tendered for evidence applies to post-conviction as well as evidentiary examinations. “*Daubert* opened the door for the admissibility of polygraph data in post-conviction sex offender management because it gives district courts the authority to determine if evidence is relevant and reliable.” (English, et al., 2002)
2. “Following *Daubert v. Merrell Dow*, renewed efforts have been made to introduce polygraph test results. Although *Daubert* technically applies only to the federal courts, several states have chosen to adopt the *Daubert* standard for admission of scientific evidence. In so doing, these states have revisited their admissibility standards after *Daubert* and specifically elected to adhere to the *Frye* test, whereas others have attempted to intertwine aspects of both.” (Stern, 1997)

3. While some may argue that post-conviction tests are not evidentiary because they are not part of a *pending judicial proceeding*, post-conviction tests are a result of an ongoing judicial proceeding that continues until the sentence has been served, in full. And then there is a possibility of civil commitment.
4. Civil commitment hearings will review polygraph examinations given during treatment and supervision. Currently, 19 states (Arizona, California, Florida, Iowa, Illinois, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, North Dakota, New Jersey, New York, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin) have civil commitment laws.
5. Convicted sex-offender examinees are in fact ordered by the *court of record* to participate in post-conviction testing and participation or lack thereof is a matter of court record. Some courts directly order polygraph testing during sentencing; some courts order offenders to follow the directions of their supervising officer; and some courts modify sentences based on post-conviction testing results.
6. Post conviction polygraph reports are reviewed by “an arm of the Court”. (U.S. v. Saxena, 2000) While some may argue that post-conviction examinations are not used as *evidence in Court*, the “recipients of the examination results are technically court officials since the officer works on behalf of the court.” (Kim English, private conversation, May 2007)
7. While “it is more common that the information from the polygraph examination triggers the supervising officer to increase surveillance or contacts with family members to investigate ‘red flags’ that surfaced during the examination” (Kim

English, private conversation, May 2007), the likelihood of testimony on post-conviction testing exists, just as it does in evidentiary testing.

8. Some will argue that evidence in a post-conviction hearing is held to a standard of preponderance of evidence while evidentiary tests must meet the reasonable doubt standard. Evidentiary exams are used in civil and criminal proceedings. Post-conviction polygraph exams range from revocations, to sentence modifications, to civil commitment, and evidence used in these proceedings must meet both thresholds.
9. Some will argue that post-conviction are not evidentiary examinations because they are not single-issue examinations. It is this author's belief that any multiple-issue situation can be addressed in a single issue test, either by using exploratory and then single-issue tests or by prioritizing and focusing on the most important issue.

### **Court Rulings**

The use of post-conviction examinations has been appealed by several defendants and the following is only a sample:

1. In U.S. v. York (2004) the 1<sup>st</sup> Circuit Court affirmed sentencing conditions that included post-conviction polygraph. Lennell York, Jr. was incarcerated on a sexual offense and while in prison mailed a threatening letter. He admitted this to the FBI, pled guilty and was consequently ordered to participate in sex offender treatment and submit to periodic polygraph testing. York appealed these conditions, based on several arguments, one of which was that the polygraph is an "inherently unreliable and thus unreasonable means of ensuring compliance with

supervised release conditions.” Quoting from U.S. v. Scheffer, York pointed to the Supreme Court's acknowledgment that "there is simply no consensus that polygraph evidence is reliable." The Court responded: “The United States does not deny that polygraph technology is of doubtful reliability, but it asserts that the polygraph is nevertheless a useful tool for policing defendants' compliance with conditions of supervised release. Regardless of the device's actual ability to detect lies, the government suggests, the polygraph provides an incentive for York to pursue his treatment program honestly because he may believe that if he lies about his progress, the polygraph will expose him.”

2. In *Kansas v. Lumley* (WL 218704, 1999) the defendant appealed a prison sentence that resulted from his untruthful answer to a polygraph question regarding contact with a child. The appeal was denied with the judge finding that polygraph reliability was sufficiently robust to be acceptable for a parole or probation revocation hearing that requires a preponderance of evidence instead of a standard of reasonable doubt. The same judge stated that the “sex offender community could not be maintained without polygraph.”
3. In *U.S. v. Lee* (2003) the defendant appealed a condition of his release (polygraph) and the 3<sup>rd</sup> Circuit Court affirmed the conditions. In November 2000 Albert Lee was convicted in Federal court on charges of transportation of child pornography, possession of child pornography, and enticing a minor by computer to engage in sex. When Lee appealed his sentence, the Court stated “We find that the polygraph condition is reasonably related to the protection of the public, as

- well as the rehabilitation of the appellant. The polygraph testing could be beneficial in enhancing the supervision and treatment of Lee.”
4. In *Jones v. Virginia* (2003) the State Appeals Court affirmed a revocation based on failure to cooperate with post-conviction polygraph. In 2000 Sylvester L. Jones was convicted of taking indecent liberties with a child and given a split 5-do-3 sentence; his probation was revoked when he refused to cooperate with a polygrapher. “The defendant initially answered the polygraph examiner’s questions, but he “basically just froze up” when the examiner asked questions about his involvement in an attempted abduction of an 11-year-old which occurred during his probation. The defendant refused to answer further questions and “said that he thought he needed to talk to an attorney.” The test was immediately stopped and never completed. His probation was revoked for a portion of the remaining sentence. In his appeal Jones argued that he was asking for an attorney to be present and the court stated that the right to counsel did not apply to non-custodial interviews.
  5. In *U.S. v. Dotson* (2003) Dotson argued sentencing conditions and they were affirmed by the 4<sup>th</sup> Circuit Court of Appeals in North Carolina. Robert Morris Dotson, Jr., pled guilty to attempting to receive in commerce a child pornography videotape after a postal inspector posed as a pornography peddler and Dotson had ordered child pornography videos. The court ruled that: “The use of a polygraph test here is not aimed at gathering evidence to inculcate or exculpate Dotson. Rather, the test is contemplated as a potential treatment tool upon Dotson’s

- release from prison — as witnessed by the district court’s direction that the results of any polygraph testing not be made public.”
6. In *U.S. v. Wilson* (1998) the 6<sup>th</sup> Circuit Court affirmed post-conviction polygraph and stated that polygraphs are "tools to help the probation officer monitor defendant’s rehabilitation and compliance with release conditions".
  7. In *State v. Travis* (125 Idaho 1, 867 P.2d 234, 1994) the court found that while the defendant’s agreement to a probation condition requiring him to submit to a polygraph examination did not establish admissibility of the results, the defendant’s probation was subsequently revoked for non-compliance.
  8. In *U.S. v. Zinn* (02-10782, 2003), the 11<sup>th</sup> Circuit US Court of Appeals ruled in support of court-ordered polygraph. In a child pornography case, Karl P. Zinn was in possession of over 4,000 images of child pornography stored on computer diskettes and compact disks. Zinn pled guilty and appealed post-conviction polygraph obligations. In its ruling the District Court stated: “[t]he results of the polygraph examination may not be used as evidence in court to prove that a violation of community supervision has occurred, but may be considered in a hearing to modify release conditions.”
  9. In *Kansas v. Foster* (2006) the defendant argued that his civil commitment was based on a psychological evaluation report that noted polygraph examinations taken while in sex offender specific treatment. The State Supreme Court overturned the commitment of the defendant, ruling that polygraph evidence is inadmissible in Kansas commitment proceedings because the standard of proof in

that state is beyond a reasonable doubt and civil commitment hearings could lead to loss of freedom.

10. In U.S. v. Taylor (2003) the 11<sup>th</sup> Circuit Court found that polygraph testing is useful in promoting the treatment of sex offenders because "probationers fear that any false denials of violations will be detected."

While these legal rulings show no universal acceptance of post-conviction polygraph for evidentiary purposes in a court of law, the fact that post-conviction polygraph is constantly under the scrutiny of the court and can become part of the evidence used in court should convince post-conviction polygraph examiners to conduct examinations in the best possible manner.

### **A Case Study**

As a private and law enforcement polygraph examiner since 1980, this author has been summoned to court more than 100 times to testify as an expert witness in criminal and civil trials; and since 1992 has testified under oath about post-conviction cases more than 30 times.

The following is a true story of one of these post-conviction cases, offered only to describe why post-conviction testing should be conducted using validated methods that are explainable and defensible in court:

Joe (name changed) was on probation for public indecency/child molestation, as his instant offense involved exposure to two young girls at a public swimming pool. His initial sentence made no mention of polygraph and his special conditions of probation included sex offender specific treatment. The treatment program Joe entered required polygraph during evaluation and treatment.

When first evaluated by a treatment provider, Joe admitted that pre-conviction he had exposed himself in public “only to adults” regularly over an extended period and claimed that exposure to children during the Instant Offense was an “accident.”

When he was referred to me for his initial examination, the validity of this claim seemed of greatest importance because his sentence allowed him to live with his wife and adolescent children, who of course had adolescent friends. This was established as the relevant issue at the inception of the pretest interview; and Joe made no modification to his claim that, since an adult, his only underage victims had been the victims of the Instant Offense. Before testing, “underage” was defined as “under 17”, and “adult” was defined as “21 and over.”

In the Instant Offense Disclosure Test, using a 3-question Utah Zone format, the relevant questions were:

*Since an adult, have you exposed your sexual organs to any underage person you have not told me about?*

*Since the age of 21, have you exposed your sexual organs to any underage person you have not told me about?*

*Besides the two girls at that pool on XXXX, since an adult, have you exposed your sexual organs to an underage person?*

While I use at least three other formats, the Utah has become my favorite post-conviction format because of its simplicity, because the rotation of questions in each chart keeps things fresh, and because the between-chart dialogue can be quite productive. “(T)he Utah PLT was created by psychologists and founded upon known and proven principles of psychology and psychophysiology.” (Raskin and Honts, 2002)

Joe was deceptive on this examination; and in the post-test interview admitted that in his sexual history, he had exposed himself to children more than adults, “probably over 50 times” in the year prior to his arrest. He also described frequent cruising in his car, looking for a target, and public masturbation.

My report was sent to probation and treatment, and the provider requested that Joe move away from his daughters. Joe refused to move until he was threatened with a violation. I testified about his admissions in his modification hearing, and his sentence was modified to prevent him from living with his family and from having unsupervised contact with any underage person, including his own children.

A year and a half later, at the inception of Joe’s fourth Maintenance Test, he immediately offered to me that since last tested he had violated his probation by going to a public park “to see if treatment is working-to see if my urges would come back-but nothing happened – what if my mind plays tricks on me and I confuse thinking with doing?”

I immediately assured him that the upcoming test would be focused on his physical and not mental activities since the preceding test and clearly defined “sexual contact,” as ‘hands on or hands-off’ behavior with another person. He made no further admissions, other than that he was unemployed, living in a shelter for free and driving a car loaned to him by that shelter.

I again used a single-issue Utah Zone-3 question version format and asked these Relevantants:

*Since your last test, have you had sexual contact with anyone younger than 17?*

*Since XXX, have you had sexual contact with an underage person?*

*Since your last test, have you had sexual contact with an underage person?*

The Comparison questions were:

*Since your last test, have you lied to an authority?*

*Since your last test, have you lied to a legal authority?*

*Since your last test, have you lied to anyone you consider an authority?*

“Honts showed how between-chart stimulation and question review in the Utah Technique dramatically reduced the false negative rate (54 percent) and the false positive rates (2.9 percent)” (Handler, 2007) and the between-chart dialogue with Joe was quite enlightening. After the second chart he offered that instead of “testing my urges” he had been bored, watched an adult movie on cable (provided by the shelter), went cruising, and “wound up at the park-just sitting there.”

Joe also said, “I didn’t tell my PO about going to the park; I know you think that is a lie.” I then modified each comparison question with an OT (other than what you have said) and asked “Do any other questions need to be modified?” He said “the other questions are okay, I only fantasized, and it wasn’t about anyone in particular . . . I just needed to get that out.”

After the third chart, the score was -2 (Inconclusive). Joe and I talked a little more and two more charts were generated. (This is another reason I like the Utah.) By the end of the fifth chart Joe had admitted to going to the park at least 15 times since the preceding test under similar circumstances (boredom, pornography, cruising).

The final score was -13, making the final call Deception Indicated. In the post-test Joe admitted to “lying to his therapist and group” about fantasies and continued to deny

any “physical” sexual contact with an underage person at the park or anywhere else. He then added that he masturbated “most of the times I went to the park” and said that he sometimes focused on a particular young female “between 10 and 12 but she didn’t see me.”

Joe was arrested on violation of his probation and held in the county jail -- because of his admission of going to the park and masturbating in public. Subpoenaed to his revocation hearing, I found that Joe was claiming that I had threatened and tricked him into confessing something he had not done. A video of the full examination was entered into evidence as proof that the pre-test was non-accusatory, Joe’s admissions were voluntary, and the examination was done correctly.

When I testified that I used the Utah Technique because of its accuracy and quoted from research (Raskin and Honts, 2002), (Handler, 2007), the prosecutor asked if all post-conviction examiners felt as strongly as I when it comes to the need for reliability. I answered “I should hope so.”

This was an interesting hearing because Joe had chosen to hire another polygrapher and had himself tested while he was in jail, I think hoping to get a bond. He was non-deceptive on that test but did not get a bond. During my cross-examination the defense attorney asked how I felt about the “independent” examination his client had taken and suggested that the difference in result was indicative of the unreliability of polygraph. I replied that if one person was tested twice about the same issue and both tests were done correctly, the results would be the same. I then offered that the relevant questions asked by the other examiner were unacceptable and explained:

A relevant question is a question asked during a polygraph examination that pertains directly to the issue at hand (allegation/purpose of examination). While I conceded that post-conviction examinations differed from “criminal exams” because there is seldom a pre-determined relevant issue for the examination, the basic principles of question construction still applied. I then reviewed the relevant questions asked by the second examiner:

*Did you expose yourself in that park for sexual enjoyment?*

*Did you show yourself while in that park for sexual reasons?*

*Did you go to that park to expose yourself for sexual gratification?*

I then quoted from a basic polygraph training manual (Argenbright, 1998) these basic rules for construction of relevant questions:

- ◆ Ask questions that are clear, concise, and without ambiguity.
- ◆ Do not ask questions about perceptions or intent. (This rule is frequently ignored in the testing of sexual offenders; and considering the errant thinking common in sex offenders, it is a very important rule.)
- ◆ Do not ask compound questions.
- ◆ When multiple issues exist, determine the most serious offense.
- ◆ Focus on the action that describes the offense (hit, shoot, touch).
- ◆ Present a dichotomy so that examinee can answer Yes or No.
- ◆ Avoid action verbs (kill, hurt, molest) that may be emotion provoking or judgmental or from legal terminology.

As an example of a poorly worded versus a properly worded question I used:

“Did you stimulate that girl’s sexual organs for your or her sexual pleasure?”

v.

“Did you touch that girl’s sexual organs?”

The defense attorney changed the subject and implied that I had run five charts to “intimidate” his client. I simply explained that proper procedure for the Utah format requires two additional charts if the first three are inconclusive and proper procedure for the Utah had been followed.

When the defense attorney asked me to score the test given by the other examiner, I replied that scoring was a measurement of physiological response to questions being asked and if the question was invalid, the response was invalid. The attorney asked why I was being defensive, and I continued to explain why ambiguous and compound questions with an action verb such as “show” and questions about intent, purpose, perspective, and emotion were unacceptable.

I then quoted from the APA Journal “It is generally recognized that decision accuracy is degraded when multiple issues are presented in the same test, or as relevant questions become more ambiguous.” (Krapohl, Cushman, 2006) I also added that poorly written questions can lead to false positives as well as false negatives and my main interest was in my profession and how it can help the community as a whole. Joe’s probation was revoked for the remainder of his sentence.

## **Conclusion**

This paper has shown that post-conviction sex offender testing can be conducted with lower standards and a higher error rate or with higher standards and a lower error

rate. Which route is taken is a matter of decision and not necessity. From a community safety perspective, the importance of optimal post-conviction examinations is undeniable and in this author's opinion, the likelihood of going to court only increases the importance.

A vital tool in the community supervision of offenders for almost 40 years, post-conviction polygraph is, in this author's opinion, "a giant step in the evolution of polygraph. That step can be forward, towards general acceptance in the scientific community, or backwards, towards who knows what." (Blackstone, 1998) Highly accurate and validated techniques are available for post-conviction testing today and new, customized techniques – based on validated principles – will be available tomorrow.

While legal rulings to this date show no absolute acceptance of post-conviction polygraph, the fact of the matter is that a post-conviction polygraph has as great a likelihood of showing up in a courtroom as any other. It is this author's opinion that every examination should be conducted as though it were headed for the Supreme Court. If only one in one million post-conviction examinations makes it that far, that one test will have more impact on the polygraph profession than all of the others combined.

True or False Questions:

1. The use of post-conviction polygraph is new to the field of sex offender management. (False)
2. Very few states allow post-conviction polygraph testing. (False)
3. Sex offender management is most effective in the containment model. (True)
4. Research on sex offender recidivism shows a re-offense rate of 87%. (False)
5. As of 2007, seven test formats have been identified as validated per APA standards. (True)
6. The most accurate validated testing format can be used for post-conviction sex offender testing. (True)

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