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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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VICTOR TAGLE,

Plaintiff,

v.

STATE OF NEVADA et al.,

Defendants.

Case No. 3:16-cv-00148-MMD-WGC

SCREENING ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis*. (ECF No. 1, 1-1.) The matter of the filing fee shall be temporarily deferred. The Court now screens Plaintiff’s civil rights complaint pursuant to 28 U.S.C. § 1915A.

**I. SCREENING STANDARD**

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

1 States, and (2) that the alleged violation was committed by a person acting under color  
2 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

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

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

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

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

## 17       **II.     SCREENING OF COMPLAINT**

18           In the complaint, Plaintiff sues multiple defendants for events that took place  
19 while Plaintiff was incarcerated at Ely State Prison (“ESP”). (ECF No. 1-1 at 1.) Plaintiff  
20 sues Defendants State of Nevada, NDOC Director E.K. McDaniels, Warden Renee  
21 Baker, Guard C. Rowly, and Guard Caldwell. (*Id.* at 8.) Plaintiff appears to allege one  
22 count and seeks monetary damages. (*Id.* at 1-6, 8.)

23           The complaint alleges the following: On March 3, 2016, prison officials told  
24 Plaintiff to get ready to go to a hospital in Ely for x-rays. (*Id.* at 1). Under Rowly’s orders,  
25 four CERT officers transported Plaintiff to the hospital. (*Id.*) Rowly had dragged Plaintiff  
26 through the hallways to the transport van. (*Id.* at 2). Plaintiff had been wearing a “box,”  
27 which had kept his hands and belly together, and shackles, which had caused Plaintiff  
28 difficulty in walking. (*Id.*)

1 Plaintiff went to the hospital. (*Id.* at 2-3.) On the way back to the transport van,  
2 the CERT officers had dragged and pushed Plaintiff. (*Id.* at 3). Rowly and Caldwell each  
3 had one of Plaintiff's arms in their hands. (*Id.*) When Rowly opened the double-sided  
4 cargo door, he pushed Plaintiff forward and hit Plaintiff with the other door "really hard  
5 [on] the face and forearm." (*Id.*) Plaintiff had asked Rowly why he had done that and  
6 Rowly responded, "Fuck you." (*Id.*) Rowly then picked Plaintiff up from the "box" and  
7 threw Plaintiff into the second back seat. (*Id.*) While Plaintiff was on his belly on the  
8 seat, Rowly hit Plaintiff in the head three or four times and held a gun to Plaintiff's ribs.  
9 (*Id.*) Caldwell had held a gun at Plaintiff's head and had told Plaintiff to move so that he  
10 could shoot Plaintiff. (*Id.*) After Rowly stopped hitting Plaintiff in the head, both officers  
11 moved away and closed the doors. (*Id.*)

12 Those officers had verbally abused Plaintiff on the way back to ESP. (*Id.*) Rowly  
13 had told Plaintiff, "Once we get to ESP, I'll remove the chains from you and I'll beat the  
14 shit out of you." (*Id.*) Plaintiff had asked Rowly what his problem was. (*Id.* at 4.) Caldwell  
15 responded, "The fucking reason we're doing it is because you're the biggest piece of  
16 shit in the whole world. You raped your 5-year-old daughter." (*Id.*) Plaintiff replied, "What  
17 the hell are you talking about?" and Rowley responded, "Yeah! That's the reason you  
18 piece of shit." (*Id.*) Plaintiff told them to "get informed" before they did their "stupidities."  
19 (*Id.*)

20 When they returned to ESP, Rowly had dragged Plaintiff again and had made  
21 Plaintiff's ankles sore to the point where he could not walk. (*Id.*) Rowly had told Plaintiff  
22 that he was going to remove Plaintiff's handcuffs and shackles and had warned Plaintiff  
23 that if he moved, Plaintiff would be sorry. (*Id.*) After Rowly had removed Plaintiff's  
24 chains, he told Plaintiff to undress and asked Plaintiff, "So, you want to fight me now?"  
25 (*Id.*) Plaintiff responded, "You're brave, 8 guards and you have the taser gun on your  
26 hands." (*Id.*) Rowly then kicked Plaintiff "really hard" on the ankles until another CERT  
27 officer told Rowly to stop. (*Id.*)

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1 Rowly had ordered Plaintiff to “bend over, spread [his] cheeks, and cough.” (*Id.* at  
2 5.) Plaintiff complied and Rowly ordered Plaintiff to “do it again and again” for over 12  
3 times. (*Id.*) Rowly had ordered Plaintiff to get dressed. (*Id.*) Plaintiff told Rowly,  
4 “[B]esides the physical abuse, you’re sexually harassing me.” (*Id.*) When Plaintiff bent  
5 over to grab his clothes, Rowly kicked Plaintiff “really hard” on Plaintiff’s forearm. (*Id.*)

6 After Plaintiff had dressed, Rowly followed Plaintiff to Unit 2B. (*Id.*) At Unit 2B,  
7 Caldwell told the officer in the bubble that Plaintiff had “snapped at [the officers], back at  
8 the hospital.” (*Id.*) The bubble officer said, “You must have done something to him.” (*Id.*)  
9 Caldwell replied, “No, we did not.” (*Id.*) The bubble officer asked if Plaintiff would be all  
10 right. (*Id.*) Caldwell asked Plaintiff if he would be all right and Plaintiff replied, “As long  
11 [as] you don’t hit me again in the face with the door, I’ll be all right.” (*Id.*)

12 On March 11, 2016, prison officials told Plaintiff that he could see a medical  
13 provider. (*Id.* at 6.) Plaintiff had thought that he was going to see the provider for his  
14 throat. (*Id.*) However, when the doctor spoke to Plaintiff, he asked Plaintiff who had beat  
15 Plaintiff up and why had the doctor not been notified right away? (*Id.* at 6-7.) Plaintiff  
16 stated that he had reported the beating right away and did not know why the doctor had  
17 not been notified. (*Id.* at 7.) Plaintiff alleges assault and battery due to discrimination.  
18 (*Id.* at 8.)

19 The Court interprets Plaintiff’s allegations as claim for excessive force. When a  
20 prison official stands accused of using excessive physical force in violation of the cruel  
21 and unusual punishment clause of the Eighth Amendment, the question turns on  
22 whether force was applied in a good-faith effort to maintain or restore discipline, or  
23 maliciously and sadistically for the purpose of causing harm. *Hudson v. McMillian*, 503  
24 U.S. 1, 6-7 (1992) (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). In  
25 determining whether the use of force was wanton and unnecessary, it may also be  
26 proper to consider factors such as the need for application of force, the relationship  
27 between that need and the amount of force used, the threat reasonably perceived by  
28 the responsible officials, and any efforts made to temper the severity of a forceful

1 response. *Hudson*, 503 U.S. at 7. Although an inmate need not have suffered serious  
2 injury to bring an excessive force claim against a prison official, the Eighth  
3 Amendment's prohibition on cruel and unusual punishments necessarily excludes from  
4 constitutional recognition *de minimis* uses of physical force. *Id.* at 9-10.

5 The Court finds that Plaintiff states a colorable claim for excessive force against  
6 Defendant Rowly. Based on the allegations, Rowly had dragged Plaintiff to the point  
7 where he could not walk, had thrown Plaintiff into a van door, and had hit Plaintiff over  
8 the head multiple times for, what appears to be, the purpose of maliciously and  
9 sadistically causing harm. The Court finds that Plaintiff fails to state a colorable claim  
10 against Caldwell. Based on the allegations, it does not appear that Caldwell had used  
11 any force against Plaintiff for the purpose of maliciously and sadistically causing harm.  
12 As such, the Court dismisses Defendant Caldwell from the case, with prejudice, as  
13 amendment would be futile. Additionally, the Court dismisses Defendants McDaniels  
14 and Baker from this case, without prejudice, because there are no allegations against  
15 them in the complaint. The Court also dismisses Defendant State of Nevada, with  
16 prejudice, from this case, as amendment would be futile. *See Will v. Michigan Dep't of*  
17 *State Police*, 491 U.S. 58, 65 (1989) (holding that states are not persons for purposes of  
18 § 1983).

### 19 **III. CONCLUSION**

20 For the foregoing reasons, it is ordered that a decision on the application to  
21 proceed *in forma pauperis* (ECF No. 1) is deferred.

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

23 It is further ordered that the excessive force claim will proceed against Defendant  
24 Rowly.

25 It is further ordered that Defendants State of Nevada and Caldwell are dismissed,  
26 with prejudice, from the case, as amendment would be futile.

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1           It is further ordered that Defendants McDaniels and Baker are dismissed, without  
2 prejudice, from the case because there are no allegations against them in the  
3 complaint.

4           It is further ordered that given the nature of the claim(s) that the Court has  
5 permitted to proceed, this action is stayed for ninety (90) days to allow Plaintiff and  
6 Defendant(s) an opportunity to settle their dispute before the \$350.00 filing fee is paid,  
7 an answer is filed, or the discovery process begins. During this ninety-day stay period,  
8 no other pleadings or papers shall be filed in this case, and the parties shall not engage  
9 in any discovery. The Court will refer this case to the Court's Inmate Early Mediation  
10 Program, and the Court will enter a subsequent order. Regardless, on or before ninety  
11 (90) days from the date this order is entered, the Office of the Attorney General shall file  
12 the report form attached to this order regarding the results of the 90-day stay, even if a  
13 stipulation for dismissal is entered prior to the end of the 90-day stay. If the parties  
14 proceed with this action, the Court will then issue an order setting a date for Defendants  
15 to file an answer or other response. Following the filing of an answer, the Court will  
16 issue a scheduling order setting discovery and dispositive motion deadlines.

17           It is further ordered that "settlement" may or may not include payment of money  
18 damages. It also may or may not include an agreement to resolve Plaintiff's issues  
19 differently. A compromise agreement is one in which neither party is completely  
20 satisfied with the result, but both have given something up and both have obtained  
21 something in return.

22           It is further ordered that if the case does not settle, Plaintiff will be required to pay  
23 the full \$350.00 filing fee. This fee cannot be waived. If Plaintiff is allowed to proceed *in*  
24 *forma pauperis*, the fee will be paid in installments from his prison trust account. 28  
25 U.S.C. § 1915(b). If Plaintiff is not allowed to proceed *in forma pauperis*, the \$350.00  
26 will be due immediately.


27           It is further ordered that if any party seeks to have this case excluded from the  
28 inmate mediation program, that party shall file a "motion to exclude case from

1 mediation” on or before twenty-one (21) days from the date of this order. The  
2 responding party shall have seven (7) days to file a response. No reply shall be filed.  
3 Thereafter, the Court will issue an order, set the matter for hearing, or both.

4 It is further ordered that the Clerk of the Court electronically serve a copy of this  
5 order and a copy of Plaintiff’s complaint on the Office of the Attorney General of the  
6 State of Nevada, attention Kat Howe.

7 It is further ordered that the Attorney General’s Office advise the Court within  
8 twenty-one (21) days of the date of the entry of this order whether it will enter a limited  
9 notice of appearance on behalf of Defendants for the purpose of settlement. No  
10 defenses or objections, including lack of service, shall be waived as a result of the filing  
11 of the limited notice of appearance.

12 DATED THIS 17<sup>th</sup> day of October 2016.

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16 MIRANDA M. DU  
17 UNITED STATES DISTRICT JUDGE  
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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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VICTOR TAGLE,  
  
v.  
  
STATE OF NEVADA, *et al.*,  
  
Plaintiff,  
  
Defendants.

Case No. 3:16-cv-00148-MMD-WGC  
  
REPORT OF THE OFFICE OF THE  
ATTORNEY GENERAL RE RESULTS OF  
THE 90-DAY STAY

**NOTE: ONLY THE OFFICE OF THE ATTORNEY GENERAL SHALL FILE THIS FORM. THE INMATE PLAINTIFF SHALL NOT FILE THIS FORM.**

On \_\_\_\_\_ [*the date of the issuance of the screening order*], the Court issued its screening order stating that it had conducted its screening pursuant to 28 U.S.C. § 1915A, and that certain specified claims in this case would proceed. The Court ordered the Office of the Attorney General of the State of Nevada to file a report ninety (90) days after the date of the entry of the Court's screening order to indicate the status of the case at the end of the 90-day stay. By filing this form, the Office of the Attorney General hereby complies.

**REPORT FORM**

[Identify which of the following two situations (identified in bold type) describes the case, and follow the instructions corresponding to the proper statement.]

**Situation One: Mediated Case: The case was assigned to mediation by a court-appointed mediator during the 90-day stay.** [If this statement is accurate, check **ONE** of the six statements below and fill in any additional information as required, then proceed to the signature block.]

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\_\_\_\_\_ A mediation session with a court-appointed mediator was held on \_\_\_\_\_ [enter date], and as of this date, the parties have reached a settlement, even if paperwork to memorialize the settlement remains to be completed. (If this box is checked, the parties are on notice that they must SEPARATELY file either a contemporaneous stipulation of dismissal or a motion requesting that the Court continue the stay in the case until a specified date upon which they will file a stipulation of dismissal.)

\_\_\_\_\_ A mediation session with a court-appointed mediator was held on \_\_\_\_\_ [enter date], and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

\_\_\_\_\_ No mediation session with a court-appointed mediator was held during the 90-day stay, but the parties have nevertheless settled the case. (If this box is checked, the parties are on notice that they must SEPARATELY file a contemporaneous stipulation of dismissal or a motion requesting that the Court continue the stay in this case until a specified date upon which they will file a stipulation of dismissal.)

\_\_\_\_\_ No mediation session with a court-appointed mediator was held during the 90-day stay, but one is currently scheduled for \_\_\_\_\_ [enter date].

\_\_\_\_\_ No mediation session with a court-appointed mediator was held during the 90-day stay, and as of this date, no date certain has been scheduled for such a session.

\_\_\_\_\_ None of the above five statements describes the status of this case. Contemporaneously with the filing of this report, the Office of the Attorney General of the State of Nevada is filing a separate document detailing the status of this case.

\* \* \* \* \*

**Situation Two: Informal Settlement Discussions Case: The case was NOT assigned to mediation with a court-appointed mediator during the 90-day stay; rather, the parties were encouraged to engage in informal settlement negotiations.** [If this statement is accurate, check **ONE** of the four statements below and fill in any additional information as required, then proceed to the signature block.]

\_\_\_\_\_ The parties engaged in settlement discussions and as of this date, the parties have reached a settlement, even if the paperwork to memorialize the settlement remains to be completed. (If this box is checked, the parties are on notice that they must SEPARATELY file either a contemporaneous stipulation of dismissal or a motion requesting that the Court continue the stay in this case until a specified date upon which they will file a stipulation of dismissal.)

\_\_\_\_\_ The parties engaged in settlement discussions and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

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\_\_\_\_\_ The parties have not engaged in settlement discussions and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

\_\_\_\_\_ None of the above three statements fully describes the status of this case. Contemporaneously with the filing of this report, the Office of the Attorney General of the State of Nevada is filing a separate document detailing the status of this case.

Submitted this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by:

Attorney Name: \_\_\_\_\_  
Print Signature

Address: \_\_\_\_\_ Phone: \_\_\_\_\_  
\_\_\_\_\_ Email: \_\_\_\_\_