

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID R. MCKUNE, WARDEN, ET AL., :

4 Petitioners :

5 v. : No. 00-1187

6 ROBERT G. LILE :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, November 28, 2001

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:03 a.m.

13 APPEARANCES:

14 STEPHEN R. McALLISTER, ESQ. Lawrence, Kansas; on behalf of
15 the Petitioners.

16 GREGORY G. GARRE, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curia,
19 supporting the Petitioners.

20 MATTHEW J. WILTANGER, Topeka, Kansas; on behalf of the
21 Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 00-1187, David R. McKune v. Robert G. Lile.

5 Mr. McAllister.

6 ORAL ARGUMENT OF STEPHEN R. McALLISTER

7 ON BEHALF OF THE PETITIONERS

8 MR. McALLISTER: Mr. Chief Justice, and may it
9 please the Court:

10 Choices have consequences, but they nonetheless
11 remain choices. The mere withdrawal of prison privileges
12 such as a personal television or how much an inmate may
13 spend at the canteen, privileges which are not part of an
14 inmate's sentence and to which an inmate has no legal
15 entitlement, does not amount to constitutional compulsion
16 in violation of the Fifth Amendment, certainly not when
17 the reason for the withdrawal of those privileges is the
18 inmate's failure to comply with an unquestionably
19 legitimate treatment requirement that he accept
20 responsibility for his offenses.

21 QUESTION: The problem, though, is he's forced,
22 in effect, to confront the treatment possibility. It's
23 not an option. I mean, the tough part of the case for me,
24 I think, is the fact that this is not a scheme, as I
25 understand the Federal scheme, in which the inmate says, I

1 want to take advantage of this treatment program. This is
2 a scheme in which the State says, you're going to take
3 advantage of it, and if you don't take advantage of it,
4 including the admissions in the reports of other offenses,
5 and so on, you're going to lose substantial privileges.
6 That, to me, is the tough part of the case.

7 MR. McALLISTER: That's true, Justice Souter,
8 and our program does differ from the Federal program in
9 that respect, but it is still a choice for Mr. Lile. He
10 does not have to incriminate himself in any way. His
11 refusal to participate is not at all incriminating, and
12 what we're talking about in terms of what he may lose here
13 are really relatively mild incentives within the prison --

14 QUESTION: I thought that the participation
15 required the prisoner to describe previous offenses that
16 he may have been --

17 MR. McALLISTER: If he participates.

18 QUESTION: -- committed.

19 MR. McALLISTER: If he participates.

20 QUESTION: That he may have committed if he
21 participates.

22 MR. McALLISTER: Right, but what I'm saying is,
23 if he simply refuses to participate, there's no
24 incrimination whatsoever, nothing drawn from that. He
25 simply --

1 QUESTION: But what happens if he refuses? Is
2 he put in a different type of confinement with different
3 terms and conditions?

4 MR. McALLISTER: He can be, yes, and he will
5 certainly, with our privilege incentive level system, as
6 the inmates work their way through they have more
7 privileges, and they're in the nature of how much they can
8 spend at the canteen --

9 QUESTION: Well, everybody goes in presumably at
10 the same level.

11 MR. McALLISTER: They start at intake.

12 QUESTION: You're screened, and you start at the
13 same level of control.

14 MR. McALLISTER: Yes.

15 QUESTION: Now, the prisoner says no, I don't
16 want to participate in that program. Does that mean that
17 he stays in that opening level, or is he then potentially
18 put in something even more severe than that?

19 MR. McALLISTER: The Kansas regulations say, if
20 an inmate is recommended for this treatment program and he
21 refuses, he goes from level 3 to level 1. Mr. Lile is at
22 level 3 because when we adopted this incentive scheme
23 several years ago we grandfathered in all the inmates at
24 the highest level, so we started them out with the level 3
25 privileges, which is the highest they can achieve in

1 prison, and it was then theirs to lose by not complying
2 with rules and committing disciplinary infractions, and so
3 forth, so he was at level 3, and when he refused to
4 participate he then comes down to level 1.

5 QUESTION: Is that where he is today?

6 MR. McALLISTER: Well, he's actually not,
7 because he got an injunction against -- in this case
8 against actually carrying out this program.

9 QUESTION: In the future --

10 QUESTION: So is he still incarcerated?

11 MR. McALLISTER: Yes, he is.

12 QUESTION: And he's at level 3?

13 MR. McALLISTER: Level 3, yes.

14 QUESTION: In the future, what's at issue is not
15 being deprived a benefit you already have, but of not
16 giving you benefits that you don't have?

17 MR. McALLISTER: Well, I --

18 QUESTION: I mean, the reason he's being chopped
19 down from 3 to 1 was that he was grandfathered.

20 MR. McALLISTER: He was grandfathered in.

21 QUESTION: But in the future, he would simply
22 not make it from 1 to 2 and from 2 to 3, if he didn't go
23 into the program?

24 MR. McALLISTER: Very possibly. I mean, very
25 possibly.

1 QUESTION: Because there's been some dispute
2 between you and the other side as to whether this is
3 simply the denial of a benefit or a punishment, and I'm
4 not sure there's a whole lot of difference, but --

5 MR. McALLISTER: And in the context of the
6 prison --

7 QUESTION: -- for the grandfathered people it
8 looks more like a punishment, chopping him down to 1, but
9 in the future, at least, he just doesn't get promoted from
10 1 to 2 to 3.

11 MR. McALLISTER: That's certainly a possibility,
12 and one thing about --

13 QUESTION: You say it's a possibility. I mean,
14 I suppose it's always a possibility, but does the scheme
15 for those who are not grandfathered provide that they will
16 never yet be on the intake level if they are a sex
17 offender and so on, unless they agree to this?

18 MR. McALLISTER: No. They will progress, unless
19 they have other reasons that they're not, because what
20 happens with this program, it's an 18-month program. Our
21 inmates are not even evaluated, typically, for release
22 until they're 2 years from their scheduled release date,
23 so anybody with a sentence of any length will go several
24 years in the system, working their way up if they're
25 complying with what they're supposed to do.

1 QUESTION: Well then, the only person that's
2 going to be in the position that Justice Scalia described
3 is the person who's been getting in trouble along the way
4 and never does progress. The person, I take it, like this
5 petitioner here is going to be in the same position as
6 this petitioner.

7 MR. McALLISTER: Yes, potentially, but in our
8 view it doesn't matter in the prison, should not matter in
9 the prison context whether you view it as taking away a
10 benefit or not bestowing a benefit, because none of these
11 inmates come in with an expectation to any of these
12 privileges.

13 QUESTION: Could the -- Kansas do that -- this
14 with respect to a prisoner who's writing letters to the
15 editor, to the newspaper, complaining about prison
16 conditions? They say, well, this -- all this is
17 privileged. We don't have to give you anything. You have
18 no --

19 MR. McALLISTER: I think that's a different
20 case, and that probably takes the Court quickly to Turner,
21 where the Court has addressed the --

22 QUESTION: But why is the First Amendment
23 different from the Self-Incrimination Clause? I mean, if
24 in the one case you can't disadvantage the person for
25 exercising that constitutional right, why in the other

1 case can you? I mean --

2 MR. McALLISTER: Two --

3 QUESTION: -- you have the First Amendment --

4 MR. McALLISTER: Two things, Justice Ginsburg.

5 One, we don't think we are disadvantaging here in terms of
6 actually compelling him.

7 QUESTION: But then you should say the same
8 thing about the First Amendment. You're not taking away
9 anything you're entitled to. You've no liberty interest,
10 property interest, all that. If that follows, then what's
11 wrong with saying --

12 MR. McALLISTER: But in the First Amendment
13 context he has a right, a free speech right or a right of
14 access to the courts that may be at issue. In this
15 context, all the Fifth Amendment says is, no person shall
16 be compelled, so --

17 QUESTION: As I recall it, the First Amendment
18 says -- speaks of abridgement --

19 MR. McALLISTER: Yes.

20 QUESTION: -- right, and Fifth Amendment speaks
21 of compulsion.

22 MR. McALLISTER: Compulsion, that's the language
23 in the amendment.

24 QUESTION: I'm concerned about the same thing
25 Justice Ginsburg is concerned -- I have to say I can't

1 find in our cases a statement that a burden on your -- or
2 an unconstitutional condition which involves the Fifth
3 Amendment is barred, but I'm wondering if it oughtn't to
4 be.

5 Is it your -- it seems to me to follow from your
6 position that every prisoner in Kansas could be told,
7 either you confess to the crime for which you've been
8 convicted and all other crimes you've committed or you go
9 to maximum security for the rest of your time here.

10 MR. McALLISTER: Not necessarily, Justice
11 Kennedy.

12 QUESTION: Because I think the State does have
13 an interest in saying, we want to rehabilitate you, and
14 it's best for you to confront your wrong. Would you say
15 the statute, or the rule I've proposed is problematic? Is
16 it different from what you're proposing?

17 MR. McALLISTER: I think it's potentially
18 different, although it is potentially permissible
19 constitutionally, but the question would become, what sort
20 of legitimate valid penological interest do we have? Do
21 we have such an interest in having every inmate do that
22 from the day they enter prison? This is very different.

23 QUESTION: I think you can make a better
24 argument.

25 MR. McALLISTER: We could make that argument.

1 QUESTION: It's better for people to confront
2 the consequences of what they've done.

3 MR. McALLISTER: We could make that argument,
4 and in this case it's critical, actually --

5 QUESTION: I'd be very troubled by that.

6 MR. McALLISTER: Well, it's much more than that
7 in this case, because here the therapists are clear that
8 denial is a big problem with sex offenders, and to
9 overcome that denial we need a meaningful acceptance of
10 responsibility, not an immunity that simply allows the
11 inmate to talk with no consequence whatsoever,
12 potentially. We need a meaningful acceptance, and that's
13 what we're after here, and Mr. Lile has not questioned
14 that's a legitimate --

15 QUESTION: Well, you think it can only be
16 meaningful if you compel them to admit to a new crime for
17 which they could be prosecuted?

18 MR. McALLISTER: Except with all due respect,
19 Justice O'Connor, we would not say we're compelling them.
20 We're simply giving them a choice that has some real
21 consequences. We want people in this program who really
22 want to participate. We have a waiting list to get into
23 this program, so we don't need inmates in this program who
24 are not serious about this. We have plenty who are
25 willing to take advantage of the program as it's done,

1 right now, and it's full, and there's a waiting list.

2 QUESTION: Then why isn't your penalogical
3 interest satisfied in confining the program to those who
4 want to be in it, who will not be subject to this
5 compulsion, if that's what it is?

6 I mean, your argument is that we have a
7 penalogical interest, in effect, that justifies these
8 consequences.

9 MR. McALLISTER: Yes, we do.

10 QUESTION: But if you could fill your program
11 without even having to raise the issue that involves these
12 consequences, why do you have a penalogical interest in
13 the insistence that gives rise to this case?

14 MR. McALLISTER: Because these fellows have
15 proven that most -- or, not most, but many of them will
16 not voluntarily engage in this program, even though they
17 need --

18 QUESTION: I'm assuming that is so, but if you
19 can fill the program with people who will, why is there an
20 interest in effect in forcing the issue for those who do
21 not want to do it voluntarily?

22 MR. McALLISTER: Because we still have an
23 interest in rehabilitating all of these sex offenders.
24 Just because some of them are more willing to be
25 rehabilitated doesn't mean the State does not have an

1 interest --

2 QUESTION: Well, if the program is full, then is
3 your interest in simply getting statements of guilt or
4 something from people who will never go into the program?

5 MR. McALLISTER: No, and that's why he has the
6 choice. He can simply refuse. He could refuse, and
7 there's no incrimination if he refuses to participate, but
8 what he's doing is taking up a bed in the medium part of
9 the facility, which is overcrowded at this point, in
10 essence double-celled everyone, and the medium unit is a
11 working unit. The medium unit is for people who are
12 actively involved in prison programs, and so we just don't
13 have the space. If you're not going to work at your
14 programs, we'll move you. That's what we're trying to do
15 with Mr. Lile.

16 QUESTION: But it's not a voluntary program,
17 it's a conscription system. What you -- first, I'd like
18 you to go back to the rehabilitation thing, because that
19 is an aim, an aspiration for every prisoner, and you made
20 very strongly the point that the first step in
21 rehabilitation is acceptance of responsibility. If that's
22 so, I don't see why you -- this -- you could not do this
23 with every prisoner who enters.

24 You could say, take responsibility by confessing
25 that you did what you were accused of doing, no matter

1 what your defense was. Two, tell us about all your other
2 nefarious deeds. You apply this to sex offenders, but the
3 reasons that you did seem to me to be across the board.
4 Is there any distinction, any constitutional distinction
5 that you would make, or are you saying yes, we could do
6 this in the case of every prisoner?

7 MR. McALLISTER: If there's -- as long as
8 there's a deter -- a legitimate penalogical interest, yes,
9 potentially we could. We don't. We're only focused on
10 the sex offenders here, but if there's a legitimate reason
11 to do it, potentially --

12 QUESTION: Well, let's take out the if, because
13 is there or isn't there? Is it -- in the case of everyone
14 that you incarcerate there is an interest in
15 rehabilitating that person.

16 MR. McALLISTER: Absolutely.

17 QUESTION: And you have said that the first step
18 in rehabilitation is acceptance of responsibility for the
19 wrong that you've done.

20 MR. McALLISTER: Yes.

21 QUESTION: But you also rely, don't you, Mr.
22 McAllister, on the fact that the therapists for this
23 particular type of crime have come down very hard on the
24 idea, and I take it perhaps there may not be the same body
25 of support for that sort of treatment for other offenders.

1 MR. McALLISTER: And there's certainly not, for
2 example, treatment programs necessarily for burglars or
3 robbers or other categories. The sex offender program is
4 somewhat special in that respect.

5 QUESTION: But constitutionally, if suddenly
6 somebody got a good idea here and a psychiatrist came
7 forward saying yes, you can reform property criminals too,
8 we'd be in exactly the same boat.

9 MR. McALLISTER: Yes, potentially, and that's
10 not, in our view, a constitutional problem, because this
11 Court has long said none of the things we're talking about
12 here are atypical in prison. The inmates have no
13 particular expectation of a particular set of living
14 conditions within prison. Meachum v. Fano is very clear.
15 They could be transferred from one prison to another for
16 whatever reason or no reason at all, without violating the
17 Constitution. This is a very mild incentive program to
18 try to get these fellows to meaningfully participate in
19 the program.

20 QUESTION: The kind of conundrum that puzzles me
21 that I don't have an answer to is illustrated by the trial
22 process itself. I suppose the Government couldn't
23 possibly say, if you insist on your right to a jury trial,
24 and insist on your right to remain silent, we're going to
25 sentence you to 10 more years in jail. But the Government

1 can say, if you confess, and don't go to trial, and show
2 true contrition, we'll give you 10 years less. That's
3 written into the guidelines.

4 But they seem to come to the same thing. Well,
5 that seems to be true of this case, and if I could
6 understand how to analyze the first, I might be able to
7 understand how to analyze the second.

8 MR. McALLISTER: Well, Justice Breyer, to say
9 the first is different, or in essence we're different,
10 because all of our -- this takes place inside the prison.
11 The expectations are quite different. That's why we
12 discuss Sandin in the briefs, not because it is
13 necessarily transportable to the Fifth Amendment, but what
14 Sandin recognizes is prisons are very different, and what
15 the expectations are, what the hardships are is just a
16 very different situation than free citizens, and what they
17 may be confronted within the way of choices.

18 QUESTION: You are saying you can have two
19 classes of prisoners, those who have confessed to their
20 crimes and those who haven't, and you can treat them
21 differently, no TV, no meat at lunch, no recreation, no
22 softball, and it seems to me the necessary consequence of
23 that for a prisoner facing a long term is that it's going
24 to induce confessions from innocent people.

25 MR. McALLISTER: Except, Justice Kennedy -- it

1 may do that, but our program, just like the Federal
2 program, has pretty strict confidentiality limits.
3 Basically there's a patient-therapist privilege that
4 operates here, and the only reason -- they're given a form
5 right up front that says the only reasons the therapist
6 will disclose anything that's disclosed to the therapist,
7 very limited, things that deal with safety within the
8 prison, threats to other inmates --

9 QUESTION: Mr. --

10 QUESTION: I thought you conceded -- you
11 conceded that a prosecutor, say, in the sexual history --
12 he says, I committed X, Y, Z rapes -- that a prosecutor,
13 as long as there's no statute of limitations problem, in
14 Kansas -- unlike, as I understand the Federal program is,
15 a prosecutor could say, okay, now we're going to indict
16 you for that.

17 MR. McALLISTER: My understanding is they could
18 do that in the Federal program as well, because there's no
19 immunity granted under the Federal program either, so if
20 they actually made a statement, the Federal program could
21 prosecute them just like we could. We have not, in 13
22 years of this program.

23 QUESTION: Yes, but under the Federal program
24 they don't suffer any loss of anything if they don't make
25 the statement and under yours, they do.

1 MR. McALLISTER: That's true, but --

2 QUESTION: But under yours, in any case, whether
3 the Feds do it or not, under yours the prosecutor could
4 use that information, couldn't he?

5 MR. McALLISTER: Could. We never have, but
6 could, yes, theoretically could.

7 QUESTION: May I ask you, Mr. McAllister, do you
8 know -- there's similar programs in a lot of States, as I
9 understand it. Do any of them give the inmate immunity if
10 he participates in the program?

11 MR. McALLISTER: Justice Stevens, it's my
12 understanding that some may, although I don't know the
13 exact number, and I do know from the State amicus brief
14 the 18 States that signed onto that obviously think
15 immunity is a bad idea and, as I said, the Federal
16 Government does not immunize the inmates who participate
17 in the Federal program.

18 QUESTION: I understand the Federal Government
19 does not, yes.

20 MR. McALLISTER: Yes.

21 QUESTION: Of those, how many are like Kansas?
22 That is, it isn't a voluntary thing?

23 MR. McALLISTER: Justice Ginsburg, I don't know
24 the answer to that. I don't know exactly what their
25 programs are like.

1 Ours was the first of its kind in some sense
2 when we implemented this program, so some may have
3 followed our model, but I don't know for sure.

4 With the Court's permission, I'd like to
5 remain -- reserve the remainder of my time.

6 QUESTION: Very well, Mr. McAllister.

7 Mr. Garre, we'll hear from you.

8 ORAL ARGUMENT OF GREGORY G. GARRE

9 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE PETITIONERS

11 QUESTION: Mr. Garre, why does the Federal
12 Government not think it a good idea to grant immunity?

13 MR. GARRE: Justice Scalia, the Federal
14 Government has a very limited program that applies in only
15 one facility Nation-wide, and it has made a determination
16 to allow for voluntary participation among convicted
17 sexual offenders in that program.

18 Now, in our view that is a judgment that this
19 Court's decisions clearly enable the Federal Bureau of
20 Prisons to make, and we think that the Kansas prison
21 officials have acted within their judgment to adopt a
22 different kind of program. As the therapists all
23 acknowledge, denial is one of the biggest obstacles to
24 receiving treatment in these kinds of programs, and I
25 think it's important for the Court to recognize --

1 QUESTION: Are you going to get around the
2 answering my question? Why did the Federal Government
3 think it not a good idea to grant immunity in its program?

4 MR. GARRE: Oh, the Federal Government reserves
5 the right of the same confidentiality limits that the
6 State does, that is, to deal with offenses that threatens
7 institutional security, to deal with suspected cases of
8 child abuse, to deal with suspected cases of harm to
9 individuals within the prison or outside of the prisons.
10 Those confidentiality limits are clearly related to
11 legitimate penalogical interests, and we think that the
12 Federal Government --

13 QUESTION: Only those things can be prosecuted?
14 I thought that it -- that prosecution was available for
15 anything that was disclosed, although there was
16 confidentiality.

17 MR. GARRE: That's right. The confidentiality
18 limits work in conjunction --

19 QUESTION: Those are confidentiality limits, not
20 immunity limits, right?

21 MR. GARRE: That's right.

22 QUESTION: So the Federal Government has not
23 given use immunity for anybody in the program.

24 MR. GARRE: And that's absolutely clear from the
25 waiver of the confidentiality statement that inmates sign

1 before they enrol in the program, and we think that
2 particularly where you're dealing with a program that does
3 clearly promote legitimate penalogical interests in
4 rehabilitating a class of offenders that poses a unique
5 risk of recidivism upon their release, that States, the
6 mere fact that the State doesn't grant immunity to inmates
7 who participate does not provide an answer to the
8 constitutional problem.

9 QUESTION: The Feds --

10 QUESTION: Well, does the Federal Government
11 deprive the prisoner of any benefits or programs if he
12 refuses to engage in the program?

13 MR. GARRE: The Federal Government doesn't apply
14 the same incentive schemes that the State of Kansas does
15 for participation.

16 QUESTION: Are there any? What are the
17 incentives in the Federal program?

18 MR. GARRE: The incentives -- the overriding
19 incentive is, of course, the value of the treatment that
20 the inmate receives. Now, once a --

21 QUESTION: But not -- nothing is threatened or
22 carried out in the Federal program to deprive the
23 nonconsenting prisoner of any privilege, is that right?

24 MR. GARRE: Well, that's true up front in terms
25 of the incentive scheme. Now, once an inmate is in the

1 program, and if he chooses not to comply with the
2 acceptance of responsibility goals, the inmate can be
3 transferred back to his parent facility and that can be
4 something on its record, but certainly up front --

5 QUESTION: The choice to go into the program is
6 strictly the inmates. There's no coercion or inducement.
7 He loses nothing if he chooses not to go in, is that
8 correct?

9 MR. GARRE: That's the way the Federal Bureau of
10 Prisons --

11 QUESTION: Is it a more desirable facility?

12 MR. GARRE: It is at a more desirable facility.

13 QUESTION: So what he loses is, he doesn't -- he
14 isn't -- he doesn't get out of the rotten place he's in to
15 a better facility, right?

16 MR. GARRE: I think that's right, and I think
17 it's important --

18 QUESTION: But he doesn't lose a benefit that he
19 currently has?

20 MR. GARRE: Well, we don't -- we think that the
21 privileges that we're talking about in the case of Kansas,
22 TV ownership, personal TV in the cell, visitation
23 privileges beyond immediate family, and lawyers, canteen
24 expenditures, these aren't the sorts of things --

25 QUESTION: The right to work, the right to take

1 other programs in the prison?

2 MR. GARRE: The privileges are reduced. I think
3 that the chart that's on page 27 of the joint appendix
4 explains how they're reduced.

5 QUESTION: Substantial reduction in how much you
6 can earn in prison, what jobs you can do in prison, isn't
7 that so?

8 MR. GARRE: There is a definite reduction, and
9 the flip side of that is Kansas reserves the higher
10 privileges, the more modern facilities to those inmates
11 who choose to take the constructive steps towards
12 reentering society.

13 QUESTION: Okay, but there's no --

14 QUESTION: Mr. Garre --

15 QUESTION: There's no reduction in the Federal
16 system, is that correct?

17 MR. GARRE: There's no -- the Federal system
18 currently doesn't employ the same earnable privilege
19 scheme that the Kansas prison does.

20 QUESTION: We're trying to be specific about it.
21 As I think we think we understand it, the inmate cannot
22 lose privileges that the inmate currently enjoys simply by
23 exercising the option not to enter the program. Are we
24 correct?

25 MR. GARRE: That's correct, except that the

1 inmate can be sent back to his parent facility.

2 QUESTION: Yes, but you have said -- you said in
3 your opening statement, and you seem to be backing away
4 from it, you said the Federal program is a voluntary
5 program.

6 MR. GARRE: As is --

7 QUESTION: It's not a voluntary program, at
8 least not for the people like --

9 MR. GARRE: Well --

10 QUESTION: That's sort of the issue here, isn't
11 it?

12 MR. GARRE: With respect, we think that that is
13 the issue. I mean, we're not talking about losing
14 someone's job, or means of livelihood, the consequence
15 faced by free individuals in the penalty cases that
16 respondents relied upon. We're talking about loss of
17 institutional privileges that inmates have no expectation
18 of enjoying once they enter the prison. We think that the
19 prison context is key to evaluating the Fifth Amendment
20 claim in this case.

21 QUESTION: Let me ask you this, Mr. Garre. Maybe
22 you can give me some help with the larger question that's
23 bothering me and I think underlies Justice Ginsburg's
24 first question. The rule of unconstitutional conditions
25 doesn't seem to apply in our cases, or hasn't been applied

1 in the Fifth Amendment context. Why is that?

2 MR. GARRE: Well, foremost because the Fifth
3 Amendment says, compelled self-incrimination. The
4 amendment therefore recognizes that there are some sorts
5 of pressures or conditions short of compulsion which would
6 not meet the Fifth Amendment standard, and this Court's
7 cases --

8 QUESTION: Anything short of compulsion does not
9 meet it? That is to say, you can have two classes of
10 inmates, those who've confessed and those who haven't, for
11 all of prison life?

12 MR. GARRE: Well --

13 QUESTION: And isn't there a danger, then, of
14 inducing innocent people to confess?

15 MR. GARRE: I think that type of hypothetical is
16 much different, much further afield than the program in
17 this case.

18 QUESTION: Well, the Fifth Amendment doesn't say
19 inducing, does it, it says compelling.

20 MR. GARRE: It says compelling, that's exactly
21 right, and that's supported by the text and history and
22 purpose of the amendment.

23 QUESTION: Mr. Garre, don't we in fact have two
24 classes in all prison systems, those who have pleaded
25 guilty and have gotten a relatively short sentence by

1 reason of their guilty plea for a particular crime, and
2 those who have refused to plead guilty and have gotten a
3 longer sentence because of their refusal to do so, for the
4 same crime?

5 MR. GARRE: That's --

6 QUESTION: You have two classes in prison.

7 MR. GARRE: That's absolutely --

8 QUESTION: I mean, not just not being able to
9 spend as much at the PX, but they're there for another 15
10 years.

11 MR. GARRE: That's correct, and I think it's
12 important for the Court to recognize that these sorts of
13 earnable daily privileges like TV ownership, canteen
14 expenditures, and housing in preferred facilities are
15 among the most common tools the prison administrators use
16 to manage order in the prison environment and to encourage
17 inmates to take socially constructive steps. This Court's
18 cases like Sandin and Meachum and Bell v. Wolfish recognize
19 that once someone is lawfully incarcerated, that brings
20 about a necessary withdrawal of many rights and privileges
21 consistent with the needs of day-to-day management.

22 QUESTION: So is compulsion anything other than
23 physical, or psychological?

24 MR. GARRE: Oh, sure. Sure.

25 QUESTION: So what would be -- I mean, in --

1 outside prison we know, at least this Court's precedent
2 has said losing your membership in the bar, losing your
3 job, that counts as compulsion, even though no one is
4 putting you on the rack and screw.

5 MR. GARRE: And we think -- we agree with Judge
6 Friendly and others who have suggested that those cases
7 lie at the outer reaches of this Court's Fifth Amendment
8 jurisprudence, and we think that the denial of the sorts
9 of common, routine privileges at issue in this case, TV
10 privileges, canteen expenditures, don't even come close.

11 QUESTION: How about loss of visiting
12 privileges? That could be crucial to a prisoner.

13 MR. GARRE: Well, it's not a complete loss of
14 this case. Again, the chart on page 27 of the joint
15 appendix in the case that --

16 QUESTION: Suppose it were. I mean, there are
17 some of these things that must mean all the difference in
18 the world to someone who's incarcerated.

19 MR. GARRE: Well, I mean, the further the Court
20 goes out in that direction, then obviously at some point
21 that program would be more difficult to defend under the
22 Turner v. --

23 QUESTION: That's the Kansas program. --

24 MR. GARRE: -- analysis.

25 QUESTION: They want to offer no limit on what

1 they can do here. They can prosecute for a new crime that
2 might be disclosed, and they can deprive the prisoner of
3 all visiting privileges and all kinds of things.

4 MR. GARRE: Well, with respect, we don't think
5 that that's the Kansas program. The Kansas program offers
6 incentives by withholding privileges from those inmates
7 who choose not to take socially constructive steps. It's
8 important to recognize that no one disputes that the
9 rehabilitation program in this case is designed to serve
10 legitimate penalogical interests. There's widespread
11 agreement the sexual offender treatment programs benefits
12 inmates and society alike by enabling convicted
13 offenders --

14 QUESTION: But it just sounds like a basic
15 difference. As I understand your description in the one
16 Federal program, it sounds like if the prisoner says no, I
17 won't participate, the prisoner goes back to the facility
18 of origin and can still, over time, earn various
19 privileges, and Kansas is telling us in their scheme no,
20 they reserve the right to deprive the prisoner of any
21 privilege thereafter during his term in prison, and to put
22 him in a more severe condition of incarceration.

23 MR. GARRE: Well, again, I would disagree with
24 the characterization of the Kansas program, but more
25 importantly we think that the judgment made by the Federal

1 Bureau of Prison and the judgment made by the Kansas
2 prison officials are well within the range of decisions
3 that this Court's prison decision --

4 QUESTION: Even if I'm correct in my
5 description?

6 MR. GARRE: Your description presents a
7 different situation.

8 QUESTION: Thank you, Mr. Garre.

9 Mr. Wiltanger, we'll hear from -- is it
10 Wiltanger, or Wiltanger.

11 QUESTION: It's Wiltanger, Your Honor

12 QUESTION: Wiltanger. Mr. Wiltanger, we'll hear
13 from you.

14 ORAL ARGUMENT OF MATTHEW J. WILTANGER

15 ON BEHALF OF THE RESPONDENT

16 MR. WILTANGER: Mr. Chief Justice, and may it
17 please the Court:

18 If you're a prisoner in Kansas and you commit a
19 rape while in prison, you get the same penalties that Mr.
20 Lile gets. If you're a prisoner in Kansas and you commit
21 arson in your cell or somewhere in the prison, you get the
22 same penalties that Mr. Lile gets. If you commit a theft,
23 you get the same penalties.

24 QUESTION: You mean, someone who commits arson
25 in prison gets only those penalties? He isn't prosecuted

1 for committing arson?

2 MR. WILTANGER: There could be a potential
3 prosecution if they turn him over --

4 QUESTION: That might --

5 QUESTION: Like a number more years in jail.

6 MR. WILTANGER: That could be, Your Honor.

7 QUESTION: That's quite different.

8 MR. WILTANGER: But under the State system they
9 get moved down to the same level that Mr. Lile is, and in
10 fact their punishment could be worse, because --

11 QUESTION: And I expect the arsonist considers
12 that he least of his worries.

13 QUESTION: When you say punishment, you assume
14 your answer in your favor. What I'd like to know is, the
15 way they characterize it, basically, is that you come in
16 without anything. Indeed, your client went -- he started
17 off in a maximum security part of the prison with a medium
18 security bed, or at least he could have done, and then
19 what happens is, people who participate in treatment
20 programs get bonuses, privileges, and if you don't
21 participate in the treatment program, well, obviously you
22 don't get the privilege. Now, that's their
23 characterization of it, basically.

24 Yours is, well, if you start treatment and you
25 stop, you get punished.

1 Now, you're both describing the same thing, but
2 it sounds as if it has very different consequences, and
3 how are we supposed to say which is the correct
4 description, the appropriate characterization?

5 MR. WILTANGER: I think the difference, Your
6 Honor, is somewhat illustrated by the Government's
7 attorney in that this is not voluntary, and that once you
8 achieve a level -- the State has set up a structure, Your
9 Honor, under which if you're good, you do your job, you
10 get to a certain level, and that's for everybody. They
11 have rules on this, and Mr. Lile did that. He got to that
12 level. He had achieved something.

13 And what the State does is, it comes along and
14 says, well, if you don't give up your Fifth Amendment
15 rights, and if you don't tell us about all these other
16 uncharged crimes, we're taking that away from you. You'll
17 no longer have it. You'll lose your job.

18 QUESTION: Is that true, or is it true that
19 their system is, you will be awarded privileges as long as
20 you participate in treatment, but our privileges are open
21 only to people who participate in treatment?

22 MR. WILTANGER: I would disagree with that, Your
23 Honor.

24 QUESTION: All right, because?

25 MR. WILTANGER: Because people in the prison

1 system who do not participate in treatment get the same
2 privileges. They get to get to that level, not just --

3 QUESTION: Why did he lose his?

4 MR. WILTANGER: Why did he lose his privileges?

5 Well, he hasn't, technically, Your Honor, lost his
6 privileges --

7 QUESTION: No, no --

8 QUESTION: What about non sex offenders --

9 MR. WILTANGER: Non sex offenders --

10 QUESTION: -- who have no ability to go into the
11 program?

12 MR. WILTANGER: Have no ability, but other --

13 QUESTION: That's a different category of
14 prisoner.

15 MR. WILTANGER: But there could be other sex
16 offenders in the prison who are not required to take SATP,
17 for example, if there was a -- if for some reason there
18 was a statutory rape penalty they may not be required to
19 take SATP, but yes, all prisoners in the system, sex
20 offenders, murderers, arsonists, get a chance to get --

21 QUESTION: What case from our Court, or what
22 cases do you think most strongly support your position?

23 MR. WILTANGER: Your Honor, I think the cases of
24 Garrity, Gardner, Cunningham support --

25 QUESTION: We're talking about loss of job in a

1 civilian society. Do you think the denials here are of
2 that consequence?

3 MR. WILTANGER: I do, Your Honor.

4 QUESTION: Why?

5 MR. WILTANGER: Specifically as to the job, Mr.
6 Lile, if -- any inmate in the prison system in Kansas, if
7 they were, for example, in minimum security can work an
8 outside job. They obviously can't leave, but they could
9 go pick up trash along the road and they could make
10 whatever the employer is going to pay them. Say -- assume
11 it's \$7 an hour. Maybe it's not that much. They can keep
12 that money. If they don't keep all of it, they pay some
13 to the prison, they pay some to victims' restitution, but
14 if they lose their job, under the Kansas structure they
15 will never get to work a job that is even equivalent to
16 that.

17 QUESTION: You're talking about a situation
18 where in civilian life the person who loses his job loses
19 his livelihood, basically. Certainly that's not true in a
20 prison. This man is going to eat whether he does it or
21 not.

22 MR. WILTANGER: He will eat, Your Honor, but at
23 the same time a policeman on guard or a policeman on duty
24 could go out and get another job and earn something, an
25 equivalent wage, or possibly even a better wage. Mr. Lile

1 can't.

2 QUESTION: Mr. McAllister, I am very, very --

3 QUESTION: Mr. Wiltanger.

4 QUESTION: Oh, I'm sorry, Mr. Wiltanger -- I am
5 very reluctant to extend our expansive notion of what
6 constitutes compulsion to the area of criminal law and
7 penology for this simple reason. Why does the situation
8 of your client differ from the situation of the person
9 who's been arrested for first degree order, and the case
10 is put to him by the prosecutor, you know, I'll go ahead
11 with this prosecution for first degree murder. You will
12 be in prison for life. On the other hand, if you confess
13 that you are guilty of voluntary manslaughter, you'll get
14 a 15-year term. Now, has that person been compelled to
15 plead guilty to voluntary manslaughter?

16 MR. WILTANGER: No, they haven't, Your Honor.

17 QUESTION: But that's -- you know, either you do
18 it, or you're going to get life.

19 MR. WILTANGER: I don't -- Your Honor, our view
20 is not -- is that that is not compulsion, because what is
21 being extended to the murder suspect is a benefit, some
22 way to improve your lot.

23 In this situation, for example, if the State
24 wanted to -- what they're doing -- it's not Mr. Lile's
25 case, because he was convicted before 1995, but if you're

1 convicted after 1995 you can be stripped of your good-
2 time credit. They take it away from you. If, on the
3 other hand, the State decided that what we're going to do
4 for those inmates who are participating in the program is
5 extend their good-time credit or make their situation
6 better, or give them a benefit, I don't think that's -- I
7 don't think that would be --

8 QUESTION: It's almost a play on words, then.

9 QUESTION: Well, yes, just start them off in the
10 worst situation and just say, you know --

11 QUESTION: That certainly doesn't benefit
12 prisoners as a class.

13 QUESTION: The Constitution surely can't turn on
14 that, whether you characterize it as giving them a benefit
15 or depriving them of a benefit they --

16 MR. WILTANGER: Well, the Constitution obviously
17 prohibits any kind of sanction for the invocation of your
18 Fifth Amendment rights.

19 QUESTION: Mr. Wiltanger, you said it in your
20 brief, and I wanted to make sure that it really is your
21 position. You said, here is a man with a certain set of
22 privileges. They take that away, and that's compulsion,
23 but if you started everyone -- you didn't say everyone,
24 you said every sex offender goes in at level 1, the lowest
25 level, and never gets out of that unless he signs up for

1 this program with all its terms and conditions. That
2 person you say is not being compelled because for him it's
3 not achieving privileges rather than having privileges
4 taken away.

5 Is that -- do you adhere to that distinction,
6 that the State of Kansas could do exactly what it's doing
7 now if it said, Mr. Wiltanger and all sexual offenders,
8 you go in at level 1 and you never get out of it unless
9 you take this program?

10 MR. WILTANGER: Your Honor, I do think that's
11 certainly closer to the -- that would be closer to a
12 constitutional law. That wouldn't be unconstitutional.

13 QUESTION: Would be, or wouldn't?

14 MR. WILTANGER: It would not be, Your Honor.

15 QUESTION: It would not be.

16 MR. WILTANGER: It would not be
17 unconstitutional.

18 QUESTION: That's what you said in your brief.

19 MR. WILTANGER: It would not be
20 unconstitutional. That is our position.

21 QUESTION: So the whole thing, then, it comes
22 down to, subtraction is no good. That doesn't work, but
23 addition is okay. I mean, you could give the person
24 nothing in the beginning, and then the carrot is okay. But
25 you can't once -- so this really says to Kansas, what

1 you re doing, the whole program is fine. The only thing
2 is, you take this category of offender and you don t give
3 them anything until they take this program.

4 MR. WILTANGER: If they could set up a system or
5 a structure or fashion some rules -- obviously, they don't
6 have that now -- I don't think that would be
7 unconstitutional.

8 Again, I do think there is -- if the Court
9 doesn't want to draw a hypertechnical distinction, that's
10 fine, but the Court -- the Fifth Amendment doesn't
11 prohibit benefiting somebody or making their life better.

12 QUESTION: So you think the Sentencing
13 Guidelines would be invalid if, instead of the current
14 provision, which gives you good points for acceptance of
15 responsibility, it rather gave you bad points for refusing
16 to accept responsibility.

17 MR. WILTANGER: I do, Your Honor. I do.

18 QUESTION: If that's so --

19 QUESTION: It's a constitutional distinction.

20 MR. WILTANGER: I do believe so, Your Honor.

21 QUESTION: If that's so, does this case -- my
22 understanding of it is that the prison created a new
23 policy, and that policy was that everybody was at level 1
24 unless you participate in a recommended program, that that
25 was their new policy, but that your client was

1 grandfathered in at level 3 because he was in prison at
2 the time, and so this case in your opinion turns on the
3 fact that we're dealing with one of the few prisoners who
4 was grandfathered in, and therefore it's a taking away
5 rather than being a new prisoner who would have started at
6 level 1, in which case it would have been added on.

7 MR. WILTANGER: Not exactly, Your Honor.

8 QUESTION: Because?

9 MR. WILTANGER: Because all inmates -- there
10 were not just inmates at level 3 who were grandfathered
11 in. Every single inmate who enters the prison system can
12 get to level 3, and as opposing counsel --

13 QUESTION: Even without participating in a
14 recommended program?

15 MR. WILTANGER: Absolutely. Absolutely.

16 QUESTION: But then they changed the rule and
17 said, if you don't participate in the recommended program,
18 you can't get to level 3. Is that right?

19 MR. WILTANGER: If -- they have not changed the
20 rule. That is not the current rule. The current rule
21 is -- and the way that SATP, or the sex offender treatment
22 is structured is, you don't really become eligible to take
23 it or forced to take it until about 2 years before your
24 first parole date, so by that time -- especially in Mr.
25 Lile's case. He's been in prison for 15 years -- most

1 inmates are going to be at that level 3, so while he was
2 grandfathered in, most inmates, when they get eligible or
3 are forced to take it are going to be at level 3.

4 There has been no change in policy. The State
5 is now not saying that you don't get from level 1 to level
6 2 unless you participate in SATP. The law still is, if
7 you're at level 3, you're going to level 1, and you're
8 going to go to maximum security, and you're going to stay
9 there forever.

10 Again, the reference I was making at the first
11 is, the arsonist --

12 QUESTION: That's -- this is a product of the --
13 they don't have the facility to give this course to
14 everyone, so they say, when you're getting closer to
15 release time, you get it, so most people who were in as
16 sexual offenders don't have the opportunity.

17 MR. WILTANGER: Well, the State wants all --
18 wants their sex offenders to take it. There is a little
19 bit of a concern response, but what they do is, they move
20 people around to make sure that those people who are
21 coming out --

22 QUESTION: But not their first year, from what I
23 understand.

24 MR. WILTANGER: No, Your Honor. I apologize if
25 I misspoke. You would not be entering into sex offender

1 treatment your first year, typically.

2 QUESTION: But your brief described a system
3 where, suppose we had all sex offenders, they go in at
4 level 1 unless they take the program. That's something
5 that doesn't exist in the current world only because of a
6 lack of resources, that Kansas can't give this program to
7 all the people who would qualify, so it concentrates on
8 the people who have served a substantial part of their
9 sentence already.

10 MR. WILTANGER: That is correct, and please
11 understand, Your Honor, that that is only one possible
12 solution that would allow the State to continue to run its
13 SATP. Obviously, another solution, as set forth by the
14 Tenth Circuit, would be immunity.

15 Another thing, to follow the program that the
16 Federal Government runs, make it voluntary. Extract no
17 penalties, and punish no one if they don't want to
18 participate in the program, or take away the admission of
19 responsibility, or take away the need --

20 QUESTION: The second one is no solution. The
21 State wants people to take it. They think it's important
22 for the rehabilitation of the people and for the safety of
23 society. They do want to exert some pressure for people
24 to go into it. The question is whether this pressure is
25 somehow unconstitutional when you deprive the person of

1 nothing to which he's entitled, nothing to which he had
2 any expectation of receiving when he goes into prison. He
3 could have been kept at level 1 for his whole period
4 there.

5 MR. WILTANGER: Your Honor, I agree with that.
6 The one distinction I would make is, the State has set up
7 a system by which prisoners understand that if they do
8 certain things they get to levels. While there may not be
9 a constitutional liberty interest in it, they do know that
10 if they follow the rules they're going to get to this
11 level.

12 But as far as addressing your first point,
13 immunity would be the result then. If you had to have
14 everybody in the program, if there was no other option,
15 then you would extend them immunity, or the other solution
16 could be, if you wanted everyone in the program, don't
17 make them admit guilt to their crime. Don't make them
18 catalogue every offense that they've never been charged
19 with. Don't then use a polygraph test to sit down and
20 ferret out and make sure that you've got every single past
21 crime. That would be one solution beyond simple immunity.

22 QUESTION: But that's a solution that isn't
23 consistent with the therapist's idea that this is how it
24 should be done.

25 MR. WILTANGER: Potentially, Your Honor. I

1 mean, the State has not always required a written
2 admission of responsibility. It's only been within the
3 past 10 years that they've required that. But you're
4 correct, the therapists apparently believe that you have
5 to have an admission of responsibility. I'm not sure why
6 it has to be a written statement where you fess everything
7 up.

8 QUESTION: But certainly the Constitution can't
9 turn on whether or not a written statement is required.

10 MR. WILTANGER: I -- Your Honor, I agree, that
11 is correct.

12 QUESTION: Do you know -- I asked your opponent
13 this question -- the extent to which other States have
14 granted immunity to solve this problem?

15 MR. WILTANGER: There are a couple of States
16 that I know off-hand, Your Honor. California and Kentucky
17 have confidentiality provisions, privileges that keep all
18 of this stuff kept within. I don't believe it's a
19 majority of the States that do that. I wish I had a
20 better answer. I do believe Kansas is the only State that
21 requires all this additional ferreting out of additional
22 information.

23 QUESTION: Well, if the -- the programs are
24 important, I take it, really important, and they're
25 thinking that this is a very important way to run them, I

1 give them that, all right. Now, if I take your
2 approach -- and I find this very difficult. I take your
3 approach, and I try to distinguish between what's the add-
4 on as a privilege and the subtraction as a penalty, now my
5 concern would be, I'm now facing a nightmare of varying
6 situations in prisons across the country, and varying
7 efforts to say what's the status quo in respect to a
8 particular prisoner, what is an add-on as opposed to a
9 subtraction, and the arguments are infinite. Now, what
10 could you say that would relieve me of that concern?

11 MR. WILTANGER: Well, first, Your Honor, if this
12 Court doesn't want to get drawn into a benefit versus a
13 punishment distinction, you don't have to follow that for
14 this rule. That is the position that we mentioned in the
15 brief, that there is -- that we feel there is a difference
16 between a benefit and a punishment.

17 But I also don't think that there will be a rash
18 of litigation. The Supreme Court law, obviously, as you
19 know, speaks to sanctions, speak to penalty, anything that
20 makes your indication of your Fifth Amendment rights
21 costly, and we've have that rule for quite sometime, and
22 certainly there have been cases that have come down since
23 then where you look at it and decide, well, is he being
24 penalized, so again I'm -- I apologize if I'm sticking to
25 a hypertechnical distinction, but I do believe that the

1 law would not really complicate matters, and that there is
2 not going to be a rash of litigation where --

3 QUESTION: Well, you didn't answer the question,
4 though, and I have the same problem Justice Breyer does.
5 I don't know that we can distinguish between a benefit and
6 a sanction. I don't know that that's a line that at the
7 end of the day is going to be a good line, so what other
8 line do you offer?

9 MR. WILTANGER: Well, I do believe that
10 sanction -- or what you can look at is, you could look at
11 this Court's ruling as to what is a voluntary statement in
12 the Colman case, whether or not he's being able to make an
13 unconstrained choice. Now --

14 QUESTION: Why not look to what Sandin looked to
15 in -- true, not in the context of the Fifth Amendment, but
16 in another context, and that is whether you have been
17 deprived of in prison is beyond what is the normal
18 expectation of prison life.

19 MR. WILTANGER: Your Honor, I think that does a
20 couple of things, and why we disagree with Sandin. One
21 is, I think you're creating a new rule, whereas I think we
22 already have a fine rule that works in the Fifth Amendment
23 arena, and if we're concerned about applying a Fifth
24 Amendment rule in the prison system --

25 QUESTION: No, no, we don't have a rule that

1 applies in the Fifth Amendment arena with regard to
2 depriving people of things to which they are not entitled
3 as free citizens. When you deprive someone of a job, he
4 isn't entitled to that job. You are depriving him of some
5 liberty that he, in fact, possessed.

6 Your client has been deprived of no liberty to
7 which he was entitled, not a single liberty to which he
8 was entitled. He could have been kept in level 1 for his
9 entire period in prison. He would have had no complaint
10 at all, so I don't think it's parallel to the out-of-
11 prison cases, so it seems to me we need a new rule for in-
12 prison cases.

13 We could have a rule that so long as you haven't
14 been deprived of a liberty to which you're entitled, there
15 has been no compulsion. That goes pretty far. We don't
16 have to go that far. We could use a line that Sandin
17 uses, so long as what's been done to you doesn't go below
18 the normal expectation of prison life. I mean, if they
19 said, you either enter this program or you're going to be
20 in solitary for the rest of your 15 years, you know,
21 that's beyond the normal expectation of prison life. But
22 what your client has suffered is not that, it seems to me.

23 MR. WILTANGER: Your Honor, I would agree with
24 you that Mr. Lile has no liberty interest at play here,
25 but I would also suggest that there is no liberty interest

1 in an at-will employment. This Court has previously found
2 that if you're an at-will employee, you have no protected
3 property or liberty interest, and yet in those cases like
4 the Gardner case and the Garrity case there has been found
5 a Fifth Amendment violation.

6 There certainly is no liberty interest in being
7 a political party officer in the Cunningham case, and yet
8 we still have a Fifth Amendment violation.

9 QUESTION: Don't call it liberty, call it a
10 right. Call it a right.

11 MR. WILTANGER: That's --

12 QUESTION: He's entitled as a free citizen to
13 have that. Your client is not entitled to be in level 3.

14 MR. WILTANGER: But the way that the State has
15 set up its structure, they have made rules that they want
16 everybody working. He's entitled to have a job. They
17 want him to have a job.

18 The other reason I think Sandin doesn't work,
19 Your Honor, is I do share some of the concern that was
20 previously expressed by some of the other justices, is
21 that there would seem to be no reason why the State
22 couldn't walk up and down the hall, or up and down the
23 cells with a note pad and suggest, well, what's your
24 crime, did you do it? I'm not really concerned at whether
25 you have an appeal ongoing or not, I just want to know

1 whether you did it, and oh, by the way, please let me know
2 everything else you've done.

3 QUESTION: Okay, so we'll add to it, there has
4 to be -- and the State of Kansas is perfectly willing to
5 add to it, it has to be for a legitimate penalogical
6 purpose.

7 MR. WILTANGER: And certainly I would agree with
8 what's previously said, that there could be a legitimate
9 penalogical purpose in confessing, in coming clean, and
10 that you will not be a model prisoner unless you take
11 responsibility for your crime, whether it be a sex offense
12 or whether it be a murder.

13 The other reason I think Sandin is not
14 applicable to this case, and should not be extended to
15 this case, is that this Court actually said in Sandin,
16 while you don't have a due process right in a particular
17 level of confinement, you do retain other protections such
18 as the First and the Eighth Amendment, that if we move
19 you, you get moved from one place to another, you still
20 may be able to bring a constitutional claim, and that's
21 what Mr. Lile's done. He's been moved in response to a
22 proper indication of his Fifth Amendment rights, and he
23 has brought a lawsuit against the State. He his actually
24 following some of the dicta in Sandin.

25 I don't think Sandin should be extended. I do

1 think there is a potential for abuse. Why would Sandin,
2 if you extend it, why would it necessarily be limited to
3 the Fifth Amendment? Is it possible that a State, if it
4 wanted, to go around and abridge First Amendment rights
5 and suggest that that's --

6 QUESTION: That's -- you see, I was thinking
7 about that, and the trouble with analogies, if you get one
8 that's very close, you become uncertain again. I mean,
9 suppose that the actual analogy was, there is a treatment
10 program, and the treatment program requires the prisoner
11 to be isolated and not get any mail and not write any
12 letters to the newspapers for a couple of months, and they
13 say as part of this -- and it's totally legitimate, and
14 they say as part of this legitimate treatment program that
15 you can't write your letter to the newspaper, that's part
16 of the treatment, and moreover, we'll give you a privilege
17 if you do it.

18 And now what happens is, they grandfather one
19 person in. Now I'm back in the same -- you see, I'm back
20 in the same dilemma. Maybe it's not quite as bad, because
21 you don't have the word compelled there, but --

22 MR. WILTANGER: Your Honor, I agree with the
23 concern over the technical distinction between benefit and
24 penalty, but I would say in that instance, again, keep in
25 mind that Mr. Lile's not just the sole person who's been

1 grandfathered in. He's one of many who were grandfathered
2 in, but --

3 QUESTION: It's not the grandfather -- I mean,
4 it is the grandfather, isn't it, in this case that makes
5 him -- you said there were some other things, and I'd like
6 to be sure to have them in mind, that make it a penalty
7 and not just the withholding of a privilege.

8 MR. WILTANGER: Assume for the moment Mr. Lile
9 were not grandfathered in.

10 QUESTION: Yes.

11 MR. WILTANGER: Assume for the moment he
12 arrives -- assume he committed his crime last year, and he
13 gets sentenced to 20 years to life tomorrow. If he were
14 to enter the prison system at intake level 1, in about 18
15 years from now the State will ask him to take the sex
16 offender treatment. That's how it's typically planned.
17 Mr. Lile will follow the rules that the State has set out,
18 will follow the regulations, will be a model prisoner, as
19 Mr. Lile actually has been, and he will get all the way to
20 level 3.

21 QUESTION: I see.

22 MR. WILTANGER: He will get all the way. He
23 will be there, and then --

24 QUESTION: And crash --

25 MR. WILTANGER: -- in 2019 they say to him,

1 please take SATP.

2 QUESTION: Well, one difference, certainly
3 between the First Amendment and its cases and the Fifth
4 Amendment is that there is a compulsion requirement in
5 order to invoke the Fifth Amendment, where the First
6 Amendment doesn't have anything like that.

7 MR. WILTANGER: I agree. They are different.
8 They are different standards. The only point that I was
9 trying to raise, Your Honor, is that I think Sandin is a
10 little bit of a dangerous --

11 QUESTION: I suppose --

12 QUESTION: That's what distinguishes the
13 detriment and the benefit. There's a compulsion, but then
14 it's a detriment. The First -- Fifth Amendment doesn't
15 say it shall be unlawful to bribe a witness to get him to
16 testify. The Fifth Amendment draws the line between
17 benefits and detriments, doesn't it?

18 MR. WILTANGER: It does, and that's again -- I'm
19 sorry.

20 QUESTION: So the Kansas program would be
21 perfectly okay, in your estimation, if it provided that at
22 the end of 18 years of 20-year sentences, or 2 years
23 before the end of their sentence, all sex offenders shall
24 be reduced, all sex offenders shall be reduced to prison
25 level 1.

1 MR. WILTANGER: No, Your Honor, I -- I'm --

2 QUESTION: Why not, because then -- then if they
3 choose to come in this program they will be getting the
4 benefit of going back up to 3, but all of them go down to
5 1.

6 MR. WILTANGER: I don't think that would be
7 constitutional, Your Honor.

8 QUESTION: Why not?

9 MR. WILTANGER: I think it would be set up as a
10 way to get around SATP and a way to get around the
11 invocation of your Fifth Amendment rights.

12 QUESTION: Well, any --

13 MR. WILTANGER: It would be an artifice.

14 QUESTION: Well, of course it's an artifice, but
15 so is the whole thing, benefit versus punishment. I
16 mean --

17 MR. WILTANGER: The one thing I would encourage
18 this Court to look at is, look at how it affects itself on
19 the prisoner, and again, if you're going to look at the
20 Colman case, which is -- again, is his choice an
21 unconstrained one? Look at what is done to the inmate
22 here. He's never going to get back to level 3. The
23 arsonist will get back to level 3. The arsonist will not
24 be moved to maximum security. Mr. Lile is there forever.

25 QUESTION: It's the same in my hypothetical,

1 though. There's no compulsion on him. After his 18
2 years in prison he's been knocked back down to 1. There's
3 no compulsion on him. He gets a benefit if he joins this
4 program.

5 MR. WILTANGER: If it's entirely divorced from
6 the program or the Fifth Amendment, Your Honor, then that
7 potentially would be constitutional. I would agree with
8 that. But unfortunately for Mr. Lile's case, it's not how
9 the State has set up the structure if you get to a point,
10 you follow the rules, you become a model prisoner, and
11 then you get broken down. That's what they're doing here.

12 And again the point I was trying to make earlier
13 is, the punishment's more severe. The Court calls -- or,
14 excuse me, the State calls this punishment. They call it
15 punishment. When we're dealing with arsonists, when we're
16 dealing with rapists, when we're dealing with somebody who
17 steals something, they call that punishment, but they're
18 unwilling to call that punishment here. It's an
19 incentive. It's a benefit, or an extension of a
20 privilege, but it's not.

21 QUESTION: You're saying to decide what is
22 compulsion you've got to look at how other people are
23 treated, in effect.

24 The -- in your answer to Justice Scalia you
25 said, you know, if everybody got knocked down within 2

1 years, no matter what the crime, there wouldn't be the
2 constitutional problem, but if only these people are, even
3 though it's written into the scheme the moment they go in,
4 there still would be a constitutional problem, and it's a
5 comparative treatment criterion among prisoners in
6 different classes of offenses that you're relying on,
7 isn't it?

8 MR. WILTANGER: Somewhat, Your Honor.

9 QUESTION: Yes.

10 MR. WILTANGER: Somewhat, and I agree, if the
11 State had set up a strict --

12 QUESTION: Then let me ask you to concentrate on
13 that question a little harder, because you did say in your
14 brief that if all sex offenders -- not all prisoners, all
15 sex offenders on day 1 were put in class 1, they could
16 stay there, and never get out unless the carrot that was
17 dangled was taken. You did say sex offenders. You didn't
18 say all prisoners.

19 MR. WILTANGER: That is correct.

20 QUESTION: So apparently you are not objecting
21 to a distinction between classes of prisoners.

22 MR. WILTANGER: No, Your Honor, you're correct,
23 and again that's consistent with the view that we took
24 between the benefit and the sanction.

25 QUESTION: So there isn't a comparative analysis

1 as between classes of prisoners depending on their
2 offense.

3 MR. WILTANGER: No, Your Honor, there isn't.

4 QUESTION: Okay.

5 MR. WILTANGER: I apologize if I misspoke.

6 QUESTION: Now, I understood you the other way.
7 That is, that you agree it would be an artifice, but if
8 the State did not knock down all sex offenders to level 1
9 2 years before they get out, then you acknowledge your
10 client wouldn't have a case.

11 MR. WILTANGER: Essentially, yes, that is
12 correct. Again, that is not what we have in place here,
13 but that is correct. That is correct. The Fifth
14 Amendment's a bedrock principle. This Court says it's the
15 mainstay of the criminal justice system, and there's no
16 more powerful piece of evidence than someone's confession.

17 They ask a lot of Mr. Lile and other sex
18 offenders. They not only ask for the admission of guilt,
19 they ask for everything, catalogue and give me everything
20 you want, and despite what the State says, there really
21 isn't a great deal of confidentiality. These records can
22 be subpoenaed. They have to turn these records over if
23 someone were to make an admission about a child sexual
24 offense. Further, these inmates are forced to discuss
25 this stuff in group therapy session. There's no

1 confidentiality, and also to point out, the State has not
2 appealed or contested that what it seeks is incriminating
3 information.

4 This information, the Fifth Amendment itself, is
5 far too valuable that the State can go around and force
6 people to give it up and to extract penalties and
7 punishment for that.

8 Thank you for your time.

9 QUESTION: Thank you, Mr. Wiltanger.

10 Mr. McAllister, you have 3 minutes.

11 REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER

12 ON BEHALF OF THE PETITIONERS

13 MR. McALLISTER: Thank you, Mr. Chief Justice,
14 and may it please the Court:

15 I'd like to start, Justice O'Connor, by
16 answering a question you raised. Can the State simply
17 take away all the privileges? Absolutely not. We
18 recognize at some point it becomes compulsive, that this
19 Court has always treated the Fifth Amendment compulsion
20 inquiry as contextual. We're simply arguing that in
21 prison that's a very different context from being on the
22 outside and losing a job or losing your law license.

23 At some point a court could decide, if we took
24 away everything from Mr. Lile, that maybe that would be
25 compulsive, so we're not saying we can take away

1 everything, but what we're saying is, what we're using
2 here is mild in the way of incentives in a prison. We
3 haven't taken away his right to spend money at the
4 canteen, his right to have visitors, his right to earn
5 money. We've limited them, but none of that has been
6 taken away from him completely. That --

7 QUESTION: They're saying with the cohort of
8 prisoners you'll go along for 10 years, all of them
9 earning points and credits, and then after 10 years,
10 they're all up to level 3, and then because he won't go in
11 the program, he alone is pushed back to level 1, and
12 that's a big change, and he says that's taking away --

13 MR. McALLISTER: Yes.

14 QUESTION: -- something.

15 MR. McALLISTER: Yes, but I mean, in our view
16 there's an important penalogical reason for doing that,
17 and it doesn't rise to the level of compulsion because
18 we're in the prison setting. That's why we think Sandin
19 is helpful here.

20 QUESTION: But why wouldn't the same penalogical
21 reason justify taking away all privileges? In other
22 words, why did you make the concession you made at the
23 beginning of your rebuttal?

24 MR. McALLISTER: Because, all I'm saying is at
25 some point even Sandin recognizes at some point things are

1 atypical and they exceed the line, so although he could be
2 moved to disciplinary segregation without a due process
3 hearing, if he was put in solitary confinement, that might
4 have been different. There is a line at which it becomes
5 too much.

6 QUESTION: No, but if he were put in solitary
7 confinement it would be justifiable, if at all, because of
8 a penalogical reason for the way he had behaved in prison,
9 creating dangerous conditions, et cetera. Why isn't the
10 rehabilitation of sex offenders who, if unrehabilitated
11 will go out in the community and repeat their crimes, just
12 as important a penalogical reason, and why wouldn't it
13 justify taking away all privileges?

14 MR. McALLISTER: Because the text of the Fifth
15 Amendment says no person shall be compelled, and the
16 question is compulsion, and at some point, if we took away
17 everything, or we make him work 20 hours a day or -- we
18 could do things to him that I think the Court would have
19 to say --

20 QUESTION: No, but you're saying -- if I
21 understand your argument, you're saying, one reason why
22 you should not characterize this as compulsion is the
23 valid penalogical reason for doing it.

24 MR. McALLISTER: That's part of it.

25 QUESTION: And my suggestion is, if there -- if

1 the State should say, look, the protection of these
2 victims on the outside, who are going to be preyed upon by
3 this person if not rehabilitated, is just as important as
4 preventing people from setting fires in their cells, and
5 therefore, if we take all privileges to the fire-setters,
6 we've got an equally good penalogical reason to take away
7 all privileges from the person who won't go into the
8 program.

9 MR. McALLISTER: And that I agree with. We do
10 have potentially --

11 QUESTION: Then you could take away all the
12 privileges.

13 MR. McALLISTER: Not all the privileges, because
14 it has to rise to the level of compulsion, and if they are
15 entitled to nothing in prison --

16 QUESTION: That's the question.

17 MR. McALLISTER: That's the question, and --

18 QUESTION: Give him some rebuttal time.

19 QUESTION: Go ahead.

20 MR. McALLISTER: That's all right. I mean, that
21 is the question, and again, the point that was drawn out
22 here on the distinction between --

23 QUESTION: -- extended your time for 2 minutes,
24 Mr. McAllister, because you really didn't have a chance to
25 say much of anything, I'm afraid.

1 MR. McALLISTER: All right.

2 (Laughter.)

3 QUESTION: Thank you, Mr. Chief Justice.

4 The distinction here between a loss of privilege
5 and the granting of a benefit in the State's view is
6 simply a semantic game. There really -- I mean, from the
7 inmate's perspective it just can't be any different, and
8 if the notion is what we should have done is, we should
9 all treat them as -- we should treat them all when they
10 come in as poorly as we can as long as we satisfy
11 constitutional minimum, treat them as poorly as we can,
12 and then make them earn everything, if that's all it
13 takes, we can go back and do that, but that certainly
14 doesn't benefit inmates as a class, and it's certainly not
15 how prisons are run at this time in this country. It
16 would be a vast shift in the way prisons are administered.

17 So that's really a semantic game, and the key
18 inquiry here is, are we compelling them, are we doing
19 something sufficiently substantial to these inmates to
20 override their will and really force them to make these
21 admissions, again which are in a treatment context, not to
22 law enforcement officials, confidentiality guidelines,
23 we've never prosecuted someone for anything they've said
24 in this program --

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 McAllister.

2 MR. McALLISTER: Thank you, Mr. Chief Justice.

3 CHIEF JUSTICE REHNQUIST: The case is submitted.

4 (Whereupon, at 12:01 p.m., the case in the

5 above-entitled matter was submitted.)

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