

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 Howard J. Ernest,

4 Plaintiff,

5 v.

6 State of Nevada,

7 Defendants.

Case No.: 2:18-cv-1100-APG-CWH

SCREENING ORDER

8 Plaintiff Howard Ernest is a prisoner in the custody of the Nevada Department of
9 Corrections (“NDOC”). He has submitted a civil rights complaint under 42 U.S.C. § 1983 and
10 has filed an application to proceed *in forma pauperis*.¹ ECF No. 1, 1-1. I now screen the civil
11 rights complaint under 28 U.S.C. § 1915A.

12 **I. SCREENING STANDARD**

13 Federal courts must conduct a preliminary screening in any case in which a prisoner
14 seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28
15 U.S.C. § 1915A(a). The court must identify any cognizable claims and dismiss any claims that
16 are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary
17 relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). *Pro*
18 *se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d
19 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
20 essential elements: (1) the violation of a right secured by the Constitution or laws of the United
21 States, and (2) that the alleged violation was committed by a person acting under color of state
22 law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

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¹ I will dismiss as moot the application to proceed *in forma pauperis* (ECF No. 1).

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

12 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
13 *Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim
14 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim
15 that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999).
16 In making this determination, the court takes as true all allegations of material fact stated in the
17 complaint and construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma*
18 *Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less
19 stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9
20 (1980). While the standard under Rule 12(b)(6) does not require detailed factual allegations, a
21 plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,
22 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
23 insufficient. *Id.*

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

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

15 **II. SCREENING OF COMPLAINT**

16 Ernest sues multiple defendants for events that took place while he was incarcerated by
17 the NDOC. ECF No. 1-1 at 1-3. He sues the State of Nevada, the Nevada Department of
18 Corrections, the Offender Management Division, Warden Brian Williams, and James Dzurenda.
19 *Id.* Ernest alleges five counts and seeks monetary damages. *Id.* at 8,11.

20 Ernest’s five counts are based on five different convictions and sentences. *Id.* at 4-8. For
21 each sentence, Ernest alleges that the Nevada Department of Corrections did not apply NRS
22 § 209.4465(7)(b) to his minimum term. *Id.* Section 209.4465(7)(b) concerns the application of
23 statutory credits to determine the date when a person becomes eligible for parole. For each

1 sentence, Ernest alleges that the failure to apply NRS § 209.4465(7)(b) directly caused him to be
2 in prison longer. *Id.* He alleges this violated his rights to due process and equal protection. *Id.*

3 Because Ernest alleges no facts to indicate that the Equal Protection Clause applies, I
4 construe his claims as Fourteenth Amendment due process claims only.

5 **A. Heck Bar**

6 First I must determine if Ernest’s claim is barred by *Heck v. Humphrey*, 512 U.S. 477
7 (1994). In *Heck*, the Supreme Court held that “in order to recover damages for [an] allegedly
8 unconstitutional conviction or imprisonment, or for other harm caused by actions whose
9 unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that
10 the conviction or sentence has been reversed on direct appeal, expunged by executive order,
11 declared invalid by a state tribunal authorized to make such determination, or called into
12 question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.” *Id.* at 486-
13 87. “A claim for damages bearing that relationship to a conviction or sentence that has not been .
14 . . invalidated is not cognizable under § 1983.” *Id.* at 487. Thus, when a state prisoner seeks
15 damages in a § 1983 suit, the district court must consider whether a judgment in favor of the
16 plaintiff would necessarily imply the invalidity of the duration of his confinement; if it would,
17 the complaint must be dismissed unless the plaintiff can demonstrate that the period of
18 confinement has already been invalidated. *Id.* A prisoner usually may not use § 1983 to
19 challenge the very fact or *duration* of confinement by seeking a determination that he was
20 entitled to a speedier release from imprisonment. *Thornton v. Brown*, 757 F.3d 834, 841 (9th Cir.
21 2013). However, a prisoner may use a § 1983 action to speed up *consideration* of an application
22 for parole consideration. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

1 It appears that Ernest is challenging the calculation of his parole eligibility date. NRS
2 § 209.4465(7)(b) determines the date that Ernest would be eligible for parole, not the date on
3 which a prisoner must be released on parole. If successful, Ernest's claim would affect the
4 proper calculation of the date upon which he would have been eligible for *consideration* for
5 parole, but would not necessarily affect the determination of the proper duration of his
6 confinement. Such a claim challenging the parole eligibility date would not be barred by *Heck*.

7 However, Ernest also appears to allege that the error in failing to apply NRS
8 § 209.4465(7)(b) directly caused him to be in prison longer. To the extent Ernest is challenging
9 the duration of his confinement in prison, such claims are barred because Ernest has not shown
10 that the duration of his confinement has been invalidated. I therefore dismiss without prejudice
11 any such claims.

12 **B. Due Process**

13 Standard due process analysis requires the existence of a liberty or property interest.
14 *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). When there is such a liberty interest or property
15 interest, the only other issue is whether the plaintiff was deprived of that interest without the
16 constitutionally required procedures. *Id.* at 219-20. A mere error of state law is not a denial of
17 due process. *Id.* at 216 (2011). Thus, an alleged error in properly applying the Nevada statute is
18 not sufficient to constitute a denial of due process. *See Young v. Williams*, No. 2:11-CV-01532-
19 KJD, 2012 WL 1984968, at *3 (D. Nev. June 4, 2012) (holding that alleged error in applying
20 good time credits to sentence was an error of state law that did not constitute a due process
21 violation).

22 In addition, Ernest's interest in parole cannot be the basis for a colorable due process
23 violation. There is no independent constitutional right to parole. *Swarthout v. Cooke*, 131 S. Ct.

1 859, 862 (2011). A state may create a liberty interest in parole, but the mere presence of a parole
2 system in a state does not give rise to a constitutionally protected liberty interest in parole. *Bd. of*
3 *Pardons v. Allen*, 482 U.S. 369, 373 (1987); *Moor v. Palmer*, 603 F.3d 658, 661 (9th Cir. 2010).
4 A state creates a liberty interest in parole only when its statutory parole provisions use
5 mandatory language creating a presumption that parole release will be granted and limits the
6 parole board’s discretion. *Allen*, 482 U.S. at 373-81. Nevada’s statutory parole scheme generally
7 does not use mandatory language and hence does not create a constitutionally cognizable liberty
8 interest in parole when the parole board is deciding whether to exercise its discretion to grant
9 parole. *Moor*, 603 F.3d at 661-62. Where there is no liberty interest in parole, there is no liberty
10 interest in parole eligibility. *Fernandez v. Nevada*, No. 3:06-CV-00628-LRH-RA, 2009 WL
11 700662, at *10 (D. Nev. Mar. 13, 2009).

12 Furthermore, a state law affecting a parole eligibility date also cannot create a liberty
13 interest as it does not inevitably affect the duration of confinement. *See Sandin v. Conner*, 515
14 U.S. 472, 484, 487 (1995) (holding that, even when a state statute uses mandatory language, a
15 state can create a liberty interest that invokes procedural protections under the Due Process
16 Clause only if the state’s action “will inevitably affect the duration of his sentence” or if there are
17 prison conditions that impose “atypical and significant hardship on the inmate in relation to the
18 ordinary incidents of prison life”).

19 Ernest does not and cannot adequately allege a liberty interest and therefore Ernest does
20 not and cannot state a due process claim. Accordingly, the due process claims are dismissed
21 with prejudice, as amendment would be futile.

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1 **III. CONCLUSION**

2 IT IS ORDERED that the Clerk of the Court shall file the complaint (ECF No. 1-1).

3 IT IS FURTHER ORDERED that, to the extent Ernest is challenging the duration of his
4 time in prison, such claims are dismissed without prejudice and without leave to amend.

5 IT IS FURTHER ORDERED that Counts I through V, alleging due process claims based
6 on allegedly incorrect calculations of Ernest's parole eligibility date, are dismissed with
7 prejudice, as amendment would be futile.

8 IT IS FURTHER ORDERED that the application to proceed *in forma pauperis* (ECF No.
9 1) is denied as moot.

10 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment
11 accordingly and close this case.

12 Dated: April 22, 2019.

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16 ANDREW P. GORDON
17 UNITED STATES DISTRICT JUDGE
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