

Jefferson v. Stancil, 2026 U.S. App. LEXIS 18106

Copy Citation

United States Court of Appeals for the Tenth Circuit

June 23, 2026, Filed

No. 25-1153

Opinion

ORDER AND JUDGMENT

Justin A. Jefferson appeals from the dismissal of his pro se action challenging several policies of the Colorado Department of Corrections (CDOC) Sex Offender Treatment and Monitoring Program (SOTMP). The district court dismissed the action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

Jefferson is serving an indeterminate sentence of ten years to life under Colorado's Sex Offender Lifetime Supervision Act, Colo. Rev. Stat. §§ 18-1.3-1001 to - 1012. A magistrate judge distilled the allegations in the third amended complaint into three claims averring that CDOC officials violated Jefferson's: 1) Fourteenth Amendment rights by conditioning his eligibility for parole on his participation in SOTMP and by denying him enrollment in 2020, while he was appealing his convictions; 2) Fifth Amendment right against compelled self-incrimination by requiring that he admit guilt, submit to a polygraph examination, and disclose his complete sexual history; and 3) First Amendment rights by prohibiting him from possessing sexually explicit material.

The magistrate judge recommended that the action be dismissed. The magistrate judge first observed that prison policies impinging on constitutional rights, including SOTMP policies

conditioning Jefferson's enrollment on his willingness and ability to comply with SOTMP rules, are permissible if they are reasonably related to legitimate penological interests. *See* R. vol. I at 235-36 (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)).

But the magistrate judge determined Jefferson lacked standing to assert his Fourteenth Amendment claim because he sought injunctive relief for the alleged denial of enrollment in 2020, yet he filed this lawsuit in 2023, after he had already enrolled in SOTMP, admitted guilt, and concluded his appeal. The magistrate judge noted that, although he sought monetary damages against defendants Folz and Bailey, his only relevant allegations indicated they compelled him to submit a reenrollment form in 2023, *see* R. vol. I at 147, and he was not denied treatment at that time.

As for the remaining claims, the magistrate judge determined Jefferson failed to allege facts showing SOTMP's policies requiring him to admit guilt, submit to a polygraph examination, and disclose his sexual history were not rationally related to a legitimate penological interest. The magistrate judge reached the same conclusion regarding Jefferson's First Amendment claim: he failed to allege facts showing the restrictions on his possession of sexually explicit materials were not reasonably related to legitimate penological interests.

Over Jefferson's objections, the district court adopted the magistrate judge's report and recommendation and dismissed the action. Jefferson appealed.

II

We review de novo the district court's dismissal under Rule 12(b)(6). *Brown v. City of Tulsa*, 124 F.4th 1251, 1263 (10th Cir. 2025). "To survive a Rule 12(b)(6) motion, the complaint must contain

sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted). The plausibility standard requires that "the complaint . . . plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Clinton v. Sec. Benefit Life Ins. Co.*, 63 F.4th 1264, 1275 (10th Cir. 2023) (internal quotation marks omitted). There must be factual allegations to plausibly infer that the SOTMP policies are not reasonably related to any legitimate penological interest. *See Al-Owhali v. Holder*, 687 F.3d 1236, 1240 (10th Cir. 2012). Although we afford Jefferson's pro se materials a liberal construction, we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

A. Fourteenth Amendment Denial of SOTMP Enrollment

Jefferson contends the district court incorrectly dismissed his Fourteenth Amendment claim under *Turner*. But the district court dismissed the Fourteenth Amendment claim for lack of standing. Because Jefferson does not challenge the district court's standing analysis, we affirm the dismissal of this claim. *See Nixon v. City & Cnty. of Denv.*, 784 F.3d 1364, 1369 (10th Cir. 2015) (affirming dismissal of claim where appellant failed to challenge the basis for the district court's dismissal).

B. Fifth Amendment Self-Incrimination

Jefferson also contends the district court erred in dismissing his Fifth Amendment claim challenging SOTMP policies conditioning his treatment on him admitting guilt, submitting to a

polygraph examination, and disclosing his complete sexual history. He says these policies violate his privilege against compelled self-incrimination.

The Fifth Amendment provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. But "[w]hat might be viewed as an unreasonable infringement of a fundamental constitutional right were it to occur outside of prison may be valid in prison as long as the infringement is reasonably related to legitimate penological objectives, which include rehabilitation, deterrence and security." Mosier v. Maynard, 937 F.2d 1521, 1525 (10th Cir. 1991). Rehabilitation of sex offenders is a legitimate penological interest. McKune v. Lile, 536 U.S. 24, 36, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). Indeed, "[t]he state's interest in rehabilitating sex offenders is a valid one, and the requirement for admission of responsibility is considered a legitimate part of the rehabilitative process." Searcy v. Simmons, 299 F.3d 1220, 1228 (10th Cir. 2002); see also McKune, 536 U.S. at 33 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. States thus have a vital interest in rehabilitating convicted sex offenders." (citation omitted)).

Here, the challenged policies all advance the state's legitimate penological interest in rehabilitating Jefferson as a convicted sex offender, and Jefferson did not plead any facts suggesting otherwise. He alleged the SOTMP policies requiring him to admit guilt, submit to a polygraph examination, and disclose his complete sexual history as a condition of treatment constitute compulsion because he "faces a penalty significantly more serious than that" in McKune—viz., denial of treatment and the loss of parole eligibility. R. vol. I at 149-50. In McKune, the Court considered a similar Fifth Amendment claim that an inmate was

compelled to incriminate himself under threat of lost privileges and better housing if he refused to admit responsibility for his crimes, disclose his complete sexual history, and submit to a polygraph examination to verify the accuracy and completeness of his responses. 536 U.S. at 30-31. Under those circumstances, a plurality of the Court upheld the rehabilitative scheme, explaining that "[a]cceptance of responsibility . . . demonstrates that an offender is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." Id. at 36-37 (internal quotation marks omitted).

McKune recognized that requiring sex offenders to admit guilt, disclose their sexual histories, and submit to a polygraph examination advance the state's interest in rehabilitation. Id. at 48. Although Jefferson denies the efficacy of treatment, "[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism." Id. at 33. That Jefferson could elect to voluntarily forego his eligibility for discretionary parole by choosing to reject SOTMP's rules does not diminish the state's interest in his rehabilitation, nor does it reflect compulsion. See Searcy, 299 F.3d at 1226 (recognizing state's interest in rehabilitation notwithstanding inmate's lost opportunity to earn discretionary good-time credits if he refused to admit guilt); see also Nowak v. Suthers, 2014 CO 14, 320 P.3d 340, 348 (Colo. 2014) ("The grant of parole [in Colorado] is a privilege, not a right."). Any impact on Jefferson's parole eligibility is "simply not the result of his refusal to incriminate himself, but [rather is] a consequence of his inability to complete rehabilitation." Searcy, 299 F.3d at 1227.

Jefferson also contends that requiring him to disclose his complete sexual history could result in his prosecution for additional crimes, demonstrating his risk of self-incrimination. But the state's policy of requiring sex offenders to disclose their sexual histories, even with the potential for incrimination, "is one central to its mission of rehabilitating sex offenders," Searcy, 299 F.3d at 1227; see also McKune, 536 U.S. at 34 (affirming the validity of the Kansas rehabilitative scheme, even though "Kansas does not offer legal immunity from prosecution based on any statements made in the course of [treatment]"). Thus, the district court correctly dismissed this claim because Jefferson failed to plead any facts plausibly alleging that SOTMP policies are not reasonably related to the state's legitimate penological interest in rehabilitating sex offenders.

C. First Amendment Access to Sexually Explicit Materials

Finally, Jefferson disputes the dismissal of his First Amendment claim, which challenged SOTMP's prohibition on his access to sexually explicit materials. The district court declined to consider Jefferson's objection to the magistrate judge's decision, ruling it was not sufficiently specific to preserve review under our firm waiver rule. See United States v. B.N.M., 107 F.4th 1152, 1168 (10th Cir. 2024) (explaining that "failure to timely object to a magistrate's recommendations waives appellate review of both factual and legal questions," and "only an objection that is sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute is sufficient" (brackets and internal quotation marks omitted)). Jefferson merely stated that he "preserve[d]" his claim "to be addressed by the ruling authority of the Supreme Court at such time." R. vol. I at 252.

On appeal, Jefferson offers various arguments ostensibly supporting the merits of his claim, but he does not challenge the district court's application of the firm waiver rule. As a result, we decline to consider the district court's dismissal. *See Nixon*, 784 F.3d at 1369.

III

The district court's judgment is affirmed. Jefferson's motion for clarification, Dkt. No. 36, which seeks to certify to the Supreme Court a question of *Turner's* continuing validity, is denied.

Entered for the Court
Bobby R. Baldock
Circuit Judge

Jefferson v. Stancil, 2025 U.S. Dist. LEXIS 51764

Copy Citation

United States District Court for the District of Colorado

March 20, 2025, Decided; March 20, 2025, Filed

Civil Action No. 23-cv-01773-PAB-NRN

Opinion

ORDER

This matter comes before the Court on the Report and Recommendation on CDOC Defendants' Motion to Dismiss Third Amended Complaint [Docket No. 65]. The recommendation addresses the defendants' Motion to Dismiss Third Amended Complaint [Docket No. 46]. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

I. BACKGROUND

The facts are set forth in the assigned magistrate judge's recommendation, Docket No. 65 at 2-5, and the Court adopts them for the purpose of ruling on the objections. Plaintiff Justin Jefferson alleges five claims against the defendants, all of whom are employees of the Colorado Department of Corrections, the Colorado State Parole Board, or the Sex Offender Management Board of the Colorado. *See generally* Docket No. 23. Mr. Jefferson's complaint challenges the constitutionality of various aspects of Colorado's Sex Offender Treatment and Monitoring Program ("SOTMP"). *Id.*

Defendants moved to dismiss Mr. Jefferson's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Docket No. 46. On October 22, 2024, the magistrate judge issued a report and recommendation and recommended that the Court grant the defendants' motion. Docket No. 65 at

1. Mr. Jefferson timely objected to the recommendation, Docket No. 67, and defendants filed a response to the objection. Docket No. 68. Defendants J.R. Hall and Chris Lobanov-Rostovsky timely objected to the recommendation, Docket No. 66, and Mr. Jefferson did not file a response.

II. LEGAL STANDARD

A. Review of a Magistrate Judge's Recommendation

The Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). An objection is "proper" if it is both timely and specific. United States v. One Parcel of Real Prop. Known as 2121 E. 30th St., 73 F.3d 1057, 1059 (10th Cir. 1996) ("One Parcel"). A specific objection "enables the district judge to focus attention on those issues — factual and legal — that are at the heart of the parties' dispute." *Id.*

In the absence of an objection, the district court may review a magistrate judge's recommendation under any standard it deems appropriate. *See Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."). The Court therefore reviews the non-objected to portions of a recommendation to confirm there is "no clear error on the face of the record." Fed. R. Civ. P. 72(b), Advisory Committee Notes. This standard of review is something less than a "clearly erroneous" or "contrary to law" standard of review, Fed. R. Civ. P. 72(a), which in turn is less than de novo review. Fed. R. Civ. P. 72(b). Because Mr. Johnson is proceeding pro se, the Court will construe his objections

and pleadings liberally without serving as his advocate. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

B. Motion to Dismiss under Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must allege enough factual matter that, taken as true, makes the plaintiff's "claim to relief . . . plausible on its face." *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "The 'plausibility' standard requires that relief must plausibly follow from the facts alleged, not that the facts themselves be plausible." *RE/MAX, LLC v. Quicken Loans Inc.*, 295 F. Supp. 3d 1163, 1168 (D. Colo. 2018) (citing *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008)). Generally, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam) (quoting *Twombly*, 550 U.S. at 555) (alterations omitted). A court, however, does not need to accept conclusory allegations. *See, e.g., Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994) ("we are not bound by conclusory allegations, unwarranted inferences, or legal conclusions.").

"[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not shown — that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quotations and alterations omitted); *see also Khalik*, 671 F.3d at 1190 ("A plaintiff must nudge [his] claims across the line from conceivable to plausible in order to survive a motion to dismiss." (quoting *Twombly*, 550 U.S. at 570)). If a complaint's allegations are "so general that they

encompass a wide swath of conduct, much of it innocent," then plaintiff has not stated a plausible claim. Khalik, 671 F.3d at 1191 (quotations omitted). Thus, even though modern rules of pleading are somewhat forgiving, "a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Bryson, 534 F.3d at 1286 (alterations omitted).

III. ANALYSIS

A. Plaintiff's Objections

1. *Objection One*

Mr. Jefferson's first objection takes issue with the magistrate judge's analysis of his due process claims. Docket No. 67 at 1-2. Mr. Jefferson argues that the recommendation focuses on whether Mr. Jefferson was denied access to SOTMP treatment because of his ongoing appeal, when instead it should focus on 1) whether he was denied access to treatment because of his claim of innocence from his conviction and 2) whether continuous denials of access to treatment violate his rights. *Id.* Mr. Jefferson further argues that "the question here falls not on whether it is constitutional to have conditions, but whether the conditions are constitutional to deny the Plaintiff his protected liberty interest and violate his Rights, which they are not." *Id.* at 2.

First, the Court agrees with the magistrate judge's analysis that the conditions for entry into the SOTMP program are constitutional. *See* Docket No. 65 at 9-12, 14-16 (discussing substantive due process issues; discussing Fifth Amendment issues).

Second, the Court agrees with the magistrate judge's finding, *id.* at 13-14, that Mr. Jefferson does not have standing to bring his due process claims. "To establish Article III standing, a plaintiff

must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." Brown v. Buhman, 822 F.3d 1151, 1164 (10th Cir. 2016) (internal quotations and citation omitted). The third component of standing — redressability — is not met here. Mr. Jefferson is not currently being denied access to SOTMP; as the defendants explained at the motion hearing, Mr. Jefferson is currently on the waiting list for open spots in the SOTMP program. Docket No. 65 at 12-13 (recounting statements made at the motion hearing). The only possible denial of treatment in this case is the denial that occurred in 2020 due to Mr. Jefferson's ongoing appeal. Docket No. 23 at 4. But a Court can only remedy past violations of the law via monetary relief, not injunctive relief. See Hale v. Ashcroft, 683 F. Supp. 2d 1189, 1197 (D. Colo. 2009) (citing Nova Health Sys. v. Gandy, 416 F.3d 1149, 1155 n. 6 (10th Cir. 2005)). Yet Mr. Jefferson requests only injunctive relief against the defendants that he alleges were involved in the 2020 denial. Docket No. 23 at 28-29. Given that the Court cannot provide the relief Mr. Jefferson requests, the Court agrees that Mr. Jefferson lacks standing. The Court will overrule this objection.

2. Objection Two

Mr. Jefferson's second objection focuses on the constitutionality of the SOTMP requirements of admitting to the crime of which he was convicted, disclosing his sexual history, and submitting to a polygraph examination. Docket No. 67 at 3-5. Mr. Jefferson argues that the offense he was charged with "is a 50/50 case of an accuser's word versus the Plaintiff's word," and that it is inevitable that there will be individuals like him who are convicted for crimes they did not commit and then are forced to admit to those crimes in order to be released. *Id.* at 3-4.

To support his argument, Mr. Jefferson cites the plurality opinion in McKune v. Lile, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002), which upheld the constitutionality of a Kansas sex offender treatment program with similar requirements to SOTMP. *Id.* at 4-5. Mr. Jefferson notes that McKune involved an inmate with a determinate sentence and argues that the Supreme Court might be less likely to uphold such a program as applied to people serving indeterminate sentences like his. *Id.* at 4. The Court does not, however, need to speculate as to how McKune might apply to the SOTMP because the Tenth Circuit has already upheld the relevant SOTMP requirements. *See Doe v. Heil*, 533 F. App'x 831, 833-41 (10th Cir. 2013) (unpublished) (citing Searcy v. Simmons, 299 F.3d 1220, 1228 (10th Cir. 2002)). The Court will overrule this objection.

3. Objection Three

At end of his objection, Mr. Jefferson writes "the Plaintiff preserves Claims 3 and 5 to be addressed by the ruling authority of the Supreme Court at such time." Docket No. 67 at 5. Mr. Jefferson's third claim is a duplicative claim relating to his access to treatment. *See* Docket No. 23 at 21 (alleging due process violations). His fifth claim asserts that he should be entitled to access sexually explicit materials. *Id.* at 25-28.

The Court finds this objection to be improper because it does not "focus attention on those issues — factual and legal — that are at the heart of the parties' dispute." One Parcel, 73 F.3d at 1059. "[O]bjections must be specific because only an objection that is sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate's Act that led us to adopt a waiver rule in the first instance." Zumwalt v. Astrue, 220 F. App'x 770, 777-78 (10th Cir. 2007) (unpublished) (internal quotations omitted)

(holding a series of sentence-long objections to various parts of a recommendation to be insufficient to preserve an issue). By merely stating that he "preserves" the issues, Mr. Jefferson does not "engage the magistrate judge's analysis and offer a reasoned argument as to why the magistrate judge's conclusion was erroneous." Katrina B. v. Kijakazi, 2021 U.S. Dist. LEXIS 147760, 2021 WL 3465710, at *3 (N.D. Okla. Aug. 6, 2021) (citing Zumwalt, 220 F. App'x at 777-78). As a result, the Court will overrule this objection.

B. Defendants' Objection

The recommendation states that defendants J.R. Hall and Chris Lobanov-Rostovsky "have not been served in this case." Docket No. 65 at 2 n.3. Mr. Hall and Mr. Lobanov-Rostovsky object, stating that they have indeed been served and that the magistrate judge granted their request to join the motion to dismiss. Docket No. 66 at 2. For this reason, Mr. Hall and Mr. Lobanov-Rostovsky argue that Mr. Jefferson's claims against them should be dismissed as well. *Id.* at 3.

Unlike the other defendants, who work for the Colorado Department of Corrections ("CDOC"), Mr. Hall works for the Colorado State Parole Board and Mr. Lobanov-Rostovsky works for the Sex Offender Management Board of the Colorado Department of Public Safety. *Id.* at 1-2. CDOC waived service for its employees. Docket No. 30. On March 11, 2024, the CDOC defendants filed the motion to dismiss that is the subject of the magistrate judge's recommendation. Docket No. 46. After being served, Mr. Hall and Mr. Lobanov-Rostovsky appeared on March 15, 2024. Docket Nos. 50, 51. The same day, Mr. Hall and Mr. Lobanov-Rostovsky moved to join the CDOC defendants' motion to dismiss. Docket No. 52. On March 21, 2024, the magistrate judge granted this motion. Docket No. 58.

The Court finds no reason that the claims against Mr. Hall and Mr. Lobanov-Rostovsky should not be dismissed for the same reasons as the CDOC defendants. Therefore, the Court will sustain this objection to the recommendation. The Court will dismiss the claims against Mr. Hall and Mr. Lobanov-Rostovsky.

C. Non-Objected to Portions of the Recommendation

The Court has reviewed the rest of the recommendation to satisfy itself that there are "no clear error[s] on the face of the record." *See Fed. R. Civ. P. 72(b)*, Advisory Committee Notes. Based on this review, the Court has concluded that the recommendation is a correct application of the facts and the law.

IV. CONCLUSION

It is therefore

ORDERED that Report and Recommendation on CDOC Defendants' Motion to Dismiss Third Amended Complaint [Docket No. 65] is **ACCEPTED in part**. It is further

ORDERED that plaintiff's Objection [Docket No. 67] is **OVERRULED**. It is further

ORDERED that Defendants Hall and Lobanov-Rostovsky's Objection to the Magistrate Judge's Recommendation on Their Motion to Dismiss [Docket No. 66] is **SUSTAINED**. It is further

ORDERED that defendants' Motion to Dismiss Third Amended Complaint [Docket No. 46] is **GRANTED**. It is further

ORDERED that claim one of the third amended complaint is **DISMISSED without prejudice** against all defendants. It is further

ORDERED that claim two of the third amended complaint is **DISMISSED with prejudice** against all defendants. It is further

ORDERED that claim three of the third amended complaint is **DISMISSED with prejudice** against all defendants. It is further

ORDERED that claim four of the third amended complaint is **DISMISSED with prejudice** against all defendants. It is further

ORDERED that claim five of the third amended complaint is **DISMISSED with prejudice** against defendants Moses Andre Stancil, Chris Lobanov-Rostovsky, Amanda Retting, Siobhan Bartlow, Shannon Foltz, and James Bailey. It is further

ORDERED that this case is closed.

DATED March 20, 2025.

BY THE COURT:

/s/ Philip A. Brimmer
PHILIP A. BRIMMER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-01773-PAB-NRN

JUSTIN A. JEFFERSON,

Plaintiff,

v.

MOSES ANDRE STANCIL,
CHRIS LOBANOV-ROSTOVSKY,
AMANDA RETTING,
SIOBHAN BARTLOW,
SHANNON FOLTZ,
JAMES BAILEY, and
J.R. HALL,

Defendants.

**REPORT AND RECOMMENDATION ON
CDOC DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT
(ECF No. 46)**

N. Reid Neureiter
United States Magistrate Judge

This prisoner civil rights case is before the Court pursuant to an Order, ECF No. 47, issued by Chief Judge Philip A. Brimmer referring Defendants Moses Andre Stancil, Amanda Retting, Siobhan Burtlow, Shannon Folz, and James Bailey (collectively, the "CDOC Defendants") Motion to Dismiss Third Amended Complaint ("Motion to Dismiss"), ECF No. 46. The motion has been fully briefed, see ECF Nos. 62 & 63, and the Court has heard argument from the parties, see ECF No. 64. Now, having taken judicial notice of the docket and considered the applicable Federal Rules of Civil Procedure and case law, the Court **RECOMMENDS** that the Motion to Dismiss be **GRANTED**.

BACKGROUND¹

Plaintiff is an inmate in the custody of the Colorado Department of Corrections (“CDOC”) serving an indeterminate (ten years to life) sentence under the Colorado Sex Offender Lifetime Supervision Act of 1998 (“SOLSA”), Colo. Rev. Stat. §§ 18-1.3-1001–1012. ECF No. 23 at 4, 8. In this 42 U.S.C. § 1983² action, he challenges multiple aspects of CDOC’s Sex Offender Treatment and Monitoring Program (“SOTMP”). He brings five claims for relief against seven CDOC employees—five are sued solely in their official capacities (Moses Andre Stancil, Chris Lobanov-Rostovsky, Amanda Retting, Siobhan Bartlow, and J.R. Hall),³ while two employees (Shannon Foltz and James Bailey) are sued in both their individual and official capacities.⁴ *Id.* at 2–3, 7–8.

Plaintiff’s first claim is brought under the Fourteenth Amendment’s Due Process Clause. ECF No. 23 at 4, 8–14. The essence of the claim is that Plaintiff must

¹ The following allegations are taken from Plaintiff’s Third Amended Complaint (“TAC”), ECF No. 23, and all non-conclusory allegations are presumed true for the purposes of the Motion to Dismiss. All citations to docketed materials are to the page number in the CM/ECF header, which sometimes differs from a document’s internal pagination.

² To state a claim for relief under § 1983, a plaintiff must establish (1) a violation of rights protected by the federal Constitution or created by a federal statute or regulation, (2) that was proximately caused (3) by the conduct of a “person,” (4) who acted under color of any state statute, ordinance, regulation, custom or usage. *Summum v. City of Ogden*, 297 F.3d 995, 1000 (10th Cir. 2002).

³ Defendants Lobanov-Rostovsky and Hall have not been served in this case.

⁴ Plaintiff seeks numerous forms of declaratory and injunctive relief, along with money damages from Defendants Foltz and Bailey. “Section 1983 plaintiffs may sue individual-capacity defendants only for money damages and official-capacity defendants only for injunctive relief.” *Brown v. Montoya*, 662 F.3d 1152, 1161, n. 5 (10th Cir. 2011) (citing *Hafer v. Melo*, 502 U.S. 21, 30, 27 (1991)). Thus, Plaintiff’s requests for relief can be liberally construed as requesting declaratory and injunctive relief from Defendants in their official capacities, which are simply claims against the CDOC. Plaintiff’s claims for money damages can be liberally construed as individual-capacity claims against Defendants Foltz and Bailey since they are sued in both an individual and official capacity.

participate in the SOTMP to be eligible for parole. *Id.* Plaintiff has served 11 years of his 10-years-to-life sentence, yet he claims he not been allowed entry into the required treatment program. As a result, he has been denied parole eligibility four times due to the lack of treatment. *Id.* at 4. Plaintiff contends that withholding mandatory treatment constitutes a major change in the conditions of his confinement by moving his status from “eligible to be considered for parole” to “ineligible to be considered for parole.” *Id.* at 8. As such, he raises a due process claim.

Plaintiff’s second claim is that “[t]he Defendants’ policies that require the revocation of the maintenance of innocence in order to have access to the protected liberties of timely treatment and the timely ability to progress in treatment violate the Fifth Amendment[.]” *Id.* at 14. Plaintiff contends that a requiring an admission of guilt regarding his underlying conviction is incriminating because the statement could be used against him in future criminal proceedings—particularly as character evidence in a sexual assault case to show propensity, motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *Id.* at 15–16. Plaintiff also identifies multiple ways in which this requirement amounts to compulsion by the state: he will not be admitted into treatment, he will be denied the ability to successfully progress in treatment, he won’t be deemed “rehabilitated,” and he will remain (indefinitely) ineligible for parole. *Id.* at 16–17.

Plaintiff’s third claim is duplicative of his first two claims. He claims that “Defendants’ policies that require the Plaintiff to revoke his maintenance of innocence infringes on his protected liberties to have Continuous Timely Access to Treatment, Continuous Ability to Timely Progress in Treatment, and his Fifth Amendment Rights in

violation of substantive due process under the Fourteenth Amendment”; and in support, Plaintiff incorporates by reference the allegations discussed above. *Id.* at 21.

In his fourth claim, Plaintiff contends the “policies that require the Plaintiff to confess past crimes and violations in a Sexual History written statement and through polygraphs violate the Fifth and Fourteenth Amendment[.]” (*Id.* at 21). The supporting allegations are similar to but broader than those supporting Claim 2. Instead of focusing just on the facts underlying the crime for which he was convicted and sentenced, he challenges the “policy requir[ing] that the Plaintiff complete a sex history written narrative and polygraphs covering the engagement of numerous criminal behaviors.” *Id.* at 22.

In his final claim, Plaintiff posits that “[t]he Defendants’ Publication Censorship Policies Violate the Plaintiff’s First Amendment Protected Under the Fourteenth Amendment[.]” *Id.* at 25. Plaintiff contests the CDOC’s policy to “censor, seize, and prevent the Plaintiff[’]s access to view, and the ability to possess, . . . non-obscene, adult pornography and sexually oriented expression.” (*Id.* at 26). Plaintiff specifically takes issue with a provision of the SOTMP treatment contract that, in part, requires him to agree that he “will not possess, nor view, material that would stimulate or reinforce [his] criminal or deviant sexual behavior or fantasy, such as, but [not] limited to pornography or sexually explicit materials at any time[.]” (*Id.*). Plaintiff also appears to challenge Administrative Regulation (“AR”) 330-26, which similarly restricts sexually explicit content. *Id.* at 27. In general, Plaintiff submits that the CDOC’s policy is not narrowly tailored in violation of the First Amendment because it prohibits an inmate from viewing material that is legal, that there is no evidence that viewing or possessing such

materials causes an inmate to become violent or act criminally, and that less restrictive means are available to further the prison's goals. *Id.* at 25–28.

Plaintiff requests injunctive relief that he be provided access to SOTMP treatment, that all statements made by Plaintiff “of charged and uncharged criminal behavior and or acts” be destroyed, and that Defendants stop censoring “protected nudity, non-obscene, and sexually explicit material.” *Id.* at 29. He also requests \$350,000 in compensatory damages and \$650,000 in punitive damages against Defendants Foltz and Bailey. *Id.*

The CDOC Defendants move to dismiss the entirety of the TAC under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

LEGAL STANDARDS

I. Pro Se Plaintiff

Plaintiff proceeds pro se. The Court, therefore, “review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys.” *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). However, a pro se litigant’s “conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983); see also *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (court may not “supply additional factual allegations to round out a plaintiff’s complaint”); *Drake v. City of Fort Collins*, 927

F.2d 1156, 1159 (10th Cir. 1991) (the court may not “construct arguments or theories for the plaintiff in the absence of any discussion of those issues”). A plaintiff’s pro se status does not entitle him to an application of different rules. See *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

II. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “The court’s function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff’s complaint alone is legally sufficient to state a claim for which relief may be granted.” *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted).

“A court reviewing the sufficiency of a complaint presumes all of plaintiff’s factual allegations are true and construes them in the light most favorable to the plaintiff.” *Hall*, 935 F.2d at 1109. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The *Iqbal* evaluation requires two prongs of analysis. First, the Court identifies “the allegations in the complaint that are not entitled to the assumption of truth,” that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 679–81. Second, the Court

considers the factual allegations “to determine if they plausibly suggest an entitlement to relief.” *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

However, the Court need not accept conclusory allegations without supporting factual averments. *S. Disposal, Inc., v. Tex. Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. Moreover, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does the complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (citation omitted). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (citation omitted).

ANALYSIS

I. Fourteenth Amendment Due Process Claim⁵

The Court first turns to Plaintiff’s due process claim that relates to the denial of SOTMP treatment.

⁵ As described above, Plaintiff purports to bring several claims under the Fourteenth Amendment. However, in *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989), the Supreme Court held that when government conduct is constrained by “an explicit textual source of constitutional protection . . . that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.” See also *Albright v. Oliver*, 510 U.S. 266, 273 (1994). As such, only Claim 1 is appropriately governed solely by the Fourteenth Amendment.

The Due Process Clause states, “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. “The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *see also Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012).

The Due Process Clause offers both procedural and substantive protections. The Court will discuss both.

a. Procedural Due Process

To allege a violation of procedural due process, a plaintiff must establish (1) a deprivation of an interest in life, liberty, or property, and (2) that the procedures followed by the government in depriving a plaintiff of that interest did not comport with due process of law. *See Elliott*, 675 F.3d at 1244; *see also Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994) (“The Due Process Clause guarantees due process only when a person is to be deprived of life, liberty, or property.”). Where the deprivation of a constitutionally-protected interest is alleged, an inmate is entitled to a relatively modest suite of procedural due process protections. *Wolff v. McDonnell*, 418 U.S. 539, 559–572 (1974). Specifically, the inmate must be provided: (i) advance written notice of the charges against him; (ii) the ability to present evidence in his defense, including the right to call witnesses (unless prohibited due to security reasons); (iii) the right to a neutral and detached hearing body; and (iv) a written statement of the hearing body’s reasons for its decision, supported by some evidence in the record. *Id.*

Here, Plaintiff does not identify any deficiencies in the procedural protections he was afforded when Defendants decided to terminate/suspend his sex offender treatment. Accordingly, he has not adequately alleged the second prong of a procedural due process claim and, to the extent that the TAC can be liberally construed to assert such a claim, it should be dismissed.

b. Substantive Due Process

The TAC alleges that Plaintiff was given a spot for treatment in 2020, eight years into his sentence, but that he was then denied entry due to his ongoing appeal.

“Substantive due process bars ‘certain government actions regardless of the fairness of the procedures used to implement them.’” *Brown v. Montoya*, 662 F.3d 1152, 1172 (10th Cir. 2011) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998)). “The Supreme Court has described two strands of the substantive due process doctrine. One strand protects an individual’s fundamental liberty interests, while the other protects against the exercise of governmental power that shocks the conscience.” *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008). “Prisoners are entitled to substantive due process; but substantive-due-process rights available to free persons may be denied to prisoners if the denial bears a rational relation to legitimate penological interests.” *Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) (internal quotations and brackets omitted).

A substantive due process claim likely turns on the existence of a constitutionally protected liberty interest. The existence of a constitutionally protected liberty interest depends upon the nature of the interest asserted. See *Sandin v. Conner*, 515 U.S. 472, 480 (1995). A prisoner is not entitled to any procedural protections in the absence of a

grievous loss. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Generally, a liberty interest protected by due process may arise under the United States Constitution or state law. See *Sandin*, 515 U.S. at 483–84. However, the Constitution itself does not create a protected liberty interest in a prisoner’s release (or consideration for parole) prior to the expiration of a valid sentence. See *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). A liberty interest may arise under state law if the challenged conditions impose an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin*, 515 U.S. at 484.

Defendants argue that the Tenth Circuit has held an inmate does not have a liberty interest in timely and adequate SOTMP treatment. That is not necessarily the case. See *Stetzel v. Williams*, No. 20-cv-01579-PAB-STV, 2022 WL 1177908, at *7 n.9 (D. Colo. Jan. 28, 2022) (explaining that the Tenth Circuit has *not* directly addressed whether an inmate sentenced under SOLSA has a liberty interest in the SOTMP such that they are entitled to due process prior to being terminated), *report and recommendation adopted*, 2022 WL 897103 (D. Colo. Mar. 25, 2022). Some courts in this District have found that, in certain circumstances, a convicted sex offender in Colorado may have a state-created liberty interest in continued sex offender treatment if such treatment is required to be eligible for parole. See *Beebe v. Heil*, 333 F. Supp. 2d 1011, 1017 (D. Colo. 2004); *Tillery v. Raemisch*, No. 16-cv-00282-WJM-STV, 2018 WL 4777411 at *7 (D. Colo. Oct. 3, 2018) (recognizing that a Colorado state prisoner may have “a liberty interest in being able to access [sex offender] treatment during his incarceration within a reasonable period of time, taking into account when and the

relative extent to which he meets the requirements for such treatment under CDOC regulations.”); *Lerner v. Stancil*, No. 22-CV-00888-NYW-NRN, 2023 WL 3595998, at *8 (D. Colo. May 23, 2023) (SOLSA “mandates sex-offender treatment, which creates a ‘legitimate claim of entitlement’ to that treatment by SOLSA inmates,” which in turn “creates a liberty interest for due process purposes”); *but see McDaniel v. Dauffenbach*, No. 20-cv-02033-DDD-KLM, 2023 WL 4908370, at *2 (D. Colo. Feb. 3, 2023) (“The Government is right that Mr. McDaniel does not have a due process liberty interest in sex offender treatment.”). In *Allen v. Clements*, 930 F. Supp. 2d 1252 (D. Colo. 2013), Chief Judge Brimmer found that “SOLSA creates a liberty interest in treatment because it both mandates treatment and conditions parole on progressing successfully through treatment” and thus “[i]nmates sentenced under SOLSA have a liberty interest in not being terminated from treatment without due process.” *Id.* at 1264, 1266 (citing *Beebe*, 333 F. Supp. 2d at 1017).

However, even assuming that Plaintiff has a protected liberty interest in accessing SOTMP treatment, “the right to [sex offender] treatment is not absolute or unconditional.” *Id.* at 1264. Thus, the court in *Beebe v. Stommel*, No. 02-cv-01993-WYD-BNB (D. Colo. Nov. 13, 2006) (ECF No. 163 at 34–35), held it is constitutional to condition receipt of sex offender treatment on an “inmate’s willingness and ability to comply with the rules and regulations governing treatment” and that courts must defer to prison officials “to determine what rules and regulations are necessary to ensure successful treatment that meets institutional concerns.” Furthermore,

in *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Supreme Court held that when inmates’ constitutional rights—even fundamental ones otherwise warranting strict scrutiny—are implicated by prison policies, the prison policy prevails so long as it is reasonably related to a legitimate penological

objective. Thus, at least as far as the “fundamental liberty” test goes in this case, [the plaintiff’s] substantive Due Process claim will fail unless he can show that either: (i) the terms of the SOTMP are not reasonably related to a legitimate penological interest, or (ii) the effect that the SOTMP has on his First and Fifth Amendment rights is shocking to the judicial conscience.

Firth v. Shoemaker, No. 09-cv-00224-MSK-MJW, 2011 WL 4501971, at *7 (D. Colo. Sept. 29, 2011), *aff’d*, 496 F. App’x 778 (10th Cir. 2012).

As will be discussed in more detail below, requiring Plaintiff to admit guilt, and thus forgo his criminal appeal, in order to be admitted to SOTMP is a reasonable policy that neither offends the Fifth Amendment nor shocks the conscience for the purposes of substantive due process. See *id.* at *8. (“The inmate may still choose to invoke his Fifth Amendment rights and fail to complete the SOTMP, but that choice (and the parole-related consequences that flow from it) will not thereafter support a claim for substantive Due Process.”).

More significantly, Defendants argue that Plaintiff’s claim is now moot because he no longer has a pending appeal and is on the list to receive SOTMP in the future. In the TAC, Plaintiff states that he submitted a reentry form in March 2023, see ECF No. 23 at 14–15, after his appeals and/or habeas proceedings had concluded, see ECF No. 63-1 (state and federal court dockets showing that as of January 2021, certiorari has been denied in Plaintiff’s criminal appeal and his habeas petition has been terminated).⁶ It also appears from the TAC that Plaintiff did, in fact, admit to engaging in the behavior for which he was convicted. See ECF No. 23 at 15 (“Plaintiff was threatened and compelled . . . to comply with the policy to revoke his maintenance of innocence as the Plaintiff did not want to spend the rest of his life in prison.”). Defendants confirmed this

⁶ The Court may take judicial notice of these documents. See *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1205 (10th Cir. 2022).

at the motion hearing and informed the Court that Plaintiff was eligible and on the list for treatment. Thus, because Plaintiff's due process claim is premised on the denial of SOTMP treatment due to his pending appeal, and Plaintiff concedes that his appeals and other post-conviction proceedings have concluded, Defendants argue that claim is now moot. See *Bacote v. Fed. Bureau of Prisons*, No. 22-1325, 2024 WL 4490517, at *3 (10th Cir. Oct. 15, 2024) ("A case becomes constitutionally moot if it ceases to present a real and substantial controversy with respect to which specific relief may be fashioned.") (citation and quotation marks omitted).

Given that Plaintiff was not pursuing any appeal at the time this case was filed and had, in fact, submitted SOTMP reentry forms, this is more accurately characterized as an issue of standing rather than mootness. See *Brown v. Buhman*, 822 F.3d 1151, 1163 (10th Cir. 2016) ("Standing concerns whether a plaintiff's action qualifies as a case or controversy when it is filed; mootness ensures it remains one at the time a court renders its decision."). Nevertheless, Defendants' argument that the Court cannot fashion any injunctive remedy for Plaintiff's alleged injury is well taken. See *id.* at 1164 ("To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) *a likelihood that the injury will be redressed by a favorable decision.*") (emphasis added) (citation and quotation marks omitted). And as to the two Defendants against whom Plaintiff seeks monetary damages—Defendants Folz and Bailey—the TAC does not allege that they played any part in the 2020 decision to deny SOTMP treatment based on Plaintiff's appeal. Instead, they are alleged to have forced Plaintiff to sign the reentry

forms in 2023, well after the appeals process had ended. Thus, as currently pled, Plaintiff does not have standing to bring his Fourteenth Amendment claim.

For these reasons, Plaintiff's Fourteenth Amendment due process claim (Claim 1) should be dismissed.

II. Fifth Amendment Claims

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The privilege against self-incrimination has two components: incrimination and compulsion. See *Lile v. McKune*, 224 F.3d 1175, 1179 (10th Cir. 2000), *rev'd on other grounds*, 536 U.S. 24 (2002). To state a cognizable Fifth Amendment claim, Plaintiff must allege that: (1) the statements desired by prison officials carried the risk of incriminating him, and (2) the penalty he suffered amounted to compulsion. See *Doe v. Heil*, 533 F. App'x 831, 837 n.4 (10th Cir. 2013) (unpublished); *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). "[T]he protection afforded by the Fifth Amendment privilege against self-incrimination" is "broadly construed." *United States v. Von Behren*, 822 F.3d 1139, 1144 (10th Cir. 2016). "The touchstone of the Fifth Amendment is compulsion . . . [however], [t]he Fifth Amendment's text does not prohibit all penalties levied in response to a person's refusal to incriminate himself." *Id.* at 1147 (citations and internal punctuation omitted).

Plaintiff cannot maintain a § 1983 claim based on an alleged Fifth Amendment violation. As stated above, Plaintiff must allege facts to show that the CDOC's policy of requiring Plaintiff to admit his crime or sexual history or take a polygraph is not rationally related to a legitimate penological interest. See *Turner*, 482 U.S. at 89; *Gee v. Pacheco*, 627 F.3d 1178, 1187–88 (10th Cir. 2010). In *Doe v. Heil*, 533 F. App'x 831, 839–40

(10th Cir. Aug. 26, 2013) (unpublished), the Tenth Circuit recognized that the CDOC has a legitimate penological interest in the rehabilitation of sex offenders before their release on parole “that is furthered by requiring [sex offenders], without regard to their Fifth Amendment stake in avoiding self-incrimination, to submit to a polygraph and admit their full sexual history.” See also *Searcy v. Simmons*, 299 F.3d 1220, 1228 (10th Cir. 2002) (“The state’s interest in rehabilitating sex offenders is a valid one, and the requirement for admission of responsibility is considered a legitimate part of the rehabilitative process.”); *McKune v. Lile*, 536 U.S. 24, 33 (2002) (“When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. States thus have a vital interest in rehabilitating convicted sex offenders. Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism. An important component of those rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct.”) (citations omitted); *Allen v. Falk*, 624 F. App’x 980, 985 (10th Cir. 2015) (reaffirming the holding of *Doe v. Heil*).

In his response, Plaintiff “combats” *Turner* and argues that *Heil* was wrongly decided. The Court is bound to follow Supreme Court precedent, see *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (“[A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”), and, like other courts in the District, it finds the reasoning of *Heil* persuasive. Therefore, the Court declines Plaintiff’s invitation to ignore these decisions. “To the extent that the SOTMP causes tension with an inmate’s invocation of his Fifth Amendment rights, the

therapeutic and rehabilitative goals behind the SOTMP constitute legitimate penological interests that prevail.” *Firth*, 2011 WL 4501971, at *8. Plaintiff’s Fifth Amendment claims should be dismissed.

III. First Amendment Claim

In his fifth claim for relief, Plaintiff alleges that the CDOC and SOTMP’s prohibition on possessing and viewing sexually explicit material violates his First Amendment rights. The Court agrees with Defendants that this claim should be dismissed.

“Inmates have a First Amendment right to receive information while in prison to the extent the right is not inconsistent with prisoner status or the legitimate penological objectives of the prison.” *Jacklovich v. Simmons*, 392 F.3d 420, 426 (10th Cir. 2004). Restrictions on a prisoner’s First Amendment free speech and association rights are constitutional if the restrictions are reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89. In applying this standard, courts are to consider the following factors: (1) whether there is a valid rational connection between the prison regulation or practice and a legitimate governmental interest; (2) whether the regulation or practice allows inmates alternative means of exercising the subject constitutional right; (3) the impact of accommodation of the asserted right on guards, other inmates, and the allocation of resources generally; and (4) the absence of ready alternatives to the regulation or practice. *Id.* at 89–91. “The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.” *Overton v. Bazzetta*, 539 U.S. 126 (2003).

As Defendants note, federal courts have roundly permitted prisons to prohibit sexually explicit material. See ECF No. 46 at 15 (collecting cases). The Court agrees “that the restriction of sexually explicit publications in a federal prison setting is reasonably related to the legitimate penological interests of rehabilitation of inmates and security of the institution as a whole.” See *Jordan v. Sosa*, 577 F. Supp. 2d 1162, 1170 (D. Colo. 2008); see also *Jones v. Salt Lake Cnty.*, 503 F.3d 1147, 1153 (10th Cir. 2007) (upholding county jail regulation barring inmates from receiving “sexually explicit material”); *Hunsaker v. Jimerson*, No. 08-cv-01479-REB, 2011 WL 4374801, at *3 (D. Colo. 2011) (where Judge Robert E. Blackburn, applying the *Turner* factors, found the CDOC regulation at issue here, AR 300-26, to be facially constitutional). This is especially true as related to sex offenders. See Colo. Rev. Stat. § 18-1.3-1001 (stating that sex offender treatment and supervision “is necessary for the safety, health, and welfare of the state”).

The Court also finds that Plaintiff has alternate means of exercising his First Amendment rights as he can access to a broad range of other publications and written material, and that “accommodating plaintiff’s asserted constitutional right would place an undue burden on prison resources and possibly threaten the security in the prison as well as the safety of the guards and inmates.” *Jordan*, 577 F. Supp. 2d at 1171. Finally, although a prison’s implemented restriction cannot be an exaggerated response, neither are prison officials required to adopt the least restrictive alternative to achieve the legitimate penological goal. *Thornburgh v. Abbott*, 490 U.S. 401, 410–11 (10th Cir. March 28, 2011). The Court is not persuaded that allowing Plaintiff to possess explicit materials would somehow be a feasible alternative in furthering the penological interests

reflected in the SOTMP and the CDOC's regulations. Indeed, "[e]xempting him from the ban on sexually explicit materials could undermine [P]laintiff's rehabilitation and the [CDOC's] plan for his rehabilitation." *Jordan*, 577 F. Supp. 2d at 1172.

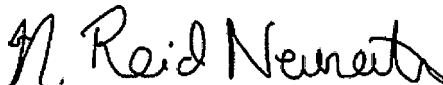
Plaintiff's First Amendment claim should be dismissed.

CONCLUSION

It is hereby **RECOMMENDED** that the CDOC Defendants' Motion to Dismiss Third Amended Complaint ("Motion to Dismiss"), ECF No. 46, be **GRANTED**.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, *Thomas v. Arn*, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated: October 22, 2024
Denver, Colorado


N. Reid. Neureiter
United States Magistrate Judge

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