UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMIR HAKIM MCCAIN a/k/a JOHN MCCAIN	:	CIVIL NO: 3:14-CV-02141
Plaintiff,	:	(Judge Rambo)
v.	:	
JOHN E. WETZEL, *et al.*,	:	(Magistrate Judge Schwab)
Defendants.	:	

REPORT AND RECOMMENDATION

I. Introduction.

On July 11, 2016, *pro se* plaintiff Amir Hakim McCain ("McCain"), a state prisoner incarcerated at SCI-Forest, filed an amended complaint alleging violations of the Fifth Amendment to the United States Constitution, as well as violations of the *Ex Post Facto* Clause and the Due Process Clause. Additionally, on October 21, 2016, McCain filed two motions: (1) a motion (*doc. 33*) for "certification"; (2) a motion (*doc. 34*) to compel. After screening the amended complaint, pursuant to 28 U.S.C. § 1915A, the Court concludes that McCain's amended complaint fails to state a claim upon which relief may be granted and that granting him further leave to amend would be futile for the reasons set forth below. Therefore, it is recommended that the amended complaint be dismissed with prejudice.

Furthermore, it is recommended that McCain's motion for "certification" and motion to compel be denied.

II. Factual Background and Procedural History.

On November 7, 2014, McCain initiated this action by filing a motion (*doc. 2*) for leave to proceed *in forma pauperis*,[1] as well as a complaint (*doc. 1*) under 42 U.S.C. § 1983, naming the following defendants: (1) John E. Wetzel ("Wetzel"), Secretary of Corrections for the Pennsylvania Department of Corrections ("DOC"); (2) Dorina Varner ("Varner"), Chief Grievance Officer for the DOC; (3) Bill C. Dombroski ("Dombroski"), Unit Manager at SCI-Forest; (4) Michael D. Overmyer ("Overmyer"), Facility Manager at SCI-Forest; (5) Kimberly A. Barkley ("Barkley"), Board Secretary; (6) A. Rivera ("Rivera"), Parole Staff Technician; (7) John Doe; and (8) Jane Doe.[2] *Doc. 1* at 1. Wetzel, Varner, Dombroski, and Overmyer are identified as employees of the DOC. *Id.* at 2. Barkley, Rivera, John Doe, and Jane Doe are identified as employees of the Pennsylvania Board of Probation and Parole ("BPP"). *Id.* The complaint alleged violations of the Fifth Amendment guarantee against self-incrimination as well as violations of the *Ex Post Facto* Clause of the United States Constitution.

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[1] On May 19, 2016, the Court granted McCain's motion for leave to proceed *in forma pauperis*. *See doc. 28*.

[2] According to the complaint, the parole panel refused to give McCain the names of the officers who denied him parole, and he had no other means to identify these officers. Accordingly, he named the officers as John Doe and Jane Doe. *Doc. 1* at ¶ 18.

Pursuant to 28 U.S.C. § 1915A, the Court conducted a preliminary screening of McCain's original complaint. Although it was determined that the complaint failed to state a claim upon which relief could be granted, an order (*doc. 28*) was issued on May 19, 2016, granting him leave to file an amended complaint as to his *ex post facto* claim only. On July 11, 2016, McCain filed an amended complaint (*doc. 31*), naming all of the same defendants as his original complaint except for Overmyer. McCain also names two new defendants in his amended complaint: (1) Parole Agent Ashbaugh ("Ashbaugh") of SCI-Forest; and (2) Ms. Price ("Price"), Counselor at SCI-Forest. Although McCain was instructed to only amend the complaint as to the *ex post facto* claims, he again raises Fifth Amendment claims in his amended complaint, and he adds what he refers to as Due Process Clause claims. Additionally, on October 21, 2016, McCain filed two motions, a motion for "certification" and a motion to compel, that are pending before the Court.

The factual allegations of McCain's amended complaint are relatively vague, disjointed, and repetitive, and they can be summarized as follows.[3]

[3] McCain actually labels the factual allegations of his amended complaint as "Statement of Undisputed Material Facts to Support Summary Judgment." McCain, however, has not filed a motion for summary judgment, and even if he did, such a motion would be premature as the defendants have not yet had an opportunity to file a responsive pleading. *See, e.g.*, *Walter v. Zenk*, No. 4:01-cv-1644, 2008 WL 351250, at *2 (M.D. Pa. Feb. 7, 2008) (recognizing that a motion

According to McCain, around 1990, he was accused of sexually assaulting his ex-girlfriend, Lani Dickerson ("Dickerson"). *See doc. 31* at ¶¶ 27-28. In connection with these allegations, Assistant District Attorney William Fisher allegedly offered McCain a plea bargain, in which he could plead guilty in exchange for a sentence of 5-10 years. *Id*. at ¶ 27. McCain refused Fisher's plea bargain, however, and pleaded not guilty. *Id*. This prompted Fisher to charge McCain with rape and related offenses. *Id*. On December 10, 1990, McCain was convicted of the charged offenses, and on April 19, 1991, he was sentenced to 21-60 years in jail (a sentence which he perceives to be "illegal"). *Id*. at ¶¶ 30, 32. McCain alleges various deficiencies associated with his criminal trial, conviction, and sentencing. Specifically, McCain claims that he was "unable to participate in the judge chambers during vior (sic) dire"; that he "did not receive Megan's Law sexually violent predator hearing"; that one of the jurors ("Juror 19") had a daughter who had been raped two months before McCain's trial and was "uncomfortable" serving a juror in plaintiff's case; that Juror 19 had been selected without his consent; and that neither Juror 19, McCain, nor Dickerson had been "assessed by a state board composed of psychiatrists, psychologists and criminal justice experts, after conviction, but before sentencing." *Id.* at ¶¶ 1, 6, 30. McCain also suggests that DNA testing, which did not become available until 1992, would have proven

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for summary judgment should be denied as premature when "defendants ha[ve] yet to file any responsive pleading.").

his innocence. *Id*. at ¶ 28. McCain appears to allege generally that these deficiencies amount to due-process violations.

McCain first applied for parole in November 2011, but he alleges that he has been denied parole because of his failure to comport with DOC policy DC-43, which mandates that convicted sex offenders participate in a sex-offender treatment program, batterer's intervention, and violence prevention in order to be eligible for parole consideration. *Id*. at ¶¶ 4, 10; *see also* 42 Pa.C.S. § 9718.1. Although McCain has been advised that he will never be granted parole if he does not comport with DC-43, he refuses to do so because he believes that entering into the requisite sex-offender programs would require him to "admit his guilt" and would amount to a violation of the Fifth Amendment's guarantee against self-incrimination. *Doc. 31* at ¶¶ 4, 10. McCain also believes that being required to comport with DC-43 would violate the *Ex Post Facto* Clause in his case because the requirement that certain sex offenders attend treatment programs to be eligible for parole did not go into effect until the year 2000, well after McCain was convicted and sentenced for the rape of Dickerson.[4] *Id*. at ¶ 32.

[4] In addition to the Fifth Amendment, due process, and *ex post facto* claims, McCain mentions that a corrections officer named Thomas Roegner sexually assaulted him at SCI-Waymart in 2010. *Doc. 31* at ¶ 5. McCain, however, does not identify Roegner as a defendant in this matter, nor does he allege any further facts regarding Roegner in his amended complaint. Such claims pertaining to Roegner are included in a separate action, *McCain v. Wetzel, et al*., No. 1:12-CV-00789 (M.D. Pa). Consequently, those claims will not be addressed in this report.

In connection with the Fifth Amendment and *ex post facto* claims, McCain seeks compensatory and punitive damages against the defendants, and he seeks release from confinement on account of the alleged deficiencies associated with his criminal trial and his perceived illegal sentence.

III. Discussion.

A. Screening of *In Forma Pauperis* Complaints—Standard of Review.

This Court has a statutory obligation to conduct a preliminary review of *pro se* complaints brought by prisoners given leave to proceed *in forma pauperis* in cases that seek redress against government officials. Specifically, such complaints must be reviewed pursuant to 28 U.S.C. § 1915A which provides, in pertinent part:

> **(a) Screening.—**The court shall 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.
>
> **(b) Grounds for dismissal.—**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.

Under § 1915A, the court must assess whether a *pro se* complaint "fails to state a claim upon which relief may be granted." This statutory text mirrors the language of Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides

that a complaint should be dismissed for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

With respect to this benchmark standard for legal sufficiency of a complaint, the United States Court of Appeals for the Third Circuit has aptly noted the evolving standards governing pleading practice in federal court, stating that:

> Standards for pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), continuing with our opinion in Phillips [v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008)], and culminating recently with the Supreme Court's decision in *Ashcroft v. Iqbal* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), pleading standard have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

Fowler v. UPMC Shadyside, 578 F.3d 203, 209–10 (3d Cir. 2009).

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). The statement required by Rule 8(a)(2) must give the defendant fair notice of what the plaintiff's claim is and of the grounds upon which it rests. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Detailed factual allegations are not required, but more is required than labels, conclusions, and a formulaic recitation of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "In other words, a

complaint must do more than allege the plaintiff's entitlement to relief." *Fowler*, 578 F.3d at 211. "A complaint has to 'show' such an entitlement with its facts." *Id.*

In considering whether a complaint fails to state a claim upon which relief may be granted, the court must accept as true all well-pleaded factual allegations in the complaint, and all reasonable inferences that can be drawn from the complaint are to be construed in the light most favorable to the plaintiff. *Jordan v. Fox Rothschild, O'Brien & Frankel, Inc.*, 20 F.3d 1250, 1261 (3d Cir. 1994). A court, however, "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). Additionally, a court need not "assume that a . . . plaintiff can prove facts that the . . . plaintiff has not alleged." *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Following *Twombly* and *Iqbal*, a well-pleaded complaint must contain more than mere legal labels and conclusions. Rather, it must recite factual allegations sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation. In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis:

> First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, 'where there are well-pleaded

> factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.'

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 675 & 679).

A complaint filed by a *pro se* litigant is to be liberally construed and "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Erickson*, 551 U.S. at 94 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Nevertheless, "pro se litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013). Thus, a well-pleaded complaint must contain more than mere legal labels and conclusions. Rather, a *pro se* complaint must recite factual allegations that are sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculations, set forth in a "short and plain" statement of a cause of action.

B. McCain's Amended Complaint Fails To State a Claim Upon Which Relief May Be Granted.

McCain's amended complaint is brought pursuant to 42 U.S.C. § 1983, which provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

Id. "Section 1983 is not a source of substantive rights, but merely a method to vindicate violations of federal law committed by state actors." *Pappas v. City of Lebanon*, 331 F.Supp.2d 311, 315 (M.D. Pa. 2004) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (2002)). Thus, to establish a claim under § 1983, a plaintiff must show that (1) the conduct complained of was committed by persons acting under the color of state law; and (2) the conduct violated a right, privilege, or immunity secured by the Constitution or laws of the United States. *Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 189 (3d Cir. 2005) (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)). "[T]he first step in evaluating a [S]ection 1983 claim is to identify the exact contours of the underlying right said to have been violated and to [then] determine whether the plaintiff has alleged a deprivation of a constitutional right at all." *Morrow v. Balaski*, 719 F.3d 160, 165–66 (3d Cir. 2013) (internal quotations and quoted case omitted).

A review of the facts presented in the amended complaint and the inferences to be drawn therefrom in the light most favorable to McCain compels the conclusion that McCain fails to allege facts from which it can reasonably be inferred that the defendants have violated his Fifth Amendment freedom from self-incrimination, the *Ex Post Facto* Clause, or the Due Process Clause of the United States Constitution.

1. McCain Fails to Allege that the Defendants Violated the *Ex Post Facto* Clause of the Constitution.

The *Ex Post Facto* Clause of the United States Constitution "generally prohibits Congress and the states from enacting any law that imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Diehl-Armstrong v. Pa. Bd. of Prob. and Parole*, No. 1:13-cv-2309, 2014 WL 1871509, at *4 (M.D. Pa. May 7, 2014). In order for a law to be considered an *ex post facto* law, it "must either punish as a crime an act previously committed which was innocent when done; make more burdensome the punishment for a crime after its commission; or, deprive one charged with a crime of any defense that was available when the act was committed." *Id.* (citing *Collins v. Youngblood*, 497 U.S. 37, 52 (1990)). There are two prongs to an *ex post facto* inquiry: "(1) whether there was a change in the law or policy which has been given retrospective effect, and (2) whether the offender was disadvantaged by the change." *Richardson v. Pa. Bd. of Prob. and Parole*, 423 F.3d 282, 287-88 (3d Cir. 2005) (citing *Weaver v. Graham*, 450 U.S. 24, 29 (1981)). As the Supreme Court of the United States has explained, the controlling inquiry is whether retroactive application of the subject law creates a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *Cal. Dept. of Corr. v. Morales*, 514 U.S. 499, 509 (1995). "A 'speculative and attenuated possibility of . . . increasing the measure of

punishment' is not enough" to establish a violation of the *Ex Post Facto* Clause. *Richardson*, 423 F.3d at 288 (quoting *Morales*, 514 U.S. at 509).

The Supreme Court has noted that retroactive changes in laws governing parole, in some instances, may violate the *Ex Post Facto* Clause. *Mickens-Thomas v. Vaughn*, 321 F.3d 374, 384 (3d Cir. 2003) (citing *Garner v. Jones*, 529 U.S. 244, 250 (2000)) (internal quotation marks omitted). "This is because an adverse change in one's prospects for release through parole disadvantages a prisoner just as surely as an upward change in the minimum duration of sentence." *Id.* (internal quotation marks omitted). A prisoner challenging parole-law amendments on *ex post facto* grounds, however, "faces a specific and compelling burden." *Diehl-Armstrong*, 2014 WL 1871509, at *4. It is not enough for a prisoner whose conviction preceded a parole-law amendment to show mere application of the amended parole law in considering whether to parole that inmate. *See Richardson*, 423 F.3d at 287. Rather, an *ex post facto* claim based upon a retroactive application of amended parole laws or criteria requires the petitioner to establish individual disadvantage. *See Coles v. Folino*, 2014 WL 5685547, at *4 (W.D. Pa. Nov. 4, 2014). To demonstrate such particularized disadvantage, the inmate bears the burden of showing that "a claimed retroactive application of a change in a parole regulation creates 'a sufficient risk of increasing the measure of punishment attached to the covered crimes [when applied to him or her specifically]." *Diehl-*

Armstrong, 2014 WL 1871509, at *4 (quoting *Garner*, 529 U.S. at 250). An inmate can meet this requisite burden by providing, for example, evidence "that he [or she] would have been a good candidate for parole under the old law, comparisons of parole rates for prisoners with similar convictions before and after the [enactment of the amended parole law], and the extent to which the reasons given for denying him [or her] parole would not have been considered before [enactment of the amended parole law]." *See Taylor v. Pa. Bd. of Prob. and Parole*, 181 Fed.Appx. 253, 255 (3d Cir. 2006).

In *Newman v. Beard*, 617 F.3d 775 (3d Cir. 2010), the plaintiff, Clifford Newman, brought a § 1983 action and raised an *Ex Post Facto* Clause challenge to 42 Pa.C.S. § 9718.1 similar to the challenge raised by McCain in the instant case. Newman argued in part that the § 9718.1 requirement that he enter into a sex-offender treatment program to be eligible for parole violated the *Ex Post Facto* Clause because it did not go into effect until the year 2000, twelve years after he was sentenced in 1988. *Newman*, 617 F.3d at 778-79. The Court found Newman had satisfied the first prong of the *ex post facto* inquiry—that there was a change in the law brought by § 9718.1 that was given retrospective effect. *Id.* at 785. The Court, however, found that he failed to allege facts to satisfy the second prong and show that he was disadvantaged by the change in the law. *Id.* at 786. In order to meet the burden required by the second prong, the Court reasoned, "Newman must

show that as applied to his own sentence the law created a significant risk of increasing his punishment." *Id.* at 785 (citing Garner, 529 U.S. at 255 (2000)) (internal quotation marks omitted). The court found that Newman had not alleged that "he would have been paroled but for § 9718.1, nor [had] he alleged that similarly situated inmates were paroled before the passage of the statute." *Id.* at 786. Accordingly, Newman failed to satisfy the second prong of the *ex post facto* inquiry, and his claim was dismissed. *Id.*

In support of his *ex post facto* claim, McCain cites *Mickens-Thomas*. In *Mickens-Thomas*, the Third Circuit granted habeas relief to prisoner Louis Mickens-Thomas who sufficiently alleged that "he had a significant likelihood of parole under an old policy but was denied parole under a new law, and that the Parole Board had paroled all other similarly situated inmates before the change in the law." *Id*. at 785 (citing *Mickens-Thomas*, 321 F.3d at 387). The record reflected that the Department of Corrections had repeatedly recommended parole for Mickens-Thomas; that he had complied with all prescriptive programming, including psychological evaluations and sex-offender therapy; and that he had job training and a post-release support network in place. *Mickens-Thomas*, 321 F.3d at 387-88. Despite the fact that these factors would have weighed in favor of Mickens-Thomas's release under older parole law, the Parole Board (in deciding to deny Mickens-Thomas parole) exhibited an "indifference to Thomas's efforts to

improve his parole candidacy," "relied almost exclusively" on factors only emphasized in parole law enacted after Mickens-Thomas was sentenced, and "fail[ed] to credibly consider any other factors."[5] *Id*. at 388, 390. Additionally, the court noted that "he [was] the only prisoner out of 266 commuted sentences who was not granted parole in his first or second application." *Id*. at 387. Thus, the court in *Mickens-Thomas* found that Mickens-Thomas had satisfied both elements of the *ex post facto* inquiry as it pertains to parole laws—that a new parole law had been applied to him retroactively *and* that this retroactive application of the law individually disadvantaged him.

In this case, McCain contends that the requirement that he enter a sex-offender treatment program went into effect in 2000, long after he was sentenced in 1991 and that compelling him to comport with this requirement would amount

[5] In December 1996, Pennsylvania's Probation and Parole Act, 61 P.S. §§ 331.1-331.34a, was amended (hereinafter "the 1996 amendments"). The policies in effect prior to the 1996 amendments "place[d] significant weight on an inmate's potential to adapt to life on the outside, and on the recommendations of the institutional staff." The 1996 amendments, however, modified parole policy to "make public safety the primary consideration." *Richardson v. Pa. Bd. of Prob. and Parole*, 423 F.3d 282, 285 (3d Cir. 2005). Although public safety was considered in the parole determination even before the 1996 amendments, the "practical effect" of the 1996 amendments was to *increase* the weight that public safety was given in the parole determination. *Id*. at 289. Thus, since the 1996 amendments substantively changed the criteria for parole in Pennsylvania, "a petitioner who could demonstrate individual disadvantage from retroactive application of the 1996 amendments could prevail on an ex post facto claim." *Parker v. Kelchner*, 429 F.3d 58, 64 n.5 (3d Cir. 2005) (citing *Richardson*, 423 F.3d at 290-91).

to an *ex post facto* violation. But even if he satisfies the first element of the *ex post facto* inquiry, that a law was applied to him retroactively, he fails to satisfy the second prong of the inquiry—that he was individually disadvantaged by the retroactive application. Unlike Mickens-Thomas, McCain has alleged no specific facts to suggest that he had a significant likelihood of parole under any old policy. McCain fails to explain why he would have been a good candidate for parole absent the treatment-program requirement, and he fails to allege facts which suggest that similarly situated inmates were paroled before entry into the treatment program was required.[6] Furthermore, unlike Mickens-Thomas, McCain does not allege that the Department of Corrections recommended his release, that he was taking part in any rehabilitative programs to prepare for his entry into life outside of prison, or that any other factors would have significantly weighed in favor of his release under older parole law. In fact, McCain himself admits that he has repeatedly refused to take part in rehabilitative efforts, in particular the sex-offender treatment program. Thus, like the plaintiff in *Newman*, McCain has failed

[6] McCain makes a general assertion that "he had a significant likelihood of parole under the pre-1996 old policy, but was denied parole under a new policy." *Doc. 31* at ¶ 59. Additionally, he makes a general assertion that "the parole board had paroled all other similarly situated inmates before the change in law." *Id.* These assertions are merely conclusory, however, and McCain does not support them with any specific factual allegations. Furthermore, since his amended complaint mainly takes issue with the sex-offender treatment requirement that was enacted in the year 2000, it is unclear why McCain is referencing the 1996 amendments and how specifically the 1996 amendments would be relevant to his amended complaint.

to establish that *but for* the treatment-program requirement, he had a significant likelihood of parole, and, therefore, his *ex post facto* claim fails.[7]

2. McCain Fails to Allege That the Defendants Violated His Fifth Amendment Guarantee Against Self-Incrimination.

Although McCain was not granted leave to amend his allegations with respect to his Fifth Amendment claims, the Court will briefly address these claims. McCain contends, as he did before, that entering into the requisite sex-offender programs would amount to an admission of his guilt and, thus, would amount to a violation of the Fifth Amendment's guarantee against self-incrimination. As the Court previously explained, however, such allegations fail to state a claim upon which relief can be granted. *See doc. 28* at 9-12. The Third Circuit has repeatedly noted that denial of parole for refusing to participate in the sex offender rehabilitation program "does not rise to the level of compulsion necessary to violate the Fifth Amendment." *Roman v. DiGuglielmo*, 675 F.3d 204, 214 (3d Cir. 2012); *see also Thorpe v. Grillo*, 80 Fed. Appx. 215, 219-20 (3d Cir. 2003). In virtually the same situation as that presented here, the Third Circuit in *Thorpe* concluded that the denial of parole for the refusal to participate in a sex offender

[7] Also worth noting is that a review of the Parole Board's decision (which McCain provides as an exhibit to his amended complaint) denying McCain parole on November 3, 2011, reveals that the Board listed ten separate reasons for denying him parole. *See doc. 31-1* at 3-4. This suggests that his refusal to enter the sex-offender treatment program was not the sole reason for his parole denial and that he likely would not have been paroled even absent the sex-offender treatment program requirement that took effect in 2000.

treatment program requiring an admission of guilt outside of a criminal trial does not constitute compulsion under the Fifth Amendment. *Thorpe*, 80 Fed. Appx. at 219-20. As in *Thorpe*, McCain presents no facts to infer or imply that the DOC's policy forced him to incriminate himself in a trial, that he received additional punishment for maintaining his innocence, or that his refusal to participate in the treatment program extended his term of incarceration. Additionally, McCain is not entitled to parole; rather, he is only entitled to *consideration* of parole, and the DOC's policy alleged here did not deprive him of that consideration. *Thorpe*, 80 Fed. Appx. at 219-20; *see also Zuniga v. Penn Bd. of Prob. and Parole*, No. 05-5517, 2007 WL 1002179, at *12 (E.D. Pa. Mar. 29, 2007); *Williams v. Martinez*, No. 06-735, 2006 WL 2588726, at *5-6 (E.D. Pa. Sept. 7, 2006). Thus, because the defendants' requirement that McCain enroll in a sex offender treatment program is not a violation of McCain's Fifth Amendment guarantee against self-incrimination, he has once again failed to state a Fifth Amendment claim upon which relief can be granted.

3. McCain's "Due Process" Claims.

Although McCain was only granted leave to amend his complaint as to the *ex post facto* claims, McCain adds what he perceives to be Due Process Clause claims in his amended complaint. Specifically, McCain alleges generally that the perceived procedural deficiencies associated with his criminal trial, conviction, and

sentencing amount to Due Process Clause violations. With respect to these alleged violations, however, it appears that McCain in actuality is challenging the validity of his "illegal" sentence and conviction and that he seeks a release from confinement. Thus, these claims would be more appropriately raised in a *habeas corpus* petition rather than in a § 1983 action. The courts have recognized that when a prisoner's challenge "ultimately attacks the 'core of habeas'—the validity of the continued conviction or the fact or length of the sentence—a challenge . . . must be brought by way of a habeas corpus petition." *Leamer v. Fauver*, 288 F.3d 532, 542 (3d Cir. 2002). Thus, to the extent McCain wishes to challenge the validity of his continued confinement or the legality of his sentence on account of the perceived procedural deficiencies with his trial, such claims would be more appropriately raised in a habeas corpus action.

C. Leave to Amend.

Before dismissing a complaint for failure to state a claim upon which relief may be granted under the screening provision of 28 U.S.C. § 1915A, the court must grant the plaintiff leave to amend his complaint unless amendment would be inequitable or futile. *See Grayson v. Mayview State Hospital*, 293 F.3d 103, 114 (3d Cir. 2002). Because McCain was already granted leave to file an amended complaint as to his *ex post facto* claims, and he failed to correct the deficiencies in his original complaint, granting him leave to file a second amended complaint as to

his *ex post facto* claims would be futile. Furthermore, as discussed above, the additional claims pertaining to the alleged procedural deficiencies at his trial and his attempt to invalidate his conviction and sentence would be more appropriately raised in a *habeas corpus* action rather than in the instant § 1983 action. Thus, the instant action should be dismissed with prejudice.

D. McCain's Motion (*doc. 33*) for "Certification" and Motion (*doc. 34*) to Compel Should be Denied.

On October 21, 2016, McCain filed two motions, one labeled as a motion (*doc. 33*) for "certification" and the other labeled as a motion (*doc. 34*) to compel; both are pending before this Court. The motion (*doc. 34*) to compel, which is brought pursuant to Federal Rule of Civil Procedure 37, seeks to compel the defendants to produce certain documents and video footage pertaining to two of McCain's prior parole hearings, one which took place in October of 2011 and the other which took place in November of 2011. *Doc. 33*, although labeled as a "motion of certification," also appears to be seeking the production of the same documents and video footage that is sought in the motion (*doc. 34*) to compel. Given the recommendation that this action be dismissed with prejudice, it is recommended that the two motions be denied as moot. Even if the recommendation of a with-prejudice dismissal is not adopted, however, McCain's motions should be denied as premature. Both of the pending motions are effectively motions to compel discovery. The defendants, however, have not yet

been served in this action, nor has counsel entered an appearance in this action. Thus, at this stage in the litigation, it is premature to file a motion to compel discovery. *See White v. Bledsloe*, 2008 WL 4793737, at *1 (M.D. Pa. Oct. 31, 2008) (holding that a "discovery request . . . [was] premature as the defendants [had] not yet entered their appearance in this action.").

IV. Recommendation.

Based on the foregoing, **IT IS RECOMMENDED** that McCain's amended complaint (*doc. 31*) be **DISMISSED** with prejudice and that his motion (*doc. 33*) for "certification" and his motion (*doc. 34*) to compel both be **DENIED**.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive

further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this **9th** day of **December 2016**.

S/ Susan E. Schwab
Susan E. Schwab
United States Magistrate Judge