

No. 18-36083

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DANIEL MIKE CHAVEZ

Plaintiff-Appellant,

v.

DAVID R. ROBINSON and LISA MOORE

Defendant-Appellees

On Appeal from the United States District Court
for the District of Oregon
No. 1:11-cv-03025
Hon. Ann L. Aiken

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT
OF PETITION FOR REHEARING EN BANC
FRAP 29, Circuit Rule 29-2**

Rosalind M. Lee
ROSALIND MANSON LEE, LLC
474 Willamette St., Ste. 302
Eugene, OR 97403
Attorneys for Movants
Oregon Criminal Defense Lawyers
Association
Dr. Kirk Johnson
Dr. Keith Linn
Dr. Kevin McGovern
Dr. Richard Wollert

Oregon Criminal Defense Lawyers Association (OCDLA) is a non-profit organization based in Eugene, Oregon. OCDLA's 1,291 members are lawyers, investigators and related professionals dedicated to defending adults and juveniles who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, networking and legislative action. OCDLA's members recognize the challenges faced by Mr. Chavez during his participation in court-ordered sex offender treatment as similar to those faced by their clients.

Dr. Kirk Johnson, Ph.D. has been a licensed psychologist in the state of Washington since 1982 and has been a certified sex offender evaluation and treatment specialist since 1992.

Dr. Keith Linn, Psy.D. is a licensed psychologist and certified forensic examiner in Portland, Oregon. Dr. Linn has worked with sex offenders since 1999, providing evaluation and treatment of adult and juvenile sex offenders.

Dr. Kevin McGovern, Ph.D. is a licensed psychologist in Portland, Oregon who specializes in clinical and forensic psychology. For over 35 years, Dr. McGovern has researched and taught in the area of treating sex offenders. Since 1975, Dr. McGovern has treated and evaluated sex offenders both in and out of correctional settings.

Dr. Richard Wollert, Ph.D. is currently a member of the Mental Health, Law, and Policy Institute at Simon Fraser University. Dr. Wollert and his staff have treated over 5,000 sex offenders at his Oregon and Canadian clinics.

Drs. Johnson, Linn, McGovern and Wollert have spent decades evaluating and treating sex offenders. They are concerned that sanctioning people for refusing to admit to conduct underlying the crime of conviction is the result of widely held but incorrect beliefs about sex offenders. Among these beliefs is the idea that sex offenders suffer an especially high rate of recidivism compared to others law violators, particularly if untreated. Another is the belief that people convicted of sex offenses cannot be successfully treated until they have taken responsibility for their actions, i.e., admitted some degree of guilt.

Movants seek to appear to make two arguments. First, that recidivism among sex offenders is often overstated and that admitting underlying conduct does not affect recidivism. Second, defendants who participate in these programs must have access to counsel to navigate the requirements of mandated sex offender treatment that implicate the right against self-incrimination. These arguments can assist the Court, because movants are practitioners in Oregon and movants' experiences and knowledge confirm that Mr. Chavez's experience is common in Oregon.

These arguments are relevant to the disposition of this case because Mr. Chavez was denied access to counsel when he was required to make admissions about his crime of conviction, and he had a right not to make those admissions. The issues before the court are critically important to *amici*, their patents and their clients.

FRAP RULE 29 STATEMENT

Pursuant to FRAP Rule 29(a) and Circuit Rule 29-3, movants sought the consent of the attorneys representing both parties to appear as *amicus*. Counsel for appellant indicated consent to the filing of the brief. Attorney Jason Montgomery, counsel for appellee David Robinson, said that he took no position on this motion. Attorney Aaron Hisel, counsel for appellee Lisa Moore, indicated that he neither objected nor consented to this motion.

Conclusion

Movants respectfully request that the court grant this motion and allow movants to appear as *amici curiae* in support of the petition for rehearing en banc.

Date: December 2, 2021

ROSALIND MANSON LEE, LLC

/s/ Rosalind M. Lee

Rosalind M. Lee

Attorney for Movants

Oregon Criminal Defense Lawyers
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Dr. Keith Linn

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**Brief of *Amici Curiae* Oregon Criminal Defense Lawyers Association, Dr.
Kirk Johnson, Dr. Keith Linn, Dr. Kevin McGovern and Dr. Richard Wollert
in Support of Petition for Rehearing En Banc**

Rosalind M. Lee
ROSALIND MANSON LEE, LLC
474 Willamette St., Ste. 302
Eugene, OR 97403
Telephone: (541) 485-5110
Email: ros@mansonlee.com

Attorney for Amici
Oregon Criminal Defense Lawyers
Association
Dr. Kirk Johnson
Dr. Keith Linn
Dr. Kevin McGovern
Dr. Richard Wollert

DISCLOSURE STATEMENT

Oregon Criminal Defense Lawyers Association (OCDLA) does not have a parent corporation and issues no stock. As a result, no publicly held corporation owns more than 10% of OCDLA.

Date: December 2, 2021

ROSALIND MANSON LEE, LLC

/s/ Rosalind M. Lee
ROSALIND M. LEE #055566

Attorney for Amici
Oregon Criminal Defense Lawyers
Association (OCDLA)
Dr. Kirk Johnson
Dr. Keith Linn
Dr. Kevin McGovern
Dr. Richard Wollert

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IDENTITY AND INTERESTS OF AMICI

OCDLA is a nonprofit organization based in Eugene, Oregon. OCDLA's 1,291 members are lawyers, investigators and related professionals dedicated to representing adults and juveniles who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, networking and legislative action.

OCDLA's members recognize the challenges faced by Appellant Chavez during his participation in court-ordered sex offender treatment as similar to those faced by their clients. OCDLA's members' clients often need counsel to navigate the requirements of sex offender treatment that implicate their rights against self-incrimination. Conditions of supervision for sex offenses in Oregon often require full disclosure of the incident underlying the conviction as well as full disclosure of one's sexual history, coupled with polygraph testing, even if these disclosures involve self-incrimination. Also, the people requiring these admissions are mandatory reporters of child abuse. Or. Rev. Stat. §419B.010. The circumstances that lead to these difficult circumstances often occur when, as with Mr. Chavez, the requirements of treatment are not evidence-based.

Dr. Kirk Johnson, Ph.D. has been a licensed psychologist in the state of Washington since 1982 and has been a certified sex offender evaluation and treatment specialist since 1992. Dr. Johnson provides trainings in the evaluation

and treatment of adult and juvenile sex offenders throughout Oregon and Washington. He received his Ph.D. in counselling psychology from the University of Arizona in 1981.

Dr. Keith Linn, Psy.D. is a licensed psychologist and certified forensic examiner in Portland, Oregon. He is also a board member of the Oregon Association for the Treatment of Sexual Abusers. Dr. Linn has worked with sex offenders since 1999, providing evaluation and treatment of adult and juvenile sex offenders. Since 2004, Dr. Linn has been in private practice providing evaluation and psychological testing to various forensic populations including sexual violence, domestic violence, sexual addiction and internet offenses. Dr. Linn has testified as an expert witness in state and federal courts throughout Oregon. Dr. Linn received his doctorate in psychology in 1998 from the University of Denver.

Dr. Kevin McGovern, Ph.D. is a licensed psychologist in Portland, Oregon who specializes in clinical and forensic psychology. For over 35 years, Dr. McGovern has researched and taught in the area of treating sex offenders. Dr. McGovern's research interests include developing assessment approaches, treatment procedures and educational materials in the areas of child sexual abuse, social inadequacy, sexual dysfunction and aberrant sexual behavior. Since 1975, Dr. McGovern has treated and evaluated sex offenders both in and out of

correctional settings. Dr. McGovern received his Ph.D in psychology from the University of Oregon in 1972.

Dr. Richard Wollert, Ph.D. is currently a member of the Mental Health, Law, and Policy Institute at Simon Fraser University in British Columbia. An expert witness in hundreds of sexually violent predator cases, his publications critique sex offender recidivism risk assessments, paraphilia diagnoses in the Diagnostic and Statistical Manual of the American Psychiatric Association, and federal sentencing guidelines for child pornography. Dr. Wollert and his staff have treated over 5,000 sex offenders at his Oregon and Canadian clinics. Dr. Wollert received his Ph.D. in clinical psychology from Indiana University in 1978.

Drs. Johnson, Linn, McGovern and Wollert have spent decades evaluating and treating sex offenders. They are concerned that sanctioning people for refusing to admit to conduct underlying the offense stems from widely held but incorrect beliefs about sex offenders. Among these beliefs is the idea that sex offenders suffer an especially high rate of recidivism compared to others law violators, particularly if untreated. Another is the belief that people convicted of sex offenses cannot be successfully treated until they have taken responsibility for their actions, i.e., admitted some degree of guilt. *Amici* argue that neither of these beliefs is supported by data or peer-reviewed analysis.

Amici recognize the seriousness of sex crimes and the impact they can have on the victims. Because of the seriousness of these offenses, court-ordered sex offender treatment requires more careful and evidence-based approaches to treating this population.

FRAP RULE 29 STATEMENT

Pursuant to FRAP Rule 29(a) and Circuit Rule 29-3, *amici* sought the consent of the attorneys representing both parties to file this *amicus* brief. Counsel for appellant indicated consent to the filing of the brief. Attorney Jason Montgomery, counsel for appellee David Robinson, said that he took no position on this motion. Attorney Aaron Hisel, counsel for appellee Lisa Moore, indicated that he neither objected nor consented to this motion. Pursuant to FRAP Rule 29(a), *amici* have filed an accompanying motion for leave to file an *amicus* brief.

Counsel for no party authored this brief in whole or in part. No party nor counsel for any party contributed money that was intended to fund preparing or submitting the brief. No person contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

I. Rates of Recidivism for Sex Offenders is Lower Than That of Other Offenders and Whether the Offender Admits the Underlying Conduct Does Not Affect Recidivism

Amici are concerned that sex offender treatment that requires admissions of underlying conduct stems from two unsupported beliefs: that sex offenders have a particularly high rate of recidivism and that admitting underlying conduct decreases the likelihood that a person will reoffend. These beliefs were famously reflected in Justice Kennedy's opinion in *McKune v. Lile*, 536 U.S. 24 (2002). In *McKune*, the court held that a prisoner's right against self-incrimination was not violated when he was punished for failing to make admissions during a prison sex-offender treatment program, where the consequence for failing to successfully participate in the program was a loss of privileges. *McKune*, 536 U.S. at 37-38. In his opinion, Justice Kennedy relied on dated statistics to state that the recidivism rate of untreated sex offenders is 80%, that it is 15% for those who have received treatment, and that denial of guilt is key to offenders failing to complete treatment. *Id.* at 33-34. None of these factual assertions are supported by current evidence and research.

A. Overall Rates of Recidivism for Sex Offenders are Low¹

In 2019, the U.S. Department of Justice published the results of its nine-year examination of sex offenders who were released from prison starting in 2005. Defining recidivism broadly—merely being rearrested for a sexual offense—the authors found that 8% of sex offenders reoffended. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-2014)* at 1. Moreover, those released from prison for rape or sexual assault were less likely to be arrested for any offense than those released after convictions for robbery, assault, property, drug or public-order offenses. *Id.* at 4. Only those who had been convicted of homicide had a lower recidivism rate than sex offenders. *Id.* The study did not differentiate between types of offenders or offenses. Nor did it differentiate between those who had completed treatment or whether the offender had admitted his or her crime of conviction, much less other, uncharged conduct. The obvious implication is that the rates of recidivism would be even lower for those who had completed treatment.

Other studies report similar findings. *See, e.g.*, Jeffrey C. Sandler, Naomi J. Freeman and Kelly Michael Socia, *Does a Watched Pot Boil? A Time-Series*

¹ *Amici* recognize that estimating and measuring recidivism is difficult. *See* Roger Przybylski, *Recidivism of Adult Sexual Offenders*, SOMAPI Research Brief, U.S. Dep't of Justice, July 2015 at 1.

Analysis of New York State's Sex Offender Registration and Notification Law, 14 Psychol., Pub. Pol'y & L., Nov. 2008, at 284-302 (examination of every registerable sexual offense, over 160,000 offenders, found that 95% had no prior criminal record involving a sexual offense).

B. Data Show No Correlation between Admitting Guilt and Reoffending

More important to this case is the idea that admission of guilt is always necessary for successful treatment, resulting reduced recidivism and in turn a safer community. While this might have some facial appeal, the data show the contrary.

Since *McKune v. Lile*, researchers have tried to identify factors which correlate with recidivism. Many factors have been identified, including prior criminal history, substance abuse, age of offender, degree of force used by the offender, and failure to complete treatment. See, e.g., R. Karl Hanson & Kelly E. Morton-Bourgon, *Predictors of Sexual Recidivism: An Update Meta-Analysis* (2004) at 3, 10, 29-42, <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/prdctrs-sxl-ffnd/index-en.aspx>. Denial of the underlying conduct is not one of the circumstances that correlate with recidivism. See *id.* at 2, 11, 14, 17, 32; Leigh Harkins et. al, *Relationships Between Denial, Risk, and Recidivism in Sexual Offenders*, 44 Arch. Sex. Behv. 157-166 (2015) (finding lower levels of recidivism in some offenders who denied guilt, and concluding that the presumption that denial represents increased risk should be reconsidered); Jayson Ware & Ruth E.

Mann, *How Should “Acceptance of Responsibility” Be Addressed in Sexual Offending Treatment Programmes?*, 17 *Aggression & Violent Beh.* 279 (2012); Jimmie Fourie, *Treating Sexual Offenders Who Categorically Deny Their Offending*, 5 *Practice: The New Zealand Corrections J.*, Jul. 2017 at 3 (summarizing findings of studies showing lack of relationship between denial and re-offending).

There can be many reasons for one to deny guilt. These include deep feelings of shame, fear of being ostracized from one’s family, and fear of retribution, especially if one is incarcerated. And, of course, there are those instances, however rare they might be, where a person really is innocent, which does occur and probably more often in sex crimes than in any other. None of these reasons for denial keep one from benefitting from therapy.²

Whatever the reason for a person’s denial of guilt, a number of studies have shown that those who are “in denial” benefit from treatment. *See Fourie, supra*, at

² Justice Kennedy cited a 1991 study coauthored by one of the *amici* psychologists, Kevin McGovern, Ph.D., for the proposition that those who completely deny are “three times more likely to fail in treatment than those who admit even partial complicity.” *McKune, supra*, at 33. The *amici* psychologists, including Dr. McGovern, note that those who refuse to admit “even partial complicity” can be treated, and that in any event since 1991 much more has been learned about treating sex offenders in general and deniers in particular. Indeed, unless precluded from doing so by contracts with departments of parole and probation, it is common for treatment providers to have special group treatment sessions set up specifically for those who deny guilt.

19 (summarizing meta-analyses and concluding “it can realistically be assumed that treatment does not need to produce change in an offender’s denial to be considered effective in reducing their risk of reoffending.”) Many treatment providers have special programs designed for those who deny guilt. Rather than focusing on efforts to bully patients into admitting guilt, those programs spend time discussing such things as victim empathy, why some people commit such crimes, and how people can avoid putting themselves in positions where they might either be tempted to commit such crimes, where they might be at greater risk of being accused. The result is the same: a person who is healthier and less likely to re-offend.

II. Defendants Convicted of Sex Offenses Need Access to Counsel to Help them Comply with Conditions of Supervision that Implicate their Right Against Self-Incrimination

Defendants convicted of sex offenses and placed on supervision often must navigate complying with conditions of supervision that implicate their constitutional right against self-incrimination. Without counsel, defendants in this position have little chance of effectively protecting their rights.³ Defendants on

³ Although defendants facing an allegation that they violated the terms of probation are entitled to appointed counsel, defendants on post-prison supervision are not. *Compare* ORS 135.050(5)(d) *with* OAR 255-075-0035. At a hearing on a violation of post-prison supervision, defendants may be represented by an attorney, but only at their own expense. OAR 255-075-0035(1). In limited instances, a

post-prison supervision are ill-equipped to make informed decisions about whether to comply with conditions of supervision that implicate their rights. Thus, as a practical matter, only those with the means to hire an attorney can bring the matter before a judge to address the tension between meeting the dictates of supervision while maintaining the protection of one's constitutional rights.

People on probation or post-prison supervision want to be successful on supervision, but the conditions of supervision after a conviction of a sex offense can be difficult to navigate. For example, conditions often require a defendant to submit to a "full disclosure" polygraph where the defendant must disclose all charged and uncharged sexual offenses. According to 2020 training materials for the Oregon Board of Parole and Post-Prison Supervision⁴, if a defendant refuses to submit to a polygraph, then the defendant is in violation of the conditions of post-prison supervision. But if the defendant invokes his or her right against self-incrimination, then it is not a violation.

Understanding the difference between refusing and invoking a right is clear to a lawyer, but not to a lay person. Similarly, understanding the well-established rule in *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005) also requires the

defendant facing a hearing on a violation of post-prison supervision may qualify for a Board appointed attorney. OAR 255-075-0035(2).

⁴ Counsel can provide a copy of these materials to the Court upon request.

assistance of counsel. In other words, avoiding a sanction for “refusing” to take a polygraph requires legal advice so the defendant understands that he or she must invoke the right against self-incrimination, not just refuse to take the polygraph. A lay person will likely not know that invoking requires particular words. Figuring out how best to conduct oneself and present arguments about the scope and application of constitutional rights is particularly challenging for *pro se* defendants.

Defendants on probation or post-prison supervision face Hobson’s choices when parole or probation officers—or, as in this case, treatment providers—demand that defendants submit to polygraph examination and admit to criminal conduct. On the one hand, failing to do so may result in revocation of probation or post-prison supervision and new incarceration under OAR 255-075-0002. On the other hand, a person’s constitutional rights to not incriminate oneself and receive the assistance of counsel are implicated when the state forces him to admit to criminal conduct without the opportunity to consult with counsel. *See Minnesota v. Murphy*, 465 U.S. 420 (1984); *Antelope, supra*.

It is unreasonable to expect a defendant to understand the scope of the right against self-incrimination in the context of probation, post-prison supervision and court-appointed sex offender treatment without the assistance of counsel. It defies imagination that a defendant should be expected to understand the law of

immunity, know how to access the court and the prosecutor to request immunity, and to understand the scope of any grant of immunity without legal assistance.

These concerns are amplified in circumstances like those faced by Mr. Chavez. Mr. Chavez had a legitimate question about how discussing his crime of conviction would affect his pending direct appeal. Mr. Chavez made every effort to assert his well-established rights but was sanctioned for doing so.

The majority's opinion disregards the true challenges faced by people on supervision for sex offenses. The Court should grant rehearing to recognize that people on supervision and in sex offender treatment have the right to consult with counsel about whether to assert the fundamental right against self-incrimination.

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III. Conclusion

For the above reasons and the reasons stated in Mr. Chavez's brief and any briefs filed by additional *amici*, the Court should grant the petition for rehearing en banc.

Date: December 2, 2021

ROSALIND MANSON LEE, LLC

/s/ Rosalind M. Lee

Rosalind M. Lee

Attorney for Amici

Oregon Criminal Defense Lawyers
Association

Dr. Kirk Johnson

Dr. Keith Linn

Dr. Kevin McGovern

Dr. Richard Wollert

Certificate of Compliance

I am the attorney for *amici curiae*.

This brief contains 2596 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

Signature /s/Rosalind M. Lee

Date December 2, 2021