



1 See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and  
2 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be  
3 granted, or seek monetary relief from a defendant who is immune from such relief. *See id.*  
4 § 1915A(b)(1), (2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v.*  
5 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C.  
6 § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the  
7 Constitution or laws of the United States, and (2) that the alleged violation was committed by a  
8 person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

9 In addition to the screening requirements under § 1915A, the Prison Litigation Reform  
10 Act (PLRA) requires a federal court to dismiss an incarcerated person's claim if "the allegation  
11 of poverty is untrue" or if the action "is frivolous or malicious, fails to state a claim on which  
12 relief may be granted, or seeks monetary relief against a defendant who is immune from such  
13 relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which  
14 relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court  
15 applies the same standard under § 1915 when reviewing the adequacy of a complaint or an  
16 amended complaint. When a court dismisses a complaint under § 1915(e), the plaintiff should be  
17 given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear  
18 from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato*  
19 *v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

20 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*  
21 *Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim is  
22 proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that  
23 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In

1 making this determination, the court takes as true all allegations of material fact stated in the  
2 complaint, and the court construes them in the light most favorable to the plaintiff. *See Warshaw*  
3 *v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to  
4 less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S.  
5 5, 9 (1980). While the standard under Rule 12(b)(6) does not require detailed factual allegations,  
6 a plaintiff must provide more than mere labels and conclusions. *Bell Atl. Corp. v. Twombly*, 550  
7 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient.  
8 *Id.*

9         Additionally, a reviewing court should “begin by identifying pleadings [allegations] that,  
10 because they are no more than mere conclusions, are not entitled to the assumption of truth.”  
11 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide the  
12 framework of a complaint, they must be supported with factual allegations.” *Id.* “When there are  
13 well-pleaded factual allegations, a court should assume their veracity and then determine  
14 whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining whether a  
15 complaint states a plausible claim for relief . . . [is] a context-specific task that requires the  
16 reviewing court to draw on its judicial experience and common sense.” *Id.*

17         Finally, all or part of a complaint filed by an incarcerated person may therefore be  
18 dismissed *sua sponte* if that person’s claims lack an arguable basis either in law or in fact. This  
19 includes claims based on legal conclusions that are untenable (e.g., claims against defendants  
20 who are immune from suit or claims of infringement of a legal interest which clearly does not  
21 exist), as well as claims based on fanciful factual allegations (e.g., fantastic or delusional  
22 scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); *see also McKeever v. Block*,  
23 932 F.2d 795, 798 (9th Cir. 1991).

1 **III. SCREENING OF COMPLAINT**

2 Johnson sues multiple defendants for events that allegedly took place while he was  
3 incarcerated by the NDCO. ECF No. 1-1 at 1. He sues the State of Nevada Dept. of Parole and  
4 Probation, State of Nevada Dept. of Corrections, Calvin Johnson, Charles Daniels, Darla Foley,  
5 Mary K. Baker, S. Conroy, Marquez, Christopher Derrico, and Eric Christiansen. *Id.* at 1-3.

6 Johnson brings three claim and seeks damages, declaratory relief, and injunctive relief,  
7 including recalculation of his release date and immediate release from prison. *Id.* at 7, 10-13.

8 **A. Claim 1**

9 Claim 1 alleges the following: On April 16, 2020, Johnson was arrested for a parole  
10 violation by the Las Vegas Metropolitan Police Department. ECF No. 1-1 at 5. On April 21,  
11 2020, he was transported to High Desert State Prison and placed into NDOC custody. *Id.* This  
12 process was done without the Nevada Division of Parole & Probation conducting a preliminary  
13 inquiry hearing to determine if there was probable cause to believe that Johnson committed acts  
14 that would constitute a violation. *Id.* Johnson had a preliminary inquiry hearing on May 21,  
15 2020. *Id.* The inquiry hearing was conducted telephonically, two cities apart and 24 working  
16 days from the date of his arrest, with Johnson in handcuffs. *Id.* Johnson was given no advance  
17 warning or notice so that he could adequately prepare witnesses and documentation. *Id.* Johnson  
18 was not given the opportunity to retain counsel because he was told 30 minutes prior to the  
19 hearing to get dressed because Parole was doing a hearing. *Id.* The speaker phone at the hearing  
20 was “defective.” *Id.* Johnson concludes that his right to due process granted by the Fifth  
21 Amendment was violated, resulting in a loss of liberty. *Id.*

22 The Fifth Amendment’s Due Process Clause applies to the federal government, not the  
23 States, while the Fourteenth Amendment’s Due Process Clause applies to the states. *See Castillo*

1 *v. McFadden*, 399 F.3d 993, 1002 n.5 (9th Cir. 2005). I therefore construe this claim as a  
2 Fourteenth Amendment due process claim.

3 Allegations that a defendant violated state or local procedures and regulations are not  
4 sufficient to state a claim for violation of the Fourteenth Amendment’s due process clause.  
5 *Swarthout v. Cooke*, 562 U.S. 216, 222 (2011). In order to state a Fourteenth Amendment due  
6 process claim, a plaintiff must adequately allege that he was denied a specified liberty interest  
7 and that he was deprived of that liberty interest without the constitutionally required procedures.  
8 *Swarthout*, 562 U.S. at 219. When there is such a liberty interest or property interest, the only  
9 other issue is whether the plaintiff was deprived of that interest without the constitutionally  
10 required procedures. *Id.*

11 Johnson alleges he suffered a loss of liberty. He appears to be claiming that, but for the  
12 alleged errors concerning his preliminary hearing, he would not be in prison. This necessarily  
13 implies the invalidity of Johnson’s confinement in prison or the duration of that confinement. In  
14 *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that “in order to recover  
15 damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm  
16 caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983  
17 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged  
18 by executive order, declared invalid by a state tribunal authorized to make such determination, or  
19 called into question by a federal court’s issuance of a writ of habeas corpus.” *Id.* at 486-87. “A  
20 claim for damages bearing that relationship to a conviction or sentence that has not been . . .  
21 invalidated is not cognizable under § 1983.” *Id.* at 487. “Thus, when a state prisoner seeks  
22 damages in a § 1983 suit, the district court must consider whether a judgment in favor of the  
23 plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the

1 complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence  
2 has already been invalidated.” *Id.* The Supreme Court also has held that, regardless of whether a  
3 plaintiff is seeking damages, injunctive relief, or declaratory relief, a state prisoner’s § 1983  
4 action is barred (absent prior invalidation) if success in that action would necessarily  
5 demonstrate the invalidity of confinement or its duration. *Wilkinson v. Dotson*, 544 U.S. 74, 81-  
6 83 (2005).

7           Johnson’s claim necessarily implies the invalidity of his revocation of parole and  
8 consequent incarceration. It is clear from the complaint that Johnson has not had his revocation  
9 of parole and incarceration invalidated. It therefore dismiss this claim without prejudice and  
10 without leave to amend. If Johnson wishes to pursue the claim presented in Claim 1, he must  
11 first have his allegedly improper incarceration either invalidated in state court or invalidated by a  
12 federal court in habeas proceedings after he exhausts available state judicial remedies.

13           **B. Claim 2**

14           Claim 2 alleges the following: On March 31, 2017, Johnson was granted parole. ECF No.  
15 1-1 at 6. At the time he was granted parole, his expiration date was June 25, 2019. *Id.* Johnson  
16 attended a parole revocation hearing on June 25, 2019, and it was determined that his “parole  
17 expiration date” had been moved to February 2, 2020 due to forfeiture of good time credit  
18 stemming from a parole violation. *Id.* At this hearing, it was determined that Johnson’s parole  
19 was not revoked or rescinded and that credits were to be restored. *Id.* At this hearing, there also  
20 was not a charge of absconding. *Id.* Johnson was given a “reinstatement date” of June 25, 2019  
21 with an October 1, 2019 “release date.” *Id.* All credit was restored and parole was “set to  
22 commence.” *Id.*

23

1 Johnson alleges that the parole and sentence have been “twice expired” and that he  
2 should have expired his parole on February 2, 2020. *Id.* He also alleges that there was never a  
3 revocation of parole and that all of his credits were restored. *Id.* Johnson alleges that he was  
4 never charged or convicted as an absconder so his time continually progressed. *Id.* He maintains  
5 that his parole should have expired on February 2, 2020. *Id.* Johnson concludes that he suffered  
6 a loss of liberty due to a violation of his right to procedural due process ensured by the Fifth  
7 Amendment and that he suffered cruel and unusual punishment. *Id.* I construe the due process  
8 claim as a Fourteenth Amendment claim and the cruel and unusual punishment claim as an  
9 Eighth Amendment claim.

10 Officials who detain a person beyond the termination of his sentence may violate that  
11 person’s rights under the Eighth Amendment if they act with deliberate indifference to the  
12 prisoner’s liberty interest. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985). Thus, as  
13 with his due process claim, in order to prevail on an Eighth Amendment claim, Johnson must  
14 prove that he was deprived of his liberty interest in being released from prison at the proper time.

15 Johnson alleges that he has been deprived of his liberty because he improperly is being  
16 held in prison even though his sentence and parole have expired. Such a claim necessarily  
17 challenges the validity of the duration of Johnson’s confinement. As discussed above, in order to  
18 pursue and prevail on such a claim, Johnson must show that the fact of his confinement or  
19 duration of his confinement has been invalidated by another court. *See Wilkinson*, 544 U.S. 81-  
20 83; *Heck v. Humphrey*, 512 U.S. at 486-487. It is apparent from the complaint that no court has  
21 invalidated the fact or duration of Johnson’s confinement in prison. I therefore dismiss this  
22 claim without prejudice and without leave to amend. If Johnson wishes to pursue the claim  
23 presented in Claim 2, he must first have his allegedly improper incarceration either invalidated in

1 state court or invalidated by a federal court in habeas proceedings after he exhausts available  
2 state judicial remedies.

### 3 **3. Claim 3**

4 Claim 3 alleges the following: At a parole revocation hearing on June 25, 2019, Johnson  
5 was reinstated to parole with a release date of October 1, 2019. ECF No. 1-1 at 7. While in  
6 custody “awaiting release to Community,” Johnson was late returning to Casa Grande  
7 Transitional Housing and was charged with an escape, and a parole violation “was generated.”  
8 *Id.* This incident occurred on August 22, 2019. *Id.* Johnson alleges that this incident allegedly  
9 occurred before he officially was able to begin his parole. *Id.* Johnson asserts that his “original  
10 parole violation was predicated on the criminal charges that were filed resulting from incident.”  
11 *Id.* Johnson’s parole was revoked due to the allegations and due to Directives and Conduct. *Id.*  
12 The incident happened before Johnson “ever signed Parole Agreement.” *Id.* He was violated for  
13 Directives and Conduct that he had never entered into an agreement to comply with. *Id.* Johnson  
14 asserts that he was not “released” on parole and therefore could not have violated parole. *Id.*  
15 “Nevada Process according to NRS 213.123 requires a parolee to sign an agreement before  
16 release.” *Id.* Therefore, Johnson’s parole was never agreed upon or entered into. *Id.* He  
17 concludes that he suffered a loss of liberty due to a procedural due process violation of the Fifth  
18 Amendment. *Id.* I construe the due process claim as a Fourteenth Amendment claim.

19 Johnson appears to be alleging that he was deprived of his liberty because his parole was  
20 revoked and he was imprisoned even though he was not on parole and therefore could not have  
21 violated parole. As discussed above, in order to pursue and prevail on such a claim, Johnson  
22 must show that the fact of his confinement or duration of his confinement previously has been  
23 invalidated by another court. *See Wilkinson*, 544 U.S. at 81-83; *Heck v. Humphrey*, 512 U.S. at



1 486-487. It is apparent from the complaint that no court has invalidated the fact or duration of  
2 Johnson’s confinement in prison. I therefore dismiss this claim without prejudice and without  
3 leave to amend. If Johnson wishes to pursue the claim presented in Claim 3, he must first have  
4 his allegedly invalid incarceration either invalidated in state court or invalidated by a federal  
5 court in habeas proceedings after he exhausts available state judicial remedies.

6 **IV. MOTION FOR PRELIMINARY INJUNCTION**

7 Johnson has filed a “Petition for Official Judicial Review & Emergency Preliminary  
8 Injunction.” ECF No. 5, 6. I construe this as a motion for a preliminary injunction. Based on  
9 allegations similar to those in the complaint, Johnson requests that an order that the NDOC  
10 recalculate his credits and immediately release him from custody or, in the alternative, order his  
11 placement in home confinement “until matters can be resolved.” *Id.* at 8.

12 A person may not obtain release from custody through a § 1983 action and must instead  
13 pursue release through a habeas petition. *Nettles v. Grounds*, 830 F.3d 922, 927–28 (9th Cir.  
14 2016). Therefore, Johnson may not obtain release from prison in this § 1983 action.

15 Furthermore, injunctive relief, whether temporary or permanent, is an “extraordinary  
16 remedy, never awarded as of right.” *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 24  
17 (2008). The court “must balance the competing claims of injury and must consider the effect on  
18 each party of the granting or withholding of the requested relief.” *Id.* at 23 (internal quotation  
19 marks and citation omitted). “A plaintiff seeking a preliminary injunction must establish that he  
20 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
21 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
22 public interest.” *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.  
23 2009) (quoting *Winter*, 555 U.S. at 20). In addition, there must be a sufficient nexus between the

1 claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint  
2 itself.” *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 635–36 (9th Cir.  
3 2015).

4 As discussed above, I am dismissing all of Johnson’s claims without leave to amend. He  
5 therefore has not shown any likelihood of success, that the balance of equities tips in his favor,  
6 and that an injunction is in the public interest. Moreover, because I am dismissing the entire  
7 complaint, Johnson cannot show a nexus between the requested relief and any of the claims in  
8 the action. Accordingly, I deny the motion for preliminary injunctive relief.

9 **V. CONCLUSION**

10 I hereby order that Johnson’s application to proceed *in forma pauperis* (**ECF No. 4**) is  
11 **GRANTED**. Johnson is not required to pay an initial installment fee. Nevertheless, the full  
12 filing fee is still due under 28 U.S.C. § 1915 as amended by the PLRA.

13 I further order that, under 28 U.S.C. § 1915 as amended by the PLRA, the Nevada  
14 Department of Corrections shall pay to the Clerk of the United States District Court, District of  
15 Nevada, 20% of the preceding month's deposits to the account of Corey Johnson, #95007 (in  
16 months that the account exceeds \$10.00) until the full \$350 filing fee has been paid for this  
17 action. The Clerk shall send a copy of this order to the attention of Chief of Inmate Services for  
18 the Nevada Department of Prisons, P.O. Box 7011, Carson City, NV 89702.

19 I further order that, even though this action is dismissed, the full filing fee is still due,  
20 under 28 U.S.C. §1915 as amended by the PLRA.

21 I further order the Clerk of the Court to file the complaint (ECF No. 1-1).

22 I further order that the entire complaint is dismissed without prejudice and without leave  
23 to amend.

1 I further order that the “Petition for Official Judicial Review & Emergency Preliminary  
2 Injunction” (ECF Nos. 5, 6) is denied.

3 I further order the Clerk of Court to enter judgment accordingly and close this case. No  
4 more documents shall be filed in this closed case.

5 I certify that any *in forma pauperis* appeal from this order would not be taken “in good  
6 faith” under 28 U.S.C. § 1915(a)(3).

7 Dated: October 19, 2020.



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U.S. District Judge