IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GARY DEAN CHILDERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. HC 2001-0440
	)	
WARDEN GLYNN BOOHER,	)	
	)	
Respondent.	)	

ORDER GRANTING EXTRAORDINARY RELIEF AND REMANDING MATTER TO DISTRICT COURT FOR FURTHER PROCEEDINGS

On April 13, 2001, Petitioner, *pro se*, filed an application for extraordinary relief in this Court. Petitioner sought a writ of habeas corpus and/or writ of mandamus in the District Court of Okfuskee County, Case No. CJ-01-44, seeking restoration of all time credits lost from September 2000 to the present at 44 days a month. Petitioner complains the Department of Corrections adopted a policy in 1989 that requires prisoners convicted of a sex offense to attend a sex offender program before receiving earned time credits and that under this program, inmates must admit guilt and submit to polygraph examination. Petitioner argues "the United States Constitution strictly forbids compelling a[n] individual to self-incriminate himself." He argues "the program refused to admit him" and he is being punished for "having his conviction still under appeal" and

"for having D.N.A. testing done by Oklahoma Indigent Defense System."

Petitioner questions whether the Department of Corrections can compel an offender to attend a program in which he must admit guilt and in which the inmate runs the risk of disclosing other crimes for which the inmate may then be prosecuted. This program was not part of his Judgment and Sentence. He also argues the program is "classified as voluntary" but that punishment is imposed for failure to participate and, in Petitioner's case, he has been denied acceptance to the program and is then being punished for not participating.

Petitioner also argues that because he was convicted in January 1985 in the District Court of Okfuskee County, Case No. CRF-85-63, this program requirement is an *ex post facto* violation.

In an order issued April 13, 2001, the Honorable Franklin D. Rahhal, District Judge, denied Petitioner habeas relief finding Petitioner failed to show he would be entitled to immediate release even if he had been permitted to accumulate the claimed credits. Judge Rahhal denied Petitioner mandamus relief finding it not to be an appropriate remedy as the District Court cannot mandate the Department of Corrections (DOC) to act counter to the existing statutes or place inmates on any certain level within the system. Judge Rahhal also found Petitioner's *ex post facto* claim patently frivolous as Section 138 required an inmate to participate in DOC sponsored schools or activities in order to accumulate extra credit under that provision for some time before Petitioner committed his offense, citing 57 O.S.Supp.1984, § 138.

Following the denial of relief in the District Court, Petitioner sought

extraordinary relief in this Court. In an Order issued May 17, 2001, the Respondent and/or the Attorney General for the State of Oklahoma was directed to file a response to Petitioner's application to this Court. The response by the Attorney General of the State of Oklahoma, by and through Patrick T. Crawley, Assistant Attorney General, was filed in this Court June 11, 2001.

As for Petitioner's *ex post facto* claim, the State asserts that "it appears that, except for opportunities to gain even more credits than were previously available, Section 138 has required prisoners to *satisfactorily* complete programs provided by the DOC to accrue credits thereunder since before Petitioner committed his crimes." And, "[i]t is clear ... that credits earned pursuant to the levels couched within Section 138 have depended upon the prisoner's successful participation in whichever programs the DOC has developed since the inception of the level program in 1988." The State sets forth:

> In any event, the level-program which afforded a method for accumulating credits on ascending levels within the system, provided a method by which a prisoner such as Petitioner, could garner more credits if he participated in the relevant program offered by the DOC. But, the statute has always required prisoners to *earn* the credits either through work or successfully completing programs such as the Sex Offenders Program that Petitioner complains about.

The State concludes:

> The legislative changes to Section 138 are neither retrospective nor disadvantageous to Petitioner. Certainly, Petitioner cannot show that he would have been entitled to a higher credit level premised upon the language of Section 138 at the time he committed his crimes. Rather, subsequent changes to Section 138 have merely provided opportunities to garner more earned credits as long as Petitioner meets the individual program needs. ... Therefore, no *ex post facto* concerns are evident.

As for Petitioner's self-incrimination claim, the State sets forth:

> The court in *Lile*[1] recognized t[w]o components couched within the privilege against self-incrimination: incrimination and compulsion. By the clear language of the constitutional provisions, both components must be present to evidence a violation of the privilege.

As for the "compulsion" component, the State argues that the *Lile* case "runs askance settled Supreme Court precedence and is the likely reason that certiorari has been granted; an indicator that the holding in *Lile* will be short lived." And, "the fact that Petitioner is not required to admit to sufficient facts to trigger a prosecution and his admissions are afforded a level of confidentiality beyond that protection undermine the incrimination component." The State concludes: "Simply put, Petitioner is not required by the sex offenders program to make admissions that would create a real and appreciable risk of incrimination in a criminal proceeding."

On June 19, 2001, Petitioner filed a reply to the State's response brief.

In *Lile*, the Tenth Circuit held that the policy of the Kansas Department of Corrections which forces an inmate "to choose between admitting incriminating information required for participation in the SATP [Sexual Abuse Treatment Program] and incurring the substantial and potent penalties that would be imposed if he refused to participate is 'capable of forcing the self-incrimination which the Amendment forbids'." 224 F.3d at 1189. The Tenth Circuit concluded the Kansas Department of Corrections "may not tie rehabilitation to an inmate's surrender of his Fifth Amendment right against self-incrimination where the *Turner*[2] balancing weighs in favor of the inmate." *Id.* at 1192. *Lile* concludes the

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[1] *Lile v. McKune*, 224 F.3d 1175 (10th Cir.2000).
[2] *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

Kansas policy is not reasonably related to legitimate penological objectives and holds that it violates the Kansas inmate's Fifth Amendment right against self-incrimination. The Tenth Circuit added that while Kansas cannot penalize the inmate for invoking his Fifth Amendment right, Kansas could determine if it wishes to modify its program "by implementing a system of confidentiality or granting immunity". *Id.*.

Petitioner cited as support the Tenth Circuit case of *Lile* in his application to this Court, but we could not determine from the record then before this Court whether this case was cited to and reviewed by the District Court. Consequently, we did not have findings of fact and conclusions of law addressing how the Oklahoma Department of Corrections and our statutory law may differ from the Kansas Department of Corrections and Kansas statutory law.

Therefore, in an Order issued August 29, 2001, the matter was remanded to the District Court of Okfuskee County for appointment of counsel to represent Petitioner and for an evidentiary hearing to determine whether the policies of the Oklahoma Department of Corrections violate an inmate's right against self-incrimination. An evidentiary hearing was held in the District Court September 24, 2001. The transcript of the evidentiary hearing and the findings and conclusions of the Honorable Franklin D. Rahhal, District Judge, were filed in this Court October 31, 2001. Judge Rahhal's order sets out:

A. With regard to Petitioner's Fifth Amendment claim, the Court makes the following findings of fact:
    1. Petitioner was incarcerated in the Department of Corrections ("DOC") on January 5, 1985, on convictions of first degree rape and sodomy to serve two (2) consecutive twenty (20) year terms.

2. In approximately August 2000, Petitioner was recommended for placement in the John Lilley Correctional Center Sex Offender Treatment Program. At that time, Petitioner was on DOC Class Level 4.
3. On August 29, 2000, Petitioner signed a Program Refusal Form for the Sex Offender Treatment Program based upon his refusal to admit that he had committed the sex crimes of which he was convicted. Petitioner stated he would participate in the program to maintain his DOC class level without incriminating himself.
4. Petitioner was assessed a program refusal and reduced to DOC Class Level 1.
5. Subsequently, Petitioner was transferred to the Residential Sex Offender Treatment Program at Joseph Harp Correctional Center. On October 17, 2001, Petitioner completed an intake form into the program and again refused to admit his crimes of incarceration based upon a pending appeal and his attempts to exonerate himself.
6. Petitioner was again assessed a program refusal.
7. To be admitted to the sex offender treatment programs sponsored by the Oklahoma Department of Corrections, an inmate is required to make a complete and written disclosure of his sexual history, including the crime of conviction and any uncharged sex crimes. By so doing, the programs seek information which could incriminate and subject an inmate to further criminal charges, especially given the fact that no confidentiality is offered in such disclosures.
8. In addition, to participate in the sex offender treatment programs the Department of Corrections requires the inmate to execute a waiver of all privileged communications.
9. To be admitted to the sex offenders program at the Joseph Harp Correctional Center, an inmate must submit to a polygraph examination and to sign a consent form which states that "admissions of criminal behavior will be held confidential, except Department of Corrections employees are required to report any child abuse or previous sexual crimes heretofore unreported, and when the employees have some specific information about such events, they shall report it to the appropriate authorities. Furthermore, any areas of deception and information regarding disclosure may be integrated into a final discharge report and the Department of Corrections employees will report the same to the appropriate authorities, such as the parole officers and community corrections officers."
10. Although the results of a polygraph exam are not considered sufficiently substantial to be admitted into evidence, it is no doubt a valuable investigation tool and could reveal a great deal

of information not only through the polygraph mechanism but through the questions asked and answered.

11. In Petitioner's case, his assessed sex offender program refusals were reported to the parole officers and as a result, Petitioner was denied the ability to even be considered for parole.
12. The adverse consequences which arise from an inmate's refusal to disclose sexual history and reveal prior crimes with which he has been convicted are many. The inmate is denied the opportunity to earn good time credits. The inmate is removed from an upper class level to a lower level. In this case, Petitioner was lowered from class level 4 to class level 1. The reduction in class level restricts and limits many privileges such as the television, phone, radio, and visitation privileges. The inmate can only be visited by his counselor and the Chaplain. It requires transfer to a higher security prison. In addition, the inmate cannot make as much money, has extremely limited canteen privileges and can't spend as much money. Petitioner suffered all of these detriments as a result of his refusal to enter the sex offender treatment programs.
13. Extremely important is the possibility that the inmate may evoke undue scrutiny by the parole officers and the parole board and unduly, under some circumstances, subject the inmate to a revocation proceeding. The Court finds this is very important because it almost happened in this case. The Petitioner was not even given the right to talk to the parole board because of one thing and one thing only, he refused to enter this particular program.
14. In the instant case or any other case of this type, an extremely serious consequence would be the possible damage to an appeal that the inmate might have pending, especially when it relates to his guilt or innocence, inasmuch as participation in the sex offender treatment programs requires the admission of guilt. Petitioner has never admitted guilt and his case is on appeal.

B. As a result of these findings, the Court makes the following conclusions of law:
    1. The Fifth Amendment provides that no person shall be compelled to be a witness against himself in any criminal case and this privilege has two (2) components, incrimination and compulsion.
    2. Department of Correction sexual offender treatment programs required Petitioner to incriminate himself by admitting his crimes of incarceration, regardless of pending appeals, and by disclosing other sexual crimes which could subject him to prosecution.

3. The imposition of the consequences set forth above on Petitioner and similarly situated inmates constitutes impermissible compulsion as held in *Lile v. McKune*, 224 F.3d 1175 (10th Cir.2000). The imposition of these consequences constitutes penalties sufficiently substantial to implicate the Fifth Amendment because they have real, substantial effects on the inmate.
4. It is contended by the Department of Corrections that participation in the sex offenders treatment programs is voluntary. A policy of imposing serious administrative and other consequences on the Petitioner for his refusal to incriminate himself is a form of compulsion and these programs are anything but voluntary.
5. The Court has given careful consideration to the State's legitimate interests in rehabilitating individuals and the public safety. The Department of Corrections has a legitimate rehabilitative purpose in demanding full disclosure in sexual offender programs, but the State's interest does not make the disclosures required any less violative of the Fifth Amendment privileges of Petitioner. In balancing the State's interest against the Petitioner, the balancing weighs heavily in favor of the Petitioner.
6. The Oklahoma Department of Corrections sexual offender treatment programs violate an inmates [sic] right against self-incrimination.
7. The Department of Corrections has not constructed a sufficient privilege for prisoners' statements which would eliminate the threat of incrimination. To do so would be very simple. The Department of Corrections must modify their policy by implementing a system of confidentiality which would privilege all incriminating statements or grant immunity. Privileging these statements or granting immunity in no way would restrict the Department of Correction's [sic] interest in rehabilitating the inmate or protecting society and promoting public safety.

C. With regard to Petitioner's *ex post facto* claims, the Court makes the following findings of fact and conclusions of law:
   1. Petitioner is not losing credits for time served under the previous version of 57 Okla.Stat. § 138, which was in effect at the time of his conviction. Rather, Petitioner is losing the ability to earn credits because of his non-compliance with the programs assigned to him and the same effect would have taken place under the old and current versions of 57 Okla.Stat. § 138.
   2. Both laws required prisoners to perform assigned tasks and programs adequately in order to be eligible to earn any credits. In order to violate the prohibition on *ex post facto* laws, the law

must be retrospective and apply to Petitioner to his disadvantage.

3. In this case, Petitioner would have been placed on a lower status and unable to earn extra credits for failing to complete the required programs under both the old and new versions of 57 Okla.Stat. § 138. Therefore, Petitioner's ability to earn extra credits is unchanged and there is no *ex post facto* violation.

We agree with Judge Rahhal that Petitioner's *ex post facto* claim has no merit. However, the record before this Court and the findings and conclusions of Judge Rahhal clearly reflect the Oklahoma Department of Corrections has not constructed a privilege of confidentiality for prisoner statements which would eliminate the threat of incrimination. We note that Judge Rahhal relied upon the Tenth Circuit's case and while we find *Lile* persuasive, we rely on state constitutional grounds in granting relief. Utilizing the totality of the circumstances[3] approach to determine whether a defendant's state constitutional rights are violated, we find the Sexual Offender Program as now applied by the Oklahoma Department of Corrections, unconstitutional as the program clearly violates an inmate's right against self-incrimination. "No person shall be *compelled* to give evidence which will tend to incriminate him". (Emphasis added.) Okla. Const. art. II, § 21. In this case the substantial penalties imposed upon Petitioner clearly constitute impermissible compulsion.

Therefore, Petitioner's application for extraordinary relief is **GRANTED** and those consequences suffered by Petitioner must be restored. The Department of Corrections must modify its program to ensure the constitutional rights of

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[3] *See Dennis v. State*, 1999 OK CR 23, ¶ 20, 990 P.2d 277.

participants are protected. This matter is, therefore, **REMANDED** to the District Court for further proceedings consistent with this Order.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 9th day of May, 2002.

DISSENT

GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

Special Concur with Writing Attached

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

Dissent

STEVE LILE, Judge

Writing Attached

ATTEST:

Clerk

JOHNSON, V.P.J.: SPECIAL CONCUR

First, I wish to commend The Honorable Franklin D. Rahhal, District Judge, for his findings of fact and conclusions of law. These were very detailed and very helpful as it relates to consideration of this Order. I certainly agree with the Tenth Circuit in their holding in *Lile v. McKune,* 224 F. 3d 1175 (10th Cir.2000). What the State of Oklahoma is doing is exactly what Kansas did in the holding in *Lile.* This State is effectively forcing someone to incriminate themselves and open themselves to additional criminal prosecution. They also are keeping someone from having treatment which may offer help to a prisoner and protect the public and at the same time refusing credits or assisting the prisoner if they do not participate and do not incriminate themselves with admissions.

I am also offended by the Sexual History Questionnaire that is asked and to be filled out by a prisoner. This, I think, is not only invasive but goes far beyond what is needed for treatment and is intrusive, most of the answers are not needed for treatment and, quite frankly, the questionnaire to me is rather sick. It seems to me this entire program should be re-evaluated to see if this type of questioning, these type of sessions, really do bring any form of rehabilitation.

The polygraph examination consent form starts with a proper statement, that is, a person has a right to remain silent but then goes ahead to say that if you do remain silent it effectively is sufficient grounds for termination from the treatment. Again, this is not necessary. The requirements in this form, quite frankly, just go too far and they violate clearly the prisoners right as it relates to self-incrimination.

LILE, JUDGE: DISSENTS

Sex offender treatment programs universally require a patient to admit that a problem exists. Petitioner does not challenge the psychological principals behind the requirement. Petitioner's participation in treatment is entirely voluntary. There is no compulsion as envisioned by the Fifth Amendment to the U.S. Constitution or as envisioned by the Oklahoma Constitution. I dissent.

I am authorized to state that Judge Lumpkin joins in this special vote.