No. 17-3256

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD LACY, on behalf of himself and all others similarly situated,
Petitioner-Appellee,

v.

KEITH BUTTS, in his official capacity as Warden of the New Castle Correctional Facility,
Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 1:13-cv-00811-RLY-DML,
The Honorable Richard L. Young, Judge.

BRIEF OF APPELLANT AND REQUIRED SHORT APPENDIX

CURTIS T. HILL, JR.
Attorney General of Indiana
Atty. No. 13999-20

FRANCES BARROW
Deputy Attorney General
Atty. No. 15115-22

LARRY D. ALLEN
Deputy Attorney General
Atty. No. 30505-53

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 233-0555
Frances.Barrow@atg.in.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Donald Lacy filed an Amended Class Action Complaint under 28 U.S.C. Section 2254 on July 10, 2017, seeking a writ of habeas corpus and asserting that the Indiana Sex Offender Management and Monitoring Program (INSOMM) violated class members' right under the Fifth Amendment, applied to the States through the Fourteenth Amendment, to be free from self-incrimination (Dkt. 122). The district court had certified Lacy's complaint as a class action on September 30, 2015 (Dkt. 93). Jurisdiction for this action is conferred by 28 U.S.C. §§ 1331 and 2241. After considering the parties' motions for summary judgment, on September 28, 2017, the district court granted the class' petition for writ of habeas corpus, granted the class' motion for summary judgment, and denied the respondent's cross-motion for summary judgment (Dkt. 135). Final judgment was entered the same day (Dkt. 136). The district court's order was a final judgment that adjudicated all of the claims with respect to all parties.

The respondent filed a notice of appeal on October 30, 2017 (Dkt. 141). No motions to alter or amend were filed under Trial Rule 59. This Court has jurisdiction pursuant to 28 U.S.C. §§ 2253 and 1291.

STATEMENT OF THE ISSUES

In prison disciplinary proceedings at the New Castle Correctional Facility, class members were convicted of Class A offense 116, Refusal to Participate in a Mandatory Program (INSOMM). The sanctions included loss

of earned credit time and demotion in credit class. The main issue on appeal is whether the program's requirement that participants discuss their underlying offenses violates their Fifth Amendment right against self-incrimination.

STATEMENT OF THE CASE

Facts Regarding INSOMM

INSOMM was established by the Indiana Department of Correction (IDOC) in 1999 (Dkt. 125-1, Declaration of Adam H. Deming, Psy. D. (Deming Dec.) ¶ 3). Since 2006 the Program has been administered through the Liberty Behavioral Health Corporation by INSOMM's Executive Director, Dr. Adam H. Deming (*Id*. ¶ 2). Dr. Deming was awarded a Bachelor of Arts in Psychology in 1985 from Edinboro University of Pennsylvania, a Master of Arts in Clinical Psychology from Edinboro University of Pennsylvania in 1986, and a Doctorate of Psychology from Nova University in 1992 (*Id*. ¶ 6). His experience and expertise in the area of sex offender treatment are shown in the more than 50 papers, publications, and presentations on his Vita, as well as his current and former employment in positions involving the treatment of sex offenders (*Id*. Vita).

Offenders convicted of certain offenses are eligible for the INSOMM Program (Dkt. 125-1, Deming Dec. ¶ 8). Offenders are not asked to participate in the INSOMM Program until they are within three to five years of their projected release date from the DOC (*Id*. ¶ 9).

INSOMM consists of three phases. The first phase is Consent and Assessment, and an offender is informed as follows:

> I understand that I must complete a series of tests and questionnaires prior to starting, during, and at the completion of the Phase II treatment program. The information gathered from these tests will be used by INSOMM providers to determine the best course of treatment for me, and to measure any benefits that I may be receiving from participation in the program.

(Dkt. 125-10, Petitioners' Exhibit J).

The second phase is Sex Offender Specific Risk Based Treatment, and an offender is informed as follows:

> I understand that, as part of Phase II of the INSOMM Program, I will be required to discuss and take responsibility for past acts of sexual violence and abuse that I have committed in order to benefit from the program. I also understand that INSOMM treatment providers are required by law to report the names of any identifiable child or disabled adult victims that I may disclose during the course of my treatment.
>
> I understand that Phase II of the INSOMM Program consists of group therapy sessions that will allow me to gain important information about my sexual offending behavior, and learn ways to reduce the chances that I will re-offend. I understand that I must attend all scheduled group sessions and satisfactorily participate in the program in order to receive a Certificate of Program Completion.

(Dkt. 125-10, Petitioners' Exhibit J). The third phase of INSOMM is Community Management and Monitoring, and is not applicable to the Petitioners' claims (*Id.*).

Offenders who are required to participate in INSOMM are exempt from participation during the pendency of an appeal of their conviction of a

sex crime and any petitions for post-conviction relief relating directly to their sex crime conviction (Dkt. 125-1, Deming Dec. ¶ 10). During the pendency of these actions, provided they submit documentation of their appeal or post-conviction relief petition, such offenders are not subject to discipline for failing to participate in INSOMM (*Id.*). Offenders who entered guilty pleas but still appealed are not exempt (*Id.* ¶ 11).

Some offenders enter the INSOMM Program but categorically deny they committed the crime for which they are incarcerated (Dkt. 125-1, Deming Dec. ¶ 17). These offenders are given the opportunity to take a polygraph test (*Id.*). If the test result is a credible indication that the offender did not commit the crime, and all other facts associated with that offense suggest that the offender has not committed a sexual offense, they could potentially be exempt from participation in INSOMM (*Id*).

An offender who does not take responsibility for his sexual behavior relating to his/her sex crime conviction may be terminated from the INSOMM Phase II treatment program (Dkt. 125-1, Deming Dec. ¶ 10). At this point the offender may be subject to discipline for a Code 116 violation (*Id.*). A Class A Code 116 violation is Refusing a Mandatory Program (Dkt. 125-5, p. 2). Discipline includes demotion in credit class and loss of earned credit time (Dkt. 125-3, 125-6, p. 38).

IDOC Executive Directive No. 06-30 provides that two months after an offender is found guilty of a Code 116, the offender shall again be instructed

to participate in INSOMM (Dkt. 125-1, Deming Dec. ¶ 21). During those two months the offender would be encouraged to participate voluntarily in INSOMM, but the two-month period is the maximum amount of time permitted to elapse before the offender is again instructed to participate (*Id.*).

At the beginning of INSOMM treatment all offenders complete an Informed Consent Form, which includes the provision "I understand that I am completing this questionnaire without promises of legal immunity" (Dkt. 125-32, p. 1). Page 2 of the Informed Consent Form provides the following information:

> You will be required to describe the gender and age of victims, the type of abuse, the degree of force, and other information that will help to guide treatment and supervision. But **you are <u>not</u> being asked to provide specific identifying information about the victims of your sexual abuse, that is specific enough to be used to prosecute you**. However, if you choose to report identifying information about your victims, this information **will** be reported to child or elder protective services as may be required by relevant state law. If you have questions about this questionnaire, please ask the individual who has given it to you.

(*Id.*, emphases in original).

Before participating in INSOMM offenders are assessed for risk of reoffending (Dkt. 125-13, p. 4). The Low Risk Core Group and Medium Risk Core Group Workbooks, and the Phase II High Risk Treatment Workbook, ask participants to complete a Sexual Offense Disclosure Form (Dkt. 125-14, p. 5; Dkt. 125-14, p. 7; Dkt. 125-16, p. 24). These disclosures apply to sexual offenses other than the index offense(s) for which a participant was convicted (*Id.*). Although the Sexual Offense Disclosure Forms ask for the first name of

victim(s), participants are permitted to use pseudonyms (Dkt. 125-1, Deming Dec. ¶ 25).

The following workbooks are assigned as appropriate to participants in INSOMM: Arousal Management, Active Empathy, Attitudes, Beliefs & Behaviors, Healthy Relationships Workbook, and Emotional Management (Dkt. 125-1, Deming Dec. ¶ 26).

Participants in INSOMM are required to take responsibility for the sexual offense(s) for which they were convicted and sentenced (Dkt. 125-1, Deming Dec. ¶ 12). They are asked to provide details of their sexual history, including the victim's gender and age, what might have motivated the offense, and whether violence was used or instead whether a victim was "groomed" (*Id.* ¶ 13). Participants are not required to identify their victims or specific dates of the sexual activity, and are specifically advised not to provide identifying information (*Id.*).

If participants in INSOMM voluntarily provide the identity of a victim of a sexual crime against a child or a vulnerable adult that has not been previously reported or brought to the attention of law enforcement, INSOMM program staff are legally required to report the crime or potential crime to a reporting agency (Dkt. 125-1, Deming Dec. ¶ 14). Treatment providers would only report a sex crime against a child or a vulnerable adult to the state reporting agency if it had not previously been reported and there is an identifiable victim (*Id.* ¶ 15).

The purpose of INSOMM is to provide sex offender treatment, and not to investigate criminal behavior (Dkt. 125-1, Deming Dec. ¶ 16).

Sex offenders who do not complete a sex offender treatment program are at higher risk for recidivism, and offenders who participate in and complete those programs are at a lowered risk (Dkt. 125-1, Deming Dec. ¶ 27).

The requirement that INSOMM participants take responsibility for their sexual behavior and their sex crime(s) is critical to maintaining the Program's legitimacy, its effectiveness, and its ethicality (Dkt. 125-1, Deming Dec. ¶ 28). It is central to helping sexual offenders receive appropriate and evidence based treatment, and it would be unethical to provide sex offender treatment to a participant in the program if that offender categorically denies having engaged in a sex crime and is not requesting help with a sexual offending problem (*Id.*). Only by taking some minimal amount of responsibility for their sexual behavior and past acts of sexual violence can an offender acquire insight into that sexual behavior, develop empathy for their victims, learn strategies to avoid improper sexual behavior upon release to the community, and be said to have successfully completed a sexual offender treatment program (*Id.*).

Dr. Deming, INSOMM's Executive Director, believes that if a court grants the relief Petitioners seek in this action and enjoins the requirement that participants in INSOMM take responsibility for and disclose past sexual

history as a requirement for successful completion of the program, the INSOMM Program will be ineffective in treating sex offenders and preventing recidivism (Dkt. 125-1, Deming Dec. ¶ 29).

This lawsuit

On May 16, 2013, Donald Lacy filed a civil action under 42 U.S.C. § 1983, seeking damages and the restoration of earned credit time that he had lost as a sanction for failing to participate in INSOMM (Dkt. 1). The district court screened the complaint under 28 U.S.C. § 1915A and dismissed Lacy's action, holding that he failed to state a claim upon which relief may be granted (Dk. 10). On May 29, 2014, this Court vacated the decision of the district court and remanded the case for consideration of INSOMM in light of the United States Supreme Court's holding in *McKune v. Lile*, 536 U.S. 24 (2002) (Dk. 24).

On remand, Lacy was appointed counsel, who sought consolidation of five other cases under 28 U.S.C. § 2254 in which similarly situated prisoners sought restoration of earned credit time lost as a result of their refusal to participate in INSOMM (Dk. 51). The court granted the motion to consolidate (Dk. 55). In each of the consolidated cases, the offender was sanctioned with a reduction in earned credit time or a demotion in credit class for refusing to participate in INSOMM.

Lacy filed a motion for class certification on August 18, 2014 (Dkt. 44). The Respondent filed a response in opposition to class certification on

December 15, 2014 (Dkt. 60). On September 30, 2015, the district court certified the following class:

> All persons incarcerated in the Indiana Department of Correction who have been asked to participate in the Indiana Sex Offender Management Program, who have refused to participate because they refuse to confess guilt on the primary offense or disclose other criminal conduct as required by the INSOMM program, and who have been subjected to disciplinary action in the form of lost credit time and/or demotion in credit class as a result.

(Dkt. 93).

Petitioners filed their Amended Complaint on July 10, 2017, along with a motion for summary judgment, designation of evidence, and supporting brief (Dkt. 122, 123, 124, 125). The Respondent filed a cross-motion for summary judgment and response in opposition to the Petitioner's summary judgment motion on August 31, 2017 (Dkt. 132). On September 15, 2017, the Petitioners filed their reply in support of their summary judgment motion and response in opposition to the Respondent's cross-motion (Dkt. 134).

On September 28, 2017, the district court issued its Entry Discussing Petition for Writ of Habeas Corpus that granted the Petitioners habeas relief.

> It is undeniable that prison authorities may, in the interest of rehabilitation, impose penalties for failing to participate in sex offender treatment programs. But the SOMM program at issue in this case provides significant penalties, in the form of lost earned good time credits and demotion in credit class, for choosing to remain silent. For the reasons discussed above, these penalties are so severe that they amount to compulsion in violation of the Fifth Amendment. The class petition for a writ of habeas corpus is therefore **granted**. The

> petitioners' motion for summary judgment, dkt [123], is **granted** and the cross-motion for summary judgment, dkt. [132], is **denied**. The disciplinary actions and sanctions for failing to participate in the SOMM program must be **vacated**.

(Dkt. 135).

SUMMARY OF THE ARGUMENT

Indiana's program for the treatment of sex offenders while they are incarcerated, INSOMM, does not unconstitutionally compel self-incrimination under the Fifth Amendment. INSOMM requires inmates to disclose prior sexual crimes, but it does not require self-incrimination. In regard to uncharged conduct, participants are told that they should not provide identifying details sufficient to be used in a future criminal prosecution, and they are permitted to use pseudonyms for victims. As a result, no prosecutions have been initiated as a result of the INSOMM program. Even for those circumstances calling for mandatory reporting—the details necessary for reporting are explicitly predicated on the participant voluntarily divulging them. The level of generality permitted by participants is such that the admission could not support a link in the chain sufficient to support an investigation or even admission at trial.

Likewise, the consequences for refusing to comply and participate in the INSOMM program does not rise to compulsion. The INSOMM program serves the legitimate penological purpose of rehabilitation and deterrence from re-offense. This is the same type of legitimate state interest that the Supreme Court recognized in *McKune v. Lile*. Additionally, Indiana's

statutory scheme that explicitly provides for the awarding and removal of credit time and change of credit time classes are not atypical and significant hardships. Under either the plurality's or Justice O'Connor's approach in *McKune*, Indiana's scheme protects any liberty interest in credit earned and does not extend the period of incarceration beyond that originally imposed. Thus, the District Court erred in determining that the INSOMM program compelled self-incrimination by permitting inmates to choose between participation and privileges.

ARGUMENT

Standard of Review

Writs may issue under Section 2254 for violations of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). This Court reviews a district court's decision on a petition for habeas corpus *de novo*. *Pannell v. McBride,* 306 F.3d 499, 502 (7th Cir. 2002). In this case, however, the due process requirements of *Superintendent v. Hill*, 472 U.S. 445 (1985), and *Wolff v. McDonnell*, 418 U.S. 539 (1974), for Section 2254 cases do not apply.

Here, the parties filed cross-motions for summary judgment on the sole issue whether the INSOMM program violated the petitioner's Fifth Amendment rights. This Court reviews "*de novo* the district court's decision on the parties' cross-motions for summary judgment, construing all facts and drawing all reasonable inferences in favor of the party against whom the

motion under consideration was filed." *Hess v. Board of Trustees of Southern Illinois University*, 839 F.3d 668, 673 (7th Cir. 2016).

Lacy's Fifth Amendment Rights were not violated because Indiana's sex offender treatment program does not unconstitutionally compel self-incrimination.

Indiana's SOMM program does not compel self-incrimination in a way that raises concerns with a participant's Fifth Amendment rights. The Self-Incrimination Clause of the Fifth Amendment provides that no one "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *Chavez v. Martinez*, 538 U.S. 760, 766 (2003); *see also Spevack v. Klein*, 385 U.S. 511, 514, 87 S.Ct. 625 (1967) (Fifth Amendment applies to the states through the Fourteenth Amendment). The prohibition against self-incrimination extends beyond the context of criminal investigations and has been held to privilege a person " 'not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' " *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316 (1973)); *see Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307 (1999). While applying broadly, it only prohibits "compelled testimony that is incriminating." *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 190, 124 S.Ct. 2451 (2004). Neither party disputed below that the statements in question here were testimonial. *See Doe v. United States*, 487 U.S. 201, 210 (1988) (holding that statements

which explicitly or implicitly relate to a factual assertion or disclose information are testimonial). Thus, to invoke the Fifth Amendment, Lacy must show (A) incrimination and (B) compulsion. *McKune v. Lile*, 536 U.S. 24, 35-36, 122 S. Ct. 2017, 2025-26 (2002). For incrimination, the witness must reasonably believe that his statements may be used to incriminate him. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814 (1951). And, the statements must be compelled. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S.Ct. 2132 (1977).

A. The INSOMM program does not present a substantial threat of incrimination to its participants.

Participants in the INSOMM program do not face a substantial threat of incrimination such that the protections of the Fifth Amendment are invoked. The Fifth Amendment privilege against self-incrimination is not imposed unless there is an actual threat of incrimination in the future. *Minor v. United States*, 396 U.S. 87, 98 (1969). This threat of incrimination must be real and not remote or speculative. *Zicarelli v. N.J. State Comm'n of Investigation*, 406 U.S. 472, 478 (1972). The District Court mistakenly found that there was a threat of incrimination despite there being no appreciable risk of it.

The INSOMM program's sole function is rehabilitation, not retribution (Dkt. 125-10, Petitioners' Ex. J). And as a result, the District Court's finding that there was a threat of incrimination overlooked the practical and particular circumstances of the participants' statements in the INSOMM

program. Relying in part on language from the Indiana Supreme Court, the District Court noted that it was not enough that no one had ever been prosecuted based on their INSOMM statements. *See DECISION;* (citing *Bleeke v. Lemmon*, 6 N.E.3d 907, 927 (Ind. 2014). However, this is too narrow and improperly focuses on part of the program. Not only has no one been prosecuted based on the information provided in the INSOMM program, the possibility of such a prosecution or even investigation would be remote based on the terms of the program itself (Dkt. 125-32, p. 1).

Outside of circumstances where jeopardy has already attached, which by themselves would not trigger Fifth Amendment protections,[1] the INSOMM program permits participants to describe their other actions in the most general terms. *See McKune*, 536 U.S. at 38 (noting that valid convictions place limitations on a defendant's Fifth Amendment right against self-incrimination (citing *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551 (1976)). A note to the sexual offense disclosure states, "If you have victims for which no report was ever made to law enforcement or child protection services, you do not have to give identifiable information about the victims" (Dkt 125-14, Petitioners' Ex. N at pp. 4-6). In practice, participants are not required to identify victims, may use pseudonyms, and do not have to disclose

[1] This includes instances where an inmate pleaded guilty to the crime below, necessarily waiving his Fifth Amendment privilege through testimony establishing factual basis. *See Rogers v. United States,* 340 U.S. 367, 373, 71 S.Ct. 438 (1951) (holding that a person may not testify voluntarily and then invoke the privilege when questioned about the details).

specific dates of sexual activity (Dkt. 125-1, Deming Dec. ¶¶ 13, 25). Participants are further advised that they "**are <u>not</u> being asked to provide specific identifying information about the victims of your sexual abuse that is specific enough to be used to prosecute**" them (Dkt. 125-32, p. 2) (emphasis in original). Moreover, participants are specifically advised not to provide identifying information because doing so could be used to prosecute them (*Id*. at ¶¶ 13, 24). In fact, the only circumstances under which INSOMM providers are required to report a sex crime is when the offender voluntarily provides identifying information, the crime is against a child or vulnerable adult, and the crime has not been previously reported (*Id*. at ¶¶ 14-15, Dkt. 125-10, Petitioners' Exhibit J). These are both narrow and extraordinary circumstances that require the voluntary disclosure of participants contrary to the warning provided them by the program. The District Court paid no heed to this important aspect of privacy that the program permitted, and it is not clear from *Bleeke* that the Indiana Supreme Court was provided this information as it made no mention of this facet of the program in its ultimate holding. *See Bleeke*, 6 N.E.3d 926-27.

The warning provided participants against providing details that may be used for prosecution and the exception itself make it highly unlikely that a prosecution could result from disclosure. *See Sornberger v. City of Knoxville, Ill.,* 434 F.3d 1006, 1026-27 (7th Cir. 2006) (holding that a criminal prosecution must at least be initiated to implicate right against self-

incrimination). Generic information about a crime that omits details, dates, identifying information, and permits pseudonyms is not likely to furnish a link in the chain sufficient to be used in a subsequent proceeding. *See United States v. Balsys*, 524 U.S. 666, 672 (1998) (holding that the Fifth Amendment may be invoked only when the witness "reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal proceeding."); *Hoffman*, 341 U.S. at 486 (holding that answers are not incriminating if they do not in themselves support a conviction or "furnish a link in the chain of evidence" necessary to prosecute). Likewise, there is little question that such statements would be insufficient to support a conviction in and of themselves because they would not be supported by the necessary *corpus delicti* of the crime even to be admissible at a subsequent trial. *See Smith v. United States*, 348 U.S. 147, 153-54, 75 S.Ct. 194, 197-98 (1954) (noting that nearly all courts recognize that an accused may not be convicted on his own uncorroborated confession alone); *accord United States v. Kampiles*, 609 F.2d 1233, 1236 (7th Cir. 1979) ("[A]n accused may not be convicted upon his uncorroborated confession"). Devoid of detail, any subsequent investigation and certainly prosecution would be far too remote to qualify as the real and appreciable danger required to invoke the Fifth Amendment. *See, e.g., Neal v. Shimoda,* 131 F.3d 818, 832 (9th Cir. 1997) (holding that treatment program requiring sex offenders to admit and take responsibility for sexual behaviors did not violate

privilege against self-incrimination because there was no evidence that the state would use admissions against them in future criminal proceedings). As a result, there is no reasonable and substantial threat of incrimination to warrant application of the Fifth Amendment's privilege to the INSOMM program.

B. The INSOMM program does not compel incriminating statements

Contrary to the Supreme Court's holding in *McKune* and the Indiana Supreme Court's determination in *Bleeke*, the District Court incorrectly found that the INSOMM program impermissibly compelled incriminating statements. Compulsion exists when some factor denies the individual the "free choice to admit, to deny, or to refuse to answer." *Lisenba v. California*, 314 U.S. 219, 241, 62 S.Ct. 280 (1941). However, this choice is not blind to the context in which it occurs, which in this case is the confined liberty of a correctional rehabilitation program. *See Turner v. Safley*, 482 U.S. 78, 4-85, 107 S.Ct. 2254 (1987) (holding that state officials must be given authority and capacity to administer prisons, and courts should "accord deference to the appropriate prison authorities"). "The privilege against self-incrimination does not terminate at the jailhouse door," but "[a] broad range of choices that might infringe constitutional rights in free society fall within the expected conditions of confinement of those who have suffered a lawful conviction." *McKune*, 536 U.S. at 36 (citing *Sandin v. Conner*, 515 U.S. 472, 485, 115 S.Ct. 2293 (1995)). Thus, "[a] prison clinical rehabilitation program,

which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute *atypical and significant hardships* in relation to the ordinary incidents of prison life." *Id*. at 37-38 (emphasis added).

1. INSOMM promotes a legitimate penological objective.

Kansas's program analyzed in *McKune* and INSOMM are nearly identical and call for the same result. The Sexual Abuse Treatment Program in Kansas required inmates to complete an "Admission of Responsibility" form, where offenders had to explain the crime they were sentenced for and accept responsibility. 536 U.S. at 29. They were also required to do a sexual history form which discussed all prior sexual acts, even those that were uncharged crimes. *Id.* There are corresponding portions asking these same questions in the INSOMM Core Workbook (Dkt. 125-14, Petitioners' Ex. N. pp. 4-6; Dkt. 125-15, Petitioners' Ex. O pp. 7-8; Dkt. 125-16, Petitioners' Ex. P pp. 24-26). In both the Kansas program and INSOMM, a polygraph could be used to verify accuracy and the completeness of what the offenders had disclosed (Dkt 125-1, Deming Dec. at ¶¶ 17-18). Neither program privileged the information obtained during treatment, and in neither state were any uncharged sexual crimes reported as a result of the program (*Id.* at ¶ 14-15).

As with Kansas' program, INSOMM promotes a legitimate penological interest of rehabilitation and deterrence. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348, 351 (1987) (acknowledging rehabilitation as a long-standing legitimate penological interest). INSOMM seeks to promote rehabilitation through participants taking responsibility for their actions. For this reason, INSOMM requires participants, at least generally, to face their past sexual crimes. As Dr. Deming explained:

> Only by taking some minimal amount of responsibility for their sexual behavior and past acts of sexual violence, can an offender acquire insight into that sexual behavior, develop empathy for their victims, and learn strategies to avoid improper sexual behavior upon release to the community, and be said to have successfully completed a sexual offender treatment program.

(Dkt. 125-1, Deming Dec. at ¶ 27). In contrast, offenders who do not complete a treatment program for sex offenders are at an increased risk for recidivism (*Id.* at ¶¶ 27, 29).

Our Supreme Court recognized the relationship between treatment, responsibility, and deterrence. As Justice Kennedy noted in *McKune*, even the slightest possibility of prosecution is a powerful deterrent, and the punishment offered here reinforces the gravity of the offenses. *McKune*, 536 U.S. at 40-42. Accordingly, the Court recognized deterrence as a legitimate penological objective. *Id*. at 34. Through deterrence, INSOMM can successfully reduce rates of recidivism. And, as all justices agreed in *McKune*, such a program does not present mere subterfuge for the State to bypass the Fifth Amendment. *See McKune,* 536 U.S. at 34 (noting that the

Fifth Amendment protects inmates from "mere subterfuge for the conduct of a criminal investigation" in an "elaborate attempt" to avoid Fifth Amendment protections); *id.* at 53 (O'Connor, J., concurring) (distinguishing Kansas' program from "stark... government attempts to compel testimony"); *id.* at 68 (Stevens, J., dissenting) (conceding that the state's interest in rehabilitation is persuasive). The state's interest here is paramount and affects the fabric of trust that society has in the potential to rehabilitate those that may otherwise pose a significant threat of recidivism. *See id*. at 33 (noting that convicted sex offenders are "much more likely than any other type of offender to be rearrested for a new rape or sexual assault").

2. The consequences of loss of credit time and class for refusal to participate do not amount to compulsion or an atypical and significant hardship.

Likewise, the consequences imposed for a refusal to participate in the INSOMM program do not constitute an "atypical and significant hardship." *McKune,* 536 U.S. at 37 (citing *Sandin*, 515 U.S. at 485). The analysis must consider "the significant restraints already inherent in prison life and the State's own vital interest in rehabilitation goals and procedures" and determine whether the adverse consequences are related to the program objectives. *Id.* As the Indiana Supreme Court rightly held, Indiana's form of disciplinary response to refusal to participate in the INSOMM program does not constitute a "penalty" that would amount to compulsion under the Fifth Amendment, as other state and federal courts have found. *Bleeke*, 6 N.E.3d

at 933. Ultimately, when examining the consequences at issue, the Court must answer whether the consequences the offenders face for failing to participate fully in the INSOMM program are closer to physical torture barred by the Constitution or something less. *McKune*, 536 U.S. at 41.

The loss of credit time privileges for refusal to participate in the INSOMM program does not constitute compulsion under the Fifth Amendment. Indiana's credit time assignments and the grounds for deprivation are statutory. *See* Ind. Code §§ 35-50-6-4, -5 (2014). Inmates only acquire a liberty interest in good time after they are actually awarded, and then the statutory framework provides the due process by which they may be revoked. *Bleeke*, 6 N.E.3d at 933; Ind. Code § 35-50-6-4(e). As the Indiana Supreme Court noted, these statutes are in place to "encourage inmates…to behave while confined, improve their morale, and thus help the prison authorities to maintain order and control." *Id.* (citing *Dunn v. Jenkins*, 268 Ind. 478, 485, 377 N.E.2d 868, 873 (1978). In this way the Court drew a parallel with *McKune*, where Justice Kennedy noted that these types of incentives are "an essential tool of prison administration" calling for "wide latitude" for prison administrators to doll out as they see fit. *McKune*, 536 U.S. at 39.

The plurality in *McKune* noted that losing earned credit time was not an atypical and significant hardship in relationship to the "ordinary incident of prison life." *Id*. at 38. Likewise, it has been clearly rejected that a change

in class amounts to any compulsion. *Id.* at 47-48. The Indiana Supreme Court rightly observed, the credit time statutory framework "of carrot and stick is simply part and parcel of life as an incarcerated inmate." *Bleeke*, 6 N.E.3d at 933 (citing *McKune*, 536 U.S. at 44). Additionally, regardless of the consequence imposed, no offender's period of incarceration would be extended beyond the original sentence. *McKune*, 536 U.S. at 38 (noting that refusal to participate did not extend prison term); *id.* at 51 (O'Connor, J. concurring) (noting that impermissible compulsion may exist where additional punishment is imposed beyond what has already been imposed through the judicial process).

This approach mirrors that taken by other federal circuits. Both the First and Tenth Circuits, applying *McKune*, have found that sex offender treatment programs do not violate the Fifth Amendment even though the failure to participate in the programs places parole or good-time credits at stake. *See Ainsworth v. Stanley*, 317 F.3d 1, 5 (1st Cir.2002) (parole at stake and affirming district court's dismissal of claim by applying the standard established in *Turner v. Safley*, 482 U.S. 78, (1987)); *Searcy v. Simmons*, 299 F.3d 1220, 1226 (10th Cir.2002) (holding that "foreclosing [the inmate] from the mere *opportunity* to earn good time credits is not a new penalty, but only the withholding of a benefit ... [Kansas] is under no obligation to give"). This is also in accord with what other circuits have done in regard to circumstances such as revoking probation and parole. *DeFoy v.*

McCullough, 301 Fed. Appx. 177, 181-82 (3rd Cir. 2008) (noting that inmate "*chose* not to participate in a valid treatment program in order to avoid potential self-incrimination, and he suffered because of his choice" by refusal to reparole); *Entzi v. Redmann,* 485 F.3d 998, 1002 (8th Cir. 2007) (mere filing of petition to revoke probation—before inmate is released from incarceration—because of failure to comply with sex offender program "is not a consequence serious enough to compel him to be a witness against himself in violation of the Fifth Amendment" and, also, petition was denied by state court).

Even Justice O'Connor's approach, which other circuits have followed as a narrower holding, does not indicate that INSOMM compels self-incrimination. *See, e.g., Roman v. DiGuglielmo*, 675 F.3d 204, 213-14 (3rd Cir. 2012) (relying in part on Justice O'Connor's approach but noting that it "stops short of articulating its own test"); *Reed v. McKune*, 298 F.3d 946, 952 (10th Cir. 2002); *Lurie v. Wittner*, 228 F.3d 113, 130 (2nd Cir. 2000). Justice O'Connor noted that the risk of punishment was acceptable as long as the "actual imposition of such punishment is accomplished through a fair criminal process." *McKune*, 836 U.S. at 53 (O'Connor, J. concurring). Indeed, Indiana's scheme accomplishes this by putting into place the due process procedures for which sex offenders may be deprived credit time when they refuse to participate in the treatment program while they are incarcerated. Ind. Code § 35-50-6-5(a)(6); *see Bleeke*, 6 N.E.3d at 934 (holding that the

legislature set out the terms by which an offender who refuses to participate in the INSOMM program may be ineligible for good time credits, which comports with Justice O'Connor's "fair criminal process"). As a result, there would be no impermissible deprivation of any liberty interest without the minimal due process called for under either the plurality's or Justice O'Connor's approaches. Thus, the District Court's determination that the INSOMM program impermissibly compelled self-incrimination from participants is not supported by the actual program or the law.

CONCLUSION

This Court should reverse the district court's decision that granted the Petitioners' request for habeas relief.

Respectfully submitted,

CURTIS T. HILL, JR.
Attorney General of Indiana
Atty. No. 13999-20

By: *s/ Frances Barrow*
Frances Barrow
Deputy Attorney General
Attorney No. 15115-22

By: *s/ Larry D. Allen*
Larry D. Allen
Deputy Attorney General
Attorney No. 30505-53

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2018, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ *Frances Barrow*
Frances Barrow
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204
Telephone: (317) 233-0555
Fax: (317) 232-7979
Frances.Barrow@atg.in.gov
GZ/859241

REQUIRED SHORT APPENDIX
Table of Contents

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DONALD LACY, LAWRENCE GREER-BEY, FREDERICK HOLMES-BEY, ALLAN KIRKLEY, Individually, on behalf of all other similarly situated, Petitioners,	)	
vs.	)	Case No. 1:13-cv-811-RLY-DML
KEITH BUTTS, Respondent.	)	

Entry Discussing Petition for a Writ of Habeas Corpus

The petitioners in this habeas class action are Indiana inmates who have lost earned credit time and/or been demoted in credit earning class based on their refusal to participate in the Indiana Sex Offender Management and Monitoring Program (the "SOMM program"). They contend that the requirement of the SOMM program that they either admit to their guilt of the offense for which they were convicted and possibly other crimes or lose earned credit time and suffer a demotion in credit class, violates their Fifth Amendment right to be free from compelled self-incrimination. They therefore seek restoration of the lost credit time and credit earning class.

Procedural Background

Petitioner Donald Lacy initially brought this action individually under 42 U.S.C. § 1983. This court found that Lacy had failed to state a claim upon which relief can be granted and dismissed. The Seventh Circuit remanded and explained that, because he lost earned credit time, Lacy's claims are more properly understood under 28 U.S.C. § 2254. Lacy consented to the

conversion to a § 2254 case, counsel was appointed to represent him, and a class of petitioners was then certified. The class of petitioners is defined as:

> All persons incarcerated in the Indiana Department of Correction who have been asked to participate in the Indiana Sex Offender Management Program, who have refused to participate because they refuse to confess guilt on the primary offense or disclose other criminal conduct as required by the INSOMM program, and who have been subjected to disciplinary action in the form of lost credit time and/or demotion in credit class as a result.

The parties were permitted to conduct discovery and file briefs in support and of and in opposition to the habeas petition. The petition is now fully briefed and has been considered.

Standard of Review

The Antiterrorism and Effective Death Penalty Act provides for habeas corpus relief when a criminal defendant is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). While the parties have filed cross motions for summary judgment, they have not disputed the material facts upon which the petition is based. Accordingly, whether the filings are treated as motions for summary judgment or not, the standard is the same. The petitioners must show that, based on the applicable law, they are entitled to habeas relief.

Facts

The Indiana Department of Correction has administered the SOMM program since 1999. The SOMM program is offered to offenders who are within three to five years of their earliest possible release date and who have been convicted of a sex offense. Specific requirements of the SOMM program and penalties for failing to satisfy the requirements are at issue here.

A. *SOMM Program Requirements*

The SOMM program is intended to provide rehabilitation for sex offenders. It has three phases, each of which places different requirements on a participant.

1. Phase I

During Phase I of the SOMM program, offenders who are identified for participation are asked to participate and provided with information about the program. This includes the Sex Offender Management and Monitoring Program Participation Notification Form, which states that the program is mandatory and that failure to attend and participate will result in disciplinary action and sanctions. In addition, participants are provided with and required to sign the Informed Consent Form. This Form notifies participants that they must "discuss and take responsibility for past acts of sexual violence and abuse" and notifies participants of the "Limits of Confidentiality." They are told that information regarding past sex offending behaviors, specific case management information, and progress may be shared with others, including other treatment providers and staff, Indiana Department of Correction personnel, community providers of sex offender specific treatment services, mental health treatment providers, providers of psychiatric evaluation, treatment and/or medication, substance abuse treatment providers, polygraph examiners, other counseling related services including job training and vocational programs, family members and support persons including but not limited to clergy, 12-step sponsors, employers, and landlords. Treatment providers are required by law to report the names of any identifiable child or disabled adult victim disclosed during treatment. *See* Ind. Code § 31-33-5. In addition, information can also be shared with the Indiana Parole Board and Probation Department.

Participants must sign the Sex Offender Treatment Participation Agreement. This form addresses the level of participation required from each offender in the group. The form states that "participation is expected in all group sessions. You are required to disclose information relevant to your offending behavior. Being shy, quiet, and/or introverted are not acceptable reasons for nonparticipation."

Participants in Phase I are asked to fill out a SOMM Program Sex Offender Questionnaire. This questionnaire includes a basic check-the-box admission to sexual acts, some of which are illegal.

2. Phase II

Phase II is the group treatment phase. Based upon a review of the participant's criminal and sexual offense history, participants are split into three treatment groups, known as risk groups. These risk groups become the "Core Group" to which each participant is assigned. Core Group sessions are therapy sessions with other inmates assigned to the same risk category. Attendance in the group sessions is mandatory.

During Phase II, participants must complete a Core Group Workbook. Included in the assignments in this Workbook is a Sexual Offense Disclosure Assignment. A Sexual Offense Disclosure is a detailed written disclosure of sexual offenses, reported and unreported. Participants are asked to be detailed and specific. Participants are also advised that if participants have victims for which no report was ever made, they do not have to give identifiable information about the victims. But disclosure on the sexual history requires providing: the victim's age, the first name of the victim and the participant's relationship to the victim, what sexual behaviors were engaged in, how many times and over what period of time, where and when, how the victim was selected, if the victim was groomed, set up or isolated, how compliance or

cooperation was accomplished, and how the participant tried to avoid detection or consequences. Participants in the High Risk Core Group are asked for a description of their life situation during the period they were sexually offending, including the offender's personal, emotional, marital, work, financial, sexual, family, physical and other information; when and how they started with each victim, a detailed description of the set-up of the sexual abuse, and in what ways victims were similar to one another, for example age, appearance, race, etc.

SOMM counselors are tasked with determining whether an offender has made full disclosure on his past sexual history. Their decision on whether full disclosure has been made is final. During treatment, offenders may be referred for a polygraph examination. Polygraphs can also be requested if a counselor feels that a participant was not truthful during the sexual history disclosure. Refusal to submit to a polygraph examination can result in a Code 116 violation. If a participant passes an index polygraph examination, meaning a polygraph relating to the sex crime in which the participant was convicted, he may be excused from further participation in the SOMM program if the SOMM program staff, upon review of the participant's record, has reason to believe the participant did not commit the offense. Of 244 polygraph examinations disclosed in discovery, 1 participant was excused.

The results of a polygraph exam are discussed in group therapy. SOMM treatment files and polygraph materials and results are subject to subpoena by a Court. Ind. Code § 11-8-5-2. No treatment group exists for those offenders who categorically deny their index offenses, and have shown deception on an index polygraph or who do not wish to take a polygraph, even on a temporary basis.

3. Phase III

During Phase III of the program, participants are required to attend and participate in SOMM sex offender treatment in the community and are required to submit to polygraph examinations. These polygraph examinations are primarily maintenance and monitoring polygraphs, asking the participant about their behavior in the community. At times, the polygraph examinations may also be used to assist treatment providers in confirming aspects of an offender's sexual history.

B. *Sanctions for Failing to Participate*

An eligible participant's refusal to participate in the program results in a disciplinary violation under Code 116, "Refusing to Participate in a Mandatory Program." If found guilty, the offender is demoted to credit class III (no credit time will be earned) and will be recommended to be placed on non-contact visits. Two months after the Code 116 violation, the offender will again be asked to participate in the program. If the offender refuses again, he or she will again be charged with a Code 116 violation and, if found guilty, will be retained in credit class III (no credit time will be earned) and deprived of 180 days of earned credit time. He or she will also be subject to other non-grievous sanctions. The offender will not be eligible to earn any additional earned credit time for completing educational, vocational, or substance abuse programs.

If an inmate has committed a violation that resulted in a credit class sanction, they would automatically be promoted to the next higher credit class if they did not receive any major conduct violations in the next 90 days. But inmates who have refused to participate in the SOMM program and found guilty of a Code 116 violation are asked again to participate every 60 days. Therefore, if an offender continues to be written up for 116 violations, credit loss would be 180 days every 60 calendar days and credit class would remain III.

Offenders who pled "not guilty" to their sexual offenses may be temporarily exempted from the program if their conviction (not sentence) is in "appeal" or "post-conviction relief" status. Documentation of a pending case must be re-verified every 90 days.

Discussion

While the parties agree on the underlying facts, they dispute whether the imposition of sanctions for refusing to admit guilt or disclose other sexual activity violates the petitioners' Fifth Amendment rights. The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This right remains available even after a defendant is convicted. *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) ("A defendant does not lose this protection by reason of his conviction of a crime . . . ."). To show a Fifth Amendment violation, a party must show that the statement is: (1) testimonial; (2) incriminating; and (3) compelled. *See Hiibel v. Sixth Judicial Dist.*, 542 U.S. 177, 189 (2004).

The parties do not dispute that the statements required by the SOMM program are testimonial. "[T]o be testimonial, an accused's communication must itself, explicitly, or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201, 210 (1988). The statements at issue here undoubtedly relates facts and disclose information.

A. *Risk of Incrimination*

The parties first disagree regarding whether the testimony that the SOMM program requires carries an impermissible risk of incrimination. For questions to create an impermissible risk of incrimination through their answers, there must be "reasonable cause to apprehend danger from a direct answer." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it

is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 486-87. Answers are incriminating not only when they "would in themselves support a conviction" but also when they would "furnish a link in the chain of evidence" necessary to prosecute the claimant for a crime. *Id.* at 486.

The respondent argues that the testimony is not self-incriminating because there is no evidence that the statements might be used in future criminal proceedings or turned over to law enforcement agencies. The respondent also points out that no testimony from the SOMM program has been used to prosecute participants. The petitioners argue that the potential for self-incrimination is real because the program requires them to provide information sufficiently detailed to lead to identifiable victims and possible new criminal charges. They also stress the fact that certain information, including if a victim is a minor or a handicapped adult, must be reported to authorities.

The Indiana Supreme Court has addressed this issue and found that the disclosure requirements of the SOMM program create a risk of self-incrimination. *Bleeke v. Lemmon*, 6 N.E.3d 907 (Ind. 2014). That court concluded, "the SOMM program is primarily aimed at treatment, but also has a degree of investigatory intent. The fact that no such follow-on prosecutions has yet occurred does not change our view 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because an injurious disclosure could result.'" *Id.* at 927 (quoting *Hoffman*, 341 U.S. at 486-87).

This court agrees with the Indiana Supreme Court's conclusion on this prong of the Fifth Amendment analysis. The SOMM program requires participants not only to disclose the details

of the crimes for which they were convicted but any other past act of sexual violence. Their disclosures must be detailed, including the age of the victim, the first name of the victim, the participant's relationship to the victim, and the sexual behaviors engaged in, among other things. While the participant is not required to give the victim's name, the amount of information required is more than sufficient to expect that an investigation into the crime would be successful. Further, if a participant's counselor believes that the participant is not being completely honest, the participant may be subject to a polygraph examination during which participants are again asked detailed questions about their prior sexual history. Participants are expressly warned that there are no promises of legal immunity and that the information may be disclosed to "authorities" and to the court. They are told that any uncharged offense disclosed involving a minor or a disabled victim must be reported under Indiana law.

For testimony to be incriminating, it need only be found that it "*might* be dangerous because an injurious disclosure *could* result." *Hoffman*, 341 U.S. at 486-87 (emphasis added). There is no requirement that the testimony definitely will result in prosecution or conviction. The amount and detail of the information that a SOMM participant is required to divulge and the lack of any guarantee of confidentiality of this information certainly subjects the participants to a risk that they might incriminate themselves through their disclosures.[1]

---

[1] The respondent compares this case to that in *Neal v. Shimoda*, 131 F.3d 818, 833 (9th Cir. 1997), where the Ninth Circuit held that the disclosures required by a similar treatment program did not create a risk of self-incrimination. But the plaintiffs in that case challenged the requirement that they admit the crimes for which they were convicted. Because one had already been convicted and was not pursuing post-conviction relief and the other had pled guilty and his plea included a waiver of prosecution for other offenses, there was no possibility that these plaintiffs would be prosecuted based on their statements. In other words, there was no chance that a responsive answer "might be dangerous." *See Hoffman*, 341 U.S. at 486-87.

The respondent also relies on *Allison v. Snyder*, 332 F.3d 1076, 1080 (7th Cir. 2003). The plaintiffs in that case were civil detainees who are offered participation in a treatment program,

B. *Compulsion*

The parties also disagree whether the consequences to someone required to participate in the SOMM program for remaining silent amount to compulsion in violation of the Fifth Amendment. As a general rule, testimony is compelled when the state threatens to inflict "potent sanctions" unless the constitutional privilege is waived or threatens to impose "substantial penalties" because a person elects to exercise that privilege. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977). The Supreme Court addressed a question of whether imposition of penalties for failing to participate in a treatment program for sexual offenses in *McKune v. Lile*, 536 U.S. 24 (2002). *McKune* therefore necessarily forms the analytical framework for consideration of the SOMM program. But *McKune* did not have a majority opinion and the penalties at issue in *McKune* differ from those in this case. The court must therefore consider whether the penalties imposed for failing to participate in the SOMM program amount to unconstitutional compulsion.

1. *McKune v. Lile*

The plaintiff in *McKune* was a Kansas state inmate who had refused to participate in the Sexual Abuse Treatment Program before his scheduled release from prison. That program required participants to accept responsibility for the crime for which they had been sentenced. Participants were also required to complete a sexual history form, detailing all prior sexual activities, regardless of whether such activities constitute uncharged criminal offenses. For his refusal to participate in the program, the plaintiff's privilege status was reduced from Level III to Level I. This resulted in a reduction of a number of his prison privileges, including visitation

---

and if they are successful, they are entitled to be released and have the charges against them dismissed. Far from finding that the plaintiffs were not at risk of incriminating themselves, the Seventh Circuit conceded that the plaintiffs might incriminate themselves, but concluded that this possibility is not a ground for recovery of damages in a § 1983 action. *Id.* (quoting *Chavez v. Martinez*, 538 U.S 760 (2003)).

rights, work opportunities, ability to send money to family, canteen expenditures, and access to a personal television. In addition, he would be transferred to a maximum-security unit, where his movement would be more limited, he would be moved from a two-person to a four-person cell, and he would be in a potentially more dangerous environment. *McKune*, 536 U.S. at 31. The plaintiff argued that these penalties violated his Fifth Amendment rights.

While the Supreme Court did not issue a majority opinion, a majority of the Court agreed that these penalties did not amount to compulsion under the Fifth Amendment. *Id.* at 37-38 (Kennedy, J., plurality). The four-Justice plurality identified the "central question" as "whether the State's program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right." *Id.* at 35. The pluarlity went on to state: "A prison clinical rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." *McKune*, 536 U.S. at 37-38. The plurality noted that the plaintiff's decision not to speak did not extend his period of incarceration or affect his eligibility for good-time credits or parole. *Id.* at 38. "Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not." *McKune*, 536 U.S. at 41.

Justice O'Connor concurred in the result, but wrote separately. She stated that "the Fifth Amendment compulsion standard is broader than the 'atypical and significant hardship' standard we have adopted for evaluating due process claims in prisons." *McKune*, 536 U.S. 48

(O'Connor, J., concurring). But she did not "believe the consequences facing respondent in this case are serious enough to compel him to be a witness against himself." *Id.* at 50. She did not state a particular test for determining what degree of penalty amounts to compulsion in the prison context. She noted, however, that a proper inquiry should "recognize that it is generally acceptable to impose the risk of punishment, however great, so long as the actual imposition of such punishment is accomplished through a fair criminal process" and so long as it stops short of punishments such as "longer incarceration or execution"—penalties that "would surely implicate a 'liberty interest.'" *Id.* at 53.

B. *Severity of the Consequences for Failing to Participate*

Because there is not a majority opinion in *McKune*, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States*, 430 U.S. 188 (1977). Applying *Marks*, a number of courts have treated Justice O'Connor's opinion as controlling. *See United States v. Antelope*, 395 F.3d 1128, 1134 n.1 (9th Cir. 2005); *Ainsworth v. Stanley*, 317 F.3d 1, 4 (1st Cir. 2002); *Searcy v. Simmons*, 299 F.3d 1220, 1225 (10th Cir. 2002). The petitioners argue that whether the plurality's test or Justice O'Connor's test is applied, the SOMM program fails. The petitioners explain that the plurality and the concurrence considered the severity of the sanctions at issue in light of the prison context and conclude that the sanctions here – which amount to extended incarceration – are so great that they amount to compulsion. The respondent applies the plurality's test and argues that the consequences for failure to participate in the SOMM program do not constitute an "atypical and significant hardship" in relation to the ordinary incidents of prison life.

The Indiana Supreme Court addressed this issue in *Bleeke*. The court concluded that losing credit time for failing to participate in the SOMM program would not be an "atypical and significant hardship[] . . . in relation to the ordinary incidents of prison life." *Bleeke*, 6 N.E.3d at 932 (citing *McKune*, 536 U.S. at 38). The court also concluded that the same would result under Justice O'Connor's *McKune* analysis because the decision to assign the inmate to the SOMM was based on a "fair criminal process" – his conviction for a sex crime. *Bleeke*, 6 N.E.3d at 934. In other words, the Indiana Supreme Court held that "the State was permitted to present Bleeke – and all SOMM inmates – with a constitutionally permissible choice: participate in the SOMM program and maintain a more favorable credit status and/or privileges within the prison system or a favorable assignment in a community transition program, or refuse to participate and instead serve out the full term for which he had been lawfully convicted." *Id.* at 935.

Relying on *Bleeke*, the respondent argues that the consequences faced for failure to participate in the SOMM are the loss of *privileges*, not *rights*. But, Indiana statute creates a non-discretionary guarantee to good-time credits. Indiana Code § 35-50-6-3 provides for persons convicted before July 1, 2014:

> (b) A person assigned to Class I earns one (1) day of good time credit for each day the person is imprisoned for a crime or confined awaiting trial or sentencing.
> (c) A person assigned to Class II earns one (1) day of good time credit for every two (2) days the person is imprisoned for a crime or confined awaiting trial or sentencing.
> (d) A person assigned to Class III earns no good time credit.
> (e) A person assigned to Class IV earns one (1) day of good time credit for every six (6) days the person is imprisoned for a crime or confined awaiting trial or sentencing.

There are no qualifications to these rights and no discretion regarding whether or not the credit time will be awarded. The Indiana Court of Appeals has repeatedly held the same. *Maciaszek v. State*, 75 N.E.3d 1089, 1092 (Ind. Ct. App. 2017) (Good time credit under that statute is a

"matter of statutory right, not a matter of judicial discretion.") (quoting *Weaver v. State*, 725 N.E.2d 945, 948 (Ind. Ct. App. 2000)); *Weaver v. State*, 725 N.E.2d 945, 947 (Ind. Ct. App. 2000) ("[W]hen Indiana Code Section 35-50-6-3 provides, without qualification or exception, that a person imprisoned for a crime or confined awaiting trial or sentencing 'earns one (1) day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing,' we must assume from the plain language of this provision that a trial court has no discretion in the granting or denial of pre-sentence jail time credit."). In other words, Indiana state prisoners have a liberty interest in good time credits as soon as they are earned. *See Cochran v. Buss*, 381 F.3d 637, 639 (7th Cir. 2004) (recognizing liberty interest in good time credits); *McPherson v. McBride*, 188 F.3d 784, 785 (7th Cir. 1999) (same).

The mandatory nature of earned good time credits in Indiana distinguishes the penalties in the SOMM program from those in *McKune* and in other cases where the penalties were found not to amount to compulsion.[2] For example, the Tenth Circuit in *Searcy v. Simmons*, 299 F.3d 1220 (10th. Cir. 2002), considered a similar program. The plaintiff in that case, a Kansas inmate, lost good time credit and the ability to earn good time credit for failing to participate in the sex offender treatment program. But, the court explained, "it is quite clear that Kansas does not make any promises regarding an inmate's ability to earn good time credits." *Id.* at 1226 (citing Kan. Stat. 21-4722). "Thus, at most, foreclosing Mr. Searcy from the mere *opportunity* to earn good time credits is not a new penalty, but only the withholding of a benefit that the KDOC is under no obligation to give." *Id.*; *see also Ainsworth v. Stanley*, 317 F.3d 1, 5 (1st Cir. 2002) (failure to

[2] The respondent argues that, while an inmate will receive a conduct report for failing to participate in the SOMM program, "there is no guarantee that an offender will be found guilty of the conduct report." But the class of petitioners in this case is defined as inmates "who have been subjected to disciplinary action in the form of lost credit time and/or demotion in credit time" as a result of their failure to participate in the SOMM program.

participate in a similar program which almost always results in the denial of parole did not amount to compulsion; noting that "inmates do not have a liberty right to parole"); *Thorpe v. Grillo*, 80 Fed.Appx 215 (3d Cir. 2003) (failure to participate in the program did not subject the plaintiff to additional punishment, extend the term of his incarceration, or automatically deprive him of consideration for parole); *Edwards v. Goord*, 362 Fed. Appx. 195 (2d Cir. 2010) (revocation of good time credits that the department of correction had discretion to award); *Wolfe v. Pennsylvania Dep't of Corr.*, 334 F.Supp.2d 762 (E.D. Pa. 2004) (participation in the program is voluntary, but if the plaintiffs do not participate, they are unlikely to receive parole).

The Ninth Circuit considered penalties similar to those the SOMM program provides in *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005). The plaintiff's probation in that case was revoked as a result of his refusal to participate in a program that would require him to disclose his sexual history. Applying Justice O'Connor's opinion in *McKune*, the court explained that "although it may be permissible for the state to impose harsh penalties on defendants when it has legitimate reasons for doing so consistent with their conviction for their crimes of incarceration, it is a different thing to impose 'penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony.'" *Id.* at 1137 (quoting *McKune* 536 U.S. at 53 (O'Connor, J., concurring)). The court agreed that the policy of requiring inmates to provide a sexual history had important rehabilitative goals, but found that those disclosures may be "starkly incriminating." *Id.* at 1138. The court also pointed out that Justice O'Connor made clear that she would not have found a penalty of longer incarceration to be constitutionally permissible. *Id.*

For refusing to participate in the SOMM program, the class members have lost significant earned credit time and the ability to earn any more credit time. Such sanctions, which directly

interfere with an inmate's liberty interest in their good time credits, would not survive the plurality's test in *McKune*, which held that a prison program does not violate the privilege against self-incrimination "if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." *McKune*, 536 U.S. at 37-38 (Kennedy, J., plurality). Here, the loss of otherwise-guaranteed good time credits certainly creates an "atypical and significant hardship." *McKune*, 536 U.S. at 37-38 (Kennedy, J., plurality).

The sanctions at issue – which necessarily force a petitioner to incriminate himself or face the extension of his incarceration – also would not hold up to Justice O'Connor's view of impermissible compulsion under the Fifth Amendment.[3] *McKune*, 536 U.S. at 52 (O'Connor, J. concurring). As Justice O'Connor explained, "penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony." *McKune*, 536 U.S. at 53 (O'Connor, J. concurring). She also suggested that lengthening a person's incarceration would implicate a liberty interest. *Id.* at 52. Here, by taking away earned credit time that an inmate is otherwise guaranteed, disciplinary action for failure to

[3] The respondent argues, and the *Bleeke* court concluded, that because the state may require an inmate to participate in the SOMM program by statute, Ind. Code 35-50-6-5(a), participation in the SOMM program and sanctions for its consequences are necessarily part of the inmate's sentence. Based on this reasoning, the inmate does not face *additional* punishment or sanction for his failure to comply, but merely the punishment imposed by statute. The statue provides that an inmate may "be deprived of any part of the credit time the person has earned . . . [i]f the person is a sex offender . . . and refuses to participate in a sex offender treatment program." But the statute itself does not include the waiver of the defendant's Fifth Amendment rights. It is undoubtedly true that earned credit time may be deprived for failure to follow prison rules or failure to participate in a required program. But this does not lead to a conclusion that the prison rules at issue or the program may violate an inmate's constitutional rights. It therefore does not make any requirement of the program part of the inmate's sentence such that the denial of earned credit time is unassailable.

participate in the SOMM program imposes penalties that go well beyond the criminal process through which the inmate was convicted.

The *Bleeke* court reached a different conclusion based on its reasoning that good time credits are not "constitutionally required" and that the denial of these credits is based on the fair criminal process that resulted in the inmate's sex offense conviction. But, as this court has already concluded, because earned credit time in Indiana is not discretionary, inmates have a liberty interest in this credit time. Further, the "fair criminal process" which resulted in the petitioners' sex offense convictions contemplates only the sentence for the crime for which they were convicted. They are entitled, statutorily, to be able to earn credit toward this sentence like any other convicted prisoner. The denial of their ability to do so for their failure to incriminate themselves in the course of the SOMM program implicates their liberty rights and results in compulsion in violation of the Fifth Amendment. [4]

[4] The respondent resists this conclusion, comparing this case to *Minnesota v. Murphy*, 465 U.S. 420 (1984). While the plaintiff in that case, Marshall Murphy, was on probation, his probation officer questioned him about another crime for which he was suspected. He answered those questions, incriminated himself, and later sought to have his answers suppressed at this criminal trial. The Supreme Court held that Murphy's disclosures were not compelled in violation of the Fifth Amendment and could be used against him in the criminal prosecution. The respondent asserts that Murphy faced increased imprisonment of up to 16 months for choosing to remain silent. But in its discussion of Murphy's probation, the Court pointed out that while Murphy was required to answer his probation officer's questions truthfully, the conditions "said nothing about his freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution." *Id.* at 437. Because there was no stated penalty for declining to provide answers that may be incriminating, Murphy's statements were not compelled. *Id.* The Court pointed out that "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." *Id.* at 436. The *Murphy* Court, in other words, did not hold that someone's incarceration could be extended for his failure to incriminate himself, but suggested that it could not.

Conclusion

It is undeniable that prison authorities may, in the interest of rehabilitation, impose penalties for failing to participate in sex offender treatment programs. But the SOMM program at issue in this case provides significant penalties, in the form of lost earned good time credits and demotion in credit class, for choosing to remain silent. For the reasons discussed above, these penalties are so severe that they amount to compulsion in violation of the Fifth Amendment. The class petition for a writ of habeas corpus is therefore **granted**. The petitioners' motion for summary judgment, dkt. [123], is **granted** and the cross-motion for summary judgment, dkt. [132], is **denied**. The disciplinary actions and sanctions for failing to participate in the SOMM program must be **vacated**.

IT IS SO ORDERED.

Date: September 27, 2017.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

CIRCUIT RULE 30(D) STATEMENT

Pursuant to Circuit Rule 30, the Appellant submits the following as the Required Short Appendix. Appellant's Required Short Appendix contains all of the materials required under Circuit Rule 30(a) and 30(b).

s/ Frances Barrow
Frances Barrow
Deputy Attorney General

PROOF OF SERVICE

The undersigned hereby certifies that the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and has been served upon each of the parties who has appeared via the Court's Electronic Case Management System on February 2, 2018.

s/ Frances Barrow
Frances Barrow
Deputy Attorney General