

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 ANTONIO M. BREAKMAN,

Case No. 2:18-cv-00128-GMN-VCF

4 Plaintiff

SCREENING ORDER

5 v.

6 JAMES DZURENDA et al.,

7 Defendants
8

9 Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections
10 (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has
11 filed an application to proceed in forma pauperis¹ and two motions requesting screening.
12 (ECF Nos. 1-1, 4, 5, 6). The Court now screens Plaintiff’s civil rights complaint pursuant
13 to 28 U.S.C. § 1915A and addresses the remaining motions.

14 **I. IN FORMA PAUPERIS APPLICATION**

15 Plaintiff’s application to proceed in forma pauperis is granted. (ECF No. 4). Based
16 on the information regarding Plaintiff’s financial status, the Court finds that Plaintiff is not
17 able to pay an initial installment payment toward the full filing fee pursuant to 28 U.S.C. §
18 1915. Plaintiff will, however, be required to make monthly payments toward the full
19 \$350.00 filing fee when he has funds available.

20 **II. SCREENING STANDARD**

21 Federal courts must conduct a preliminary screening in any case in which a
22 prisoner seeks redress from a governmental entity or officer or employee of a
23 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any
24 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
25 upon which relief may be granted or seek monetary relief from a defendant who is immune
26 from such relief. See 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be

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28 ¹ Plaintiff’s application to proceed in forma pauperis is complete when looking at
ECF Nos. 1-1 and 4.

1 liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).
2 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
3 (1) the violation of a right secured by the Constitution or laws of the United States, and
4 (2) that the alleged violation was committed by a person acting under color of state law.
5 See *West v. Atkins*, 487 U.S. 42, 48 (1988).

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

18 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
19 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
20 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
21 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
22 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
23 allegations of material fact stated in the complaint, and the court construes them in the
24 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
25 Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than
26 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
27 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
28 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,

1 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
2 insufficient. *Id.*

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

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

19 **III. SCREENING OF COMPLAINT²**

20 In the complaint, Plaintiff sues multiple defendants for events that took place while
21 Plaintiff was incarcerated at High Desert State Prison (“HDSP”). (ECF No. 1-1 at 1).
22 Plaintiff sues Defendants NDOC Director James Dzurenda, Warden Nevens, Warden B.
23 Williams, Caseworker Ritz, and John Doe. (*Id.* at 1-3). Plaintiff alleges two counts and
24 seeks monetary damages. (*Id.* at 5, 9).

25 The complaint alleges the following: Prison officials failed to correctly apply
26 Plaintiff’s statutory time credits to his minimum sentence. (*Id.* at 3). The failure to
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28 ² The motions requesting screening (ECF Nos. 5, 6) are denied as moot in light of
this screening order.

1 correctly apply Plaintiff's statutory time credits to his minimum sentence resulted in
2 Plaintiff failing to see the parole board on time. (Id.) Plaintiff states that he only received
3 181 days of credit for time served even though NRS § 209.4465 states that he should
4 receive more. (Id. at 4). As a result, prison officials denied Plaintiff the opportunity to visit
5 the parole board on time. (Id. at 5). Plaintiff alleges Fifth, Eighth, and Fourteenth
6 Amendment violations. (Id. at 4-5).

7 The Supreme Court has held that a prisoner in state custody cannot use a § 1983
8 action to challenge "the fact or duration of his confinement," but instead must seek federal
9 habeas corpus relief or the appropriate state relief. *Wilkinson v. Dotson*, 544 U.S. 74, 78
10 (2005); see *Nettles v. Grounds*, 830 F.3d 922, 927(9th Cir. 2016) (reiterating that the
11 Supreme Court has "long held that habeas is the exclusive vehicle for claims brought by
12 state prisoners that fall within the core of habeas, and such claims may not be brought in
13 a § 1983 action"). In *Wilkinson*, the Supreme Court held that "a state prisoner's § 1983
14 action is barred (absent prior invalidation)—no matter the relief sought (damages or
15 equitable relief), no matter the target of the prisoner's suit (state conduct leading to
16 conviction or internal prison proceedings)—if success in that action would necessarily
17 demonstrate the invalidity of confinement or its duration. Id. at 81-82.

18 The Court dismisses this action in its entirety, without prejudice, because Plaintiff
19 is attempting to challenge the duration of his sentence. Specifically, Plaintiff seeks to
20 have prison officials award him statutory good time credits that he believes he is entitled
21 to. See NRS § 209.4465 (detailing credits per month for offenders meeting certain
22 conditions). If Plaintiff were to succeed in this lawsuit, the duration of his sentence would
23 be reduced. In *Williams v. State Dep't of Corr.*, 402 P.3d 1260 (Nev. 2017), the Nevada
24 Supreme Court addressed whether NRS § 209.4465 applied to a prisoner in that case
25 and noted that the prisoner had properly raised the issue in a postconviction petition for
26 habeas corpus. Id. at 1262; see also NRS § 34.724(2)(c) (stating that a postconviction
27 petition for a writ of habeas corpus is "the only remedy available to an incarcerated person
28 to challenge the computation of time that the person has served pursuant to a judgment

1 of conviction”).

2 The Court acknowledges that Plaintiff is attempting to couch his lawsuit in terms
3 of being unable to appear before the parole board in a timely manner. However, the
4 ability for Plaintiff to appear in front of the parole board is directly related to Plaintiff serving
5 his minimum sentence in which he seeks credits for. As such, Plaintiff must raise the
6 issue in a petition for habeas corpus.

7 **IV. CONCLUSION**

8 For the foregoing reasons, it is ordered that Plaintiff's application to proceed in
9 forma pauperis (ECF No. 4) without having to prepay the full filing fee is **granted**. Plaintiff
10 shall not be required to pay an initial installment fee. Nevertheless, the full filing fee shall
11 still be due, pursuant to 28 U.S.C. § 1915, as amended by the Prisoner Litigation Reform
12 Act. The movant herein is permitted to maintain this action to conclusion without the
13 necessity of prepayment of fees or costs or the giving of security therefor. This order
14 granting in forma pauperis status shall not extend to the issuance and/or service of
15 subpoenas at government expense.

16 It is further ordered that, pursuant to 28 U.S.C. § 1915, as amended by the Prisoner
17 Litigation Reform Act, the Nevada Department of Corrections shall pay to the Clerk of the
18 United States District Court, District of Nevada, 20% of the preceding month's deposits
19 to the account of **Antonio M. Breakman, #83500** (in months that the account exceeds
20 \$10.00) until the full \$350 filing fee has been paid for this action. The Clerk shall send a
21 copy of this order to the attention of **Chief of Inmate Services for the Nevada**
22 **Department of Prisons**, P.O. Box 7011, Carson City, NV 89702.

23 It is further ordered that, even if this action is dismissed, or is otherwise
24 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended
25 by the Prisoner Litigation Reform Act.

26 It is further ordered that the Clerk of the Court file the complaint (ECF No. 1-1).

27 It is further ordered that the complaint is dismissed in its entirety without prejudice.

28 It is further ordered that the motions requesting screening (ECF Nos. 5, 6) are

1 denied as moot.

2 It is further ordered that this Court certifies that any in forma pauperis appeal from
3 this order would not be taken "in good faith" pursuant to 28 U.S.C. § 1915(a)(3).

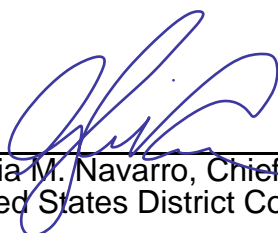
4 It is further ordered that the Clerk of the Court close this case and enter judgment
5 accordingly.

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7 DATED THIS 19 day of December 2018.

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Gloria M. Navarro, Chief Judge
United States District Court

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