

NO. 44637-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Petitioner,

v.

DWIGHT A. FINCH,

Respondent.

BY  STATE OF WASHINGTON
DEPUTY

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FILED
COURT OF APPEALS
DIVISION II

**BRIEF OF AMICUS CURIAE WASHINGTON STATE
DEPARTMENT OF COMMERCE**

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I. INTRODUCTION

In its role of crime victim advocate, Amicus Curiae Washington State Department of Commerce supports the State of Washington's (State) position that the superior court lacked authority to order an alleged sexual assault victim to take a polygraph test. The order is not authorized by law, and in fact is contrary to state and federal laws that protect victims of alleged sexual assault. The order also violates separation of powers by infringing upon the county prosecutor's duty to determine on what evidence to bring criminal charges.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

This case involves whether a court may order an alleged sexual assault victim to take a polygraph test. Under RCW 43.280, Amicus Curiae Washington State Department of Commerce (Department) and its Office of Crime Victims Advocacy coordinate the programs and funding of community-based services for sexual assault victims in Washington. In this role, the Department receives federal Violence Against Women Act grants, which prohibit the state from requiring polygraphs on sexual assault victims. The Legislature has given the Department a "victim-focused mission" to enhance services to victims. RCW 43.280.010. Accordingly, the Department has an interest in protecting victim rights, including their right not to take a polygraph.

III. ISSUE ADDRESSED BY AMICUS CURIAE

The issue addressed by the Department is whether a court may order an alleged sexual assault victim to take a polygraph test.

IV. ANALYSIS

For three reasons, a court may not order an alleged sexual assault victim to take a polygraph test. The order violates RCW 10.58.038 and federal law, and is not authorized by statute. It also violates separation of powers by infringing upon the county prosecutor's duty to determine on what evidence to bring criminal charges.

The Department is aware of only one case where a court has ordered an alleged sexual assault victim to take a polygraph test. An Ohio judge in 2010 sparked national controversy by ordering a polygraph on a juvenile who allegedly had been sexually assaulted. The judge vacated her order. Appendix (App.) at 1-2 (newspaper article).

The Department respectfully asks the Court to reverse the superior court's polygraph order.

A. **RCW 10.58.038 And Federal Law Prohibit Forcing An Alleged Sexual Assault Victim To Take A Polygraph Test**

The State filed charges against Dwight Finch, a registered sex offender, for sexual assault of A.W. based on A.W.'s allegations. A.W. is a juvenile sex offender serving a special sex offender disposition

alternative (SODA) under RCW 13.40.162. Mr. Finch moved in his criminal case for an order requiring A.W. to take a polygraph regarding his allegations against Mr. Finch. Neither A.W. nor his attorney was given the opportunity to participate in the hearing on the motion. Due to the fact that A.W. is serving a SODA sentence, the superior court granted the motion in Mr. Finch's criminal case.

The Department agrees with the State that, as a non-party, Mr. Finch should not have been allowed to in effect intervene in A.W.'s SODA case to request the polygraph order. State Brief at 17-18. Nor should A.W. have been ordered to take a polygraph in Mr. Finch's criminal case in which he is not a party. If not reversed on these procedural grounds, the polygraph order should be reversed on the merits, as discussed below.

Because of their questionable reliability, polygraph results are not admissible in criminal trials absent stipulation of the parties. *State v. Thomas*, 150 Wn.2d 821, 860, 83 P.3d 970 (2004). The State is not stipulating to admission of A.W.'s polygraph test, and so any evidence of a failed test would be inadmissible in Mr. Finch's trial. The Department agrees with the State that Mr. Finch made his motion not for A.W.'s therapeutic benefit, as alleged (CP 21), but in hopes that a failed polygraph would cause the State to drop the charges against him. Indeed,

there seems no other reason Mr. Finch would request a polygraph test that could not be admitted in his criminal trial. The polygraph order violates RCW 10.58.038, stating:

A law enforcement officer, prosecuting attorney, or other government official may not ask or require a victim of an alleged sex offense to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of the offense. The refusal of a victim to submit to a polygraph examination or other truth telling device shall not by itself prevent the investigation, charging, or prosecution of the offense.

The challenged order violates the first sentence of RCW 10.58.038. As a “government official,” the judge may not in effect condition a sex offense investigation on the alleged victim taking a polygraph test. Even if not a “government official”, the judge should not have ordered a polygraph on A.W. given that (1) the apparent purpose of doing so would be to influence the prosecutor’s investigation of the case, and (2) the prosecutor himself would be prohibited under RCW 10.58.038 from requiring a polygraph. This holding would prevent the judge in A.W.’s case from circumventing the intent behind RCW 10.58.038.

Mr. Finch argues that this interpretation of RCW 10.58.038 “begs the question” of whether A.W. is actually a “victim,” and deprives Mr. Finch of the “presumption of innocence.” Respondent Brief at 9. This argument lacks merit. RCW 10.58.038 applies in cases of an

“alleged” sex offense, meaning the accuser is only an *alleged* victim. Moreover, RCW 10.58.038 applies only to a prosecutor’s pre-trial conduct towards an alleged victim. The statute makes no inference about an accused’s guilt, and has no effect on the presumption of innocence.

Furthermore, for 2012-14, the Department will receive \$2,742,643 from the Department of Justice under the Violence Against Women Act. App. at 3-4 (McConnon Declaration). The funding was contingent on the Department certifying that Washington has a no-forced-polygraph policy that contains the very language in RCW 10.58.038. See 42 U.S.C. § 3796gg-8(a)(b). The Department so certified. App. at 3-4. The polygraph order is contrary to the Department’s certification under federal law.

Reasons for prohibiting forced polygraphs are explained in a 2009 article by the National Sexual Violence Resource Center. App. at 5-19.

The article states in part:

Researchers and victim advocates argue that polygraph tests should not be used with victims of sexual assault (Archambault & Lonsway, 2006). Since polygraph testing is widely over-simplified and misunderstood to be a “lie detector,” victims may feel disbelieved when they are asked to take a polygraph test. This may discourage their participation in the criminal process (Archambault & Lonsway, 2006). In addition, such practices discourage victims from reporting sexual assaults in the first place, which may contribute to the widespread underreporting of the crime. Also, many social and psychological factors

may produce signs of anxiety in rape victims who are actually telling the truth. The stress and anxiety likely to accompany a sexual assault experience may produce a polygraph result that shows that the victim is being deceptive when she is not (Sloan, 1995).

App. at 12. In short, sound public policy underlies the state and federal laws prohibiting forced polygraph tests on alleged victims of sexual assault.¹

B. The Court Lacked Authority To Order A.W. To Take A Polygraph Test Regarding His Allegations Against Mr. Finch

A court's authority to require a person to take a polygraph test may be implied from the legislative intent behind a statute. Accordingly, a court may require a convicted defendant to take a polygraph in order to carry out its statutory duty to monitor compliance with sentencing conditions. *State v. Riles*, 135 Wn.2d 326, 342, 957 P.2d 655 (1998). As part of his SODA sentence, the court required A.W. to "obey" the law. Mr. Finch alleges that A.W.'s "false-reporting" of a crime by Mr. Finch would violate this sentencing condition, and allow the court to require A.W. to take a polygraph. Respondent Brief at 11.

¹ In addition, protection of victim rights is enshrined in state law. Article I, Section 35 of the State Constitution mandates that victims be treated with "due dignity and respect." In setting out specific victim rights, the Legislature has expressed intent that those rights be "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." RCW 7.69.010, 7.69A.010.

Mr. Finch's allegation would not authorize a forced polygraph on A.W. because, as explained above, forced polygraphs on victims of alleged sexual offenses are prohibited by RCW 10.58.038.

Moreover, the court's authority under *Riles* to require a polygraph would not apply because no claim was made in *A.W.'s SODA case* that he had violated a sentencing condition by allegedly making a false report against Mr. Finch. Instead, the claim was made in Mr. Finch's criminal case. A.W. is not party to the criminal case, and was not given an opportunity to oppose the polygraph order, as would be required by due process.

Finally, in *State v. Combs*, 102 Wn. App. 949, 953-54, 10 P.3d 1101 (2000), the court held that sentence-monitoring polygraphs may not be required to explore whether other crimes have been committed by the offender. This holding means that a polygraph may not be required to explore the truthfulness of A.W.'s allegations against Mr. Finch. The holding should apply here with special force, given that A.W.'s allegations are believed by the prosecutor and are the subject of a *separate* criminal proceeding against Mr. Finch. That criminal proceeding is the appropriate forum to resolve the truthfulness of A.W.'s allegations.²

² Mr. Finch cites no authority supporting his novel argument that the court may force a polygraph on A.W. merely because Mr. Finch claims that he passed a polygraph. Respondent Brief at 11.

C. The Court's Polygraph Order Violates Separation Of Powers By Infringing Upon The Evidence-Gathering Duty Of The County Prosecutor

In *Dedman*, the Kansas Supreme Court considered whether a court may order a rape victim to take a polygraph. *State v. Dedman*, 640 P.2d 1270, 1270 (Kan. 1982). The court noted that that the prosecutor – part of the executive branch of government – had broad discretion to determine what evidence is needed to support a criminal charge, including whether a victim polygraph test is needed. *Id.* Under the “separation of powers” doctrine, the court held that a court – the judicial branch of government – may not interfere in the prosecutor’s discretion in deciding whether the victim should take a polygraph before bringing any criminal charge. *Id.* In explaining its reasoning, the court quoted from *People v. District Court, In and For Tenth Judicial District*, 632 P.2d 1022, 1024 (Colo. 1981):

It is clear from the record before us that the district attorney, in evaluating the reliability and credibility of the key witness, did not believe it necessary to subject the witness of the alleged burglary to a polygraph examination in preparation of the People’s case. For the court to order the district attorney to do so for the benefit of the defense, in our view, amounts to an impermissible judicial intrusion into the prosecutor’s function.

People, 632 P.2d at 1024.

This same holding is mandated under Washington law. There are three branches of government: executive, legislative, and judicial. The separation of powers doctrine prevents one branch of government from “aggrandizing itself or encroaching upon the ‘fundamental functions’ of another [branch].” *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002) (citing *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The doctrine is “‘one of the cardinal and fundamental principles of the American constitutional system’ and forms the basis of our state government.” *State v. Rice*, 174 Wn.2d 884, 900, 279 P.3d 849 (2012) (citing *Wash. State Motorcycle Dealers Ass’n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988)).

County prosecutors are identified in article XI, section 5, of the State Constitution. They are part of the executive branch of government. *Rice*, 174 Wn.2d at 900-06. Hence, their “core function” of “charging discretion” may not be impinged upon by the legislative branch of government. *Id.* at 905. The courts are the judicial branch of government, empowered under article VI to decide court cases. Like the legislative branch, under *Rice*, the judicial branch may not impinge upon a core function of county prosecutors.

In deciding A.W.’s case, the holding in *Moreno* is particularly instructive. The court held that a district court judge did not violate

separation of powers by calling and questioning witnesses in a traffic case, as allowed by court rule. *Moreno*, 147 Wn.2d at 506. The court concluded that the judge's actions did not impermissibly infringe on the executive branch's (State Patrol's) power to police the highways and "gather[] the evidence" of an infraction. *Id.*

A.W.'s case presents a much different situation in which the court *did* impinge upon the prosecutor's core function of gathering evidence to decide whether to bring criminal charges against a person. The prosecutor decided to bring charges against Mr. Finch without subjecting A.W. to a polygraph. The superior court then ordered A.W. to take a polygraph for the purpose of providing the prosecutor with additional investigatory information. This order violates the separation of powers doctrine, requiring reversal of the order.

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V. CONCLUSION

Based on the foregoing, Amicus Curiae Washington State Department of Commerce respectfully requests the Court reverse the order requiring A.W. to take a polygraph test.

RESPECTFULLY SUBMITTED this 26 day of September, 2013.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26 day of September, 2013, at Olympia, Washington.



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Legal Assistant

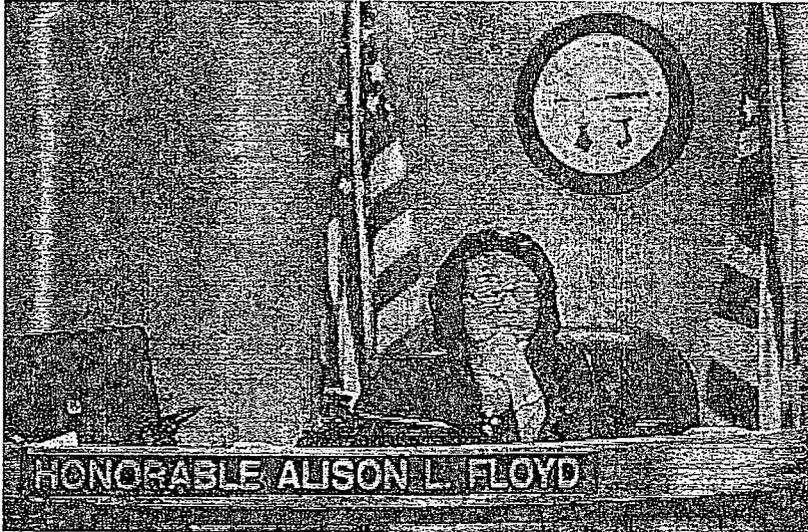


Judge Alison Floyd backs away from ordering polygraphs for sexual assault victims

Published: Tuesday, April 27, 2010, 5:45 AM Updated: Tuesday, April 27, 2010, 10:19 AM

Rachel Dissell, The Plain Dealer

By



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Dealer file Cuyahoga County Juvenile Court Judge Alison Floyd

With Leila Atassi

CLEVELAND, Ohio -- Cuyahoga County Juvenile Judge Alison Floyd has backed away from a **court order forcing juvenile victims** in several sexual assault cases to take polygraph examinations.

Floyd had ordered three juveniles to take the exams earlier this year after she found the teen boys accused of attacking them delinquent -- the juvenile court equivalent of guilty.

Victims, sexual assault advocates and prosecutors all objected. None of the victims complied with the order to take the tests.

In a brief filed in one of the cases, prosecutors accused Floyd of trying to "re-investigate the case."

Floyd admitted in a recent journal entry that she has "limited jurisdiction over a victim or witness" and that she had no authority over the victim after she made the decision to find the accused youth delinquent.

The judge explained in the same entry that she had ordered the polygraphs of the victim and her attacker after considering the "significant discrepancy" in the stories both youths told. Floyd said she wanted to "verify his truthfulness to determine an appropriate treatment services and an appropriate victim and community safety plan."

Floyd has not commented publicly on the orders or fully explained her rationale.

But her actions drew outrage from victim advocates and activists across the country, as national news sources, feminist blogs and women's rights websites carried the story.

Ms. Magazine, a political feminist publication, spotlighted the issue in its online blog, arguing that forcing victims to take a polygraph test violates the federal Violence Against Women Act and might violate Ohio's rape shield law, which is intended to prevent courts from trying the victim rather than the defendant. The magazine called feminists to action and encouraged readers to contact the judge and express their dissent.

Last week, Floyd's bailiff, Greg Moore, said the judge has received feedback from across the country about her decision.

He said she might discuss her rationale once all the cases are completed.

In one of the cases, Floyd has dismissed rape charges against a 13-year-old Lakewood boy who she had earlier found delinquent.

In an entry filed earlier this month in the case, the judge wrote that both the accused youth and the victim, who was also 13, "lacked adequate knowledge regarding legal and illegal sexual behavior."

She also questioned how and when the victim chose to report the crime as factors in her decision. Prosecutors plan to appeal the decision, according to Ryan Miday, spokesman for Prosecutor Bill Mason.

"We are confused about why polygraph tests were issued in the first place and why charges were dismissed in one case," said Megan O'Bryan, CEO & President of the Cleveland Rape Crisis Center, which has been working with some of the teen victims.

"We are very concerned that these actions will discourage other rape survivors from coming forward," she added. "All survivors should feel believed and supported at all stages of the criminal justice process, but especially after their perpetrator is found guilty or adjudicated."

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Respondent.

DECLARATION OF
DAN McCONNON

Dan McConnon certifies:

I am the Deputy Director of the Washington State Department of Commerce, which manages the state Office of Crime Victims Advocacy (OCVA).

OCVA receives federal funds from the Department of Justice (DOJ) under the Violence Against Women Act. For 2012-14, the state of Washington is approved to receive \$2,742,643 under the Act. OCVA allocates the funds local agencies for a variety of programs to assist crime victims.

In order to receive the funds, OCVA was required to certify to DOJ in part that:

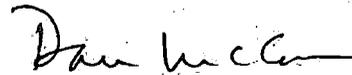
[A] State, Indian tribal government, territorial government, or unit of local government . . . will ensure that no law enforcement officer, prosecuting officer or government

official shall ask or require an adult, youth, or child victim of an alleged sex offense . . . to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of such an offense.

On April 3, 2012, OCVA so certified based on a similar prohibition in RCW 10.58.038.

I CERTIFY UNDER PENALTY OF PERJURY THAT TO THE BEST OF MY KNOWLEDGE THE FOREGOING IS TRUE AND CORRECT.

DATED this 17 day of September, 2013.



DAN McCONNON,
Deputy Director
Washington State Department
of Commerce

The Use of Truth-Telling Devices in Sexual Assault Investigations

Written by Kristen Houser and Emily Dworkin

Acknowledgments

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Critical Issues

The Use of Truth-Telling Devices in Sexual Assault Investigations

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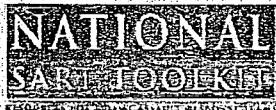
II. The Accuracy of Truth-Telling Devices

III. Judicial and Legislative Issues

IV. Truth-Telling Devices and Sexual Assault Victims

V. Conclusion

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Critical Issues

I. Introduction

This guide examines the use of polygraph tests and other truth-telling devices (sometimes called "lie-detector tests") in sexual assault investigations. It is meant to support the Violence Against Women Act and Department of Justice Reauthorization Act of 2005 (VAWA 2005) provision that truth-telling devices must not be used with sexual assault victims as a condition of charging or prosecution of an offense. This guide examines special issues relevant to using truth-telling devices with sexual assault victims. Legislative and judicial actions that have been taken as a result of this debate will also be discussed. Victim advocates, law enforcement officers, and policy makers may use this guide to develop policies, practices, and procedures and to improve collaborations regarding the use of truth-telling devices as the VAWA 2005 provision is adopted across the United States.

The Polygraph Test

Polygraph tests measure and record bodily changes in a person such as blood pressure, pulse, respiration, and sweat on the palms of the hands in response to a set of structured questions (Iacono & Lykken, 1997; Saxe, Dougherty, & Cross, 1985). This test is meant to determine whether a person is being deceptive or honest. During a polygraph exam, the subject may be attached to several instruments including a blood pressure cuff, a device that records respiration, and finger electrodes. In the most common type of test, known as the Control Question Test, examiners compare bodily changes in response to questions about the crime being investigated with changes in response to control questions, which focus on vaguely stated past misbehaviors (for example, "Have you ever lied in your life?"). These responses are compared with bodily changes in response to irrelevant questions, which ask about known facts (for example, "Is your name John?") (Ganis, Kosslyn, Stose, Thompson, & Yurgelun-Todd, 2003; Iacono & Lykken, 1997). An alternative to the Control Question Test, called the Guilty Knowledge Test, assesses bodily responses to questions that only the person guilty of a crime could answer (Ganis et al., 2003).

Polygraph testing is used in the United States in settings such as

- Criminal investigations
- Military interrogations
- National security investigations (Ansley & Garwood, 1984)
- Screening job applicants and employees
- Obtaining confessions
- Sex offender treatment
- Monitoring sex offender compliance with probation or parole conditions

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Polygraph tests can be especially useful as tools of interrogation and manipulation, since statements made to investigators by subjects during polygraph tests can be entered into evidence, even though the overall test findings often cannot (Eggen & Vedantam, 2006; Iacono & Lykken, 1997).

Other Types of Truth-Telling Devices

Voice stress analysis is a method used to determine whether someone is lying by examining their voice (Dampousse, 2008). Examiners use computer software to pick up microtremors in an individual's voice, which are said to be indicators that the examinee is trying to hide a lie. The subject does not have to be present for his or her voice to be tested; voice stress analysis can be used to test audio or video recordings, which makes it useful outside of formal police interviews.

Handwriting analysis, also called graphology, is the examination of a person's handwriting to determine if it contains characteristics common to people who tend to lie (Ford, 2006). However, this technique is meant to detect lying as a personality characteristic, not lying in specific instances. Research of this method has found little to no support for its accuracy (Ford, 2006).

Several methods of lie detection attempt to measure the patterns of brain activation that is associated with lying (Ganis et al., 2003). Functional magnetic resonance imaging (fMRI) and electroencephalograms (EEG) are both used as lie detectors (Ford, 2006). Although research is currently being conducted to improve the accuracy of these tools, limitations such as cost and availability may make it difficult for these machines to be used (Ganis et al., 2003).

II. The Accuracy of Truth-Telling Devices

Polygraph Accuracy

The debate around the accuracy of truth-telling devices is a central reason for the VAWA 2005 provisions limiting the use of such devices with victims of sexual assault. Since polygraph tests were first widely publicized in the early 1900s, the scientific community has disagreed about whether they are accurate (Office of Technology Assessment, 1983). Scientists agree that polygraphs are able to measure bodily changes in a subject. However, they disagree about whether polygraphs and other lie detectors can accurately tell truth from lie.¹ Supporters of polygraph testing claim that the act of lying creates bodily changes in a person because they are afraid that they will be caught in their lie. Therefore, if the subject shows bodily changes that indicate anxiety during a polygraph test, this is evidence that they are lying (Office of

¹ Although an in-depth discussion of various polygraph techniques and the studies used to determine their validity is beyond the scope of this guide, detailed descriptions of various polygraph techniques can be read in Kircher and Raskin's 1992 review of this topic.

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Technology Assessment, 1983; *Issues surrounding the use of polygraphs*, 2001). Opponents of polygraph testing argue that while many bodily changes are known to be associated with anxiety, none are unique to lying. They also argue that while a polygraph test may detect bodily signs of anxiety, it cannot be assumed that lying is the cause of the anxiety.

Many factors may affect polygraph results:

- Extreme emotional tension or nervousness
- Anger
- Concern over neglect of duty or responsibility that made possible the commission of the offense
- Physical discomfort during the test
- Excessive number of test questions
- Use of medications
- Poor question phrasing

Examiner Variability and Standardization

Polygraph tests take a variety of forms and are used in different ways by different test administrators. The instruments attached to the subject to detect bodily changes during questioning and the methods of questioning vary across tests (*Issues surrounding the use of polygraphs*, 2001). Dr. William G. Iacono, Professor of Psychology and Neuroscience at the University of Minnesota, testified to the Senate Judiciary Committee in 2001 that the scoring of data is the only standardized component of a polygraph test, and the test outcome is not determined by the scored data alone (*Issues surrounding the use of polygraphs*, 2001, p. 77). The examiner makes subjective decisions throughout the examination about how to proceed and interact with the person being examined. Since each examination can proceed differently based upon these subjective decisions, polygraph tests are not standardized (*Issues surrounding the use of polygraphs*, 2001, p. 77). Richard W. Keifer, a past president of the American Polygraph Association, responded that while the quality and ability of individual examiners can make a difference in the accuracy of polygraph examination results, "fairly uniform procedures [are] used by examiners throughout the field," and tests are "generally standardized" (*Issues surrounding the use of polygraphs*, 2001, pp. 69, 79). While the American Polygraph Association has tried to standardize education and practices, membership in this organization is voluntary, and it cannot ensure compliance.

The examiner's abilities may impact polygraph test results (Blasinghame, 1998). Researchers have observed a lack of standardization among polygraph examiners, found widely varying accuracy rates, and have found that different polygraph schools take significantly different approaches (Blasinghame, 1998, p. 39). In an attempt to address examiner skill deficiencies and



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inconsistencies, 29 states have laws which govern the regulation or licensure of polygraph examiners (American Polygraph Association, *State Licensing*, 2007). Additionally, the American Polygraph Association has adopted a code of ethics and standards of practice by which members are expected to abide, however, membership is individual and voluntary. Further, the American Polygraph Association has accredited 14 schools in the United States and six in other countries. The accredited schools are inspected periodically to assure that they are conforming to Association standards. The American Polygraph Association cautions law enforcement organizations against sending personnel to non-accredited schools where training is cheaper and warns that doing so may increase their risk for liability.

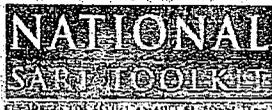
Voice Stress Analysis Accuracy

Opponents of voice stress analysis raise a similar concern to those opposing polygraph testing, that is, while voice stress analysis can detect stress in an individual's voice, it is not clear whether this stress is due to deception (Dampousse, 2008). Few methodologically sound studies have assessed the ability of voice stress analysis to detect deception. The National Institute of Justice recently assessed the accuracy of voice stress analysis at 50%, which is the same level as chance (Dampousse, 2008). However, it has been suggested that a subject will be more likely to tell the truth if he thinks he is connected to a machine that can tell the truth from a lie.

III. Judicial and Legislative Issues

Today, the findings of truth-telling devices are often inadmissible in trial (Eggen & Vedantam, 2006). The Supreme Court set standards to define the conditions under which scientific evidence was admissible in a court of law in 1923, when the *Frye v. United States* decision ruled that scientific evidence was admissible only if the scientific community accepted the scientific technique (in this case, the polygraph test) used to gather the evidence. These standards were unchanged until 1993, when a Supreme Court decision allowed for courts to decide for themselves whether a scientific technique is accurate, and thus admissible (*Daubert v. Merrell*, 1993; Saxe & Ben-Shakhar, 1999). The decision regarding whether polygraph test results may be entered into evidence in both federal and state criminal and civil courts is now made on a case-by-case basis, and depends on how the court interprets the rules of evidence (Dripps, 1998). However, most recent cases have found that polygraph evidence does not meet the standards set by Daubert (Ford, 2006).

Currently, no states admit polygraph evidence at trial in all cases
(Archambault & Lonsway, 2006)



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In some states, if certain conditions exist (for example, if the complainant and the defendant both agree to use the evidence obtained from the truth-telling device in trial), the evidence are entered into evidence (Archambault & Lonsway, 2006).

Congress has held hearings and commissioned several reports to review polygraph testing. The United States House Committee on Government Operations concluded in 1965 and again in 1976 that there was not adequate evidence to establish the accuracy of polygraph test results (Office of Technology Assessment, 1983). The Office of Technology Assessment (OTA) determined that polygraph tests may detect deception better than chance in some investigations, but that they make a significant number of errors. Additionally, OTA noted problems with the underlying theory of polygraph testing. Specifically, OTA stated that the polygraph infers deception when the physiological response to questions about a crime or unauthorized activities are greater than responses to other questions, but the subject's intelligence, mental health, emotional stability, and belief in the ability of the polygraph to detect deception are not adequately considered as factors which may affect physiological responses (Office of Technology Assessment, 1983).

IV. Truth-Telling Devices and Sexual Assault Victims

Use of Truth Telling Devices on Victims

The debate about polygraph use is especially important when the person being tested is a sexual assault victim. The general suspicion about the truthfulness of rape allegations and the motive of the person making them has been the basis for "sufficient grounds for suspecting that the victim has given false or misleading statements" (American Polygraph Association, *Model Policy*, 2007) to justify the use of polygraph tests with people who report sexual assaults. Thus, before the VAWA 2005 provisions, victims of sexual assault were often given polygraph tests at various points of the investigation and prosecution of their claims.

Polygraph testing of people who report having been sexually victimized was sometimes used as a way to stop the investigation of a sexual assault report (Archambault & Lonsway, 2006; Sloan, 1995). This meant that opportunities to incarcerate perpetrators may have been missed. Unfortunately, many sexual assault perpetrators are serial offenders (Abel, Becker, Mittleman, Cunningham-Rathner, Rouleau, & Murphy, 1987; Colorado Sex Offender Management Board, 1999; Lanning, 2001; Lisak, 1999; Merrill et al., 1998).

There are usually no eyewitnesses to sexual assaults. Also, evidence that supports the victim's story may be difficult to find. As a result, some investigators, prosecutors, and even some victims and victim advocates believe that polygraph testing is a useful way to verify the truthfulness and accuracy of the victim's story (Wright, 2004).



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While victims may ask to take a polygraph to prove the truth of their accusations, some victims are stunned to find that their polygraph test results are inconclusive or indicate deception. According to Beth Barnhill, Executive Director of the Iowa Coalition Against Sexual Assault, "They are devastated and disbelieving when (the polygraph result) does not support the truth of their experience."

Researchers and victim advocates argue that polygraph tests should not be used with victims of sexual assault (Archambault & Lonsway, 2006). Since polygraph testing is widely oversimplified and misunderstood to be a "lie detector," victims may feel disbelieved when they are asked to take a polygraph test. This may discourage their participation in the criminal process (Archambault & Lonsway, 2006). In addition, such practices discourage victims from reporting sexual assaults in the first place, which may contribute to the widespread underreporting of the crime. Also, many social and psychological factors may produce signs of anxiety in rape victims who are actually telling the truth. The stress and anxiety likely to accompany a sexual assault experience may produce a polygraph result that shows that the victim is being deceptive when she is not (Sloan, 1995).

J. E. Reid, the developer of the modern polygraph examination, warned that many factors may affect the accuracy of the test results (Archambault & Lonsway, 2006; Sloan, 1995). These factors include extreme emotional tension or nervousness, anxiety, or anger. Sexual assault victims may be particularly likely to be emotional, especially if they have been made to feel trapped, threatened, helpless, or in fear for their safety (for instance, if they have been threatened with being prosecuted for making a false complaint if they "fail" the polygraph). Clinicians have expressed concerns that people with Post Traumatic Stress Disorder (PTSD), a common consequence of sexual violence, are not suitable for polygraph testing (Blasingame, 1998; Clum, Calhoun, & Kimerling, 2000). In individuals with PTSD, the traumatic event is experienced over and over again, they may avoid certain thoughts, people, or places that remind them of the trauma, they may feel numb or detached, or they may experience heightened arousal (for example, trouble staying asleep or an exaggerated startle response) (American Psychological Association, 2000). Therefore, victims of sexual assault may have altered reactions to things that remind them of their trauma. A polygraph examination may detect these signs of arousal and attribute them to deception by the victim rather than PTSD.

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Impact of Truth-Telling Devices on Victims

The incidents described below highlight the experience of victims of sexual assault with truth-telling devices:

A young girl with a developmental disability was taken to the emergency department immediately after the assault by her mother. Evidence was collected and there was indication of force and injury. However, the responding law enforcement officer did not believe that a rape had occurred and suggested that the physical evidence was due to consensual sexual activity and requested the victim take a polygraph test. The prosecutor argued that, without the polygraph, the victim would not make a credible witness. DNA results demonstrated that he was a match for the DNA found on the victim. Regardless, the prosecutor would not prosecute the case without a polygraph from the victim.



The victim was 18 years old and a freshman living in a dormitory. After going out one evening with a group of friends, one of them, a male friend, slept over at her dorm room. She awoke in the middle of the night to the man penetrating her. The officer assigned to this case was extremely skeptical of her accusations and continually pressured her to submit to a polygraph test in order for the investigation to continue. This victim's advocate described the emotional toll that this process took on the victim.

"It was a very tough situation for the victim and she suffered at unnecessary lengths throughout this process. She struggled through the evenings with nightmares and flashbacks, but it seemed the daytime was harder for her yet. Even with a support network including family, close friends, advocates and her church she still felt alone. Once she spoke to me about the excitement she felt when moving away from home and into the dorms. By the end of this interview process her self esteem had plummeted even farther beyond where it had been directly after the assault." --Victim Advocate



A college-aged female victim was raped in a drug-facilitated assault. When she refused to take a voice stress test, law enforcement told her that her refusal coupled with the lapses in her memory indicated that she was lying. They threatened to charge her with obstruction of justice if she continued to refuse the test and she was then referred to as a suspect. The victim indicated that she felt more traumatized by her experience with law enforcement than the assault itself.

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Policies and Recommendations Regarding the Use of Truth-Telling Devices with Victims of Sexual Assault

The Violence Against Women Act and Department of Justice Reauthorization Act of 2005 (VAWA 2005) amended the STOP Violence Against Women Formula Grant Program (STOP Program) and the Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program (Arrest Program) to make it a condition of receiving funds under these programs that the jurisdiction prohibits the use of truth telling devices on victims of sexual assault as a condition for investigating the offense. Every state and territory receives a base amount of \$600,000 per year plus additional funds based on population under the STOP Program, which provides significant financial support to law enforcement agencies and prosecutors' offices to assist in the investigation and prosecution of domestic violence, dating violence, sexual assault, and stalking as well as significant support to nonprofit, nongovernmental victim service providers. Beginning January 5, 2009, in order for a state or territory to receive funds under the STOP Program must meet the following VAWA requirements:

- (a) In General- In order to be eligible for grants under [the STOP Program], a State, Indian tribal government, territorial government, or unit of local government shall certify that, not later than 3 years after the date of enactment of this section, their laws, policies, or practices will ensure that no law enforcement officer, prosecuting officer or other government official shall ask or require an adult, youth, or child victim of an alleged sex offense as defined under Federal, tribal, State, territorial, or local law to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of such an offense.
- (b) Prosecution- The refusal of a victim to submit to an examination described in subsection (a) shall not prevent the investigation, charging, or prosecution of the offense.

Although many states currently have legislation regulating the administration of polygraphs to victims of sexual assault, the nature of the legislation varies from state to state (for state-by-state list of legislation and other official actions taken to limit the use of polygraphs and other truth-telling devices in the course of sexual assault examinations go to

<http://www.nsvrc.org/projects/154/regulating-use-truth-telling-devices-sexual-assault-cases>)

- In some states (e.g., California, Connecticut, Florida, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, Ohio, Washington, West Virginia, Wisconsin) it is not permissible to require *or request* the use of a truth-telling device with someone claiming to be a victim of sexual assault. This legislation conforms to VAWA 2005.
- In other states, (e.g., Colorado, Illinois, Indiana, Iowa, New Mexico, North Carolina, Oregon, Tennessee, Texas) it may be legally requested that someone claiming to be a



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victim of sexual assault undergo examination by a truth-telling device, but the victim's participation cannot be a precondition of case progression:

- Some states (e.g., Colorado, Kentucky, Minnesota) include language mandating that a person claiming to be a victim must give informed consent before a truth-telling device is administered.
- Polygraph tests only (i.e., not other types of truth-telling devices) are regulated by legislation in Indiana and Michigan.

Although the American Polygraph Association supports the accuracy, validity and usefulness of polygraph examinations, they recommend that polygraphs "should not be used to verify a victim's allegation without sufficient grounds for suspecting that the victim has given false or misleading statements" (American Polygraph Association, *Model Policy*, 2007). However, this policy does not provide example criteria or a definition of "sufficient grounds," and thus misinformation about the act of rape, rape victims, and sex offenders are used to justify the use of polygraph tests with people who report sexual victimization to the criminal justice system. The American Polygraph Association further recommends that examiners make reasonable efforts, where allowed by law, to establish medical and psychological fitness prior to testing, including inquiries about past psychiatric or psychological treatment (American Polygraph Association, *APA Standards of Practice*, 2007). However, if a victim has received treatment, they may be reluctant to disclose this history. While well intentioned, such reasonable efforts are unlikely to uncover information that would make the victim ineligible for polygraph testing or overcome cultural biases about sexual victimization.

Recommended practices for police investigations of sexual assault complaints and for victim support services call for a "victim-centered approach" to be employed (IACP, 2005; Murphy, 2004). A victim-centered approach is a method that prioritizes the victim's needs, wants, and rights (Murphy, 2004). This approach requires that victims receive and understand full information about their options and are given opportunities to make choices about how to proceed. In support of such an approach, the Office of Technology Assessment (OTA) noted that for the polygraph test to be accurate, the subject being tested must voluntarily agree to the test (Office of Technology Assessment, 1983). In other words, the imposition of penalties for not taking a test may create a de facto involuntary condition which increases the chances of invalid or inconclusive test results. Although polygraphs may be effective tools of interrogation, a victim-centered sexual assault investigation process by definition does not include interrogation of the complainant or the employment of coercive practices.

V. Conclusion

The use of polygraph tests often undermines the recommended best-practice of using a victim-centered approach to a sexual assault investigation. If a victim refuses a polygraph test or fails it when she is in fact telling the truth and law enforcement decides to close the case, the effect is



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two-fold: assailants will not be held accountable and will thus be free to commit subsequent acts of sexual violence against other members of the community, and the recovery of the victim will be impeded and complicated. In her landmark book, *Trauma and Recovery*, Judith Herman notes:

The response of the community has a powerful influence. (R)estoration of the breach between the traumatized person and the community depends, first, upon the public acknowledgement of the traumatic event and, second, upon some form of community action. Once it is publicly recognized that a person has been harmed, the community must take action to assign responsibility for the harm done and to repair the injury. These two responses – recognition and restitution – are necessary to rebuild a survivor's sense of order and justice (Herman, 1992, p. 70)

The use of a polygraph test by investigators to determine the validity of a sexual assault complaint or the credibility of the victim is likely to be harmful to both the investigation and the victim. Resources are available to assist communities in conforming to VAWA requirements. In particular, the examples set by states such as California and Connecticut, in which law enforcement may not request a polygraph of a victim are helpful guides. Victim advocates, law enforcement and prosecutors are important collaborators in developing victim-centered policies and procedures. State and Territory Sexual Assault Coalitions can be an integral resource in this effort. Law enforcement representatives who are in compliance with the VAWA requirements may also provide trainings to advocates to help them better understand the nuances of the legal process. Collaboration between community organizations that facilitate the prosecution of sexual assault cases may ultimately aid in the development of victim-centered protocols. Continued progress must be made to protect victims of sexual assault from experiencing further trauma through polygraph testing.

VI. Resources

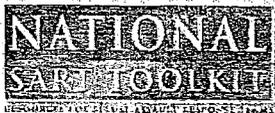
- [Polygraph exam information for victims of sex crimes](#)
- [State laws regarding use of polygraph tests with sexual assault victims](#)



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