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.

REPLY BRIEF OF APPELLANT

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

FRANCES BARROW
Deputy Attorney General
Atty. No. 15115-22
Office of Attorney General
Indiana Government Center South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
TEL: 317/ 233-0555
FAX: 317/232-7979

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

SUMMARY OF THE ARGUMENT

INSOMM does not present a substantial threat of incrimination. It is a rehabilitative program that requires sex offenders to admit and take responsibility for their sexual misbehaviors as part of treatment. The program does not violate the Fifth Amendment privilege against self-incrimination because there is no evidence that the State uses or intends to use those admissions in future criminal proceedings.

Disclosure of past sexual behavior is a necessary part of treatment; prisoners must take responsibility for their past misconduct. Courts discussing sex offender treatment programs that also require disclosure of sexual histories have determined that the purpose of disclosure is effective treatment, not seeking incriminating information.

The INSOMM program does not compel incriminating statements. It does not matter that in Indiana credit time is given by statute and not at the discretion of prison officials. To the extent Indiana prisoners have a liberty interest in credit time, their due process rights are the same as any other prisoners. A prisoner's having a liberty interest in credit time has nothing to do with compulsion under the Fifth Amendment.

Indiana prisoners have a constitutionally permissible choice. They may participate in INSOMM and thus obtain early release, or refuse to participate and instead serve out the full term for which they were lawfully convicted.

Immunity is not an option. If prisoners know they will never be prosecuted for past offenses, they may be led to believe that society does not consider their crimes to be serious. For that reason, Federal prisons and other states with similar treatment programs do not offer immunity.

I.
INSOMM does not present a substantial threat of incrimination.

INSOMM is a rehabilitative program that requires sex offenders to admit and take responsibility for their sexual misbehaviors as part of treatment. The program does not violate the Fifth Amendment privilege against self-incrimination because there is no evidence that the State uses or intends to use those admissions in future criminal proceedings.

A. INSOMM is a therapeutic setting.

The privilege against self-incrimination is only sustained where it is "evident from the implications of the question, *in the setting in which it is asked,*" that answering the question might be dangerous because an incriminating disclosure could result. *Hoffman v. United States*, 341 U.S. 479, 486–87 (1951) (emphasis added). Thus, the setting where disclosure is sought is important, and here it is a rehabilitative treatment program.

The petitioners argue that "[t]he mandatory detailed disclosures required by the INSOMM program create a particular and apparent threat of future prosecution sufficient to rise to the level of a constitutional claim" (Appellees' Br. 14). But that ignores the setting of the INSOMM program. *Hoffman*, 341 U.S. at 486-87.

INSOMM is a therapeutic setting in which sexual histories are required to assist therapists in providing meaningful treatment, not to gather incriminating evidence for law enforcement purposes. And the petitioners do not and cannot point to a single prosecution resulting from information acquired in the INSOMM treatment process.

The district court acknowledged the unique setting of INSOMM, observing that it "is intended to provide rehabilitation for sex offenders" (App. 3). The Supreme Court has emphasized that "clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism." *McKune v. Lile*, 536 U.S. 24, 34 (2002). And a critical "component of those rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct" because "'[d]enial is generally regarded as a main impediment to successful therapy.'" *Id*. at 33 (quoting H. Barbaree, Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome, 3 Forum on Corrections Research, No. 4, at 30 (1991)). "'Therapists depend on offenders' truthful descriptions of events leading to past offences in order to determine which behaviors need to be targeted in therapy.'" *Id.* Just as an attorney cannot fullyprovide effective legal services to a client who conceals information from the attorney, so too is a therapist unable to provide effective sex-offender treatment to a sex offender who refuses to disclose the details of his sexual past.

B. Sexual history is not obtained for purposes of incrimination.

The petitioners outline in detail the disclosures required by INSOMM, arguing that by asking for this information "the state demands incriminating information" (Appellees' Br. 13). The fact that the information may be confirmed by polygraph, the petitioners continue, "represents another deep dive into incriminating territory" (Appellees' Br. 11). The petitioners seem to believe that INSOMM is uniquely geared toward obtaining incriminating information, but the programs described in other cases are very similar, and the courts have not found any intent to obtain incriminating information, as opposed to an intent to provide successful sex-offender treatment.

In *McKune*, for example, prisoners had to disclose all prior sexual activities, and the information was subject to verification by polygraph. 537 U.S. at 30. The Court noted the State's argument that no inmate had ever been charged or prosecuted for any offense based on information disclosed in treatment, and determined there was no contention "that the program is a mere subterfuge for the conduct of a criminal investigation." *Id*. at 34. Nor was there any indication that the program was "merely an elaborate ruse to skirt the protections of the privilege against compelled self-incrimination." *Id*. at 48.

The prisoners in *Searcy v. Simmons* had to provide a complete sexual history, verifiable by polygraph, based on a sample form that called for victims' names and ages (not required in Indiana), and the age of the prisoner at the time of the incident. 299 F.3d 1220, 122 (10th Cir. 2002). Nevertheless, the Tenth Circuit

concluded that although there existed a potential for disclosure of incriminating information, "there [was] no assertion that the [Kansas DOC was] using the [Kansas program] as a surreptitious means to obtain evidence for criminal prosecutions." *Id.* at 1227.

Similarly, the Indiana Supreme Court in *Bleeke v. Lemmon* determined there was no evidence that INSOMM was being used "as a fishing expedition to identify other uncharged crimes … or is threatening the loss of credit time purely to compel incriminating testimony." 6 N.E.3d 907, 934 (Ind. 2014).

By contrast, in *United States v. Antelope* a counselor in the sex offender treatment program admitted that he had turned over evidence of past crimes to the authorities, that he had in fact reported crimes that led to additional convictions, and he would continue to turn over such evidence in the future. 395 F.3d 1128, 1135 (9th Cir. 2005). The Ninth Circuit concluded that the prisoner "has shown a sufficiently real possibility of incrimination." *Id.* But the petitioners in this case have made no such showing.

C. There is no evidence of "investigatory intent."

Even though *Bleeke* recognized that requesting sexual history was not an effort to discover uncharged crimes, the court still determined that "the SOMM program is primarily aimed at treatment, but also has a degree of investigatory intent." 6 N.E.2d at 927. The district court relied on this language (App. 8), and so do the petitioners (Appellees' Br. 15), in support of petitioners' conclusion that INSOMM presents a substantial threat of incrimination. But finding an

"investigatory intent" is inconsistent with determining that INSOMM is not a "fishing expedition to identify other uncharged crimes" "or is threatening the loss of credit time purely to compel incriminating testimony." 6 N.E.3d at 934.

The undisputed purpose of INSOMM is to provide rehabilitative treatment and prevent recidivism. No evidence shows that any INSOMM disclosures have been turned over to authorities or resulted in criminal prosecutions. Therapists use offenders' sexual histories to provide effective treatment, not to investigate crimes.

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). The program's integrity "would be very much in doubt" if the State were "forced to graduate prisoners from [INSOMM] without knowing what other offenses they may have committed." *McKune*, U.S. 536 at 47-48.

II.
The INSOMM program does not compel incriminating statements.

The district court determined that because Indiana prisoners are statutorily entitled to earn credit time, "[t]he 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" (App. 17). The district court's rationale embraces dicta from Justice O'Connor's concurring opinion in *McKune* suggesting that "the imposition of [longer incarceration] as a penalty for refusing to incriminate oneself would surely implicate a 'liberty

interest.'" 536 U.S. at 52 (O'Connor, J., concurring). But in relying on this dicta, neither the district court nor the petitioners explain how a prisoner's having a liberty interest in credit time has anything to do with compulsion under the Fifth Amendment.

A. A liberty interest in credit time has no bearing on the Fifth Amendment compulsion analysis.

The State's brief cited cases that held sanctions affecting the length of imprisonment are not compulsion (Appellant's Br. 22-23). The petitioners counter that in the cases cited in the State's opening brief "petitioners are merely being denied discretionary relief from a penalty already imposed," and "[t]his is not a situation where good time credits are a discretionary measure controlled by the department of corrections" (Appellees' Br. 22). The district court also distinguished those cases on this basis; Indiana prisoners have a statutory right to credit time, and prisoners in other states earn credit time at the discretion of prison officials (App. 14). "In other words, Indiana state prisoners have a liberty interest in good time credits as soon as they are earned" (*Id.*). It does not matter whether credit time initially is mandatory or discretionary. This is not a valid basis on which to distinguish the cases cited in the State's brief.

Neither the petitioners nor the district court explain how Indiana prisoners have any greater liberty interest than prisoners in states where credit time is awarded as a matter of discretion. *See e.g. Searcy*, 299 F.3d at 1226 (sanction for refusing to participate in sex offender treatment resulted in the mere opportunity to earn good time credit where the Kansas Department of Correction had discretion

whether to award such credit time). Once the credit time is awarded, the due process protections would be the same under *Wolff v. McDonnell*, 418 U.S. 539, 563-567 (1974) and *Superintendent v. Hill*, 472 U.S. 445, 454 (1985).

B. Taking away credit time is not compulsion.

The consequences of loss of credit time and credit class for refusing to participate in INSOMM do not amount to compulsion or an "atypical and significant hardship" (Appellant's Br. at 20, citing *McKune*, 536 U.S. at 38 (plurality)).[1] The Indiana Supreme Court rightly observed that 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). The State is permitted to present an INSOMM inmate "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 refuse to participate and instead serve out the full term for which he had been lawfully convicted." *Id*. at 934.

By wanting to avoid INSOMM but still have the benefit of a shortened sentence, the offender in *Bleeke* sought "to have his cake and eat it too." *Bleeke*, 6 N.E. 3d at 935. He wanted to "refuse to participate in a program legitimately aimed at his rehabilitation, but yet still receive the full benefits of a shortened sentence … ." *Id*. He would "thus re-enter society more quickly, but without the benefits of

[1] The Appellant's Brief inadvertently argued at pages 21 to 22 that "it has been clearly rejected that a change in class amounts to any compulsion," citing *McKune*, 536 U.S. at 47-48. The *McKune* plurality opinion actually is not as clear as this argument suggests.

rehabilitative care." *Id*. "The State is not required to afford such an option to incarcerated inmates." *Id*.

In addition to *Bleeke*, federal circuits have held 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 (Appellant's Br. 22-23, citing *e.g. Ainsworth v. Stanley*, 317 F.3d 1, 5 (1st Cir.2002); *Searcy*, 299 F.3d at 1226). Petitioners argue that these cases are inapposite because they involve discretionary relief and not a situation where good time credits are statutorily guaranteed (Appellees' Br. 22, referring to a nonexistent page 27 of Appellant's Brief, and citing cases not mentioned in that brief: *Thorpe v. Grillo* and *Edwards v. Goord*).

But as discussed above, the fact that an Indiana statute provides for the grant of credit time has no bearing on whether taking away credit time that has already been earned is compulsion under the Fifth Amendment.

Searcy succinctly concluded that the sanctions implicating credit time are "not the result of [a prisoner's] refusal to incriminate himself, but are a consequence of his inability to complete rehabilitation the [Kansas DOC] has determined – in light of the serious offense for which [the prisoner] was convicted – is in the best interest for [the prisoner] and society." 299 F.3d at 1227. Indiana prisoners who lose credit time for refusing to participate in INSOMM incur the sanction because they are unable to complete the rehabilitation provided by the program, but because

they refuse to incriminate themselves. They are given a "constitutionally permissible choice." *Bleeke*, 6 N.E. 3d at 934.

C. Immunity is not an option.

The petitioners suggest that immunity would solve the problem (Appellees' Br. 25). But they ignore the problems with that solution. If prisoners know they will never be prosecuted for past offenses, "they may be left with the false impression that society does not consider those crimes to be serious ones." *McKune*, 536 U.S. at 34. Also, the Federal Bureau of Prisons and other States with similar treatment programs do not offer immunity. *Id*. at 35 (citing *Ainsworth v. Risley*, 244 F.3d 209, 214 (1st Cir. 2001) (describing New Hampshire's program)).

The practical effect of offering immunity for INSOMM disclosures would be that offenders convicted of a single sex offense "would be given a windfall for past bad conduct, a result potentially destructive of any public or state support for the program and quite at odds with the dominant goal of acceptance of responsibility." *McKune*, 536 U.S. at 47.

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

FED. R. APP. P. 32(g) WORD COUNT CERTIFICATE

Pursuant to Fed. R. App. P. 32(g), the undersigned counsel for the Appellant certifies that this brief complies with the type-volume limitations of Circuit Rule 32(c) because the brief contains 2,385 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief has been prepared in a proportionally spaced typeface using Microsoft Word Century Schoolbook typeface in font size 12 for the text and font size 11 for the footnotes. See Cir. R. 32(b).

s/ *Frances Barrow*
Frances Barrow
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 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/859989