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,

vs.

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
Case No.: 1:13-cv-00811-RLY-DML
The Honorable Richard L. Young
District Court Judge

BRIEF OF THE PETITIONER-APPELLEE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 17-3256
Donald Lacy v. Keith Butts

The full name of every party that the attorney represents in this case:

Donald Lacy

The names of all law firms whose partners or associates have appeared for the party in this case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Indiana Federal Community Defenders, Inc.

Date: June 12, 2018

s/Sara J. Varner
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JURISDICTIONAL STATEMENT

The Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUE

When the penalties for remaining silent are demotion in credit class and taking of statutorily guaranteed good time credit, thereby extending the duration of incarceration, is the Fifth Amendment right against compelled self-incrimination violated?

STATEMENT OF THE CASE[1]

This case arose when Petitioner, Donald Lacy, filed a Complaint with the United States District Court for the Southern District of Indiana on May 16, 2013, under 42 U.S.C. § 1983. Dkt. 1. Mr. Lacy alleged that the Indiana Sex Offender Monitoring and Management Program ("INSOMM") was unconstitutional and violated his Fifth Amendment right against compelled self-incrimination. On September 11, 2013, the District Court entered Judgment, dismissing the action for failure to sate a claim upon which relief could be granted. Dkt. 8. On appeal, this Court vacated and remanded the ruling, sending the case back with instructions for the district court to explore the consequences that Indiana attaches to the refusal to participate in the INSOMM

[1] The following abbreviations are used herein: Docket: "Dkt. #", the Appendices are referenced as follows: Appendix: "App. page #"; Supplemental Exhibits Appendix Volume 1, "Ex. App. v1 page #"; Supplemental Exhibits Appendix Volume 2, "Ex. App. v2 page #".

program in light of the Supreme Court's ruling in *McKune v. Lile*, 536 U.S. 24 (2002). Dkt. 24, 13-3171, Dkt. 15.

Joined by his fellow inmates, Mr. Lacy and the Class Representatives below desired to seek the certification of a class in order to protect not only their rights, but also the rights of those who would come after them in the Indiana Department of Corrections. On September 30, 2015, the district court certified a class. Dkt. 93. The Class, as defined by the court consists of:

> All persons incarcerated in the Indiana Department of Corrections 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.

Id.

After a lengthy period of discovery, the Petitioners filed their Motion for Summary Judgment and brief in Support on July 10, 2017. Dkt. 123, 124, 125. As a part of that motion, the Petitioners included a Joint Statement of Material Facts not in Dispute. Dkt. 125, p. 7-25, App. 19. Though the Appellant has referenced and relied upon few of them in their brief to this Court, the Respondent's filings in the district court represented their unfettered agreement to those facts. Dkt. 132, p. 4. "Respondent relies upon those material facts listed in Petitioner's "Joint Statement of Material Facts" ECF 125 (at pp. 7-25)" Dkt. 132, p.4. Those facts are excerpted here in the appendices to

this brief, in the same format as originally submitted, along with the exhibits related thereto, as they form the solid basis for the district court's ruling on the Summary Judgment motion and are therefore critical for this Court's *de novo* review and are included under Circuit Rule 30(b)(6).

On September 28, 2017, finding that the INSOMM program's policy of taking good time credit and demotion in credit class as a consequence of choosing to remain silent rose to the level of compulsion in violation of the Fifth Amendment, the district court granted summary judgment in Petitioner's favor. Dkt. 135, App. 1. This appeal follows.

SUMMARY OF THE ARGUMENT

After review of a detailed statement of joint material facts not in dispute the district court found as a matter of law that the INSOMM program was a violation of the Fifth Amendment right against compelled speech. The Appellant does not argue that a dispute exists over a material fact, but instead seeks to overturn the legal conclusion. On *de novo* review, this Court should affirm the district court because Supreme Court precedent, *McKune v. Lile*, 536 U.S. 24, 33 (2002), leads directly to the district court's conclusion that the INSOMM program presents a real and appreciable risk of self-incrimination and that the demotion in credit class and/or taking of statutorily guaranteed credit time rises to the level of compulsion.

ARGUMENT

The INSOMM program presents a real and appreciable danger of self-incrimination and the loss of statutorily guaranteed credit time rises to the level of compulsion.

I. Argument

A. Introduction

A bedrock principal of American law is the right to freedom of speech, the right to speak without being censored by the Government. But the right extends farther. It includes the implied right not to speak, the right to remain silent. The Fifth Amendment prohibits the government from forcing a person to testify against himself "nor shall any person... be compelled in a criminal case to be a witness against himself." U.S. Const. amend. V. The privilege allows an individual to refuse to "answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers may incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). In *Malloy v. Hogan*, 378 U.S. 1 (1964) the United States Supreme Court extended the privilege against self-incrimination to state action through the Due Process Clause of the Fourteenth Amendment.

In order for the privilege to apply, two distinct elements must be present-compulsion and incrimination. The privilege prohibits only statements that are compelled *and* that present a "real and appreciable" risk of incrimination. *Brown v. Walker*, 161 U.S. 591, 599 (1896). As a general rule, compulsion is present 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 the privilege. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

The Indiana Sex Offender Monitoring and Management Program ("INSOMM") is a mandatory program which denies inmates the right to assert their Fifth Amendment privilege by compelling participants to speak where they would otherwise remain silent. Inmates mandated to the program face the intolerable choice, speak and admit guilt, or be demoted in credit class and lose statutorily guaranteed good credit time at a rate faster than it can be earned.

The INSOMM program has an understandably important focus. It provides treatment and rehabilitation to sex offenders with the goal of reducing recidivism[2]. The program began in 1999[3] during a period of moral panic and what has been called "sex offense hysteria" in the United States[4]. During that time, it was thought that sex offenders recidivated at a higher rate than any other type of offender[5]. We now know that is not true. Studying released persons in 30 states over a period of five years revealed that sex offenders are no more likely to reoffend than the perpetrators of other crimes[6]. These statistics make the INSOMM program's required sweeping admissions

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[2] Deming Declaration, Exhibit A, Dkt. 125; Ex. App. v1, p. 1
[3] Id.
[4] *Friedman v. Rehal*, 618 F.3d 142, 155-156 (2nd Cir. 2010).
[5] *McKune v. Lile*, 536 U.S. 24, 33 (2002).
[6] Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005-2010.* Available at: https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf

of guilt and the consequential demotion in credit class and taking of good time credit for refusal deeply troubling.

Recidivism of prisoners released in 30 states in 2005, by most serious commitment offense and time from release to first arrest

	Cumulative percent of released prisoners arrested within—					
Most serious commitment offense	6 months	1 year	2 years	3 years	4 years	5 years
All released prisoners	28.2%	43.4%	59.5%	67.8%	73.0%	76.6%
Violent	24.9%	38.4%	53.8%	61.6%	67.2%	71.3%
Homicide[a]	12.5	21.5	33.9	41.5	47.0	51.2
Murder	10.1	18.8	30.4	37.8	43.6	47.9
Nonnegligent manslaughter	17.3	27.7	39.4	46.0	51.5	55.7
Negligent manslaughter	13.2	21.9	35.5	43.7	48.8	53.0
Rape/sexual assault	20.8	30.9	43.7	50.9	56.0	60.1
Robbery	25.8	41.0	58.6	66.9	72.8	77.0
Assault	27.9	42.6	58.9	67.1	72.9	77.1
Other	28.7	43.4	56.6	63.0	66.9	70.4
Property	33.6%	50.3%	66.7%	74.5%	79.1%	82.1%
Burglary	31.0	48.7	65.8	73.9	78.9	81.8
Larceny/motor vehicle theft	39.3	56.2	70.8	77.6	81.6	84.1
Fraud/forgery	27.7	42.2	60.0	68.6	73.2	77.0
Other	33.2	49.5	66.6	75.5	80.9	83.6
Drug	26.9%	42.3%	59.1%	67.9%	73.3%	76.9%
Possession	28.7	44.5	60.7	69.6	75.2	78.3
Trafficking	26.9	41.5	58.0	66.6	71.9	75.4
Other	25.3	41.4	59.3	68.3	73.6	78.1
Public order	25.6%	40.1%	55.6%	64.7%	69.9%	73.6%
Weapons	35.3	49.1	65.1	73.1	76.9	79.5
Driving under the influence	11.9	22.1	37.2	48.0	54.9	59.9
Other[b]	27.8	44.9	60.4	69.2	74.1	77.9

The issue squarely presented by this case addressees a specific unanswered question remaining after the Supreme Court's decision in *McKune*. Does the demotion in credit class and/or taking of statutorily guaranteed credit time, thereby extending the duration of the incarceration, rise to the level of compulsion?

B. INSOMM and the Real and Appreciable Risk of Incrimination

Participation in the INSOMM program is mandatory for those inmates who have a history of sex offense conviction[7]. Participation in the INSOMM program begins when an inmate begins to near his release date and is "called out" to be asked to begin the

[7] Executive Directive #15-13, Exhibit C, Dkt. 125; Ex. App. v1p. 57

program[8]. This phase of the program is referred to by the INSOMM providers as "Assessment and Consent"[9]. At that time, participants are given an information sheet[10] and are asked to begin the program by signing a number of forms[11]. The forms tell the participants that their participation is mandatory[12], that they will be disciplined if they do not participate[13], that they must disclose information regarding past acts of sexual violence and abuse (which includes both charged and uncharged offenses)[14], and that there is no promise of immunity and very limited confidentiality[15].

Specifically, the participants are told that any uncharged offense disclosed involving a minor or a disabled victim must be reported under Indiana law[16]. They are warned that the information disclosed during treatment can be shared with the personnel of the Department of Corrections, community providers of sex offender treatment services, mental health treatment providers, providers of psychiatric evaluations, substance abuse treatment providers, polygraph examiners, other

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[8] Deming Declaration, Exhibit A, Dkt. 125; Ex. App. v1, p. 1; George Sanders INSOMM Treatment Notes Excerpt, Exhibit I, Dkt. 127; Ex. App. v2, p. 74
[9] Offender Orientation Form, Exhibit AE, Dkt. 125; Ex. App. v1, p. 260
[10] Id.
[11] Sex Offender Management and Monitoring Program Participation Notification (Form 49826), Exhibit D, Dkt. 125; Ex. App. v1, p. 60; Sex Offender Management and Monitoring Informed Consent, Exhibit J, Dkt. 125; Ex. App. v1, p. 134; INSOMM Sex Offender Participation Agreement, Exhibit K, Dkt. 125; Ex. App. v1, p. 137
[12] Executive Directive #15-13, Exhibit C, Dkt. 125; Ex. App. v1, p. 57
[13] Id.
[14] INSOMM Informed Consent, Exhibit J, Dkt. 125; Ex. App. v1, p. 134
[15] Id.
[16] Id.

counseling related services, and family members or support persons up to and including employers or landlords[17]. Participants are told of the expanse of information which can be shared outside the treatment group, including (but expressly not limited to) information about the inmate's sex offenses, specific information about their case management, level of group participation and progress in the program[18]. This information is also provided without the inmate's permission to the Indiana Parole Board and Probation Department[19].

In addition to the forms, inmates must fill out the INSOMM Sex Offender Questionnaire[20]. This represents the first incriminating disclosure. The questionnaire asks how often inmates have engaged in a number of sexual acts, some of which are illegal, including amongst others, rape[21], child molestation[22], prostitution[23], and necrophilia[24], all violations of Indiana law.

Phase Two of the program is referred to as "Risk Based Sex Offender Treatment" and is the group therapy portion of the program[25]. Based upon an assessment of the participant's criminal and sexual offense history, participants are split into three risk

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[17] INSOMM Informed Consent Form, Exhibit J, Dkt. 125; Ex. App. v1, p. 134
[18] Id.
[19] Id.
[20] INSOMM Sex Offender Questionnaire, Exhibit L, Dkt. 125; Ex. App. v1, p. 140
[21] I.C. § 35-42-4-1
[22] I.C. § 35-42-4-3
[23] I.C. § 35-45-4-2
[24] I.C. § 35-45-11-2
[25] Offender Orientation Form, Exhibit AE, Dkt. 125; Ex. App. v1, p. 260

based treatment groups, low, medium and high risk, who must complete 30, 60, and 100 hours of treatment respectively[26]. These groups become the "core group" to which a participant is assigned and group therapy happens with other inmates assigned to the same risk category[27]. Participants are advised that attendance at core group sessions attendance is mandatory and that active participation is required "being shy, quiet, and/or introverted are not acceptable reasons for nonparticipation[28].

Each of the core group workbooks contains a Sexual Offense Disclosure Assignment. The Sexual Offense Disclosure is a complete detailed written account of past sexual offenses, reported and unreported. While participants are advised not to give identifiable information about crimes for which no report was made[29], participants are also asked to be detailed and specific[30]. The disclosure asks participants to "write out and present a detailed description of your sexual offenses, both reported and unreported... being completely honest about your index offense as well as any other sex offenses you have committed.[31]" Participants are asked to be "detailed and specific," writing about one victim at a time and using a separate sheet for each victim[32].

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[26] Id.
[27] Low Risk Core Workbook, Exhibit N, p.3, Dkt. 125; Ex. App. v1, p. 154
[28] Sex Offender Participation Agreement, Exhibit K, Dkt. 125; Ex. App. v1, p. 137; Low Risk Core Group Workbook, Exhibit N, p.3, Dkt. 125; Ex. App. v1, p. 154
[29] Medium Risk Core workbook, Exhibit O, p.8, Dkt. 125; Ex. App. v1, p. 174
[30] Id.
[31] Id.
[32] Id.

Participants are required to disclose the age of the victim at the time of the offense, the first name of the victim and the relationship to the victim, the sexual behaviors engaged in, how many times the victim was offended and over what period of time, where and when the sexual abuse occurred, how the victim was selected, if the victim was groomed, and how they attempted to avoid detection or consequences for the behavior[33]. Participants in the high risk core group are also 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 sexual abuse, and in what way the victims were similar to one another, for example age, appearance, race[34].

This is a formal process each group member must undergo, wherein the disclosure form is filled out and then the history is presented to the group during treatment sessions[35]. The treatment providers in the INSOMM program have the full discretion to determine whether or not an offender is being truthful and making a full disclosure or not. And that decision is final[36]. If the counselors believe that a participant

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[33] Id.
[34] High Risk Core workbook, Exhibit P, p.28, Dkt. 125; Ex. App. v1, p. 198
[35] Lawrence Greer INSOMM Conduct File & Treatment Notes, Exhibit V, Dkt. 127; Ex. App. v2, p. 119
[36] Michael Parker Conduct Report and Offender Complaint, Exhibit Q, Dkt. 127; Ex. App. v2, p. 76

is denying or not fully disclosing, they may be asked to submit to a polygraph examination[37].

The polygraph represents another deep dive into incriminating territory. The process begins with the participant filling out a Polygraph Sex History Questionnaire[38]. The questionnaire advises participants that they do not need to provide identifying information about victims which would be specific enough for prosecution[39]. Participants are expressly warned that there are no promises of legal immunity and that the information may be disclosed to "authorities" involved with the sex offender's treatment and to the court[40]. Contrary to the advisement regarding identifying information, participants are advised that they may be sanctioned if they either refuse to fill the form out or do not complete it accurately[41]. The substance of the form then asks participants to "list every illegal, abusive and deviant sexual act you have committed during the time period defined in each section" and are warned that they must give "complete and honest answers"[42]. The form then delves into particular topics of sexual conduct asking questions like

[37] Lawrence Greer INSOMM Conduct File & Treatment Notes, Exhibit V; Ex. App. v2, p. 119; Quinton Bonner Polygraph Report, Exhibit S; Ex. App. v2, p. 83
[38] INSOMM Polygraph Sex History Questionnaire, Exhibit AF, p.2, Ex. App. v1, p. 262
[39] Id.
[40] Id.
[41] Id.
[42] Id., p. 3

> "How many children have you physically forced into sexual activities? Describe what you did:"[43]
>
> "How many times have you made child pornography (taken pictures, video-tapes, films, etc.) of nude children or children engaged in sex acts? Describe:"[44]
>
> "How many times have you forced sex with adults? Describe"[45]
>
> "How many times have you had sexual contact with someone who is handicapped? Describe:"[46]
>
> "Have you ever killed someone during or after sex? Describe what you did:"[47]

Like the sexual offense group disclosure, the polygraph form requires victim forms. Participants must complete a one page form for each victim and must disclose the sex of the victim, year of the offense, relationship to the victim, victim's age at the time the offense began and ended and the participant's age at the time the offense began and ended[48]. The participant must then check off a list of 27 specific actions to indicate they occurred with that particular victim, nearly all of which would constitute a crime[49].

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[43] Id., p. 5
[44] Id.
[45] Id., p. 7
[46] Id., p. 8
[47] Id., p. 16
[48] Id., p. 19
[49] Id.

The polygraphs themselves can be used to explore the sexual history of the participant, the offense they are incarcerated on, and can even extend to questioning directly related to offenses that the participant currently faces charges on[50].

In administering the INSOMM program, the state demands incriminating information. "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." *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951). The privilege "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972). The constitutional privilege does not depend upon the likelihood of prosecution, only when the likelihood is "fanciful" would the privilege not apply. *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871 (7th Cir. 1979)("When a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster.")

The potential for self-incrimination is real and appreciable in the INSOMM Program. The program's materials specifically contemplate the possibility of prosecution and warn offenders that it is a risk. Participants who testified at trial face

[50] Larry Smith Polygraph Report, Exhibit AG, p.6, Dkt. 127; Ex. App. v2, p. 253

the threat of perjury charges which has a statute of limitations period of five years[51]. All participants face the threat of charges for other sexual crimes discovered during treatment. Though the appellant argues primarily against incrimination by alleging that the program permits participants to describe their actions "in the most general terms," (App. Brief at 19) and does not require details, a review of the programs documents and stipulated facts reveal the weakness of that argument. The level of the detail required in the disclosures would easily lead to identifiable victims and possible new criminal charges. Moreover, the counselors of the program are solely responsible for determining whether or not an offender has made a full disclosure or not and that decision is final. Stipulated Fact 32, App. p. 28, and Ex. App. v2, p. 76. The statutes of limitations for those crimes vary widely ranging from prosecution could be commenced "at any time" for offenses such as an aggravated rape charge[52], or for some child sex offenses prosecution could commence up until the child reaches 31[53], or five years for sexual misconduct with a minor[54]. The 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. The Supreme Court in Indiana

[51] I.C. § 35-41-4-2
[52] I.C. § 35-42-4-1; I.C. § 35-41-4-2
[53] I.C. § 35-41-4-2
[54] I.C. § 35-42-4-9; I.C. § 35-42-4-1

reached the same conclusion when it examined the INSOMM program in 2014. *Bleeke v. Lemmon*, 6 N.E. 3d 907 (Ind. 2014).

> Put simply, 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 injurious disclosure could result.

Bleeke, 6 N.E.3d at 927, *quoting Hoffman*, 341 U.S. at 486-87. The district court rightly reached the same result. App. p. 8-9.

C. Compulsion by taking statutorily guaranteed credit time

The privilege against self-incrimination is not checked at the prison door, but the fact of incarceration also cannot be ignored as it has long been recognized that incarceration places limits on the exercise of an inmate's privileges against self-incrimination. *McKune v. Lile*, 536 U.S. 24, 36-38 (2002). Actions which would violate constitutional rights of free persons outside the prison walls will not necessarily violate them inside those walls. *Id.*

The contours of the element of compulsion in the context of the Fifth Amendment was examined by the Supreme Court in *McKune,* 536 U.S. 24. In *McKune* the Supreme Court looked at a Kansas sex offender treatment program similar to the INSOMM program. Like the INSOMM program, Kansas required sex offenders to admit the crime which precipitated the treatment and other past offenses as well.

McKune, 536 U.S. at 29. And, similar to the INSOMM program, the inmate in *McKune* faced consequences if he did not participate in the program. The consequences included a curtailment of privileges such as visitation rights, wages, work opportunities, canteen and television access and the inmate faced transfer to a more secure facility where his movements would be more limited and his safety less certain. *Id.* at 30. In the district court, the court entered summary judgment for the inmate, finding that because the inmate had testified at trial, an admission of guilt would subject him to a possible charge of perjury and ruled that the loss of privileges and change in conditions constituted coercion in violation of the Fifth Amendment. *Id*. at 31.

The Supreme Court heard the case on the basis that the Court of Appeals, in affirming the case, had held that an important Kansas prison regulation violated the Constitution. Noting that the privilege against self-incrimination does not end at the door to the prison, the Court's balancing included both the importance of this privilege but also the important rehabilitative interest of the prison system. *Id*. at 36-38. Finding that the consequences faced by the inmate did not compel self-incrimination, the plurality for the Court stated "[a] prison 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 an

atypical and significant hardships in relation to the ordinary incidents of prison life." *Id*. at 37-38.

McKune did not produce a majority opinion. The Justices were divided over what standard to apply when evaluating compulsion for the purpose of the Fifth Amendment in a prison setting. The plurality's opinion represented a major break from prior precedent. Prior to *McKune*, the test which prevailed was that in *Turner v. Safely*, 482 U.S. 78, 89 (1987). The *Turner* court confirmed that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. *Id.* at 89. The *Turner* court also set out factors for courts to consider in determining whether a state's prison regulations were reasonable. The *Turner* factors can be summarized into two primary principles. First, the prison regulations cannot be upheld if they are arbitrary or irrational. Second, the regulations are not reasonable when there are ready alternatives that do not burden the inmates' rights and have minimal cost to the penological objective.[55]

McKune produced three opinions. Justice Kennedy wrote for four of the justices in the plurality opinion, Justice Stevens wrote for four dissenting justices, and Justice

[55] *Turner v. Safely*, 482 U.S. 78, 89-91 (1987). 1) There must be a rational connection between the prison regulation and the legitimate governmental interest, 2) Whether the inmates had alternative means of exercising the right, 3) whether accommodation of the right would have an impact on guards and other inmates, and the allocation of prison resources generally, and 4) whether there was an alternative that fully accommodated the prisoner's rights at minimal cost to valid penological interests

O'Connor wrote separately in concurrence. When there is no majority opinion, the holding of the Supreme Court is expressed by those members who concurred in the judgment on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193 (1977). As a result, the controlling opinion in *McKune* appears to be that of Justice O'Connor. *Ainsworth v. Stanley*, 317 F.3d 1, 7-8 (1st Cir. 2002).

Writing for the plurality, Justice Kennedy stressed that the fact of incarceration must be considered and adopted the stringent standard set forth by the Supreme Court for a violation of due process rights in prison, ruling that the consequences of invoking the privilege against self-incrimination must result in an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *McKune*, 536 U.S. at 38, *quoting, Sandin v. Conner*, 515 U.S. 472 (1995). The plurality's test emphasized that the Court must make a judgment call, looking at the severity of the consequences that result from the choice to remain silent. *McKune*, 536 U.S. at 44. Under this standard, the plurality ruled that the loss of privileges and transfer of institutions suffered did not represent an atypical and significant hardship and was instead a denial of privileges.

Writing for the dissenters, Justice Stevens strongly disagreed with the plurality's characterization of the consequences imposed for exercising the privilege as a loss of privileges and argued that they were instead punitive consequences imposed by the state which rose to the level of compulsion. *McKune*, 536 U.S. at 63-65, 67. He acknowledged that the program served a legitimate purpose but concluded that the

state could not punish the assertion of the privilege with the same mandatory sanction that follows a disciplinary conviction for offenses like theft, sodomy, riot, arson, or assault. *Id*. at 54.

Concurring with the plurality, Justice O'Connor took another approach. Justice O'Connor looked to the penalty cases, comparing whether the penalties imposed on the prisoners were greater than those which the Court had found rose to the level of compulsion, such as termination of employment, the loss of professional license, ineligibility to receive government contracts, and the loss of the right to participate in political associations and hold public office. *McKune*, 536 U.S. at 49-50. Compared to these penalties, Justice O'Connor found the penalties faced by the inmate in *McKune* far less serious. *Id*. Though Justice O'Connor did not find the plurality's test of "significant and atypical hardship" appropriate, she did not articulate her own test, only finding that conduct which could result in compulsion was broader. *Id.* at 52. Although Justice O'Connor did not attempt to articulate a new standard which would apply to all cases, noting that she did not "need [to] resolve this dilemma to make [her] judgment", she stated that a penalty of longer incarceration would constitute compulsion. *Id.* at 54, 52.

Though the right test to apply is somewhat murky post-*McKune*[56], taken together the concurrence and the plurality impose an obligation on the court to consider the

[56] The *Marks* approach itself is under fire recently. Brief for Petitioner at 41, *Hughes v. U.S.*, (No. 17-155), 2018 U.S. LEXIS 3385 (S. Ct. June 4, 2018), There is a principled argument that the *Marks* approach should be limited to those cases where the narrowest opinion is a logical subset of the

prison setting and focus its analysis on the severity of the consequences imposed for exercising the privilege, including the ultimate sanction of additional incarceration. If the Court applies this approach it leads to the conclusion that the INSOMM practice of taking statutorily guaranteed credit time is unconstitutional.

It is not disputed that the INSOMM policy of required admissions, sexual history disclosure and polygraphs may serve a legitimate purpose in the attempt to rehabilitate sex offenders. The constitutional problem is that the disclosures are starkly incriminating and the automatic, mandatory penalty for invoking the privilege is much more severe than that in *McKune*. The Indiana Department of Corrections has made participation in the INSOMM program mandatory for anyone with a prior sex offense conviction[57]. Exercise and assertion of the right against self-incrimination leads to a Code 116 violation, and results in an automatic mandatory Class A, or Major Conduct disciplinary violation[58]. This is the same conduct violation that would result were an inmate to commit serious offenses such as an assault or battery, rape, engaging in a riot, possession of a dangerous or deadly weapon, or escape[59]. In the first instance, upon a

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other opinions, "represent[ing] a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *citing, King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(en banc).

[57] Executive Directive #15-13, Exhibit C; Ex. App. v1, p. 57

[58] Id.; IDOC Disciplinary Code for Adult Offenders, Exhibit F; Ex. App. v1, p. 76; Joint Stipulations 7-12, App. 20-21.

[59] IDOC Disciplinary Code for Adult Offenders, Appendix I; Ex. App. v2, p. 74: Offenses, Exhibit E; Ex. App. v1, p. 62

finding of guilty, the inmate is demoted to Credit Class 3 and placed on non-contact visits[60]. If an inmate continues to refuse participation, the inmate is retained in Credit Class 3 and 180 days of earned good time credit are taken[61]. Credit time in Indiana is guaranteed by statute. I.C. § 35-50-6-3[62].

Every sixty days thereafter, inmates are be asked to participate and if they do not, they stand to lose 180 days of good time credit every 60 calendar days and they will remain in credit class III[63]. Under this policy, inmates stand to lose every day of good time credit towards their sentence for asserting their right to remain silent. Moreover, the inmate will be disqualified from earning any additional credit time for completion of other educational or vocational programs[64].

Justice O'Connor made clear in her concurrence that a penalty of longer incarceration would be constitutionally impermissible. *McKune*, 536 U.S. at 52. Like Justice O'Connor, the plurality also indicated that a penalty of longer incarceration

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[60] Executive Directive #15-13, Exhibit C; Ex. App. v1, p. 57

[61] Id.

[62] For offenses completed prior to July 1, 2014, Credit Class I earns 1 day of credit for every 1 day of confinement; Credit Class II earns 1 day of credit for every 2 days of confinement; Credit Class III earns no good time credit, and Credit Class IV earns 1 day of credit for every 6 days of confinement. I.C. § 35-50-6-3[62]. Deprivation of credit time is also dictated by statute. I.C. § 35-50-6-5. For offenses completed after June 30, 2014, Credit Class A earns 1 day of credit for every 1 day of confinement; Credit Class B earns 1 day of credit for every 3 days of confinement, Credit Class C earns 1 day of credit for every 6 days of confinement; Credit Class D earns no good time credit; Credit Class P earns 1 day of credit for every 4 days on pretrial home detention. I.C. § 35-50-6-3.1. Each of the named class representative petitioners completed their crimes prior to July 1, 2014.

[63] Executive Directive #15-13, Exhibit C; Exhibit C; Ex. App. v1, p. 57

[64] Id.

would not be constitutionally permissible- stating that the decision not to participate in *McKune* "did not extend his term of incarceration. Nor did his decision affect his eligibility for good-time credits or parole." *Id*. at 38.

This is not a case akin to the cases cited by the Appellant, Appellant Brief at 27. This is not a situation in which petitioners are merely being denied discretionary relief from a penalty already imposed, such as being released on parole. *Ainsworth v. Stanley*, 317 F.3d 1 (1st Cir. 2002); *Thorpe v. Grillo*, 80 Fed. Appx. 215 (3rd Cir. 2003). This is not a situation where good time credits are a discretionary measure controlled by the department of corrections. *Searcy v. Simmons*, 299 F.3d 1220 (10th Cir. 2002), *Edwards v. Goord*, 362 Fed. Appx. 195 (2nd Cir. 2010).

Instead, this is a situation where the Petitioners have a statutorily guaranteed right to good time credit which is protected by the Constitution. *Wolff v. McDonnell*, 418 U.S. 539, 556-58 (1974). This case brings to life the situation imagined in *McKune*, the Petitioners, with statutorily guaranteed liberty interest in their good time credits, have each been incarcerated longer as a mandatory automatic penalty for asserting their Fifth Amendment privilege. This is constitutionally impermissible. *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005).

Finally, even reaching back to the *Turner* framework, the taking of statutorily guaranteed credit time is constitutionally invalid. Under *Turner* a regulation was unreasonable where there are ready alternatives that do not burden the inmate's rights

and have minimal cost to penological objectives. *Turner v. Safely*, 482 U.S. 78, 89-91 (1987).

The INSOMM program not only requires admissions but sets up particularly high hurdles to successful completion of the program. If an inmate is pursuing relief through the courts, a docket sheet, which could be easily obtained through the prison law library is not sufficient to verify a pending claim. Instead, an inmate must send out in the mail and hope for a timely return of verification by his defense lawyer or the court. If a timely return is not received, the program will not accept any other evidence[65]. In August of 2014, Donald Lacy was beginning the process of filing for post-conviction relief. On August 18, 2014 he received a 116 for failure to participate in the INSOMM program[66]. At that time, he presented the INSOMM counselor with a copy of his motion, a witness statement from the prison librarian verifying that he was at work on a motion, and a letter from the Indiana Court of Appeals stating that he had permission to proceed *pro se*[67]. He was still given a violation[68]. He was approached again on November 17, 2014, and asked for participation. He told the counselor that he had sent his motion to be filed with the Indiana Courts and had given the counselors of

[65] Joint Stipulation 16, App. p. 23
[66] Donald Lacy INSOMM Conduct File & Treatment Notes, Exhibit H; Ex. App. v2, p. 1
[67] Id.
[68] Id.

the program a copy, he was still refused an exemption[69]. Donald Lacy did in fact have a pending case at that time[70].

Even for a participant who wants to participate and who has agreed to make admissions the program is extraordinarily difficult to navigate. A participant who in good faith is trying to comply may be referred for a polygraph because a counselor subjectively makes a decision that full disclosure has not been made[71]. During treatment, Donald Wrobel admitted to the facts in his offense that he had pled guilty to, but would not admit facts on a charge that was dismissed. Mr. Wrobel was sent for a polygraph and upon Mr. Wrobel's filing of a grievance regarding the disciplinary action, the counselor responded by stating[72]:

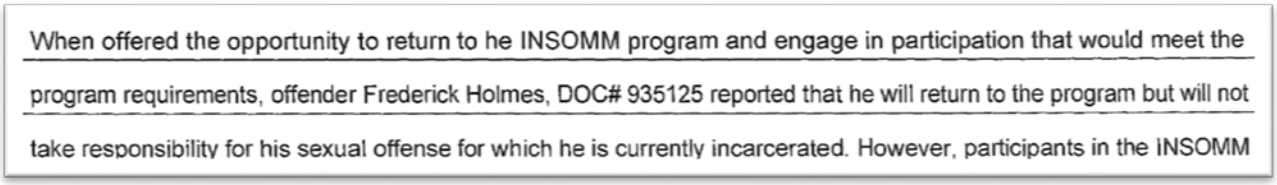
> Anytime you are not admitting to everything you are not fully participating or complying with the SOMM program. We have already talked about this. You are already aware of the requirement of SOMM as you have quoted information from the participation agreement. Even after taking the polygraph test you continue to be deceptive and will not accept full responsibility for your sexual offense. All you need to do is be honest and acknowledge everything that you have done.

Additionally, even after a polygraph is taken, if the results do not indicate deception a person may not be excused from the program. The INSOMM counselors retain the

[69] Id.
[70] Petitioners' Indiana Case Summaries, Exhibit B; Ex. App. v1, p. 21
[71] Donald Wrobel Polygraph & Disciplinary Action, Exhibit U; Ex. App. v2, p. 108
[72] Id.

subjective discretion to decide after a records review if the person is nonetheless being deceptive[73].

Accommodations for constitutional rights can be made with two simple alternatives. One, the state could offer immunity to the participants for any incriminating statements given in relationship to the program. Granting immunity would arguably make for a healthier relationship between the counselor and the inmate. And if the state granted immunity, offenders would be more likely to participate in the program because statements made during therapy could not be used against them.


When offered the opportunity to return to he INSOMM program and engage in participation that would meet the program requirements, offender Frederick Holmes, DOC# 935125 reported that he will return to the program but will not take responsibility for his sexual offense for which he is currently incarcerated. However, participants in the INSOMM

Frederick Holmes Conduct Report and Treatment Notes, Exhibit AB. Ex. App. v2, p. 164.

Two, as suggested by Justice Stevens in his dissent, the state could offer a truly voluntary program by removing the coercive penalties. Indiana is capable of developing a reward framework for the program. By statute in Indiana prisoners can earn extra time credit for completion of educational programs such as earning a GED or college degree. I.C. § 35-50-3-3.3. Credit is also available for inmates who complete

[73] Joint Stipulation 35, App. 29.

career, technical or vocational programs; substance abuse programs; literary and basic life skills programs; or other reformative programs. I.C. § 35-50-6-3.3(b)(3).

CONCLUSION

The INSOMM program offers treatment, but at a price that many inmates are unwilling to pay. Instead the Petitioners invoke their right to silence and decline to participate. They decline because they would be forced to confess to crimes that they maintain they did not commit. This right remains available to them despite their convictions. Participation would lead to the loss of any chance for a new trial based on newly discovered evidence. The participants who testified at trial would subject themselves to perjury charges. And each participant risks new charges for disclosing too much in a system where they must walk the line between not disclosing too many details and disclosing enough to satisfy the counselors in the program. When the Government compels incriminating testimony by threat of potent sanctions, the testimony is obtained in violation of the Fifth Amendment.

For these reasons, this Court should affirm the district court's decision to grant summary judgment in favor of the Petitioners below.

Respectfully submitted,

s/Sara J. Varner
Sara J. Varner

ATTORNEY CERTIFICATION OF COMPLAINCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,370 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32, because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in Palatino Linotype font, 12 point.

s/Sara J. Varner
Sara J. Varner

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,

vs.

KEITH BUTTS, in his official capacity as Warden of the New Castle Correctional Facility,

Respondent-Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 12, 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.

Participants in this case who are registered CM/ECF users will be notified by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by first class mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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SHORT APPENDIX & CERTIFICATION OF COMPLIANCE WITH CIRCUIT RULE 30(d)

Counsel for Petitioner-Appellee hereby certifies that this Appendix includes all material required by Circuit rule 30(a) and (b).

s/Sara J. Varner
Sara J. Varner

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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

scour every inch of the record for evidence that is potentially relevant to the summary judgment motion before them." *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 898 (7th Cir. 2003)(emphasis added). Additionally, the Seventh Circuit Court of Appeals has held that reliance on the pleadings or speculative statements supported by inadmissible evidence is insufficient to produce an issue of material fact on summary judgment. *Id.* at 901.

The court is therefore tasked with determining whether admissible evidence exists to support a plaintiff's claims or a defendant's affirmative defenses, not the weight or credibility of that evidence, both of which are assessments reserved for the trier of fact. *See, Schacht v. Wis. Dep't of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999). Finally, when evaluating a motion for summary judgment, the court must give the non-moving party the benefit of all reasonable inferences from the evidence submitted and resolve "any doubt as to the existence of a genuine issue for trial ... against the moving party." *Celotex*, 477 U.S. at 330 n.2.

III. Joint Statement of Material Facts Not in Dispute

Good Time Credit in Indiana

1. In Indiana, credit time within the Indiana State prison system is dictated by statute. For offenses completed prior to July 1, 2014, Credit Class I earns 1 day of credit for every 1 day of confinement; Credit Class II earns 1 day of credit for every 2 days of confinement; Credit Class III earns no good time credit, and Credit Class IV earns 1 day of credit for every 6 days of confinement. I.C. § 35-50-6-3[16]. Deprivation of credit time is also dictated by statute. I.C. § 35-50-6-5.

[16] For offenses completed after June 30, 2014, Credit Class A earns 1 day of credit for every 1 day of confinement; Credit Class B earns 1 day of credit for every 3 days of confinement, Credit Class C earns 1 day of credit for every 6

2. Each of the named Class Representative Petitioners completed their crimes of incarceration prior to July 1, 2014. Petitioners' Indiana Case Summaries, Exhibit B.

The INSOMM Program

3. The Indiana Sex Offender Monitoring and Management Treatment Program (INSOMM) is a program utilized in the Indiana State Prison system. IDOC Executive Directive #15-13, Exhibit C.
4. The Indiana Department of Correction has provided the SOMM program under a contract with Liberty Behavioral Health since 1999. Deming Declaration, Exhibit A.
5. The SOMM program is offered to offenders who are within three to five years of their earliest possible release date. Deming Declaration, Exhibit A; SOMM Program Participation Notification, State Form 49826, Exhibit D.
6. Eligible participants in the program include all adult offenders with a history of sex offense conviction. IDOC Executive Directive #15-13, Exhibit C.
7. 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." IDOC Executive Directive #15-13, Exhibit C.
8. Refusing to participate in the program includes: failure to register for the program, failure to comply with the criteria for program participation, and failure to cooperate with the staff presenting the program, and being terminated from the program based

days of confinement; Credit Class D earns no good time credit; Credit Class P earns 1 day of credit for every 4 days on pretrial home detention. I.C. § 35-50-6-3.1. Each of the named class representative petitioners completed their crimes prior to July 1, 2014.

upon failure to participate or for behavioral reasons. IDOC Executive Directive #15-13, Exhibit C.

9. An eligible participant who refuses to participate in the program is charged with a Code 116 violation and if found guilty, is demoted to credit class III (no credit time will be earned) and will be recommended to be placed on non-contact visits.

> Any offender with a history of a sex offense conviction shall be advised that the Sex Offender Treatment Program (SOMM) is a mandatory program and that failure to participate in the program or failure to complete the program successfully shall result in a disciplinary action. If an offender refuses to participate in the SOMM Program, the offender shall be charged with the following disciplinary code offense:
>
> Code A116 Refusing to participate in a mandatory program (as authorized by statute or by order of the Commissioner), to include: failure to register for the program, failure to comply with the criteria for participation in the program, failure to cooperate with the staff presenting the program and being terminated from the program based upon failure to participate or for behavioral reasons.

IDOC Executive Directive #15-13, Exhibit C.

10. Two months after the Code 116 violation, the offender will again be asked to participate in the program. If the offender refuses again, they will be charged with a Code 116 violation and if found guilty, the offender shall be retained in credit class III (no credit time will be earned) and 180 days of earned credit time will be lost. They will also be subject to other non-grievous sanctions. IDOC Executive Directive #15-13, Exhibit C.
11. After being found guilty of a Code 116 violation, an offender will not be eligible to earn any additional earned credit time for completing educational, vocational, or substance abuse programs. IDOC Executive Directive #15-13, Exhibit C.
12. A Code 116 violation is a Class A or Major Conduct violation offense in the Indiana State Prison system. Class A offenses include: Violation of any federal, state or local law; assault/battery upon another offender with a weapon or inflicting serious injury;

encouraging, directing, commanding, coercing, or signaling one or more offenders to riot; possession or use of any explosive, ammunition, hazardous chemical or dangerous or deadly weapon; escape; conspiracy/attempting/aiding, abetting to commit any Class A offense; engaging in trafficking with anyone who is not an offender residing in the same facility; sexual act with a visitor; nonconsensual sexual act - nonconsensual sexual contact of a sexual nature by an offender with another offender; refusing a mandatory program offered by statute or by the Commissioner; assault on staff which results in serious bodily injury; violation of condition of temporary leave. IDOC Disciplinary Code for Adult Offenders, Appendix I: Offenses; Exhibit E.

13. If an inmate has committed a violation which 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. IDOC Disciplinary Code for Adult Offenders, p.44-45; Exhibit F.
14. Under Executive Directive #15-13, inmates are asked again to participate in the INSOMM program 60 days after a 116 violation. 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. IDOC Executive Directive #15-13, Exhibit C.
15. 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 thereafter. IDOC Executive Directive #15-13, Exhibit C; INSOMM Request for Temporary Exemption, Exhibit G.

16. Documentation of the exemption must come from outside the facility, from a defense attorney or sentencing court and must verify that the offender pled "not guilty" and must verify that the case is under appeal or seeking post-conviction relief. A print out of a docket sheet showing an active or pending case does not suffice unless it comes directly from the court. INSOMM Request for Temporary Exemption, Exhibit G; Donald Lacy INSOMM Conduct File & Treatment Notes, p.68, Exhibit H.
17. No written policy exists as to what qualifies as "appeal" or "post-conviction relief" status. The determination as to whether a pending case qualifies for an exemption is made by the INSOMM supervisory staff upon review of documentation received.

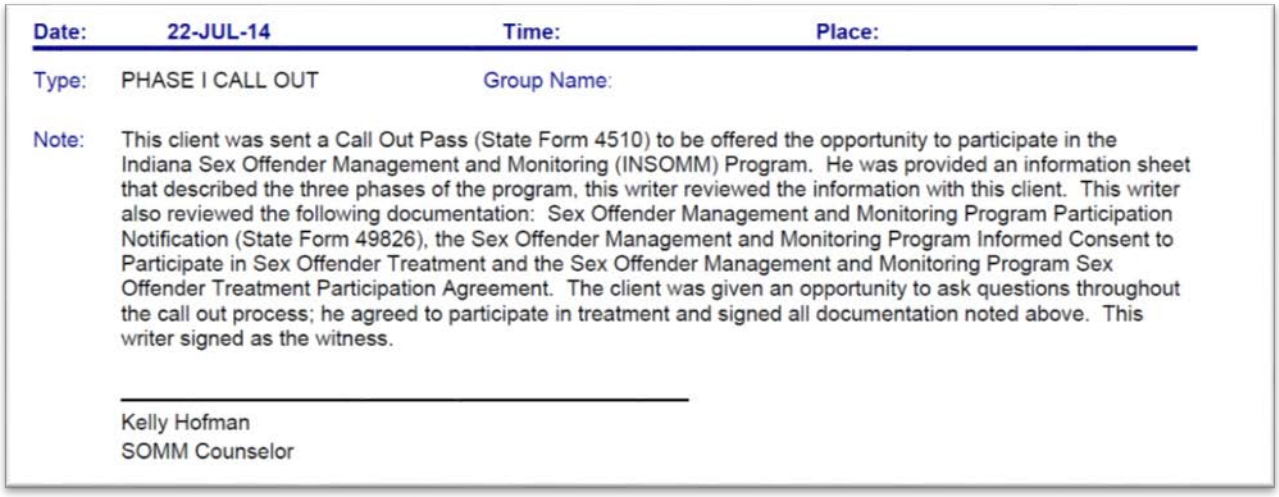
> Note: Mr. Lacy was called out of his dorm on a call out. Ms. Sara Young, GPS Facility Coordinator witnessed the meeting. Mr. Lacy reported being on active appeals. This writer again explained that documentation is needed from the court sent directly to this writer from outside of the facility stating that Mr. Lacy is currently on appeal or seeking post conviction relief. This writer stated that if and when documentation was received the documentation would be reviewed by this writer's supervisor. A decision about Mr. Lacy's appropriateness for the temporary exemption would be made based on a review of documention.

Donald Lacy INSOMM Conduct File & Treatment Notes, p.67, Exhibit H.

18. Any offender who is convicted of or sentenced for a crime in Indiana may file a collateral attack on their sentence under the Indiana Rules of Post-Conviction Remedies "at any time." Indiana Rules of Post-Conviction Relief, R. 1(a). Additionally, second or successive petitions are allowed upon a showing of a "reasonable probability" of entitlement to relief. Indiana Rules of Post-Conviction Relief, R. 12(b).

Phase I of the INSOMM Program- Assessment & Consent

19. During Phase I of the INSOMM program, participants are issued a "Call Out Pass" in order to be asked for participation in the program. They are given an information sheet and given documents to sign.



Date:	22-JUL-14	Time:	Place:

Type: PHASE I CALL OUT Group Name:

Note: This client was sent a Call Out Pass (State Form 4510) to be offered the opportunity to participate in the Indiana Sex Offender Management and Monitoring (INSOMM) Program. He was provided an information sheet that described the three phases of the program, this writer reviewed the information with this client. This writer also reviewed the following documentation: Sex Offender Management and Monitoring Program Participation Notification (State Form 49826), the Sex Offender Management and Monitoring Program Informed Consent to Participate in Sex Offender Treatment and the Sex Offender Management and Monitoring Program Sex Offender Treatment Participation Agreement. The client was given an opportunity to ask questions throughout the call out process; he agreed to participate in treatment and signed all documentation noted above. This writer signed as the witness.

Kelly Hofman
SOMM Counselor

George Sanders INSOMM Treatment Notes Excerpt, Exhibit I.

20. Participants must sign the Sex Offender Management and Monitoring Program Participation Notification Form (Form 49826). This form states that the program is mandatory. "Based upon your conviction... you are eligible for this program and are required to attend and participate." This form also states that failure to attend and participate will result in disciplinary action in the form of a Code 116 violation and sanctions. INSOMM Program Participation Notification, State Form 49826, Exhibit D.

21. Participants must sign the Informed Consent form. This form notifies participants that they must "discuss and take responsibility for past acts of sexual violence and abuse." The form also notifies participants of the "Limits of Confidentiality." Information regarding past sex offending behaviors, specific case management information, and progress may be shared with others, specifically:

    a. Treatment providers are required by law to report the names of any identifiable child or disabled adult victim disclosed during treatment. I.C. § 31-33-5.

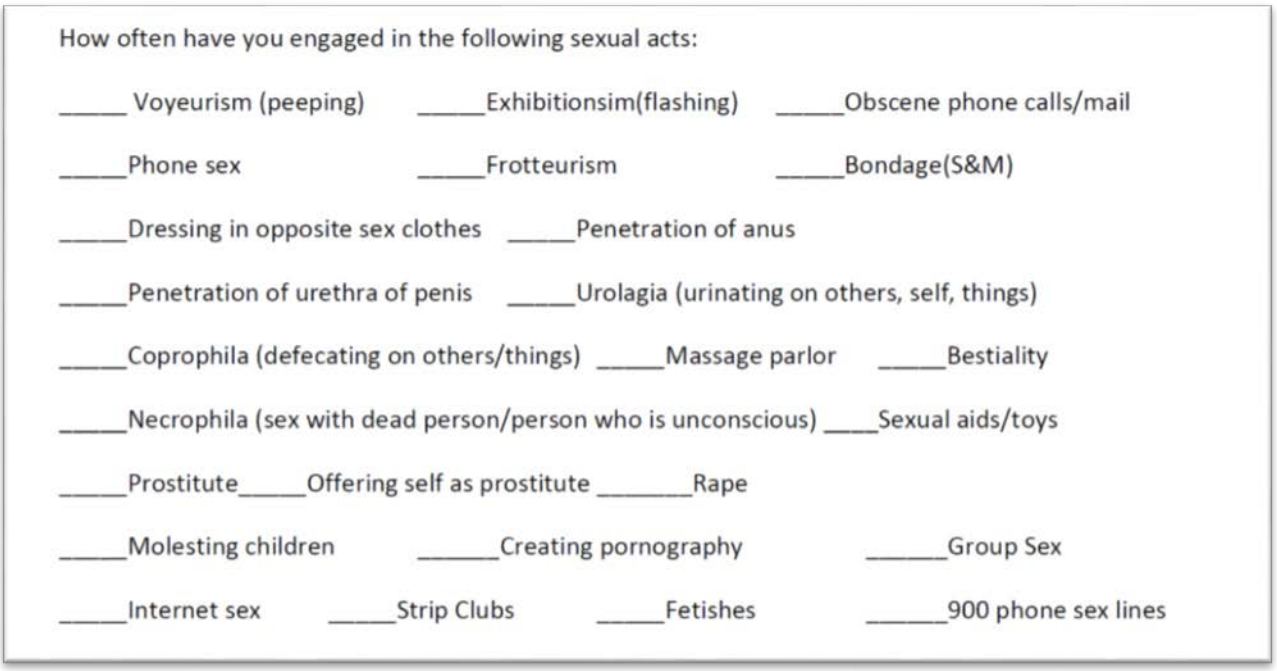
    b. Treatment providers and staff may share information with one another, and with:

i. Indiana Department of Corrections personnel
ii. Community providers of sex offender specific treatment services
iii. Mental health treatment providers
iv. Providers of psychiatric evaluation, treatment and/or medication
v. Substance abuse treatment providers
vi. Polygraph examiners
vii. Other counseling related services including job training and vocational programs
viii. Family members and support persons including but not limited to clergy, 12-step sponsors, employers, landlords

c. Information can be shared with the Indiana Parole Board and Probation Department. INSOMM Informed Consent, Exhibit J.

22. 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." INSOMM Sex Offender Participation Agreement, Exhibit K.

23. Participants are asked to fill out an INSOMM Program Sex Offender Questionnaire. This questionnaire includes a basic check the box admission to sexual acts, some of which are illegal.



How often have you engaged in the following sexual acts:

_____ Voyeurism (peeping) _____Exhibitionsim(flashing) _____Obscene phone calls/mail

_____Phone sex _____Frotteurism _____Bondage(S&M)

_____Dressing in opposite sex clothes _____Penetration of anus

_____Penetration of urethra of penis _____Urolagia (urinating on others, self, things)

_____Coprophila (defecating on others/things) _____Massage parlor _____Bestiality

_____Necrophila (sex with dead person/person who is unconscious) ____Sexual aids/toys

_____Prostitute_____Offering self as prostitute _____Rape

_____Molesting children _____Creating pornography _____Group Sex

_____Internet sex _____Strip Clubs _____Fetishes _____900 phone sex lines

INSOMM Sex Offender Questionnaire, Exhibit L.

Phase II of the INSOMM Program- Facility Based Treatment & Re-Entry Services

24. Phase II is the group treatment phase. INSOMM Informed Consent, Exhibit K

25. Based upon a review of the participant's criminal and sexual offense history, participants are split into three treatment groups, Low Risk (who must complete at least 30 hours of treatment), Medium Risk (who must complete at least 60 hours of treatment) and High Risk (who must complete at least 100 hours of treatment). INSOMM Orientation Workbook, Exhibit M, p.5.

26. These risk groups become the "Core Group" to which each participant is assigned. Core Group sessions are group therapy sessions with other inmates assigned to the same risk category. INSOMM Low Risk Core Group Workbook, Exhibit N, p.3.

27. Attendance in the group sessions is mandatory:

not recommended for your treatment. Core group is the group that all sex offenders at the facility are required to participate in. What is a core group? Core group is the treatment

INSOMM Low Risk Core Group Workbook, Exhibit N, p.3.

28. Each of the risk groups are provided a Core Group Workbook. Completion of the workbook is required. INSOMM Orientation Handbook, Exhibit M, p.9. 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.

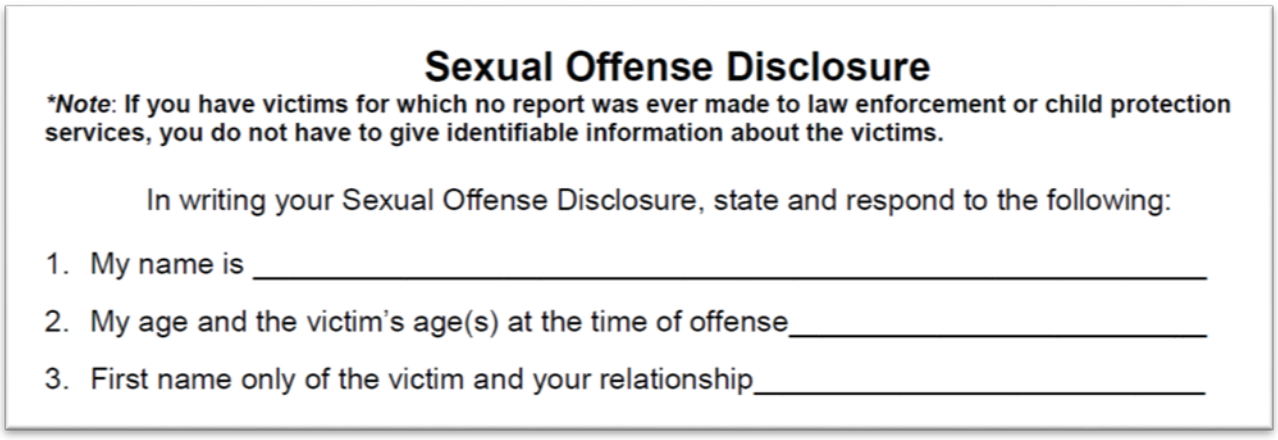
Instructions for Sexual Offense Disclosures

1) Be detailed and specific.

2) Write about one victim at a time, and use a separate form for each individual.

INSOMM Medium Risk Core Group Workbook, Exhibit O, p.7.

29. 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.



Sexual Offense Disclosure

***Note*: 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.**

In writing your Sexual Offense Disclosure, state and respond to the following:

1. My name is _____
2. My age and the victim's age(s) at the time of offense_____
3. First name only of the victim and your relationship_____

INSOMM Medium Risk Core Group Workbook, p.8, Exhibit O.

30. Disclosure on the sexual history requires recounting: 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. INSOMM Medium Risk Core Group Workbook, p. 8-9, Exhibit O.
31. 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. INSOMM High Risk Core Group Workbook, Exhibit P, p.28.
32. The INSOMM 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. Michael Parker Conduct Report & Offender Complaint, Exhibit Q.
33. During treatment, offenders may be referred for a polygraph examination.

17. Some offenders enter the INSOMM Program but categorically deny they committed the crime for which they are incarcerated. These offenders are given the opportunity to take a polygraph test. 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.

Deming Declaration, Exhibit A.

34. Refusal to submit to a polygraph examination can result in a Code 116 violation.

Note: During the session, one group member presented his sexual offense disclosure. He denied the offense and was put on polygraph hold. Following the presentation, the remaining group members examined the sexual history checklist assignment. The client answered each question posed to him and engaged actively in

Note: Mr. Greer refused to take the polygraph exam and he was written up on a Code 116A. He will be called out in 61 days to be offered the program again.

Lawrence Greer INSOMM Conduct File & Treatment Notes, Exhibit V.

35. 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 INSOMM program if the INSOMM program staff, upon review of the participant's record, has reason to believe the offender did not commit the offense. Deming Declaration, Exhibit A.

36. Of 244 polygraph examinations disclosed in discovery, 1 participant was excused. Lewis Exemption, Exhibit W.

37. The results of a polygraph exam are discussed in group therapy.

38. The INSOMM treatment files and polygraph materials and results are subject to subpoena by a Court. I.C. § 11-8-5-2.

39. 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. Respondent's Discovery Response Excerpt, 8-22-16, Exhibit X.

Phase III of the INSOMM Program- Community Management & Monitoring

40. During Phase III of the program, participants are required to attend and participate in INSOMM sex offender treatment in the community and are required to submit to polygraph examinations. INSOMM Informed Consent, Orientation Workbook, p. 9. 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. INSOMM Orientation Handbook, p. 9, Exhibit M; See also *Bleeke v. Lemmon*, 6 N.E.3d 907, 935 (Ind. 2014).

IV. Petitioners' Statement of Material Facts Not in Dispute

Polygraph Requirement:

41. Participants categorically deny, or partially deny, their index sexual offense, can be asked to take an index polygraph exam regardless of whether they pled guilty or not guilty at trial on that index sex offense. Polygraphs can also be requested if a counselor feels that a participant was not truthful during the sexual history disclosure. Refusal to take the polygraph as requested leads to a 116 Code Violation.

    a. Richard Dobeski Polygraph Report, Exhibit R; convicted by trial
    b. Quinton Bonner Polygraph Report, Exhibit S; convicted by trial
    c. Lionel May Polygraph Report, Exhibit T; guilty plea
    d. Donald Wrobel, Polygraph Report & Disciplinary Action; guilty plea, Exhibit U

The Class Petitioners

a. Donald Lacy, #184915

1. Petitioner Donald Lacy was an inmate at New Castle Correctional Facility and is currently released. He was released on February 5, 2015. Donald Lacy, Indiana Offender Data, Exhibit Y.
2. On February 12, 2007, Donald Lacy was charged in Delaware Circuit Court for the State of Indiana with four counts of child molestation, a Class C felony. Petitioners' Indiana Case Summaries, Exhibit B.
3. Following a three-day jury trial, wherein Mr. Lacy testified on his own behalf, Mr. Lacy was convicted only on Count 3. The jury deadlocked on Counts 1 and 2, and Count 4 was dismissed by the prosecution. *Lacy v. State*, 2008 Ind. App. Unpub. LEXIS 833 (Ind. Ct. App. 2008).
4. On January 7, 2008, Mr. Lacy was sentenced to an 8 year term of incarceration, with credit for time served. At the time of judgment, Mr. Lacy had served 335 days. Petitioners' Indiana Case Summaries, Exhibit B.
5. Mr. Lacy appealed his conviction to the Indiana Court of Appeals. Finding that judicial prejudice had been shown, but did not rise to the level of fundamental error, the Court of Appeals upheld the conviction and sentence in an opinion entered on September 29, 2008. *Lacy v. State*, 2008 Ind. App. Unpub. LEXIS 833 (Ind. Ct. App. 2008).
6. In March of 2008, Mr. Lacy was asked to participate in the INSOMM program. Mr. Lacy, continuing to maintain his innocence and having testified under oath that he did not commit the offense, did not want to admit guilt as a part of the INSOMM program. Donald Lacy Conduct Report File & Treatment Notes, Exhibit H.

7. As a result, on March 6, 2008, Mr. Lacy received his first disciplinary action for failure to participate in a mandatory program, a violation of Code 116. After a finding of guilt, Mr. Lacy was demoted from Credit Class I to Credit Class III. Donald Lacy Conduct Report File & Treatment Notes, Exhibit H.

8. Mr. Lacy would go on to receive another twelve Disciplinary Actions[17] losing more than 2,000 days credit due to Code 116 violations. When he was released in February of 2015 he had served his entire sentence without the benefit of credit time. Donald Lacy Conduct Report File & Treatment Notes, Exhibit H.

b. Lawrence Greer-Bey, #876141

9. Petitioner Lawrence Greer-Bey is an inmate at New Castle Correctional Facility. His current release date is May 11, 2023. Lawrence Greer-Bey, Indiana Offender Data, Exhibit Z.

10. On April 17, 1984 Lawrence Greer-Bey was charged in Vanderburgh Circuit Court for the State of Indiana with child molestation, a Class B felony. Following a jury trial, Mr. Greer-Bey was convicted and sentenced on November 30, 1987 to a 36 year term of incarceration. Petitioners' Indiana Case Summaries, Exhibit B.

11. Mr. Greer appealed his conviction to the Indiana Court of Appeals where his conviction was upheld in an opinion entered September 26, 1989. *Greer v. State*, 543 N.E.2d 1124 (Ind. Ct. App. 1989).

[17] Mr. Lacy Received Code 116 Disciplinary violations on: 3/6/08; 5/7/08; 5/4/11; 7/11/11; 10/12/11; 1/25/12; 4/25/12; 7/2/12; 10/15/12; 5/20/13; 6/6/14; 8/18/14; 11/17/14

12. In November of 2013, Mr. Greer-Bey was a participant in the INSOMM program. Because he continued to maintain his innocence on his crime of conviction, he was ordered to take a polygraph examination, which he refused. Mr. Greer-Bey refused the polygraph exam because having pled not guilty at trial, he did not want to be in the position of a forced admission of guilt on a charge for which he had always maintained his innocence or be compelled to make other incriminating statements against himself. Mr. Greer-Bey was informed that his refusal of the polygraph would be considered a refusal of the INSOMM program and that he would receive a disciplinary action. Lawrence Greer Conduct Report & Treatment Notes, Exhibit V.
13. As a result, on November 11, 2013, Mr. Greer-Bey received a disciplinary violation for failure to participate in a mandatory program, a violation of Code 116. After a finding of guilt, Mr. Greer-Bey was given 30 days in segregation, deprived of 180 credit days, demoted from Credit Class I to Credit Class III, and lost 45 days commissary and phone privileges. Lawrence Greer-Bey Conduct Report File & Treatment Notes, Exhibit V.
14. Mr. Greer-Bey has received an additional 17 disciplinary actions[18] losing every day of his good time credit due to Code 116 violations. If Mr. Greer-Bey were credited back his lost days, he would be eligible for immediate release. Lawrence Greer-Bey Conduct Report File & Treatment Notes, Exhibit V.

[18] Mr. Greer-Bey Received Code 116 Disciplinary violations on: 11/11/2013, 1/24/14, 4/1/14, 6/13/14, 8/20/14, 11/3/14, 1/13/15, 3/26/15, 6/2/15, 8/14/15, 10/21/15, 1/13/16, 3/30/16, 6/8/16, 8/25/16, 11/2/16, 1/25/17, 4/13/17

15. After steadfastly maintaining his innocence, on June 21, 2017, Mr. Greer-Bey agreed to participate in the program. Lawrence Greer-Bey Conduct Report File & Treatment Notes, Exhibit V.

c. Frederick Holmes-Bey, #935125

16. Petitioner Frederick Holmes-Bey is an inmate at New Castle Correctional Facility. His current release date is June 23, 2020. Frederick Holmes, Indiana Offender Data, Exhibit AA.

17. On February 10, 1998, Frederick Holmes-Bey was charged in Allen County Superior Court for the State of Indiana with three-counts (two A-felony counts and one B-felony count) of child molestation. Following a jury trial, Mr. Holmes-Bey was convicted, and was sentenced on March 29, 1999, to a 40 year term of incarceration. Petitioners' Indiana Case Summaries, Exhibit B.

18. Mr. Holmes-Bey appealed his conviction to the Indiana Court of Appeals where his conviction was upheld in an opinion entered January 20, 2000. *Holmes v. State*, 2000 Ind. App. LEXIS 86 (Ind. Ct. App. 2000).

19. In January of 2014, Mr. Holmes-Bey was called to participate in the INSOMM program. He was informed that in order to participate in the program he must complete a "sexual offense disclosure" and take responsibility for his crime. Mr. Holmes-Bey participated in the INSOMM program for 26 hours, but denied that he committed a sexual offense and refused to complete the sexual offense disclosure. He was then ordered to take a polygraph examination, which he refused. Frederick Holmes-Bey Conduct Report File & Treatment Notes, Exhibit AB.

20. As a result, on January 23, 2014, Mr. Holmes-Bey received a disciplinary action for failure to participate in a mandatory program, a violation of Code 116. After a finding of guilt, Mr. Holmes-Bey was demoted from Credit Class I to Credit Class III, but the sanction was suspended as Mr. Holmes-Bey showed willingness to return to the INSOMM program. Frederick Holmes-Bey Conduct Report File & Treatment Notes, Exhibit AB.
21. Having pled not guilty at trial, Mr. Holmes-Bey was willing to participate in the INSOMM program, but was not willing to admit guilt on a charge for which he had always maintained his innocence or be compelled to make other incriminating statements against himself. Frederick Holmes-Bey Conduct Report File & Treatment Notes, Exhibit AB.
22. Following his initial refusal to submit to a polygraph examination, Mr. Holmes-Bey refused again the polygraph and participation in the INSOMM program on February 4, 2014. Frederick Holmes-Bey Conduct Report File & Treatment Notes, Exhibit AB.
23. After a finding of guilt, Mr. Holmes-Bey was given 30 days in segregation, deprived of 180 credit days, demoted from Credit Class I to Credit Class III, and lost 45 days commissary and phone privileges. Frederick Holmes-Bey Conduct Report File & Treatment Notes, Exhibit AB.
24. Mr. Holmes-Bey has received an additional 16 disciplinary actions[19] losing every day of his good credit time to Code 116 violations. If Mr. Holmes-Bey were credited back his

[19] Mr. Holmes-Bey Received Code 116 Disciplinary violations on: 1/23/14, 2/4/14, 4/14/14, 6/16/14, 8/19/14, 10/22/14, 1/22/15, 3/31/15, 6/9/15, 8/20/15, 10/27/15, 1/7/16, 3/30/16, 6/21/16, 9/14/16, 12/16/16, 3/9/17

lost days, he would be eligible for immediate release. Frederick Holmes-Bey Conduct Report File & Treatment Notes, Exhibit AB.

d. Allan Kirkley, #232790

25. Petitioner Allan Kirkley is an inmate at New Castle Correctional Facility. His current release date is September 29, 2017. Allan Kirkley, Indiana Offender Data, Exhibit AC.

26. On March 9, 2012, Allan Kirkley was charged in Greene Circuit Court for the State of Indiana, with two counts of child molestation, a class C felony. Following a jury trial, wherein Mr. Kirkley testified on his own behalf, Mr. Kirkley was convicted, and was sentenced on June 17, 2013 to a five year term of incarceration. Petitioners' Indiana Case Summaries, Exhibit B.

27. Mr. Kirkley appealed his conviction to the Indiana Court of Appeals where his conviction and sentence were upheld in an opinion entered January 31, 2014. *Holmes v. State*, 2000 Ind. App. LEXIS 86 (Ind. Ct. App. 2000).

28. Mr. Kirkley began attending the INSOMM program in April of 2014. After attending group sessions for approximately one month, Mr. Kirkley was asked and refused to admit his offense and refused a polygraph examination. Allan Kirkley Conduct File & Treatment Notes, Exhibit AD.

29. On May 15, 2014, Mr. Kirkley received a disciplinary action for failure to participate in a mandatory program. After a finding of guilt, Mr. Kirkley was demoted from Credit Class I to Credit Class III, but the sanction was suspended as Mr. Kirkley showed a willingness to return to the INSOMM program. Allan Kirkley Conduct File & Treatment Notes, Exhibit AD.

30. After returning to the program, Mr. Kirkley continued to refuse to admit guilt on a charge for which he continues to maintain his innocence and testified under oath that he did not commit. Allan Kirkley Conduct File & Treatment Notes, Exhibit AD. As a result, on June 4, 2014, Mr. Kirkley received a disciplinary action for failure to participate in a mandatory program. After a finding of guilt, Mr. Kirkley was given 30 days in segregation, deprived of 180 credit dates, demoted from Credit Class I to Credit Class III, and lost 45 days of commissary and phone privileges.

31. Mr. Kirkley has received an additional 13 disciplinary actions[20] losing every day of his good credit time to Code 116 violations. If Mr. Kirkley were credited back his lost days, he would be eligible for immediate release. Allan Kirkley Conduct Report File & Treatment Notes, Exhibit AD.

V. Law and Argument

A bedrock principal of American law is the right to freedom of speech, the right to speak without being censored by the Government. But the right extends farther. It includes the implied right not to speak, the right to remain silent. The Fifth Amendment prohibits the government from forcing a person to testify against himself "nor shall any person... be compelled in a criminal case to be a witness against himself." U.S. Const. amend. V. The privilege allows an individual to refuse to "answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers may incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). In *Malloy v. Hogan*,

[20] Mr. Kirkley Received Code 116 Disciplinary violations on: 5/15/14, 6/4/14, 9/16/14, 1/12/15, 3/17/15, 5/20/15, 7/30/15, 9/30/15, 1/7/16, 3/11/16, 5/18/16, 7/27/16, 10/12/16, 12/22/16,