APPENDIX

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APPENDIX A

Opinion United States Court of Appeals for the Sixth Circuit, Charles Keith Wampler v. Alicia Handwerk, et al., No. 23-3010 (June 23, 2023)

NOT RECOMMENDED FOR PUBLICATION

No. 23-3010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES KEITH WAMPLER,

Plaintiff-Appellant,

v.

ALICIA HANDWERK, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: COLE, McKEAGUE, and NALBANDIAN, Circuit Judges.

Charles Keith Wampler, a pro se Ohio prisoner, appeals the district court's judgment dismissing his civil rights complaint filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). As set forth below, we affirm the district court's judgment.

Wampler, who has served approximately 40 years of an aggregate sentence of 20 years to life in prison for aggravated murder and other crimes, filed a § 1983 complaint against several members of the Ohio Parole Board, alleging that they violated his constitutional rights by continuing his parole hearing for the five-year maximum "based solely upon the crime and [his] refusal to accept guilt for a crime that he did not commit." Wampler claimed that the defendants violated (1) the separation-of-powers doctrine by exercising powers reserved for the judicial branch, (2) his Fifth Amendment rights by punishing him for not incriminating himself, (3) the Eighth Amendment guarantee against cruel and unusual punishment by punishing him for not admitting a crime that he did not commit, (4) his Fourteenth Amendment due process rights by considering elements of the crime without affording him the opportunity to present evidence of his innocence, (5) his Fourteenth Amendment due process rights by considering community

opposition without affording him the opportunity to face his accusers or respond to the statements made against him, (6) his Fourteenth Amendment due process rights by exercising more authority over his sentence than the sentencing court, and (7) the Fourteenth Amendment guarantee of equal protection by using its discretionary power to continue to punish him for a crime for which the sentencing court has already punished him. As relief, Wampler sought (a) a declaratory judgment stating that the actions of the Ohio Parole Board are judicial in nature and that the Ohio Parole Board falls under and is answerable to the judicial branch and (b) a permanent injunction barring the Ohio Parole Board from using the elements of the crime of conviction in making parole decisions and requiring those decisions to be made solely upon an inmate's post-conviction conduct.

Upon an initial screening, a magistrate judge recommended that the district court dismiss Wampler's complaint for failure to state a claim. *See* 28 U.S.C. § 1915A(b)(1). The district court adopted the magistrate judge's report and recommendation, dismissed Wampler's separation-of-powers and procedural due process claims, and recommitted the matter to the magistrate judge to review Wampler's other claims, which the magistrate judge had not addressed. Upon further review, the magistrate judge recommended that the district court dismiss Wampler's remaining claims. The district court adopted the magistrate judge's report and recommendation and dismissed Wampler's complaint in its entirety.

This timely appeal followed. Wampler argues that the district court erred in dismissing his due process, self-incrimination, cruel and unusual punishment, and equal protection claims; he expressly abandons his separation-of-powers claim.

Wampler moves this court to take judicial notice of the fact that, despite his efforts to follow the proper procedures, the district court never served his complaint on the defendants. Wampler's motion is unnecessary. The district court dismissed Wampler's complaint under 28 U.S.C. § 1915A, which requires the court to "review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity" and to dismiss the complaint or any portion thereof if the complaint fails to state a claim upon which relief may be

granted, among other reasons. The district court properly screened Wampler's complaint before serving the defendants in accordance with that statute.

We review de novo the district court's dismissal of Wampler's complaint for failure to state a claim under 28 U.S.C. § 1915A. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 437 (6th Cir. 2012). To avoid dismissal under this statute, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Wampler claimed that the defendants violated his Fourteenth Amendment due process rights by considering elements of the crime without affording him the opportunity to present evidence of his innocence, by considering community opposition without affording him the opportunity to face his accusers or respond to the statements made against him, and by exercising more authority over his sentence than the sentencing judge. To state a procedural due process claim under the Fourteenth Amendment, a plaintiff must establish the deprivation of a constitutionally protected liberty or property interest. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). And Wampler claims that his interest comes from his interest in parole. "[T]he presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole release." *Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Due process rights therefore do not attach to parole procedures unless state law creates a liberty interest in parole. *Inmates of Orient Corr. Inst. v. Ohio St. Adult Parole Auth.*, 929 F.2d 233, 235 (6th Cir. 1991). We have held that Ohio law, which provides for a completely discretionary parole system, does not create a protected liberty interest in parole. *Jergens v. Ohio Dep't of Rehab. & Corr. Adult Parole Auth.*, 492 F. App'x 567, 569–70 (6th Cir. 2012) (citing *Michael v. Ghee,* 498 F.3d 372, 378 (6th Cir.2007)). Accordingly, the district court properly dismissed Wampler's procedural due process claims because he lacks a protected liberty interest in parole.

Wampler argues on appeal that the Ohio Parole Board is a part of the Ohio Department of Rehabilitation and Correction and that the use of the word "rehabilitation" in the name of that department implies a liberty interest in parole. But "a mere unilateral hope or expectation of

release on parole is not enough to constitute a protected liberty interest; the prisoner 'must, instead, have a legitimate claim of *entitlement* to it.'" *Inmates of Orient Corr. Inst.*, 929 F.2d at 235 (quoting *Greenholtz*, 442 U.S. at 7). The use of the word "rehabilitation" in the department's name does not give rise to an entitlement to parole.

Wampler claimed that the defendants violated his Fifth Amendment rights by punishing him for refusing to incriminate himself. "The Self-Incrimination Clause 'does not prohibit all self-incrimination but only *compelled* self-incrimination.'" *In re Flint Water Cases*, 53 F.4th 176, 215 (6th Cir. 2022) (Thapar, J., concurring in part) (quoting Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 865 (1995)). So long as the refusal to admit guilt does not render a prisoner automatically ineligible for parole, the pressure to admit guilt to improve the chance of obtaining parole is not sufficiently compulsory to implicate the Fifth Amendment. *See McKune v. Lile*, 536 U.S. 24, 44 (2002) (Kennedy, J.) (plurality opinion) ("States may award good-time credits and early parole for inmates who accept responsibility because silence in these circumstances does not automatically mean the parole board, which considers other factors as well, will deny them parole."); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) ("[T]his pressure to speak in the hope of improving his chance of being granted clemency does not make the interview compelled."); *Hawkins v. Morse*, No. 98-2062, 1999 WL 1023780, at *2 (6th Cir. Nov. 4, 1999) ("[I]t cannot be said that the alleged pressure to admit that he committed the crime for which he is incarcerated in order to improve his chances for parole forces [one] to incriminate himself in violation of the Fifth Amendment.").

Wampler did not allege that his refusal to accept responsibility for the crimes of conviction automatically rendered him ineligible for parole. Wampler instead alleged that the defendants denied him parole based not only on his refusal to accept responsibility but also on the nature of the crimes and community opposition to his release. The district court properly dismissed Wampler's Fifth Amendment claim because he was not compelled to incriminate himself.

Wampler claimed that the defendants violated the Eighth Amendment guarantee against cruel and unusual punishment by punishing him for not admitting a crime that he did not commit.

According to Wampler, an "innocent person" is subject to cruel and unusual punishment when forced to choose between (1) falsely confessing to a crime in the hope of receiving parole or (2) maintaining his innocence, knowing that parole will be denied.

The district court concluded that Wampler lacked standing to assert this claim unless he is, in fact, innocent of the crimes for which he has been convicted and that the court could not presume his innocence unless and until his convictions are overturned. *See Heck v. Humphrey*, 512 U.S. 477, 487, 487 n.7 (1994). The district court went on to determine that, to the extent that Wampler's claim could be reframed to not necessarily rest on his status as an innocent person, it is not cruel and unusual to condition parole on a prisoner's willingness to accept responsibility for the crime of conviction. *See Robins v. Wetzel*, No. 22-1006, 2022 WL 4533850, at *2 (3d Cir. Sept. 28, 2022) ("[R]equiring an admission of guilt, even falsely, did not deprive [the plaintiff] of 'the minimal civilized measure of life's necessities.'") (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

On appeal, Wampler contends that he did not ask the district court to accept his innocence and instead asked the district court to protect his right to assert his innocence. But the right to assert one's innocence does not translate to a right to parole. And we have recognized that the denial of parole does not implicate the Eighth Amendment's prohibition on cruel and unusual punishment. *See Kordenbrock v. Brown*, 469 F. App'x 434, 435 (6th Cir. 2012) (per curiam); *Carnes v. Engler*, 76 F. App'x 79, 81 (6th Cir. 2003); *see also United States v. Organek*, 65 F.3d 60, 62–63 (6th Cir. 1995). Wampler has failed to show that the district court erred in dismissing his Eighth Amendment claim.

Wampler finally claimed that the defendants violated the Fourteenth Amendment guarantee of equal protection by using their discretionary power to continue to punish him for a crime for which the sentencing court has already punished him. The Fourteenth Amendment's Equal Protection Clause "is essentially a direction that persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either

burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 299 (6th Cir. 2006)).

The district court determined that, to the extent that Wampler based his claim on the Equal Protection Clause, his claim failed because he did not allege that the denial of parole burdened a fundamental right or targeted a suspect class or that similarly situated prisoners were granted parole. *See Michael v. Ghee*, 498 F.3d 372, 379 (6th Cir. 2007). The district court went on to determine that Wampler's claim that parole "decisions are ultimately left up to the whims of human beings" was more appropriately analyzed as a substantive due process claim. Although other circuits have held that an arbitrary denial of parole may violate a prisoner's substantive due process rights, we have not adopted such reasoning. *See Sturgis v. Mich. Parole Bd.*, No. 18-1554, 2019 WL 2156429, at *1 (6th Cir. Feb. 1, 2019); *Bell v. Anderson*, 301 F. App'x 459, 462 (6th Cir. 2008) (per curiam). And a discretionary parole system itself is insufficient to "shock the conscience." *Bell*, 301 F. App'x at 461–63 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998)).

On appeal, Wampler maintains that his claim is based on the Equal Protection Clause, arguing that granting discretionary power to the defendants conflicts with equal protection. But Wampler failed to allege that "similarly situated" persons were treated differently, which is a "prerequisite for equal protection analysis." *Jackson v. Jamrog*, 411 F.3d 615, 619 (6th Cir. 2005). The district court properly dismissed Wampler's claim—whether construed as an equal protection claim or a substantive due process one.

For these reasons, we **AFFIRM** the district court's judgment and **DENY** Wampler's motion to take judicial notice as unnecessary.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3010

CHARLES KEITH WAMPLER,

Plaintiff-Appellant,

v.

ALICIA HANDWERK, et al.,

Defendants-Appellees.

Before: COLE, McKEAGUE, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 06/23/2023.

Case Name: Charles Wampler v. Alicia Handwerk, et al
Case Number: 23-3010

Docket Text:
ORDER filed : We AFFIRM the district court's judgment and DENY Wampler's motion to take judicial notice [6936093-2] as unnecessary. Mandate to issue, decision not for publication, pursuant to FRAP 34(a)(2)(C);. R. Guy Cole, Jr., David W. McKeague, and John B. Nalbandian, Circuit Judges.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Charles Keith Wampler
London Correctional Institution
P.O. Box 69
London, OH 43140

A copy of this notice will be issued to:

Mr. Richard W. Nagel

APPENDIX B

Opinions United States District Court for the Southern District of Ohio, Eastern Division. No. 2:21-cv-5852 (December 15, 2022) and (July 11, 2022).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Charles Keith Wampler,

Plaintiff,

v.

Alicia Handwerk, *et al.*,

Defendants.

Case No. 2:21-cv-5852

Judge Michael H. Watson

Magistrate Judge Vascura

OPINION AND ORDER

Magistrate Judge Vascura performed an initial screen of this *pro se*, prisoner civil rights case under 28 U.S.C. § 1915A and issued a Report and Recommendation ("R&R") recommending the Court dismiss Plaintiff's Complaint in its entirety. R&R, ECF No. 2. Plaintiff timely objected, Obj., ECF No. 3, and the Court performed a de novo review pursuant to Federal Rule of Civil Procedure 72(b)(3). The Court adopted the R&R insofar as it recommended dismissal of Plaintiff's separation-of-powers claim and procedural due process claim. Op. and Order, ECF No. 11. However, the Court determined that Plaintiff's Complaint also raised claims under the Fifth and Eighth Amendments, via the Fourteenth Amendment, and a claim under the Fourteenth Amendment's Equal Protection clause. *Id.* The Court therefore recommitted the matter to the magistrate judge for an initial screen of those claims.

Magistrate Judge Vascura has performed that screen and again recommends dismissal. R&R, ECF No. 12. Plaintiff timely objected, Obj. 13, and

the State responded to the objection as an interested party, Resp., ECF No. 14. Plaintiff replied. Reply, ECF No. 15. The Court once more determines de novo the portions of the second R&R that were properly objected to. *See* Fed. R. Civ. P. 72(b)(3).

Before turning to the merits of each claim, the Court addresses some statements Plaintiff makes in his objections. This Court agrees that many inmates have legitimate issues, relief for which require pursuit in court. Plaintiff is also correct that inmates do not lose all constitutional rights upon conviction. It is axiomatic that federal courts must ensure that every plaintiff—regardless of their status—receives careful, impartial consideration. On the other hand, courts are duty-bound to follow the law. In this case, the law does not support the claims Plaintiff pursues, and the Court must dismiss the same. Each claim is addressed in turn.

A. Fifth Amendment

The Court begins with Plaintiff's Fifth Amendment claim. As an initial matter, Plaintiff mischaracterizes the R&R as concluding that an inmate loses the protection against self-incrimination upon conviction. The R&R contains no such conclusion. Rather, it recommends that the Fifth Amendment is not implicated in parole hearings unless, at a minimum, the failure to admit guilt *automatically* makes an inmate ineligible for parole. In other words, the R&R concludes that the pressure to incriminate one's self is not sufficiently compulsive, for purposes of the Fifth Amendment, unless eligibility for parole at least *requires* such self-

incrimination; self-incrimination that merely *enhances* an inmate's chances of receiving parole is not sufficiently compulsory to implicate the Fifth Amendment.

Upon de novo review, the Court agrees with the R&R's conclusion on this issue. The Fifth Amendment does not protect against all self-incrimination; it protects against only compelled self-incrimination. *McKune v. Lile*, 536 U.S. 24, 35–36 (2002) (Kennedy, J.) (plurality opinion) (citations omitted). Read together, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) and the plurality opinion in *McKune* suggest that, so long as parole is not *automatically* denied if an inmate refuses to admit guilt, self-incrimination during a parole hearing is not sufficiently "compulsory" as to rise to a Fifth Amendment violation. *Cf. Woodard*, 523 U.S. at 288 ("[T]his pressure to speak in the hope of improving his chance of being granted clemency does not make the interview compelled."); *McKune*, 536 U.S. at 44 ("States may award good-time credits and early parole for inmates who accept responsibility because silence in these circumstances does not automatically mean the parole board, which considers other factors as well, will deny them parole." (citation omitted)).

The Sixth Circuit recently held that it would amount to compulsion to render an inmate automatically ineligible for parole upon that inmate's refusal to participate in a sex-offender treatment program that required the admission of guilt. *Harper v. Arkesteyn*, No. 19-1928, 2020 WL 4877518, at *4 (6th Cir. Apr. 28, 2020). The Sixth Circuit has never held, however, that admission of guilt that

merely enhances one's chances of obtaining parole is sufficiently "compulsory" to implicate the Fifth Amendment.

Here, Plaintiff does not allege that he was automatically rendered ineligible for parole due to his refusal to admit guilt at the parole hearing; rather, he alleges only that his refusal to accept responsibility for the crime of conviction was one of the reasons parole was denied. Indeed, Plaintiff's Complaint expressly alleges that parole was also denied, in part, due to the severity of the crime of conviction and community opposition to release. *See, e.g.*, Compl. ¶¶ 1, 4–6, ECF No. 1. Accordingly, *Woodard* and *McKune* suggest that Plaintiff was not "compelled" to incriminate himself, and the Court so holds. This is also consistent with pre-*McKune* Sixth Circuit law. *See Hawkins v. Morse*, No. 98-2062, 1999 WL 1023780, at *2 (6th Cir. Nov. 4, 1999) ("[I]t cannot be said that the alleged pressure to admit that he committed the crime for which he is incarcerated in order to improve his chances for parole forces Hawkins to incriminate himself in violation of the Fifth Amendment."). It is also consistent with the approaches by at least the First, Third, Tenth, and D.C. Circuits. *See Redmond v. Fulwood*, 859 F.3d 11, 15 (D.C. Cir. 2017) ("[N]o First or Fifth Amendment law prohibited [the parole commission chairman's] consideration of [plaintiff's] refusal to acknowledge culpability" when denying [plaintiff's] request for reconsideration of parole denial); *Roman v. DiGuglielmo*, 675 F.3d 204, 214 (3rd Cir. 2012) ("[Plaintiff's] Fifth Amendment claim [on habeas] fails because the consequence he faces—the repeat denial of parole for refusing to participate in the sex

offender treatment program—does not rise to the level of compulsion necessary to violate the Fifth Amendment."); *Carroll v. Simmons*, 89 F. App'x 658, 662 (10th Cir. 2004) (rejecting Fifth Amendment claim even where prisoner's refusal to admit guilt, and subsequent inability to participate in rehabilitation program, resulted in ineligibility for parole); *Ainsworth v. Stanley*, 317 F.3d 1, 4–6 (1st Cir. 2002) (holding, post *McKune*, that reduced likelihood of parole for refusing to participate in program requiring admission of guilt does not constitute compelled self-incrimination).

At bottom, although Plaintiff surely faced a difficult dilemma during his parole hearing, he was not compelled to incriminate himself, and his Fifth Amendment claim fails.

B. Eighth Amendment

Regarding his Eighth Amendment claim, Plaintiff's Complaint states, "the Ohio Parole Board punished [Plaintiff] for not claiming guilt for a crime of which he is not guilty." Compl. ¶ 3, ECF No. 1. He further explains his theory: an "innocent person" is cruelly punished when he is forced to choose between either (1) falsely confessing to the crime of conviction in the hopes of receiving parole or (2) remaining steadfast in his assertion of innocence, knowing parole will be denied. Compl. ¶ 3, ECF No. 1.

Magistrate Judge Vascura recommends dismissing this claim as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). R&R 7, ECF No. 12.

Plaintiff objects that *Heck* does not apply because he does not seek damages and does not ask the Court to nullify his conviction. Obj. 4–5, ECF No. 13.

Upon de novo review, the Court agrees that Plaintiff lacks standing to assert this claim unless he is innocent of the crimes for which he has been convicted. As noted above, Plaintiff's Eighth Amendment claim rests on the premise that it is cruel and unusual to punish *an innocent person* who maintains their innocence by denying that person parole. Unless Plaintiff is himself innocent, he does not have the Article III standing to litigate such a theory. And this Court cannot presume Plaintiff's innocence unless and until his conviction is overturned. Because Plaintiff cannot even advance this theory unless he is innocent, the claim is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).[1]

To the extent Plaintiff's Eighth Amendment claim can be re-framed to not necessarily rest on his status as an innocent person, it is not barred by *Heck*. That is, *Heck* would not bar an Eighth Amendment claim that it is cruel and unusual to punish an inmate (regardless of guilt) for refusing to accept guilt at a parole hearing by denying parole. Success on such a claim would not guarantee a speedier release; it would merely guarantee that the parole board could not

[1] The Court notes for completeness that neither *Graham v. Florida*, 560 U.S. 48, 74–75 (2010) (holding the Eighth Amendment prohibits a sentence of life without parole for juveniles convicted of non-homicide offenses) nor *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (holding the Eighth Amendment prohibits mandatory life imprisonment without the possibility of parole for juveniles) are relevant to this case. Plaintiff was convicted of aggravated murder and has the possibility of parole.

deny Plaintiff parole as punishment for his refusal to admit his guilt during a parole hearing, even if he is, in fact, guilty. *See Hill v. Snyder*, 878 F.3d 193, 209–10 (6th Cir. 2017) (finding certain claims challenging procedures for parole consideration, that did not depend on the innocence of the plaintiff, were cognizable under § 1983).

However, the Court holds as a matter of law that, even if the Eighth Amendment applies in the context of discretionary parole decisions,[2] it is not cruel and unusual to condition parole on a convict's willingness to accept responsibility for the crime of conviction. "The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions." *Miller*, 567 U.S. at 469 (internal quotation marks and citation omitted). The concept has evolved from prohibiting merely barbaric modes of punishment to prohibiting sentences that are disproportionate to the crime and offender. *Graham*, 560 U.S. at 59.

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[2] The Sixth Circuit appears to conclude that the denial of parole does not itself implicate the Eighth Amendment, but parole procedures may. *Compare, e.g.*, *Carnes v. Engler*, No. 03-1212, 2003 WL 22177118, at *3 (6th Cir. Sept. 19, 2003) ("[T]he denial of the plaintiffs' parole does not implicate the Eighth Amendment's prohibition against cruel and unusual punishment. The Eighth Amendment prohibits conduct that involves the unnecessary and wanton infliction of pain. The denial of parole clearly does not fall under this umbrella." (citation omitted)); *and Kordenbrock v. Brown*, 469 F. App'x 434, 435 (6th Cir. 2012) (holding denial of parole did not implicate Eighth Amendment where inmate would end up serving a sentence within the statutory maximum); *with Weshe v. Combs*, 763 F.3d 500, 505–06 (6th Cir. 2014) (remanding for consideration of the plaintiff's claim that a state's parole *procedures* violated the Eighth Amendment, in light of *Graham v. Florida*). Plaintiff's re-framed claim here would arguably implicate the Eighth Amendment.

It is neither barbaric nor disproportionate to require someone convicted of a crime to accept responsibility for that crime as a condition to returning into society. Plaintiff cites no case that has ever held to the contrary, and the Court's independent research reveals none. In fact, the most analogous caselaw supports the Court's conclusion. *E.g.*, *Robins v. Wetzel*, No. 22-1006, 2022 WL 4533850, at *2 (3rd Cir. Sept. 28, 2022) ("[R]equiring an admission of guilt, even falsely, did not deprive [the plaintiff] of the minimal civilized measure of life's necessities." (internal quotation marks and citation omitted)); *Kikuchi v. Bauman*, No. 20-1593, 2020 WL 7587156, at *2 (6th Cir. Oct. 22, 2020) ("[A]ny directive by the parole board that Kikuchi participate in the Sex Offender Treatment Program as a prerequisite to consideration of parole did not result in an equal protection violation, a due process violation, a Fifth Amendment violation, or an Eighth Amendment violation of Kikuchi's constitutional rights." (citation omitted)), *cert. denied*, 141 S. Ct. 2679 (2021); *Alexander v. Vittitow*, No. 17-1075, 2017 WL 7050641, at *5 (6th Cir. Nov. 9, 2017) (holding that where a state's parole system does not create a liberty interest in parole, it is not cruel and unusual to impose a finding of misconduct, even if it may prevent parole).

Accordingly, Plaintiff's Eighth Amendment claim, as framed, fails for lack of standing. Any alternative framing of the claim fails as a matter of law.

C. Fourteenth Amendment: Equal Protection

The Magistrate Judge acknowledged that Plaintiff purported to raise a Fourteenth Amendment Equal Protection claim but found his theory was more

appropriately addressed as a substantive due process claim. R&R 7–8, ECF No. 12. She recommended dismissing the substantive due process claim. *Id.*

Plaintiff objects that "[t]his is clearly an equal protection issue and should be addressed as such." Obj. 5–6, ECF No. 13. The remainder of his objection argues that the discretionary power of the Parole Board inherently violates the Equal Protection Clause. *Id.*

Upon de novo review, the Court agrees with the Magistrate Judge. Despite the label Plaintiff puts on his claim, he has not alleged that he was denied a fundamental right, is a member of a suspect class, or that anyone otherwise similarly situated was granted parole because they admitted guilt (let alone that there is no rational basis for treating differently, for parole purposes, those inmates who accept responsibility for their crime of conviction and those who do not). He has thus not stated a viable claim under the Equal Protection Clause. *Cf. Robins*, 2022 WL 4533850 at *2 (rejecting similar Equal Protection claim); *Mann v. Mohr*, 802 F. App'x 871, 875 (6th Cir. 2020) (upholding dismissal of inmate's Equal Protection claim vis-à-vis parole under rational basis test); *Marshall v. Mausser*, No. 1:13-cv-847, 2015 WL 105032, at *6 (S.D. Ohio Jan. 7, 2015), *R&R adopted by* 2015 WL 457302. Accordingly, to the extent Plaintiff brings his claim under the Equal Protection Clause, it fails.

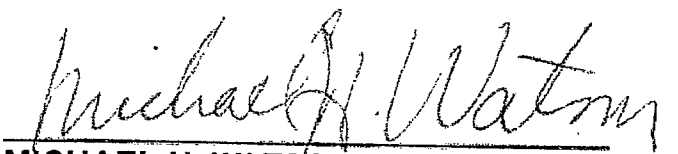
Moreover, as the Magistrate Judge noted, where, as here, the theory is that discretionary power inherently leads to arbitrary and capricious decision-making, the claim is more appropriately analyzed as a claim for violation of

substantive due process. And the R&R correctly notes that "although other circuits have found that arbitrary parole denials may . . . violate a plaintiff's substantive due process rights" notwithstanding the lack of a protected interest in parole, the Sixth Circuit has not adopted that reasoning. *Sturgis v. Mich. Parole Bd.*, No. 18-1554, 2019 WL 2156429, at *1 (6th Cir. Feb. 1, 2019) (citations omitted). Nor is the Court aware of any caselaw holding that a discretionary parole system, itself, shocks the conscience. Therefore, to the extent Plaintiff challenges the parole board's discretionary power under the Substantive Due Process Clause, this claim also fails.[3]

D. Conclusion

For the above reasons, the Court **DISMISSES** Plaintiff's Complaint. The Clerk shall enter judgment for Defendant and terminate the case.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

[3] The Sixth Circuit has left open the possibility that arbitrary denials of parole based on impermissible criteria amount to a substantive due process violation, "even where a prisoner may not have a protected liberty interest[.]" *C.f., e.g., Mayrides v. Chaudhry*, 43 F. App'x 743, 746 (6th Cir. 2002). Thus, if it was unconstitutional to consider protestations of innocence when considering parole (i.e., if Plaintiff succeeded on his Fifth Amendment claim), then Plaintiff might have stated a viable substantive due process claim that the denial of his parole due, in part, to the exercise of his Fifth Amendment rights shocked the conscience.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN A CIVIL CASE

Charles Keith Wampler,

vs.

Case No. 2:21-cv-5852

Alicia Handwerk, *et al.*,

Judge Michael H. Watson

[] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the December 15, 2022 Opinion and Order, the Court DISMISSES Plaintiff's Complaint.

Date: **December 15, 2022**

Richard Nagel, Clerk

s/ Jennifer Kacsor

By Jennifer Kacsor/Courtroom Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Charles Keith Wampler,

Plaintiff,

v.

Alicia Handwerk, *et al.*,

Defendants.

Case No. 2:21-cv-5852

Judge Michael H. Watson

Magistrate Judge Vascura

OPINION AND ORDER

Donald Richard ("Richard") moves for permissive intervention under Federal Rule of Civil Procedure 24(b). Mot. Intervene, ECF No. 4. Plaintiff opposes intervention, noting that the issues Richard raises are not the same as the issues Plaintiff raises. Resp., ECF No. 5. Richard has filed a reply brief, and Plaintiff filed a sur-reply brief.[1] Reply, ECF No. 6; Sur-Reply, ECF No. 7. Richard's motion to intervene is **DENIED.**

Federal Rule of Civil Procedure 24(b) states "the court may permit" anyone to intervene who, *inter alia*, "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention requires the proposed intervener to establish two elements: (1) the motion to intervene is timely; and (2) the proposed intervener's

[1] Plaintiff's sur-reply brief is quite difficult to read in parts, but the difficulty is immaterial because the Court did not need the benefit of a sur-reply to rule on Richard's motion.

claim presents at least one common question of law or fact. *Shy v. Navistar Intern. Corp.*, 291 F.R.D. 128, 138 (S.D. Ohio Feb. 6, 2013) (citing *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005)). If the proposed intervenor establishes these two requirements, "the district court must then balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." *Michigan*, 424 F.3d at 445 (citation omitted).

As an initial matter, Richard's motion is procedurally deficient. Federal Rule of Civil Procedure 24(c) requires a motion to intervene to "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Richard's motion was not accompanied by such a pleading.

But more importantly, a review of Plaintiff's Complaint, Richard's motion to intervene, and the briefing on the same shows that Richard's claim does not meet the standard for permissive intervention. Specifically, Plaintiff challenges the Parole Board's ability to deny parole due to an inmate's refusal to admit responsibility for the crime of conviction. He also challenges the authority of the Parole Board under the separation-of-powers requirement. Richard argues that any inmate sentenced prior to July 1, 1996 (or for an offense committed before July 1, 1996) is statutorily entitled to parole after a specific period of time if they do not incur a disciplinary infraction. *See generally*, Compl., ECF No. 1; Obj., ECF No. 3; Mot. Intervene, ECF No. 4. As there is no common issue of law or

fact between the arguments made by Plaintiff and those made by Richard, permissive intervention is not warranted.

Moreover, the Court agrees with Plaintiff that including Richard in this case would "only serve to muddy the waters and confuse the issues at hand." Resp. 2, ECF No. 5. It is clear from Richard's filings thus far that intervention would both prejudice Plaintiff and Defendants and would unduly delay resolution of Plaintiff's claims. Therefore, and in the alternative, the Court exercises its discretion to deny intervention even if a common question exists.

Richard's motion to take judicial notice, ECF No. 8, and motion for order to declare the intent of a specific statute, ECF No. 9, are **STRICKEN** given the Court's denial of Richard's motion to intervene.

The Clerk is directed to terminate ECF Nos. 4, 8, and 9. A ruling on Plaintiff's objections to the Report and Recommendation will be made in a separate Opinion and Order.

IT IS SO ORDERED.

Richard H. Watson

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHARLES KEITH WAMPLER,

Plaintiff,

v.

Civil Action 2:21-cv-5852
Judge Michael H. Watson
Magistrate Judge Chelsey M. Vascura

ALICIA HANDWERK, *et al.*,

Defendants.

REPORT AND RECOMMENDATION

Plaintiff, an Ohio inmate proceeding without the assistance of counsel, brings this civil rights action under 42 U.S.C. § 1983 against seven members of the Ohio Adult Parole Authority Board ("OAPA Board"). The undersigned previously performed an initial screen of Plaintiff's Complaint under 28 U.S.C. § 1915A to identify cognizable claims and to recommend dismissal of Plaintiff's Complaint, or any portion of it, that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. (R. & R., ECF No. 2.) That initial screen identified, and recommended dismissal of, claims arising under the separation-of-powers doctrine and the Fourteenth Amendment's procedural due process clause. (*Id.*) Over Plaintiff's objection, the District Judge adopted the Report and Recommendation in part and dismissed Plaintiff's separation-of-powers and procedural due process claims. (Op. & Order, ECF No. 11.) However, the District Judge determined that Plaintiff's Complaint also advances claims under the Fifth Amendment, Eighth Amendment, and the Fourteenth Amendment's equal protection clause. (*Id.* at 5.) The District

Judge therefore recommitted the matter to the undersigned to perform an initial screen of those claims. (*Id.*) For the reasons that follow, the undersigned **RECOMMENDS** that the Court **DISMISS** Plaintiff's Fifth Amendment, Eighth Amendment, and Fourteenth Amendment equal protection claims pursuant to § 1915A(b)(1) for failure to state a claim on which relief may be granted.

I. BACKGROUND

According to the Complaint, during Plaintiff's September 20, 2021 hearing before the OAPA Board, board members questioned him about the crime for which he was incarcerated. OAPA Board members appeared "visibly anger[ed]" when Plaintiff proclaimed his innocence. (Compl., ECF No. 1, at PAGEID #19.) One OAPA Board member commented on the injuries of the victim and told Plaintiff that "[s]omeone really did a number on that boy." (*Id.*) The OAPA Board member also brought up various facts from the case. The OAPA Board Decision and Minutes, attached to Plaintiff's Complaint, reflect that the OAPA Board denied parole, citing the severity of the crime for which Plaintiff was convicted, community opposition, and Plaintiff's refusal to accept responsibility. These same records also noted that Plaintiff had maintained a good conduct record at prison. Plaintiff's next hearing before the OAPA Board was continued for five years.

In his Complaint, Plaintiff asks this Court to declare the OAPA Board's actions unconstitutional and to enjoin future such actions. More specifically, Plaintiff alleges that his Fifth Amendment privilege against self-incrimination was violated because the OAPA Board denied his parole, in part, based on his refusal to accept responsibility for the crime of conviction; that his Eighth Amendment rights to be free of cruel and unusual punishment were violated when he was forced to choose between falsely admitting guilt to receive parole or maintaining his innocence and thereby extending his term of imprisonment; and that his equal

protection rights under the Fourteenth Amendment were violated because the OAPA Board was given discretionary power and his parole decision was left "to the whims of human beings." (Compl., ECF No. 1, at PAGEID #17.)

II. STANDARD OF REVIEW

Congress enacted 28 U.S.C. § 1915A as part of the Prison Litigation Reform Act in order to "discourage prisoners from filing [frivolous] claims that are unlikely to succeed." *Crawford-El v. Britton*, 523 U.S. 574, 596 (1998). Congress directed the Courts to "review, before docketing, if feasible or in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). In particular, subsection (b) provides:

> On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—
>
> (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or—
>
> (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(b). Thus, § 1915A requires *sua sponte* dismissal of an action upon the Court's determination that the action is frivolous or malicious, or upon determination that the action fails to state a claim upon which relief may be granted. *See Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010) (applying Federal Rule of Civil Procedure 12(b)(6) standards to review under 28 U.S.C. §§ 1915A).

To properly state a claim upon which relief may be granted, a plaintiff must satisfy the basic federal pleading requirements set forth in Federal Rule of Civil Procedure 8(a). *See also Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010) (applying Federal Rule of Civil Procedure 12(b)(6) standards to review under 28 U.S.C. §§ 1915A and 1915(e)(2)(B)(ii)). Under Rule 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the

pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Thus, Rule 8(a) "imposes legal and factual demands on the authors of complaints." *16630 Southfield Ltd., P'Ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 503 (6th Cir. 2013). Although this pleading standard does not require "detailed factual allegations, a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action" is insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). A complaint will not "suffice if it tenders naked assertion devoid of further factual enhancement." *Id.* (cleaned up). Instead, in order to state a claim upon which relief may be granted, "a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face." *Id.* (cleaned up). Facial plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct." *Flagstar Bank*, 727 F.3d at 504 (citations omitted). Further, the Court holds *pro se* complaints "to less stringent standards than formal pleadings drafted by lawyers." *Garrett v. Belmont Cty. Sheriff's Dep't*, 374 F. App'x 612, 614 (6th Cir. 2010) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). This lenient treatment, however, has limits; "courts should not have to guess at the nature of the claim asserted." *Frengler v. Gen. Motors*, 482 F. App'x 975, 976–77 (6th Cir. 2012) (quoting *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989)).

III. ANALYSIS

A. Fifth Amendment Self-Incrimination Claim

Plaintiff's Fifth Amendment claim is based on his theory that the "Ohio Parole Board punished him for not incriminating himself in a crime he had nothing to do with." (Compl., ECF No. 1, at PAGEID #15). In short, Plaintiff alleges that the OAPA Board denied him parole, in

part, because he refused to accept responsibility for the crime of conviction in violation of the Fifth Amendment.

Courts have rejected Plaintiff's argument that a parole board's consideration of an inmate's refusal to admit guilt violates an inmate's Constitutional right against self-incrimination. For example, in the similar context of death penalty clemency interviews, the United States Supreme Court in *Ohio Adult Parole Auth. v. Woodard* held that "we do not think that respondent's testimony at a clemency interview would be 'compelled' within the meaning of the Fifth Amendment." 523 U.S. 272, 286 (1998). Citing *Woodard* as part of its rationale, the Supreme Court later stated that "[s]tates may award good time credits and early parole for inmates who accept responsibility because silence in these circumstances does not ***automatically*** mean the parole board, which considers other factors as well, will deny them parole." *McKune v. Lile,* 536 U.S. 24, 44 (2002) (Kennedy, J. plurality opinion) (emphasis added).

In *McKune*, the Supreme Court addressed whether a Kansas sex-offender-rehabilitation program, which required for its first step that participants admit to committing the crime of conviction as well as other past crimes, violated the Fifth Amendment's prohibition against self-incrimination. Inmates were incentivized to participate in the treatment program, and failure to participate could result in transfer to a less desirable prison and/or loss of privileges, *id.* at 30, but it did not "extend [the] term of incarceration [or] . . . affect . . . eligibility for good-time credits or parole," *id.* at 38. In a plurality opinion, the Supreme Court rejected the inmate's Fifth Amendment challenge, finding the consequences of failing to participate in the program did not amount to compulsion. *Id.* at 36, 50–51. One opinion by the United States Court of Appeals for the Sixth Circuit, applying *McKune*, has held that a prisoner stated a Fifth Amendment claim when he alleged that he would be ineligible for parole unless he participated in a sex offender

program wherein he must admit guilt. *Harper v. [Unknown] Arkesteyn*, No. 19-1928, 2020 WL 4877518, at *4 (6th Cir. Apr. 28, 2020). The *Harper* Court deemed this automatic ineligibility for parole as "precisely the kind [of adverse consequence] that the *McKune* plurality thought would implicate the Fifth Amendment's protections against self-incrimination." *Id.* (citation omitted).

Significantly, *McKune* and *Harper* dealt with, and rejected as constitutionally impermissible, a parole board's use of refusal to admit guilt as an automatic, threshold barrier to parole eligibility. As noted in *McKune*, however, parole boards may permissibly consider acceptance of responsibility for the crime of conviction (or lack thereof) as one factor in the parole decision. 536 U.S. 24, 44; *see also Hawkins v. Morse*, 1999 WL 1023780 at *2 (6th Cir. Nov. 4, 1999) ("[I]t cannot be said that the alleged pressure to admit that he committed the crime for which he is incarcerated in order to improve his chances for parole forces Hawkins to incriminate himself in violation of the Fifth Amendment.") (citing *Woodard*); *Hernandez v. Tribley*, No. 2:14-CV-21, 2016 WL 1749765, at *2 (W.D. Mich. May 3, 2016) ("It is well-settled that the Fifth Amendment right against self-incrimination is not implicated by the alleged pressure on a prisoner to admit, in order to improve his chances for parole, that he committed the crime(s) for which he is incarcerated.") (citing *Hawkins* and *Woodard*); *Grimmett v. Berrios*, No. CIV.A. 2:08-CV-14678, 2008 WL 5102262, at *3 (E.D. Mich. Dec. 1, 2008) (same); *Vinson v. Mich. Parole Bd.*, No. 05-CV-72425-DT, 2006 WL 305653, at *1 (E.D. Mich. Feb. 9, 2006) (same) (citing *McKune* and *Hawkins*); *Thorpe v. Grillo*, 80 F. App'x 215, 219 (3d Cir. Oct. 31, 2003) (holding that unless an inmate's refusal to admit guilt "extend[s] his term of his incarceration or ***automatically*** deprive[s] him of consideration for parole," it does not violate his

Fifth Amendment rights even where it has a negative impact on his parole decision) (emphasis added).

Applied here, Plaintiff has not alleged that refusal to admit guilt operated as an automatic, threshold barrier to parole eligibility. To the contrary, Plaintiff acknowledges that, notwithstanding his refusal to admit guilt, the OAPA Board proceeded to hold a parole hearing, and that at this hearing, in their discretion, the OAPA Board considered Plaintiff's refusal to accept responsibility together with other factors, including the severity of the crime for which Plaintiff was convicted, community opposition to his release, and his good conduct record while incarcerated. Nor has Plaintiff alleged that he remains automatically ineligible for parole until he admits his guilt. Rather, he concedes that the OAPA Board indicated that his next parole hearing would be in five years.

Accordingly, it is **RECOMMENDED** that the Court **DISMISS** Plaintiff's Fifth Amendment claim pursuant to § 1915A(b)(1).

B. Eighth Amendment Cruel and Unusual Punishment Claim

Plaintiff argues it is cruel and unusual punishment to force an innocent person to choose between falsely admitting guilt to receive parole or maintaining their innocence and, thereby, extending their term of imprisonment. (Compl., ECF No. 1, at PAGEID #15.)

Such a claim is precluded in this § 1983 case by *Heck v. Humphrey*, 512 U.S. 477 (1994), because Plaintiff would have standing to litigate this claim only if he was, in fact, innocent. Such a finding would undermine his criminal conviction. Accordingly, it is **RECOMMENDED** that the Court **DISMISS** Plaintiff's Eighth Amendment claim pursuant to § 1915A(b)(1).

C. Fourteenth Amendment Equal Protection Claim

Finally, Plaintiff's Complaint purports to raise an Equal Protection claim under the Fourteenth Amendment. At the outset, the Court notes that Plaintiff does not allege the denial of

a fundamental right or membership in a suspect class. Nor does he seem to be raising a class-of-one Equal Protection claim. In fact, he does not argue that he was treated differently than anyone else vis-à-vis the denial of parole. Rather, Plaintiff argues that the grant of discretionary authority to the OAPA Board inherently violates the Equal Protection Clause of the Fourteenth Amendment by leaving parole decisions "to the whims of human beings." (Compl., ECF No. 1, at PAGEID #17.) He argues the discretionary system means there is no guarantee that like cases will receive the same parole decision. (*Id.*) Thus, although Plaintiff frames this claim in terms of equal protection, it is more appropriately analyzed as a substantive due process claim because Plaintiff essentially argues that the discretionary system is so rife for constitutional violation that it "shocks the conscience." *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998).

Yet, Plaintiff does not allege that the OAPA Board exercised its discretion in a wholly arbitrary manner when it denied him parole. Rather, he argues the ability to exercise discretion is *itself* arbitrary and capricious. But the Sixth Circuit has never held that arbitrary parole denials violate a prisoner's substantive due process rights. *See, e.g.*, *Sturgis v. Mich. Parole Bd.*, No. 18-1554, 2019 WL 2156429, at *1 (6th Cir. Feb. 1, 2019). The undersigned thus finds Plaintiff has failed to state a claim that Ohio's grant of discretionary authority to the OAPA Board, in and of itself, violates any substantive due process right. Accordingly, it is **RECOMMENDED** that the Court **DISMISS** Plaintiff's Fourteenth Amendment claim pursuant to § 1915A(b)(1).

IV. DISPOSITION

For the reasons set forth above, it is **RECOMMENDED** that the Court **DISMISS** Plaintiff's remaining claims pursuant to § 1915A.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A Judge of this Court shall make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a Judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the District Judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Charles Keith Wampler,

Plaintiff,

v.

Alicia Handwerk, *et al.*,

Defendants.

Case No. 2:21-cv-5852

Judge Michael H. Watson

Magistrate Judge Vascura

OPINION AND ORDER

Inmate Charles Wampler ("Plaintiff") sues Alicia Handwerk ("Handwerk"), Lance Pressley ("Pressley"), Kathleen Kovach ("Kovach"), Marc Houk ("Houk"), Scott Widmer ("Widmer"), Steve Herron ("Herron"), and Lisa Hoying ("Hoying," collectively, "Defendants") under 42 U.S.C. § 1983. Compl., ECF No. 1. The Magistrate Judge screened Plaintiff's *pro se* Complaint under 28 U.S.C. § 1915A and issued a Report and Recommendation ("R&R") recommending the Court dismiss the same. R&R, ECF No. 2. Plaintiff timely objected. Obj., ECF No. 3. For the following reasons, the Court **ADOPTS IN PART** the R&R but **RECOMMITS** this matter to the Magistrate Judge for an analysis of Plaintiff's remaining claims.

I. FACTS

Defendants, who are all members of the Ohio Parole Board, denied Plaintiff parole after a video parole hearing on September 20, 2021. Compl.,

ECF No. 1 at PAGEID # 19. Plaintiff alleges that Defendants denied him parole partly because he maintained his innocence for the crime of conviction during the hearing. *Id.* Plaintiff alleges the meeting minutes indeed reflect that Plaintiff was denied parole because of the nature of his crime of conviction and because he refused to accept responsibility for that crime. *Id.* at PAGEID # 20.

Plaintiff brings claims under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and argues that the authority granted to the Ohio Parole Board violates the separation-of-powers requirement in the United States Constitution.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 72(b)(3), the Court reviews *de novo* those portions of the R&R that Plaintiff specifically objected to. Fed. R. Civ. P. 72(b)(3).

III. ANALYSIS

The R&R recommended dismissing Plaintiff's separation-of-powers claim because the separation-of-powers doctrine that applies to the federal government is not mandatory for states. R&R 5, ECF No. 2. The R&R recommended dismissing Plaintiff's due process claim because Plaintiff lacks a protected liberty interest in parole. *Id.*

A. Separation of Powers

On objection, Plaintiff presses his argument that the function of the Ohio Parole Board essentially usurps the role of the judiciary, in violation of the federal

Constitution's separation-of-powers requirement. Obj. 2–3, ECF No. 3. Plaintiff argues that the State of Ohio cannot act in contravention of the United States Constitution; thus, any separation-of-powers violation by Ohio is a federal violation. *Id.* at 3.

As Magistrate Judge Vascura explained, the federal Constitution requires separation of powers within the *federal* government but does not require states to follow that separation of powers within their own governments. *See, e.g.*, *Johnson v. Voinovich*, 49 F. App'x 1, 3 (6th Cir. 2002) ("The district court properly found that the disputed state [parole] laws did not implicate federal separation of powers principles." (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957))); *Harris v. Wilson*, No. 1:06 CV 2342, 2006 WL 3803410, at *5 (N.D. Ohio Dec. 26, 2006) ("The separation of powers between a state trial judge and state parole board members is a matter of state law." (citing *Austin v. Jackson*, 213 F.3d 298, 302 (6th Cir. 2000))); *Michael v. Ghee*, 411 F. Supp. 2d 813, 823 (N.D. Ohio 2006) ("The alleged violation of separation of powers doctrine relates to the relationship between the branches of Ohio's government: plaintiff's contention being that the executive, through the APA, is taking over the job of the state judiciary. Any alleged violation concerns only state law. Thus, § 1983 is inapplicable."), *aff'd* 498 F.3d 372, 376 (6th Cir. 2007). Because the federal Constitution's separation-of-powers requirement does not apply to state governments, Ohio's scheme does not violate the federal Constitution's separation-of-powers doctrine. This objection is therefore **OVERRULED**.

B. Procedural Due Process

With respect to his Fourteenth Amendment procedural due process claim, Plaintiff argues on objection that he is not asking the Court for a guarantee of parole but rather asks the Court to prohibit the Ohio Parole Board from denying parole without the due process guaranteed by the federal Constitution. Obj. 3–4, ECF No. 3. His claim is that the Ohio Parole Board denied him procedural due process by: (1) considering the elements of Plaintiff's crime of conviction without letting him present evidence of his innocence; (2) considering community opposition to parole without letting Plaintiff face his accusers; and (3) violating the separation of powers between the executive and judiciary. Compl., ECF No.1 at PAGEID ## 15–16.

Those allegations, however, do not state a viable procedural due process claim. "Procedural due process requirements only apply to deprivation of interests in liberty and property." *Ghee*, 411 F. Supp. 2d at 817 (citation omitted). Neither the United States Constitution nor Ohio law create a liberty interest in parole. *Id.* (citations omitted). "If inmates do not have a liberty interest in parole itself, they cannot have a liberty interest in parole consideration or other aspects of parole procedures." *Id.* (citations omitted). Thus, as Magistrate Judge Vascura correctly explained, R&R 4–5, ECF No. 2, the due process requirements of the federal Constitution do not apply to Plaintiff's parole decision-making process because Plaintiff lacks a liberty interest in parole. *See also, e.g.*,

Jergens v. Ohio Dept. of Rehab. & Corr. Adult Parole Auth., 492 F. App'x 567, 570 (6th Cir. 2012). Plaintiff's objection is therefore **OVERRULED.**

C. Remaining Claims

Upon review, it appears the R&R did not analyze Plaintiff's Fifth Amendment, Eighth Amendment, or Fourteenth Amendment Equal Protection claims. This aspect of Plaintiff's objection is therefore **SUSTAINED**, and the Court **RECOMMITS** the matter to the Magistrate Judge to perform an initial screen of those claims.

IV. CONCLUSION

The R&R is **ADOPTED IN PART**. The Court **DISMISSES** Plaintiff's Separation of Powers claim and Procedural Due Process claim. The Court **RECOMMITS** the matter for additional review and issuance of an R&R consistent with this Opinion and Order.

IT IS SO ORDERED.

Michael H. Watson

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

Relevant Constitutional Provisions

U.S. Const. Amend. V

U.S. Const. Amend. VIII

U.S. Const. Amend. XIV

UNITED STATES CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

UNITED STATES CONSTITUTION AMENDMENT XIV (Sec. 1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Additional material from this filing is available in the Clerk's Office.