

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

VAN MILTON, )  
Plaintiff, )  
vs. )  
JOSEPH LOMBARDO, *et al.*, )  
Defendants. )  
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)  
Case No. 2:17-cv-01842-RFB-GWF  
**ORDER**  
Application to Proceed *in Forma  
Pauperis* (#3) and Screening of  
Complaint (#1-1)

This matter comes before the Court on Plaintiff's Application to Proceed in Forma Pauperis (ECF No. 3), filed on July 17, 2017.

## BACKGROUND

Plaintiff brings this case pursuant to 42 U.S.C. § 1983. Plaintiff argues that Defendants used excessive force against him based on his race in violation of Plaintiff's rights to equal protection, due process and to be free from unreasonable seizures.

## **DISCUSSION**

## **I. Application to Proceed In Forma Pauperis**

Plaintiff filed this instant action and attached a financial affidavit to his application and complaint as required by 28 U.S.C. § 1915(a). Reviewing Plaintiff's financial affidavit pursuant to 28 U.S.C. § 1915, the Court finds that Plaintiff is unable to pre-pay the filing fee. As a result, Plaintiff's request to proceed *in forma pauperis* in federal court is granted.

## II. Screening the Complaint

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.

1       § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims  
2       that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek  
3       monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. §  
4       1915A(b)(1),(2).

5       In addition to the screening requirements under § 1915A, pursuant to the PLRA, a federal  
6       court must dismiss a prisoner’s claims, “if the allegation of poverty is untrue,” or if the action “is  
7       frivolous or malicious,” “fails to state a claim on which relief may be granted,” or “seeks monetary  
8       relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of  
9       a complaint for failure to state a claim upon which relief may be granted is provided for in Federal  
10      Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under Section 1915(e)(2)  
11      when reviewing the adequacy of a complaint or amended complaint.

12      Review under Fed. R. Civ. P. 12(b)(6) is essentially a ruling on a question of law. *See*  
13      *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure  
14      to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support  
15      of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th  
16      Cir. 1999). In making this determination, the Court takes as true all allegations of material fact  
17      stated in the complaint, and the Court construes them in the light most favorable to the plaintiff.  
18      *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations in a *pro se* complaint  
19      are held to less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*,  
20      449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*). While the  
21      standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide  
22      more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-  
23      1965 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*, *See*  
24      *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

25      All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the  
26      prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal  
27      conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims  
28      of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful

1 factual allegations (e.g. fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319,  
2 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

3 Plaintiff's complaint asserts claims for violations of his First, Fourth and Fourteenth  
4 Amendment rights. However, the entirety of Plaintiff's complaint states as follows:

5 Defendants utilized excessive force based on racial motivation in  
6 violation of plaintiff's right to due process, against unreasonable  
seizure of his person and to be free from race motivated crime.

7 *Complaint* (ECF No. 1-1), pg. 3. This bare bones allegation is not enough for the Court to screen  
8 Plaintiff's complaint. Plaintiff's complaint must contain a more detailed explanation of the facts  
9 that give rise to his claims. Therefore, the Court will dismiss Plaintiff's complaint with leave to  
10 amend.

11 If Plaintiff elects to proceed in this action by filing an amended complaint, he is informed  
12 that the court cannot refer to a prior pleading in order to make his amended complaint complete.  
13 Local Rule 15-1 requires that an amended complaint be complete in itself without reference to any  
14 prior pleading. This is because, as a general rule, an amended complaint supersedes the original  
15 complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.1967). Once Plaintiff files an amended  
16 complaint, the original pleading no longer serves any function in the case. Therefore, in an  
17 amended complaint, as in an original complaint, each claim and the involvement of each defendant  
18 must be sufficiently alleged. Plaintiff is advised that litigation will not commence upon the filing  
19 of an amended complaint. Rather, the Court will need to conduct an additional screening of the  
20 amended complaint pursuant to 28 U.S.C. § 1915A. If Plaintiff fails to file an amended complaint  
21 or fails to cure the deficiencies identified above, the Court will recommend that the complaint be  
22 dismissed with prejudice. Accordingly,

23 **IT IS HEREBY ORDERED** that Plaintiff's Application to Proceed *in Forma Pauperis*  
24 (ECF No. 3) is **granted**. Plaintiff shall not be required to pay an initial partial filing fee. However,  
25 even if this action is dismissed, the full filing fee must still be paid pursuant to 28 U.S.C.  
26 § 1915(b)(2).

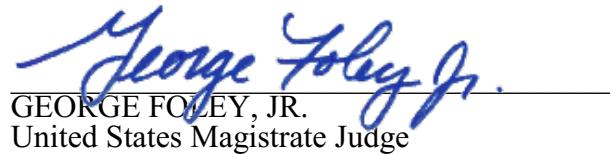
27 **IT IS FURTHER ORDERED** that the movant herein is permitted to maintain this action  
28 to conclusion without the necessity of prepayment of any additional fees or costs or the giving of

1 security therefor. This Order granting *forma pauperis* status shall not extend to the issuance of  
2 subpoenas at government expense.

3 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915(b)(2), the Nevada  
4 Department of Corrections shall pay to the Clerk of the United States District Court, District of  
5 Nevada, 20% of the preceding month's deposits to Plaintiff's account (inmate #7016548), in the  
6 months that the account exceeds \$10.00, until the full \$400 (which includes the \$350 filing fee and  
7 \$50 administrative fee) filing fees have been paid for this action. The Clerk of the Court shall send  
8 a copy of this Order to the Finance Division of the Clerk's Office. The Clerk shall also send a copy  
9 of this Order to the attention of the Chief of Inmate Services for the Nevada Department of  
10 Corrections, P.O. Box 7011, Carson City, NV 89702.

11 **IT IS FURTHER ORDERED** that Plaintiff's Complaint is **dismissed** without prejudice  
12 with leave to amend. Plaintiff shall have until **January 8, 2018** to file an amended complaint  
13 correcting the noted deficiencies.

14 DATED this 6th day of December, 2017.

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17 GEORGE FOLEY, JR.  
United States Magistrate Judge