SUPREME COURT OF THE UNITED STATES

No. 00–1187

DAVID R. MCKUNE, WARDEN, ET AL., PETITIONERS
v. ROBERT G. LILE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 10, 2002]

JUSTICE O'CONNOR, concurring in the judgment.

The Court today is divided on the question of what standard to apply when evaluating compulsion for the purposes of the Fifth Amendment privilege against self-incrimination in a prison setting. I write separately because, although I agree with JUSTICE STEVENS that the Fifth Amendment compulsion standard is broader than the "atypical and significant hardship" standard we have adopted for evaluating due process claims in prisons, see *post,* at 5–7 (dissenting opinion) (citing *Meachum* v. *Fano,* 427 U. S. 215 (1976)). I do not believe that the alterations in respondent's prison conditions as a result of his failure to participate in the Sexual Abuse Treatment Program (SATP) were so great as to constitute compulsion for the purposes of the Fifth Amendment privilege against self-incrimination. I therefore agree with the plurality that the decision below should be reversed.

The text of the Fifth Amendment does not prohibit all penalties levied in response to a person's refusal to incriminate himself or herself—it prohibits only the compulsion of such testimony. Not all pressure necessarily "compel[s]" incriminating statements.

For instance, in *Miranda* v. *Arizona,* 384 U. S. 436, 455 (1966), we found that an environment of police custodial interrogation was coercive enough to require prophylactic

warnings only after observing that such an environment exerts a "heavy toll on individual liberty." But we have not required *Miranda* warnings during noncustodial police questioning. See, *e.g.*, *Beckwith* v. *United States,* 425 U. S. 341 (1976). In restricting *Miranda*'s applicability, we have not denied that noncustodial questioning imposes some sort of pressure on suspects to confess to their crimes. See *Oregon* v. *Mathiason,* 429 U. S. 492, 495 (1977) *(per curiam)* ("Any interview of one suspected of a crime by a police officer will have coercive aspects to it . . ."); *Berkemer* v. *McCarty*, 468 U. S. 420, 440 (1984) (describing the "*comparatively* nonthreatening character of [noncustodial] detentions" (emphasis added)). Rather, as suggested by the text of the Fifth Amendment, we have asked whether the pressure imposed in such situations rises to a level where it is likely to "compe[l]" a person "to be a witness against himself."

The same analysis applies to penalties imposed upon a person as a result of the failure to incriminate himself—some penalties are so great as to "compe[l]" such testimony, while others do not rise to that level. Our precedents establish that certain types of penalties are capable of coercing incriminating testimony: termination of employment, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York,* 392 U. S. 280 (1968), the loss of a professional license, *Spevack* v. *Klein,* 385 U. S. 511 (1967), ineligibility to receive government contracts, *Lefkowitz* v. *Turley,* 414 U. S. 70 (1973), and the loss of the right to participate in political associations and to hold public office, *Lefkowitz* v. *Cunningham,* 431 U. S. 801 (1977). All of these penalties, however, are far more significant than those facing respondent here.

The first three of these so-called "penalty cases" involved the potential loss of one's livelihood, either through the loss of employment, loss of a professional license essential to employment, or loss of business through gov-

ernment contracts. In *Lefkowitz*, we held that the loss of government contracts was constitutionally equivalent to the loss of a profession because "[a government contractor] lives off his contracting fees just as surely as a state employee lives off his salary." 414 U. S., at 83; contra, *post,* at 15–16, n. 11. To support oneself in one's chosen profession is one of the most important abilities a person can have. A choice between incriminating oneself and being deprived of one's livelihood is the very sort of choice that is likely to compel someone to be a witness against himself. The choice presented in the last case, *Cunningham*, implicated not only political influence and prestige, but also the First Amendment right to run for office and to participate in political associations. 431 U. S., at 807–808. In holding that the penalties in that case constituted compulsion for Fifth Amendment purposes, we properly referred to those consequences as "grave." *Id.,* at 807.

I do not believe the consequences facing respondent in this case are serious enough to compel him to be a witness against himself. These consequences involve a reduction in incentive level, and a corresponding transfer from a medium-security to a maximum-security part of the prison. In practical terms, these changes involve restrictions on the personal property respondent can keep in his cell, a reduction in his visitation privileges, a reduction in the amount of money he can spend in the canteen, and a reduction in the wage he can earn through prison employment. See *ante*, at 3. These changes in living conditions seem to me minor. Because the prison is responsible for caring for respondent's basic needs, his ability to support himself is not implicated by the reduction in wages he would suffer as a result. While his visitation is reduced as a result of his failure to incriminate himself, he still retains the ability to see his attorney, his family, and members of the clergy. App. 27. The limitation on the possession of personal items, as well as the amount that

respondent is allowed to spend at the canteen, may make his prison experience more unpleasant, but seems very unlikely to actually compel him to incriminate himself.

JUSTICE STEVENS also suggests that the move to the maximum-security area of the prison would itself be coercive. See *post,* at 11. Although the District Court found that moving respondent to a maximum-security section of the prison would put him "in a more dangerous environment occupied by more serious offenders," 24 F. Supp. 2d 1152, 1155 (Kan. 1998), there was no finding about how great a danger such a placement posed. Because it is respondent's burden to prove compulsion, we may assume that the prison is capable of controlling its inmates so that respondent's personal safety is not jeopardized by being placed in the maximum-security area of the prison, at least in the absence of proof to the contrary.

JUSTICE STEVENS argues that the fact that the penalties facing respondent for refusal to incriminate himself are the same as those imposed for prison disciplinary violations also indicates that they are coercive. See *post,* at 10. I do not agree. Insofar as JUSTICE STEVENS' claim is that these sanctions carry a stigma that might compel respondent to incriminate himself, it is incorrect. Because the same sanctions are also imposed on all prisoners who refuse to participate in any recommended program, App. 19–20, any stigma attached to the reduction would be minimal. Insofar as JUSTICE STEVENS' claim is that these sanctions are designed to compel behavior because they are used as disciplinary tools, it is also flawed. There is a difference between the sorts of penalties that would give a prisoner a reason not to violate prison disciplinary rules and what would compel him to expose himself to criminal liability. Therefore, on this record, I cannot conclude that respondent has shown that his decision to incriminate himself would be compelled by the imposition of these penalties.

Although I do not think the penalties respondent faced were sufficiently serious to compel his testimony, I do not agree with the suggestion in the plurality opinion that these penalties could permissibly rise to the level of those in cases like *McGautha* v. *California,* 402 U. S. 183 (1971) (holding that statements made in the mitigation phase of a capital sentencing hearing may be used as evidence of guilt), *Bordenkircher* v. *Hayes,* 434 U. S. 357 (1978) (holding that plea bargaining does not violate the Fifth Amendment privilege against self-incrimination), and *Ohio Adult Parole Authority* v. *Woodard,* 523 U. S. 272 (1998) (holding that there is no right to silence at a clemency interview). See *ante*, at 14–16. The penalties potentially faced in these cases—longer incarceration and execution—are far greater than those we have already held to constitute unconstitutional compulsion in the penalty cases. Indeed, the imposition of such outcomes as a penalty for refusing to incriminate oneself would surely implicate a "liberty interest."

JUSTICE STEVENS attempts to distinguish these cases because, in each, the negative outcome did not follow directly from the decision to remain silent, and because none of these cases involved a direct order to testify. See *post,* at 7. As the plurality's opinion makes clear, however, these two factors do not adequately explain the difference between these cases and the penalty cases, where we have found compulsion based on the imposition of penalties far less onerous. See *ante,* at 16–17.

I believe the proper theory should recognize that it is generally acceptable to impose the risk of punishment, however great, so long as the actual imposition of such punishment is accomplished through a fair criminal process. See, *e.g.*, *McGautha* v. *California, supra,* at 213 ("[The] criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions,

to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose") (citation and internal quotation marks omitted). Forcing defendants to accept such consequences seems to me very different than imposing penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony; in the latter context, any penalty that is capable of compelling a person to be a witness against himself is illegitimate. But even this explanation of the privilege is incomplete, as it does not fully account for all of the Court's precedents in this area. Compare *Griffin* v. *California,* 380 U. S. 609 (1965) (holding that prosecutor may not comment on a defendant's failure to testify), with *Ohio Adult Parole Authority* v. *Woodard, supra* (holding that there is no right to silence at a clemency interview).

Complicating matters even further is the question of whether the denial of benefits and the imposition of burdens ought to be analyzed differently in this area. Compare *ante*, at 18–19, with *post,* at 12–13. This question is particularly important given the existence of United States Sentencing Commission, Guidelines Manual §3E1.1 (Nov. 2000), which can be read to offer convicted criminals the benefit of a lower sentence in exchange for accepting responsibility for their crimes. See *ante*, at 19–20.

I find the plurality's failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination troubling. But because this case indisputably involves burdens rather than benefits, and because I do not believe the penalties assessed against respondent in response to his failure to incriminate himself are compulsive on any reasonable test, I need not resolve this dilemma to make my judgment in this case.

Although I do not agree that the standard for compulsion is the same as the due process standard we identified in *Sandin* v. *Conner,* 515 U. S. 472 (1995), I join in the judgment reached by the plurality's opinion.