APPENDICE — A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 18 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ENOMA IGBINOVIA,

Plaintiff-Appellant,

v.

JAMES GREG COX; et al.,

Defendants-Appellees.

No. 18-16580

D.C. No.
3:16-cv-00497-MMD-VPC
District of Nevada,
Reno

ORDER

Before: LEAVY, BYBEE, and HURWITZ, Circuit Judges.

Upon a review of the record and the responses to the court's October 4, 2018 order, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 2, 3), *see* 28 U.S.C. § 1915(a), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

All other pending motions are denied as moot.

DISMISSED.

APPENDICE – A

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APPENDICE — B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ENOMA IGBINOVIA, Petitioner, v. STATE OF NEVADA ex rel NEVADA DEPARTMENT OF CORRECTIONS, *et al.*, Respondents.	Case No. 3:16-cv-00497-MMD-VPC ORDER ACCEPTING AND ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE VALERIE P. COOKE

Before the Court is the Report and Recommendation of United States Magistrate Judge Valerie P. Cooke (EDF No. 141) ("R&R") relating to three pending motions: Defendants' motion to dismiss ("Defendants' MTD") (ECF No. 64); Defendants' motion for summary judgment ("Defendants' MSJ") (ECF No. 65); and Plaintiff's cross-motion for summary judgment ("Plaintiff's Motion") (ECF No. 114).[1] Judge Cooke recommends granting Defendants' MSJ, denying Plaintiff's Motion, and denying Defendants' MTD as moot. (ECF No. 141.) Plaintiff had fourteen (14) days or until August 7, 2018, to file an objection. (*Id.*) To date, no objection to the R&R has been filed.

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party timely objects to a magistrate judge's report and recommendation, then the Court is

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[1]Plaintiff also filed a motion to offer as an exhibit a copy of the receipt dated May 31, 2018, showing that he mailed his reply brief before the deadline. (ECF No. 138.) Plaintiff's motion (ECF No. 138) is granted. While Plaintiff's reply was field a day late, the Court did consider his reply.

APPENDICE – B

required to "make a *de novo* determination of those portions of the [report and recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). Where a party fails to object, however, the Court is not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Indeed, the Ninth Circuit has recognized that a district court is not required to review a magistrate judge's report and recommendation where no objections have been filed. *See United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review employed by the district court when reviewing a report and recommendation to which no objections were made); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (reading the Ninth Circuit's decision in *Reyna-Tapia* as adopting the view that district courts are not required to review "any issue that is not the subject of an objection."). Thus, if there is no objection to a magistrate judge's recommendation, then the Court may accept the recommendation without review. *See, e.g., id.* at 1226 (accepting, without review, a magistrate judge's recommendation to which no objection was filed).

Nevertheless, this Court finds it appropriate to engage in a *de novo* review to determine whether to adopt Judge Cooke's R&R. Judge Cooke recommends granting Defendants' MSJ, finding that the two-year statute of limitations on section 1983 claims bars all five (5) claims that survived screening. (ECF No. 141.) Having reviewed the R&R and underlying briefs, this Court agrees with Judge Cooke and finds good cause to adopt the R&R in full.

It is therefore ordered, adjudged and decreed that the Report and Recommendation of Magistrate Judge Valerie P. Cooke (ECF No. 141) is accepted and adopted in its entirety.

It is further ordered that Plaintiff's motion to file supplement (ECF No. 138) is granted.

It is further ordered that Defendants' motion to dismiss (ECF No. 64) is denied as moot.

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It is further ordered that Defendants' motion for summary judgment (ECF No. 65) is granted.

It is further ordered that Plaintiff's cross-motion for summary judgment (ECF No. 114) is denied.

The Clerk is instructed to enter judgment in accordance with this Order and close this case.

DATED THIS 13th day of August 2018.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

AO450 (NVD Rev. 2/18) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ENOMA IGBINOVIA,

Petitioner,

v.

STATE OF NEVADA ex rel NEVADA DEPARMENT OF CORRECTIONS, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Case Number: **3:16-cv-00497-MMD-VPC**

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' motion for summary judgment (ECF No. 65) is granted.

IT IS FURTHER ORDERED that Plaintiff's cross-motion for summary judgment (ECF No. 114) is denied.

Date: August 13, 2018

DEBRA K. KEMPI
Clerk

/s/ D. R. Morgan
Deputy Clerk

APPENDICE — C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ENOMA IGBINOVIA,

Plaintiff,

v.

STATE OF NEVADA, *et al.*,

Defendants.

3:16-cv-00497-MMD-VPC

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment (ECF No. 65). Plaintiff opposed (ECF No. 113), and defendants replied (ECF No. 119). Plaintiff's cross-motion for summary judgment (ECF No. 114) and defendants' motion to dismiss (ECF No. 64) is also before the court. For the reasons stated below, the court recommends that the motion for summary judgment (ECF No. 65) be granted, and that plaintiff's cross-motion for summary judgment (ECF No. 114) and defendants' motion to dismiss (ECF No. 65) be denied as moot.

I. PROCEDURAL BACKGROUND

Enoma Igbinovia ("plaintiff") is an inmate in the custody of the Nevada Department of Corrections ("NDOC"). Presently, plaintiff is incarcerated at Southern Desert Correctional Center in Indian Springs, Nevada, but the alleged events underlying his claims occurred while he was incarcerated at Ely State Prison ("ESP") in Carson City, Nevada. Proceeding *pro se*, plaintiff brings civil rights clams under 42 U.S.C. § 1983 against several NDOC and ESP officials.

While the factual underpinnings of plaintiff's claims are heavily disputed, plaintiff's claims generally arise from his allegations that defendants' indefinitely classified him as a high risk potential ("HRP") status on the basis of false and fabricated evidence, indefinitely confined him in solitary confinement, never allowed plaintiff to be present at due process hearings on his classification, and refused to answer plaintiff's grievances and kites regarding his HRP status.

APPENDICE - C

(ECF No. 1-2; *see also* ECF No. 65 at 2.) Plaintiff sues NDOC Deputy Director James G. Cox ("Cox"), NDOC Inspector General Dave Molnar ("Molnar"), NDOC Inspector General Harry Churchward ("Churchward"), Warden Eldon K. McDaniels ("McDaniels"), Associate Warden Deborah Brooks ("Brooks"), Associate Warden Renee Baker ("Baker"), Senior Caseworker Claude Willis ("Willis"), Caseworker Michael Oxborrow ("Oxborrow"), Sergeant Robert Huston ("Huston"), Nurse Practitioner Greg Martin ("Martin"), Dr. Michael B. Koehn ("Koehn"), Nurse Gloria Carpenter ("Carpenter"), and Health Information Coordinator Cheryl Magnum ("Magnum"). (ECF No. 1-2 at 2-3.) Plaintiff seeks monetary damages, declaratory relief, and injunctive relief. (*Id.* at 9.)

Plaintiff filed his complaint on June 28, 2016. (ECF No. 1-2.). On June 22, 2017, the District Court entered a screening order pursuant to 28 U.S.C. § 1915, and found that plaintiff stated five cognizable claims for relief: (1) a retaliation claim; (2) a due process claim relating to plaintiff's transfer to administrative segregation; (3) a cruel and unusual punishment claim; (4) a due process claim relating to plaintiff's disciplinary hearings in 2010; and, (5) a denial of access to the grievance process claim. (ECF No. 25.). Plaintiff brings his claims against all defendants, with the exception of his due process claim relating to his disciplinary hearing, which is brought only against Huston and Churchward. (*Id.* at 11-12, 16.)

The court permitted plaintiff to proceed based on the following allegations. (*Id.*) Beginning in September 2009, Molnar and Churchward investigated the Aryan Warriors prison gang regarding the possession of contraband cellphones at ESP. (ECF No. 1-2 at 9.) On September 22, 2009, Plaintiff had an interview with Molnar and Churchward. At that interview, Plaintiff threatened to file grievances and sue Molnar after Plaintiff found out that Molnar had placed plaintiff's safety in jeopardy by naming him as a witness against the Aryan Warriors. Based on the allegations, both Molnar and Churchward threatened to put Plaintiff into indefinite "HRP supermax status[1]" if he did not give them information about the Aryan Warriors. When Plaintiff did not provide them with information, prison officials followed through with their threat and designated plaintiff as HRP.

[1] "HRP" is an acronym for High Risk Potential. (ECF No. 65 at 2; ECF No. 113 Exh. 2 at 8.)

(*Id.* at 29.) The court permitted plaintiff to proceed on a retaliation claim against all defendants because plaintiff's allegations suggested that the defendants acted in concert to fabricate evidence and charges against Plaintiff in retaliation for his threats to sue Molnar and failure to assist the investigation of prison contraband. (ECF No. 25 at 9.)

On September 22, 2009, plaintiff was placed in administrative segregation. (ECF No. 113 Exh. 2 at 8.) Plaintiff alleges that prison officials never provided plaintiff with the reason for his administrative segregation and never gave plaintiff an opportunity to contest the administrative segregation designation. Moreover, defendants collectively created false evidence to move plaintiff into administrative segregation and keep him there. (*Id.* at 18-20.) In particular, Oxborrow created a false case note entry stating that he provided plaintiff with a full classification hearing and notified him that he was placed in administrative segregation "due to a pending investigation." (ECF No. 113 Exh. 2 at 8.) Plaintiff's prison records also indicate that he received administrative segregation review hearings in January 2010, February 2010, March 2010, and June 2010. (ECF No. 1-2 at 18; ECF No. 113 Exh. 2 at 8.) Plaintiff was not present at the full classification hearing nor the administrative segregation review hearings. (ECF No. 1-2 at 18.) The court found that plaintiff had properly stated that defendants' collective actions caused plaintiff to be placed in administrative segregation without providing him due process of law, in violation of the Fourteenth Amendment. (ECF No. 25 at 10-11.)

Plaintiff was officially designated as HRP supermax status on September 23, 2009 (ECF No. 1-2 at 5-6), where he remained until March 6, 2015 (ECF No. 65 Exh. A). He explains that "indefinite HRP supermax status" entails both an HRP status classification and indefinite solitary confinement. (ECF No. 1-2 at 14-15, 17.) Because plaintiff was imprisoned in solitary confinement solely on the basis of defendants allegedly fabricated evidence, the court permitted plaintiff to proceed on an Eighth Amendment cruel and unusual punishment claim. (ECF No. 25 at 12.)

In February 2010, Churchward charged plaintiff with MJ26 possession of prison contraband—a cellphone—and MJ47 attempted escape. (*Id.* at 51.) The MJ26 charge was based

on Churchward's allegations that plaintiff admitted to having access to a cellphone and that investigators searched a cellphone confiscated from another inmate and found phone numbers from plaintiff's family. (*Id.*; ECF No. 113 Exh. 1 at 1.) The MJ47 charge was based on an incomplete letter confiscated from plaintiff's cell, which Churchward alleged referenced "code" and "practiced script" constituting upcoming escape attempt. (ECF No. 1-2 at 51.) Plaintiff asserts that the confession and the phone records were fabricated, and that his cellmate confessed to writing the letter in an interview with Churchward. (*Id.* at 57.) On March 5 and 12, 2010 Huston conducted disciplinary hearings on the MJ26 and MJ47 charges. Huston did not permit plaintiff to speak at the disciplinary hearings. Huston found plaintiff guilty of the MJ26 charge based on Churchward's allegedly fabricated testimony that plaintiff had admitted to possessing a cellphone. (*Id.* at 52.) However, Huston dismissed plaintiff's MJ47 charge because he could not confirm that the handwriting in the letter belonged to plaintiff. (*Id.*; ECF No. 113 Exh. 24 at 3.) The court permitted plaintiff to proceed on a Fourteenth Amendment due process claim against Huston and Churchward. (ECF No. 25 at 12.)

Finally, plaintiff alleges that he filed numerous grievances regarding the reason he was placed on HRP supermax status. Prison officials either completely ignored grievances, or did not directly respond. For example, plaintiff asserts that he was frequently told he was placed on HRP status for safety and security concerns without any further explanation. (ECF No. 1-2 at 13.) As such, the court found that plaintiff stated a colorable claim for denial of access to the grievance process. (ECF No. 25 at 13.)

Defendants now move to dismiss the complaint on the grounds that plaintiff's claims are barred by the doctrines of claim preclusion and issue preclusion. (ECF No. 64.) Additionally, defendants move for summary judgment on the basis that plaintiff's claims are barred by the statute of limitations. Plaintiff opposed both motions (ECF Nos. 81 & 113) and defendants replied (ECF Nos. 83 & 119). Finally, plaintiff moves for summary judgment (ECF No. 114) on the basis of undisputed evidence, which defendants oppose (ECF No. 131) and to which plaintiff replied (ECF No. 137). The court's recommendation follows.

II. LEGAL STANDARDS

B. Motion for Summary Judgment

Summary judgment allows the court to avoid unnecessary trials, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994), and is appropriately granted when the record demonstrates that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute is "genuine" only where a reasonable jury could find for the nonmoving party. *Id.* Conclusory statements, speculative opinions, pleading allegations, or other assertions uncorroborated by facts are insufficient to establish a genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996). At this stage, the court's role is to verify that reasonable minds could differ when interpreting the record; the court does not weigh the evidence or determine its truth. *Schmidt v. Contra Costa Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Nw. Motorcycle Ass'n*, 18 F.3d at 1472.

Summary judgment proceeds in burden-shifting steps. A moving party who does not bear the burden of proof at trial "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element" to support its case. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the moving party must demonstrate, on the basis of authenticated evidence, that the record forecloses the possibility of a reasonable jury finding in favor of the nonmoving party as to disputed material facts. *Celotex*, 477 U.S. at 323; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). The court views all evidence and any inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014).

Where the moving party meets its burden, the burden shifts to the nonmoving party to "designate specific facts demonstrating the existence of genuine issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "This burden is not a light one," and requires the nonmoving party to "show more than the mere existence of a scintilla of evidence. . . . In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *Id.* (internal citations and quotations omitted). The nonmoving party may defeat the summary judgment motion only by setting forth specific facts that illustrate a genuine dispute requiring a factfinder's resolution. *Liberty Lobby*, 477 U.S. at 248; *Celotex*, 477 U.S. at 324. The Ninth Circuit follows a "policy of liberal construction in favor of *pro se* litigants." *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998). Accordingly, for purposes of opposing summary judgment, a reviewing court will consider as evidence the allegations a *pro se* litigant offers in motions and pleadings, where the allegations are based on personal knowledge and set forth facts that would be admissible into evidence, and where the litigant attested under penalty of perjury that they are true and correct. *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004). Nevertheless, mere assertions, pleading allegations, and "metaphysical doubt as to the material facts" will not defeat a properly-supported and meritorious summary judgment motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

III. DISCUSSION

Defendants argue that the complaint is barred by the statute of limitations because it is based upon events that occurred in 2010 and 2011. (ECF No. 65.) Plaintiff counters that he was not in possession of the facts underlying each of his five claims until June 18, 2015. Plaintiff's claims are discussed in turn.

A. Statute of Limitations Standard

42 U.S.C. § 1983 does not contain a statute of limitations. Instead, federal courts apply the forum state's statute of limitations for personal injury claims. *Comm. Concerning Cmty. Improvement v. City of Modesto*, 853 F.3d 690, 701 n.3 (9th Cir. 2009). Thus, in Nevada, the statute of limitations for a § 1983 claim is two years. Nev. Rev. Stat. § 11.190(4)(e); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 895 (9th Cir. 2014). However, federal law determines when a

section 1983 action accrues. *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153-54 (9th Cir. 2000). The cause of action accrues and the statute of limitations begins to run "when the plaintiff knows or has reason to know" of the injury that is the basis for the § 1983 claim. *Canatella v. Van De Kamp*, 486 F.3d 1128, 1133 (9th Cir. 2007) (). A plaintiff need not know *all* the facts surrounding an incident for a cause of action to accrue. Rather, the statute of limitations "begins to run once a plaintiff has knowledge of the 'critical facts' of his injury, which are 'that he has been hurt and who has inflicted the injury.'" *Bibeau v. Pac. NW Research Found. Inc.*, 188 F.3d 1105, 1108 (9th Cir. 1999) (quoting *United States v. Kubrick*, 444 U.S. 111, 122 (1979)). Even "a plaintiff who did not actually know that his rights were violated will be barred from bringing his claim after the running of the statute of limitations, if he should have known in the exercise of due diligence." *Bibeau*, 188 F.3d at 1108.

B. Retaliation Claim

Plaintiff's retaliation claim is based on his allegations that defendants falsely placed plaintiff in "indefinite HRP supermax status" in retaliation for threatening to sue Molnar and refusing to provide information for an ongoing investigation. (ECF No. 25 at 9-10.) Prison inmates have a First Amendment right to file grievances and lawsuits against prison officials and "be free from retaliation for doing so." *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). There are five basic elements for a viable claim of First Amendment retaliation in the prison context: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). Because claims of retaliation are easy for inmates to allege, courts examine such claims with skepticism to avoid interfering too much with prison operations. *See Canell v. Multnomah County*, 141 F. Supp. 2d 1046, 1059 (D. Or. 2001) (quoting *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994).

Defendants contend that plaintiff admitted to learning of the allegedly false and retaliatory status change in an opposing brief filed on November 14, 2011, in a related case brought by

plaintiff, *Igbinovia v. Churchward*, 3:11-cv-00079. (ECF No. 65 at 3 (citing ECF No. 1-2 at 24-25)). Plaintiff responds that the opposing brief apprised him only of "defendants' reason/evidence used as basis to designate plaintiff into HRP status ...." (ECF No. 113 at 25.) He "was not aware of the facts ... used as [the] basis for his HRP status placement because at the time of defendants' admission on 11/14/11 they continue[d] to fraudulently conceal the facts...." (*Id.*)

Instead, plaintiff insists that he was not aware defendants' actions were retaliatory until June 18, 2015, when plaintiff reviewed a copy of his medical record "I-Files" for the first time and found that prison officials had fabricated a particular piece of evidence. (ECF No. 113 at 12, 26-27.) Plaintiff's theory is convoluted, but he appears to argue that defendants created a "false classification casenote[sic] entry" stating that, on September 1, 2009, he "was approved to have a medical x-ray done at Ely hospital," which required him to be transferred outside of ESP. (ECF No 1-2 at 4; ECF No. 113 at 5, 13, 25-27.) Looking to the complaint, this allegedly fabricated entry of approval caused prison officials to "designate[] [plaintiff] into the indefinite HRP supermax status for a mock escape attempt investigation." (ECF No. 1-2 at 4.) The court notes that it is unclear *how* the fabricated entry caused plaintiff's status change. (*See* ECF No. 1-2 at 4.) Defendants maintain that no connection exists.[2] (ECF No. 65 at 3 n.5.)

Without inspecting the soundness of plaintiff's argument, the court finds that the information provided in case number 3:11-cv-79 provided plaintiff with sufficient notice of the harm underlying his retaliation claim well before he discovered the allegedly fabricated x-ray approval. Specifically, plaintiff was served with an opposition to his cross-motion for summary judgment on March 14, 2011. (ECF No. 113 Exh. 4 at 30.) The opposition brief puts plaintiff on notice that he was official classified HRP because he "claimed that he did it and had no excuse, but was forced to buy minutes for a cell phone," and that was deemed a "substantial risk to the institution." (*Id.* at 5.) Additionally, attached to the opposition brief was a copy of plaintiff's "case

[2] Defendants' evidence overwhelmingly shows that plaintiff's HRP was based on a pending investigation into contraband cellphones at the prison (ECF No. 65 Exh. B, C, E), and attach the relevant prison regulations to show that inmates are not subject to a full classification hearing, much less a status change, when they are transferred from a prison to a hospital. (ECF No. 65 at 3 n.5) (citing Exh. D, 521.01(2)(H)).

note printout report," which contained an entry stating that on September 23, 2009, plaintiff was designated HRP due to his confession to possessing a contraband cellphone and "his presenting a substantial safety risk to the institution." (ECF No. 11 Exh. 2.)

While plaintiff claims in his opposition that he never admitted to possessing a contraband cellphone, his receipt of the case note printout and other evidence basing his status change on this admission necessarily provided plaintiff with notice that defendants retaliated against him. Plaintiff claims that Molnar threatened to place plaintiff in HRP supermax status if he did not provide information for an ongoing investigation. As such, plaintiff could infer from defendant's records that defendants fabricated plaintiff's admission, and perhaps the scope of their investigation, in order to place plaintiff into HRP supermax status to punish plaintiff for refusing to cooperate. Plaintiff should have been aware that his retaliation claim was actionable at this point. *Canatella*, 486 F.3d at 1133. Plaintiff provides no evidence on which a reasonable jury could find otherwise.

It is immaterial for limitations purposes whether defendants effected their retaliation in part by falsifying the "medical x-ray transfer approval case note." (*Id.* at 14.) The adverse action at the heart of plaintiff's retaliation claim is defendants' decision to place plaintiff in HRP supermax status, not their alleged evidence fabrication. (See ECF No. 25.) The evidence plaintiff received in case number 3:11-cv-00079 shows that defendants purported to base their decision to change plaintiff's status on his allegedly false confession to possessing a cellphone. (ECF No. 113 Exh. 2 at 8-9; Exh. 4 at 5.) This discovery should have alerted plaintiff that defendants' decision was not motivated by a legitimate correctional goal, but rather by retaliatory animus. After bringing a timely claim, plaintiff would have the opportunity to engaged in discovery to investigate what role, if any, the allegedly false transfer approval played in his status change. Nothing required plaintiff to conduct his own investigation into the authenticity of the medical approval case note, (*see* ECF No. 113 at 25), so a tolling of the statute of limitations on this basis is unwarranted.

Finally, plaintiff attempts to argue that his claim is not barred by the statute of limitations under the continuing violations doctrine. (ECF No. 113 at 27.) Under the continuing violations doctrine, the statute of limitations does not begin to run on a violation that is ongoing in nature until

the wrongful conduct comes to an end. *Flowers v. Carville*, 310 F.3d 1118, 1126 (9th Cir. 2002). However, "[t]he doctrine applies only where there is 'no single incident' that can 'fairly or realistically be identified as the cause of significant harm.'" *Id.* (internal quotation omitted).

Plaintiff contends that defendants' retaliation was ongoing because he had classification review hearings every six months at which defendants could have reclassified him, but chose not to do so. (ECF No. 113 at 28.) However, plaintiff's harm, including his subsequent reclassification denials, stems from a "single incident"—defendants' retaliatory placement of plaintiff into "indefinite HRP supermax status." (ECF No. 1-2 at 29 (noting that Molnar threatened *indefinite* placement)). Defendants' refusal to reclassify plaintiff at subsequent classification review hearings was merely a "delayed, but inevitable consequence" of plaintiff's placement because, as he concedes, the same allegedly fabricated evidence that supported his placement in HRP supermax status was also the sole grounds for the unfavorable classification review hearing decisions. *Knox*, 260 F.3d at 1014 (quoting *Hoersterey v. City of Cathedral City*, 945 F.2d 317, 319 (9th Cir. 1991); *see, e.g.*, *Bruce v. Woodford*, No. 1:07-cv-00269-BAM PC, 2012 WL 1424166 (E.D. Cal Apr. 24, 2012) (finding that "the classification committee hearings that periodically took place while Plaintiff was held in segregation" were not themselves "retaliatory acts that constitute a continuing violation").

Moreover, "[t]he purpose of permitting a plaintiff to maintain a cause of action on the continuing violation theory is to permit the inclusion of acts whose character as discriminatory acts was not apparent at the time they occurred." *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 445 (7th Cir. 1994); *see Knox v. Davis*, 260 F.3d 1009, 1014 (9th Cir. 2001). As discussed above, plaintiff should have known of the retaliatory character of his status designation by November 2011. The information he received via case number 3:11-cv-00079 gave him notice of all the "allegedly wrongful acts that he wished to challenge," *Knox*, 260 F.3d at 104, including the defendants' pattern of rendering unfavorable decisions at plaintiff's classification review hearings. (ECF No. 113 Exh. 02 at 9-10 (showing the plaintiff received three classification review hearings from his initial HRP designation until May 27, 2011.)

Accordingly, the court finds that the continuing violations doctrine is inapplicable here. Because plaintiff received evidence in November 2011 that should have made him aware that his placement in HRP supermax status was retaliatory, he had until November 2013 to bring his retaliation claim. Thus, his June 28, 2016 filing date is untimely. Summary judgment is proper.

C. Due Process–Administrative Segregation Claim

Plaintiff brings a due process claim on a variety of grounds, all of which relate to his placement in administrative segregation. His claim is based in part on the allegation that he was placed in administrative segregation on the basis of fabricated evidence. (ECF No. 25.) Plaintiff admits that he learned of the allegedly false evidence on November 14, 2014 through the documents he received in case number 3:11-cv-00079. (ECF No. 113 at 2, 9-10.) Applying Nevada's two-year statute of limitations, the limitations period expired on November 14, 2013, well before he filed complaint on June 28, 2016. NRS 11.190(4)(e).

Plaintiff's due process claim is also based in part on his allegation that defendants failed to provide him with an adequate explanation of the grounds for his placement. However, plaintiff does not have a right to "detailed written notice of charges," or a "written decision describing the reasons for placing the prisoner in administrative segregation." *Toussaint v. McCarthy*, 801 F.3d 1080, 1100-01 (9th Cir. 1986), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995). The record establishes that on September 22, 2009, plaintiff was advised that defendants placed him in administrative segregation due to a "pending investigation" and that he would remain in solitary confinement until the investigation completed. (ECF No. 113 at 62; ECF No. 113 Exhs. 2 & 3). Plaintiff's desire for a more comprehensive explanation is insufficient as a matter of law to give rise to a due process claim, and, therefore, is irrelevant in assessing the limitation period.

Next, plaintiff alleges that defendants deprived him of the opportunity to contest his placement in administrative segregation. Although plaintiff has a due process right to "present his views to the prison official charged with deciding whether to transfer him to administrative segregation," prison officials are obligated only to give him this opportunity at some reasonable

time *after* his transfer. *See Hewitt v. Helms*, 459 U.S. 460, 476 (1983), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995). As such, plaintiff knew or should have known at a reasonable time after being transferred to administrative segregation that defendants had impermissibly deprived plaintiff of the right to contest the transfer. Plaintiff was transferred on September 22, 2009. (ECF No. 65 Exh. B at 1; ECF No. 113 Exh. 2 at 8, Exh. 3 at 1.) At best, his claim accrued in October 2009. *Hewitt*, 459 U.S. at 476-77 (finding that five days after transfer is a reasonable time to conduct a post-placement review, at which an inmate's challenge is considered). A more precise calculation is unnecessary, as plaintiff filed his claim on June 28, 2016, well after the two-year statute of limitations had expired. The court's analysis is not altered by plaintiff's contention that he discovered a fabricated record of an "x-ray medical transfer approval" because the right to present his views is purely procedural; plaintiff has no substantive right to examine, nor contest, particular pieces of evidence considered at his post-placement review. *See Hewitt*, 459 U.S. 476-77; *Toussaint*, 801 F.2d at 1100-1101.

Finally, plaintiff asserts that he was never present at the administrative segregation classification review hearings that took place after his initial placement in administrative segregation. Plaintiff is correct in asserting that he is entitled to "some sort of periodic review" of his indefinite administrative segregation. *Hewitt v. Helms*, 459 U.S. at 477 n.9. However, he has no right to be present at the periodic review, nor does he have a right to submit additional statements or evidence. *See* Hewitt, 459 U.S. at 476, 477 n.9 ("This review will not necessarily require that prison officials permit the submission of any additional evidence or statements."); *Edmonson v. Coughlin*, 21 F. Supp. 2d 242, 253 (W.D.N.Y. 1998). This allegation is insufficient as a matter of law to give rise to a due process claim, and, therefore, is irrelevant in assessing the limitation period. this claim.

Regardless of its factual predicate, plaintiff's due process claim accrued more than two years prior to the date he filed his complaint. NRS 11.190(4)(e). The court recommends that summary judgment be granted on plaintiff's due process claim relating to his administrative segregation.

D. Cruel and Unusual Punishment Claim

Plaintiff's cruel and unusual punishment claim is based solely on defendants' use of fabricated evidence to place plaintiff in solitary confinement. (ECF No. 25 at 12-13.) As discussed above, plaintiff admits to receiving documents in case number 3:11-cv-00079 indicating that his HRP supermax status, which relegated him to solitary confinement, was based upon Churchward's allegedly fabricated account of witnessing plaintiff confess to possessing a contraband cellphone. *See infra* Section II.B. It makes no difference for limitations purposes that he asserts to have uncovered an additional instance of evidence fabrication—a "false x-ray transfer medical approval"—on June 18, 2015. (ECF No. 113 at 26.) The documents plaintiff received in his prior case had already provided plaintiff with the requisite notice that his solitary confinement was improperly secured. Plaintiff's claim accrued on March 14, 2011, and expired two years later on March 14, 2013. Just as his retaliation is barred by Nevada's two-year statute of limitation, so, too, is his cruel and unusual punishment claim time-barred. *See infra* Section II.B.

E. Due Process–Disciplinary Proceedings Claim

Plaintiff alleges that at disciplinary hearings held on March 5 and 12, 2010, Huston violated plaintiff's due process rights by refusing to allow plaintiff to speak and by finding plaintiff guilty of possessing contraband solely based on Churchward's fabricated account of plaintiff admitting to using a cellphone. (ECF No. 1-2 at 51-53, 57; *see* ECF No. 131 at 4.) Plaintiff also seeks to hold Churchward liable for knowingly producing the fabricated evidence used at the disciplinary hearings. (ECF No. 1-2 a 51-53, 57; *see* ECF No. 113 Exh. 1.)

Defendants argue that plaintiff's due process claim accrued at the time the alleged violations occurred because plaintiff attended both the March 5 and 12, 2010 disciplinary hearings. (ECF No. 65 at 6.) Plaintiff argues that Churchward's fabricated evidence is a "constituent element of the false evidence used as basis for the mock HRP status placement," and attempts to incorporate by reference his legal reasoning used to defend his retaliation, cruel and unusual punishment, and due process–administrative segregation claim. (ECF No. 113 at 28-29.) Essentially, his position is that he "did not have the facts to use in March 2010, or in 2013, to present his claims" due to

"defendants' fraudulent concealment of the evidence and facts of the evidence/nucleus of the entire claims[sic]." (*Id.* at 29.) He does not contest his contemporaneous awareness that he was deprived the ability to speak at the March 2010 disciplinary hearings. (*Id.*)

Plaintiff's argument is without merit. He admits that he attended the March 5 and 12, 2010 disciplinary hearings and that a record of the hearing was served on plaintiff after the hearing. (ECF No. 1-2 at 50-52; ECF No. 113 Exh. 24.) He necessarily witnessed Huston deprive him of the ability to participate in the hearings. Additionally, he knew or should have known at the hearing or by way of the hearing record that Huston relied on Churchward's evidence in finding him guilty of possessing prison contraband. Plaintiff denies ever admitting to possessing a contraband cellphone, so the allegedly fabricated nature of Churchward's evidence is self-revealing; plaintiff cannot reasonably argue that he first needed to discover the "facts to his HRP status" to become aware that his admission was fabricated. (ECF No. 113 at 29; *see also* ECF No 1-2 (suggesting that plaintiff was aware at the hearing of the use of alleged fabricated evidence)). Accordingly, plaintiff knew or should have known on March 12, 2010 that he was barred from participating in the disciplinary hearings and found guilty on the basis of allegedly fabricated evidence. Plaintiff's claim accrued at that time and he had until March 12, 2012 to bring his claim. NRS 11.190(4)(e). Because he failed to do so, the court recommends that summary judgment be granted as to plaintiff's due process claim relating to his disciplinary hearings.

F. Denial of Access to the Grievance Process Claim

Plaintiff's denial of access to the grievance process claim is based on his allegation that prison officials ignored or did not directly answer his grievances that requested an explanation for his placement on HRP supermax status. (ECF No. 1-2 at 13.) Defendants argue that plaintiff filed inmate request forms and grievance related to his HRP supermax status from September 2009 to February 2010, which, at best, gave him until February 2013 to file his claim. (ECF No. 65 at 6-7.) Plaintiff does not appear to meaningfully dispute the date that he filed the relevant inmate request forms and grievances. (ECF No. 113 at 30-33.) However, plaintiff once again attempts to incorporate by reference his legal reasoning used to defend his retaliation, cruel and unusual

punishment, and due process–administrative segregation charge. (ECF No. 113 at 31.) According to plaintiff, he could not have brought his denial of access to the grievance process claim until June 18, 2015, the date on which he discovered "defendants' fraudulent concealment and obstruction of plaintiff's investigation" of the actual "facts" underlying his HRP status placement. (*Id.* at 32-33.)

The court finds that plaintiff should have known a reasonable time after filing his inmate request forms and grievances between 2009 and 2010 that they were either ignored or not directly answered. For those grievances and inmate request forms that failed to provide a direct response to plaintiff's request, plaintiff knew or should have known of their inadequacy upon receipt. For those that were ignored, plaintiff should have known after the grievance response deadlines elapsed that prison officials had obstructed "his ability to access the prison grievance system" and that he could have brought his claim. *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995), *abrogated in part on other grounds by Shaw v. Murphy*, 532 U.S. 223 (2001); (ECF No. 113 Exh. 38) (setting forth the timeframes for official responses to inmate grievances). Even the most charitable calculation of time cannot justify plaintiff's decision to file his claim on June 28, 2016, over six years after submitting his grievances. (*see* ECF No. 113 Exh. 38.)

Plaintiff's assertion that he did not discover the "facts" underlying his HRP status until June 18, 2015 does not support a tolling of his access to the grievance process claim. Even assuming plaintiff's claim required his awareness that he was placed in HRP supermax status on the basis of fabricated evidence, plaintiff was provided with evidence on November 14, 2011 that his placement was due to an investigation into contraband cellphones at the prison. He also acknowledges that, around this time, he was in possession of a case note printout indicating that his placement was due to an allegedly fabricated admission to possessing a contraband cellphone. He did not need to uncover additional fabrications supporting his placement in order to claim that his grievances and inmate requests had been purposely undermined to prevent his access to the courts.

Accordingly, the court finds that plaintiff's access to the grievance process claim accrued by November 14, 2011. Because plaintiff did not bring his claim until June 28, 2016, his claim is

clearly barred by Nevada's two-year statute of limitations. NRS 11.190(4)(e). Defendants' motion for summary judgment should be granted.

IV. CONCLUSION

For the foregoing reasons, the court recommends that defendants' motion to for summary judgment (ECF No. 65) be granted, as plaintiff's claims are barred by the two-year statute of limitations on section 1983 claims. NRS 11.190(4)(e). Consequently, the court recommends that defendants' motion to dismiss (ECF No. 64) and plaintiff's cross-motion for summary judgment (ECF No. 114) be denied as moot.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendants' motion for summary judgment (ECF No. 65) be **GRANTED.**

IT IS FURTHER RECOMMENDED that defendants' motion to dismiss (ECF No. 64) be **DENIED** as moot.

IT IS FURTHER RECOMMENDED that plaintiff's cross-motion for summary judgment (ECF No. 114) be **DENIED** as moot.

DATED: July 24, 2018

UNITED STATES MAGISTRATE JUDGE

APPENDICE – D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 8 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ENOMA IGBINOVIA,

Plaintiff-Appellant,

v.

JAMES GREG COX; et al.,

Defendants-Appellees.

No. 18-16580

D.C. No.
3:16-cv-00497-MMD-VPC
District of Nevada,
Reno

ORDER

Before: LEAVY, BYBEE, and HURWITZ, Circuit Judges.

Appellant has filed a motion for reconsideration en banc of this court's December 18, 2018 order.

The motion for reconsideration en banc (Docket Entry No. 19) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDICE — D

MBI/MOATT

APPENDICE — E

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ENOMA IGBINOVIA, Petitioner, v. STATE OF NEVADA ex rel NEVADA DEPARTMENT OF CORRECTIONS, *et al.*, Respondents.	Case No. 3:16-cv-00497-MMD-VPC SCREENING ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections ("NDOC"), has filed an amended complaint in state court, which Defendants have removed. It appears from the documents and the removal statement that removal to federal court was proper. The Court now screens Plaintiff's amended civil rights complaint (ECF No. 1-2) pursuant to 28 U.S.C. § 1915A and addresses the motion to strike (ECF No. 6), the motion to extend time (ECF No. 7), the motion to extend copy work limit (ECF No. 8), the motion to produce last known addresses (ECF No. 9), the motion for status check (ECF No. 18), the motion for temporary restraining order (ECF No. 19), the motion for preliminary injunction (ECF No. 20), and the motion to dispense with the requirement of security (ECF No. 21).

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

APPENDICE — E

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

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

Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all allegations of material fact stated in the complaint, and the court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than

formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*

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

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

II. SCREENING OF AMENDED COMPLAINT[1]

In the amended complaint,[2] Plaintiff sues multiple defendants for events that took place while Plaintiff was incarcerated at Ely State Prison ("ESP"). (ECF No. 1-2 at 3.) Plaintiff sues Defendants NDOC Deputy Director James G. Cox, NDOC Inspector

[1]The Court denies the motion for status check (ECF No. 18) as moot in light of this screening order. Additionally, the Court denies the motion to extend time to serve defendants (ECF No. 7) and the motion to produce last known addresses (ECF No. 9) as premature. The Court will direct service when procedurally applicable to do so.

[2]Plaintiff's amended complaint is 73-pages long excluding exhibits. (ECF No. 1-2.)

General Dave Molnar, NDOC Inspector General Harry Churchward (formerly known as Harry Bush), Warden Eldon K. McDaniels, Associate Warden Deborah Brooks, Associate Warden Renee Baker, Senior Caseworker Claude Willis, Caseworker Michael Oxborrow, Sergeant Robert Huston, Nurse Practitioner Greg Martin, Dr. Michael B. Koehn, Nurse Gloria Carpenter, and Health Information Coordinator Cheryl Magnum.[3] (*Id.* at 2-3.) Plaintiff alleges two counts and seeks monetary damages, declaratory relief, and injunctive relief. (*Id.* at 51, 73.)

In Count I, Plaintiff alleges the following: Sometime between August and September 2009, inspector generals Molnar and Churchward went to ESP to investigate information that inmate-members of the Aryan Warrior security threat group had obtained cellular phones and had possibly compromised a staff member. (*Id.* at 3.) Plaintiff, who is black, was not a member of the Aryan Warriors or any other type of gang. (*Id.* at 3-4.) Plaintiff did not have any information that benefitted Molnar or Churchward's investigation against the Aryan Warriors. (*Id.* at 4-5.)

On September 1, 2009, Willis entered a false case note into Plaintiff's file which stated that Plaintiff had been approved for a transfer to Ely Hospital for a medical x-ray. (*Id.* at 4-6.)

On September 17, 2009, Baker created and lodged a false adverse warning against the fabricated medical x-ray transfer approval case note. (*Id.* at 14.) Baker noted that Plaintiff was not to be transferred outside the prison grounds without first notifying McDaniels, Molnar, and Cox. (*Id.*)

That same day, Brooks removed Plaintiff from general population, where Plaintiff had a job, and put Plaintiff into the segregation maximum lockdown unit ("MLU") absent any misconduct. (*Id.* at 6, 39.) On that same day, prison officials served Plaintiff with a

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[3]Plaintiff originally named the State of Nevada and the NDOC as defendants in his amended complaint. (ECF No. 1-2 at 2.) However, Plaintiff later filed a motion to strike those defendants due to sovereign immunity. (ECF No. 6.) The Court grants Plaintiff's motion to strike those defendants from his amended complaint.

DOC 2003 form indicating that prison officials were putting Plaintiff into "indefinite HRP[4] supermax status." (*Id.* at 6.) Indefinite HRP supermax status meant indefinite solitary confinement. (*Id.* at 14.) The DOC 2003 notice form only stated that the reason for Plaintiff's placement was "safety and security." (*Id.* at 15.)

On September 22, 2009, at an interview with Molnar, Plaintiff complained to Molnar that Molnar had endangered Plaintiff's life by using Plaintiff's name as a witness against the Aryan Warriors in a criminal case without Plaintiff's consent. (*Id.* at 5.) Several Aryan Warriors had repeatedly harassed Plaintiff. (*Id.*) Plaintiff told Molnar that, if Molnar did that again, Plaintiff would file a grievance and a lawsuit against Molnar. (*Id.*) During that interview, Molnar threatened to put Plaintiff into indefinite HRP supermax status if Plaintiff did not provide Molnar with information relating to the Aryan Warriors' investigation. (*Id.* at 29.) Plaintiff told Molnar that he did not have any information. (*Id.*)

That same day, Oxborrow entered a false classification case note into Plaintiff's file stating that Oxborrow had conducted a due process hearing with Plaintiff pertaining to an alleged escape attempt. (*Id.* at 18.) However, Plaintiff never spoke to or attended a due process hearing on that date with Oxborrow. (*Id.*) Although Plaintiff's file stated that he had administrative segregation review hearings on January 6, 2010, January 22, 2010, February 5, 2010, March 2, 2010, and June 22, 2010, Plaintiff was never present at those hearings and never spoke to Oxborrow. (*Id.*) Oxborrow's case notes stated that Plaintiff admitted to purchasing cell phone minutes even though this was false. (*Id.* at 19-20.)

On September 23, 2009, prison officials put Plaintiff into indefinite HRP supermax status where he remains. (*Id.* at 5-6.) On that day, Willis conducted a "mock" classification placement hearing for Plaintiff. (*Id.* at 7-8.) At the hearing, prison officials only informed Plaintiff that he had been designated a high risk potential due to Plaintiff presenting a "substantial safety risk to the institution." (*Id.* at 8.) This was the only notice and reason prison officials gave to Plaintiff for being classified as indefinite HRP supermax status.

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[4]HRP is "high risk potential." (ECF No. 1-2 at 8.)

(*Id.*) Although Plaintiff attempted to speak at the hearing, Willis did not permit Plaintiff to speak, challenge the inadequate notice, or question why prison officials were putting him in indefinite HRP supermax status. (*Id.* at 17.)

McDaniels authorized Plaintiff's placement into the MLU. (*Id.* at 15.) McDaniels told Plaintiff that he put Plaintiff into indefinite HRP supermax status because Cox had ordered it. (*Id.* at 16.) At the time, Cox, Molnar, and Churchward were in charge of investigating Plaintiff's fabricated escape attempt. (*Id.*)

Years later, through his own investigation, Plaintiff discovered that prison officials put him into indefinite HRP supermax status by concocting a fabricated escape investigation with fabricated classification entries from September 1 and 17, 2009, and a false allegation that Plaintiff aborted his attempt to escape. (*Id.* at 7-8.) Plaintiff learned that prison officials falsely accused him of attempting to escape during the fabricated medical x-ray transfer to Ely Hospital. (*Id.* at 32.) Even though Plaintiff had filed numerous grievances to prison officials asking why they had put him into indefinite HRP supermax status, prison officials never told Plaintiff the actual reason, i.e., a fabricated escape attempt. (*Id.* at 23-24.) Plaintiff notes that ESP medical had its own medical x-ray facility within the prison grounds and that, in the past, prison officials had taken x-rays of Plaintiff at the prison. (*Id.* at 39-40.)

During Plaintiff's personal investigation into the fabricated medical x-ray transfer approval to Ely Hospital, Magnum and Carpenter refused to provide Plaintiff with the information he needed to verify the alleged transfer. (*Id.* at 27.) Magnum and Carpenter refused to answer Plaintiff's medical kites and grievances on this issue. (*Id.* at 37.) They also helped falsify Plaintiff's medical x-ray transfer approval. (*Id.* at 27.)

In September 2009, Dr. Koehn and Nurse Martin where the only medical providers at ESP who could have issued a referral to the Utilization Review Panel Committee to seek authorization and approval for a medical x-ray service at Ely Hospital. (*Id.* at 36.) Dr. Koehn and Nurse Martin helped falsify Plaintiff's medical x-ray transfer approval. (*Id.*)

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Plaintiff suffered from high-blood pressure due to the "very high stress" of being in indefinite HRP supermax status. (*Id.* at 33.) Plaintiff was under chronic care for his high blood pressure and took high blood pressure medication twice a day. (*Id.*) Plaintiff also used eye glasses due to the hypertension. (*Id.*) Plaintiff suffered from depression, anxiety, and panic attacks. (*Id.*)

In April 2016, Healer, Plaintiff's caseworker, permitted Plaintiff to review his I-file and NOTIS printout for the first time since his incarceration. (*Id.* at 38.) Plaintiff's I-file did not contain a transfer approval to Ely Hospital for a medical x-ray.[5] (*Id.*)

In Count II, Plaintiff alleges the following: Five months after prison officials put Plaintiff into indefinite HRP supermax status, Churchward issued a false notice of charges against Plaintiff for MJ26 (possession of contraband-cellular phone) and MJ47 (escape, escape attempt, and/or escape plan). (*Id.* at 51.) Prison officials never found a cellular phone in Plaintiff's property or on his person. (*Id.*) Churchward based the notice of charges on a confiscated letter which Churchward alleged referenced "code" and "practiced script" constituting an upcoming escape attempt and cellular phone possession. (*Id.*)

On September 22, 2009, Churchward falsely alleged that Plaintiff had access to a cellular phone but, by the time of the interview with the investigators, Plaintiff no longer had one. (*Id.* at 57.) Churchward and Molnar told Plaintiff that they had found Plaintiff's family phone numbers in a cellular phone that was found on a member of the Aryan Warrior security threat group. (*Id.*) Churchward and Molnar accused Plaintiff of using a cellular phone. (*Id.*) Churchward and Molnar threatened to put Plaintiff in indefinite HRP supermax status if he did not provide them with information. (*Id.*) Plaintiff repeatedly told them that he did not have and had not used a cellular phone. (*Id.*) Although Plaintiff asked

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[5]Willis's September 1, 2009, case note about the approval appears to be in Plaintiff's file but not the paperwork documenting the approval for the transport. (ECF No. 1-2 at 39.)

Churchward and Molnar what phone numbers of his family they had found, they never provided Plaintiff with any telephone numbers. (*Id.*)

On March 5, 2010, Huston conducted Plaintiff's disciplinary hearing on the MJ26 and MJ47 charges. (*Id.* at 52.) The sole basis for the charges was the letter. (*Id.*) Huston conducted a handwriting analysis of the letter, found that Plaintiff had not written the letter, and dismissed the letter as evidence. (*Id.* at 52, 57.) Huston dismissed the MJ47 escape charge. (*Id.* at 52.) However, Huston continued the hearing in order to confer with Churchward about the MJ26 charge because Huston lacked a basis to find Plaintiff guilty without the letter. (*Id.*)

On March 12, 2010, Huston reconvened the disciplinary hearing to adjudicate the MJ26 charge. (*Id.*) Huston found Plaintiff guilty of the MJ26 charge based on Churchward falsely stating that, on September 23, 2009, Plaintiff admitted at his classification hearing that he had used a cellular phone. (*Id.* at 52-53.) Plaintiff had not admitted anything at the September 23, 2009, hearing because prison officials had not permitted Plaintiff to speak during that hearing. (*Id.*) Huston did not permit Plaintiff to challenge the finding. (*Id.* at 52.)

On September 17, 2009, prison officials removed Plaintiff and his cell mate, Mike McNeil, from their cells. (*Id.* at 54.) During Plaintiff and McNeil's removal, prison officials gathered the inmates' properties and searched their cell. (*Id.* at 55.) On September 24, 2009, after prison officials designated Plaintiff as indefinite HRP supermax status, prison officials permitted Plaintiff and McNeil to retrieve their co-mingled property. (*Id.*) Oxborrow oversaw the separation of the property. (*Id.*)

Prison officials knew that the letter they used to conduct false charges against Plaintiff belonged to McNeil. (*Id.*) However, prison officials sent McNeil back to general population and sent Plaintiff to indefinite HRP supermax status. (*Id.*) McNeil told Plaintiff that the letter belonged to him and that it did not allude to the allegations and assertions used against Plaintiff for the MJ26 and MJ47 charges. (*Id.* at 56.) McNeil also stated that the letter mentioned McNeil's son's name and that he and his son both had the same name. (*Id.*)

In Count I, Plaintiff alleges claims for retaliation, due process, cruel and unusual punishment for indefinite solitary confinement, denial of access to the grievance process, and violations of 5 U.S.C. § 552a. (*Id.* at 48-51.) In Count II, Plaintiff alleges violations of due process, denial of access to the grievance process, retaliation, and cruel and unusual punishment for indefinite solitary confinement. (*Id.* at 69-72.)

A. Retaliation (Counts I and II)

Prisoners have a First Amendment right to file prison grievances and to pursue civil rights litigation in the courts. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2004). "Without those bedrock constitutional guarantees, inmates would be left with no viable mechanism to remedy prison injustices. And because purely retaliatory actions taken against a prisoner for having exercised those rights necessarily undermine those protections, such actions violate the Constitution quite apart from any underlying misconduct they are designed to shield." *Id.*

To state a viable First Amendment retaliation claim in the prison context, a plaintiff must allege: "(1) [a]n assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Id.* at 567-68.

The Court finds that Plaintiff states a colorable retaliation claim. Based on the allegations, on September 22, 2009, Plaintiff had an interview with Molnar and Churchward. At that interview, Plaintiff threatened to file grievances and sue Molnar after Plaintiff found out that Molnar had used Plaintiff's name as a witness against the Aryan Warriors. Based on the allegations, both Molnar and Churchward threatened to put Plaintiff into indefinite HRP supermax status if he did not give them information about the Aryan Warriors. When Plaintiff did not provide them with information, prison officials put Plaintiff into indefinite HRP supermax status. For screening purposes, the Court will permit the retaliation claim to proceed against all of the defendants because it appears that Defendants may have fabricated charges against Plaintiff in retaliation for threatening

to sue Molnar. The retaliation claim will proceed against Defendants Cox, Molnar, Churchward, McDaniels, Brooks, Baker, Willis, Oxborrow, Huston, Martin, Koehn, Carpenter, and Magnum.

B. Due Process-Administrative Segregation (Count I)

Under the Fourteenth Amendment, prisoners "may not be deprived of life, liberty, or property without due process of law." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). However, "the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." *Id.* "[T]here must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Id.* The Supreme Court held that a prisoner possesses a liberty interest under the federal constitution when a change occurs in confinement that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *See Sandin v. Conner*, 515 U.S. 472, 484 (1995).

When a prisoner is placed in administrative segregation, prison officials must, within a reasonable time after the prisoner's placement, conduct an informal, non-adversary review of the evidence justifying the decision to segregate the prisoner. *See Hewitt v. Helms*, 459 U.S. 460, 476 (1983), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995). After the prisoner has been placed in administrative segregation, prison officials must periodically review the initial placement. *See Hewitt*, 459 U.S. at 477 n.9. An inmate has the right to notice and the right to be heard. *Mendoza v. Blodgett*, 960 F.2d 1425, 1430 (9th Cir. 1992). The Ninth Circuit has held that where the prisoner alleges material differences between the conditions in general population and administrative segregation, the prisoner's procedural due process claim should not be dismissed on the pleadings. *See Jackson v. Carey*, 353 F.3d 750, 755-57 (9th Cir. 2003).

The Court finds that Plaintiff states a colorable due process-administrative segregation claim. Based on the allegations, all of the defendants created false evidence

to move Plaintiff into and keep him in administrative segregation. Moreover, based on the allegations, prison officials never provided Plaintiff with the actual reason for putting him into administrative segregation and never gave Plaintiff an opportunity to contest the administrative segregation designation. Additionally, although Plaintiff's file states that he had administrative segregation classification review hearings, Plaintiff was never present at any of them. This claim will proceed against Defendants Cox, Molnar, Churchward, McDaniels, Brooks, Baker, Willis, Oxborrow, Huston, Martin, Koehn, Carpenter, and Magnum.

C. Due Process- Disciplinary Proceedings (Count II)

In order to state a cause of action for deprivation of procedural due process, a plaintiff must first establish the existence of a liberty interest for which the protection is sought. *Sandin v. Conner*, 515 U.S. 472, 487 (1995). In *Sandin*, the Supreme Court held that a prisoner has a liberty interest when confinement "imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. In *Sandin*, the Supreme Court focused on three factors in determining that the plaintiff possessed no liberty interest in avoiding disciplinary segregation: (1) disciplinary segregation was essentially the same as discretionary forms of segregation; (2) a comparison between the plaintiff's confinement and conditions in the general population showed that the plaintiff suffered no "major disruption in his environment;" and (3) the length of the plaintiff's sentence was not affected. *Id.* at 486-87.

When a protected liberty interest exists and a prisoner faces disciplinary charges, prison officials must provide the prisoner with (1) a written statement at least twenty-four hours before the disciplinary hearing that includes the charges, a description of the evidence against the prisoner, and an explanation for the disciplinary action taken; (2) an opportunity to present documentary evidence and call witnesses, unless calling witnesses would interfere with institutional security; and (3) legal assistance where the charges are complex or the inmate is illiterate. *See Wolff v. McDonnell*, 418 U.S. 539, 563-70 (1974).

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"When prison officials limit an inmate's efforts to defend himself, they must have a legitimate penological reason." *Koenig v. Vannelli*, 971 F.2d 422, 423 (9th Cir. 1992). An inmate's right to present witnesses may legitimately be limited by "the penological need to provide swift discipline in individual cases . . . [or] by the very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff." *Ponte v. Real*, 471 U.S. 491, 495 (1985). Jail officials "must make the decision whether to allow witnesses on a case-by-case basis, examining the potential hazards that may result from calling a particular person." *Serrano v. Francis*, 345 F.3d 1071, 1079 (9th Cir. 2003). Despite this, an inmate has no right to cross-examine or confront witnesses in prison disciplinary hearings. *See Wolff*, 418 U.S. at 567-68.

"[T]he requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board." *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985). However, this standard does not apply when a prisoner alleges that a prison guard's report is false. *Hines v. Gomez*, 108 F.3d 265, 268 (9th Cir. 1997).

The Court finds that Plaintiff states a colorable due process claim for the March 5 and 12, 2010, disciplinary hearings. Based on the allegations, Huston found Plaintiff guilty of the MJ26 charge based on Churchward's fabricated statement that Plaintiff had admitted to the use of a cellular phone. Additionally, Huston had not permitted Plaintiff to speak at the disciplinary hearings. This claim will proceed against Defendants Huston and Churchward.

D. Cruel & Unusual Punishment—Solitary Confinement (Counts I and II)

Although the Supreme Court has found that "[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards," the Supreme Court has not held that the use of solitary confinement is unconstitutional. *See Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005) (noting that long-term solitary confinement itself is not unconstitutional). However, for the purposes of screening, the Court will permit Plaintiff's

Eighth Amendment claim to proceed based on his indefinite HRP supermax status. Based on the allegations, prison officials fabricated reasons to confine Plaintiff into indefinite solitary confinement. Plaintiff has been in solitary confinement since 2009. This claim will proceed against Defendants Cox, Molnar, Churchward, McDaniels, Brooks, Baker, Willis, Oxborrow, Huston, Martin, Koehn, Carpenter, and Magnum.

E. Denial of Access to the Grievance Process (Counts I and II)

Prisoners have a constitutional right of access to the courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). To establish a violation of the right of access to the courts, a prisoner must establish that he or she has suffered "actual injury." *Id.* at 349. The actual-injury requirement mandates that an inmate "demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded." *Id.* at 353. "The right of meaningful access to the courts extends to established prison grievance procedures." *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995), *overruled on other grounds by Shaw v. Murphy*, 532 U.S. 223, 230 n.2 (2001).

The Court finds that Plaintiff states a colorable claim for denial of access to the grievance process. Based on the allegations, when Plaintiff filed kites and grievances to find out why he was in indefinite HRP supermax status, prison officials either ignored his grievances or did not directly answer his grievances. This claim will proceed against Defendants Cox, Molnar, Churchward, McDaniels, Brooks, Baker, Willis, Oxborrow, Huston, Martin, Koehn, Carpenter, and Magnum.

F. 5 U.S.C. § 552a (Count I)

Plaintiff attempts to sue Defendants under 5 U.S.C. § 552a for violations of privacy. (ECF No. 1-2 at 49.) The Court finds that Plaintiff fails to allege a cognizable claim under this statute. This statute applies to federal agencies. Defendants are employed by a state agency. The Court dismisses this claim, with prejudice, as amendment would be futile.

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III. MOTIONS FOR TRO/PRELIMINARY INJUNCTION

Plaintiff has filed identical motions for temporary restraining order ("TRO") and preliminary injunction. (ECF No. 19, 20.) Although Plaintiff's motions are 37-pages each,[6] the heart of Plaintiff's motions is that Defendants are obstructing Plaintiff's ability to "fully, competently, and successfully litigate" the instant case. (ECF No. 19 at 2.) Plaintiff alleges that Defendants' obstruction has impeded his ability to draft discovery requests, interrogatories, and admissions. (*Id.*)

Injunctive relief, whether temporary or permanent, is an "extraordinary remedy, never awarded as of right." *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20). Furthermore, under the Prison Litigation Reform Act ("PLRA"), preliminary injunctive relief must be "narrowly drawn," must "extend no further than necessary to correct the harm," and must be "the least intrusive means necessary to correct the harm." 18 U.S.C. § 3626(a)(2).

The Court denies the motions for TRO and preliminary injunction (ECF No. 19, 20). The Court finds that Plaintiff is unlikely to succeed on the merits because the claim of alleged obstruction with discovery in this case is not related to the claims articulated in the two counts in Plaintiff's amended complaint. Plaintiff may seek court intervention if needed to resolve discovery disputes; injunction relief is not available under these circumstances. In addition, Plaintiff is unlikely to suffer irreparable harm in the absence of preliminary relief because Plaintiff's discovery requests, interrogatories, and admissions are not procedurally applicable at this time. The Court denies as moot

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[6]Pursuant to Nevada Local Rule 7-3, Plaintiff's motions for TRO and preliminary injunction are limited to 24-pages each, excluding exhibits. Nev. Loc. R. 7-3(b).

Plaintiff's motion to dispense with the security requirement (ECF No. 21) for injunctive relief.

IV. MOTION TO EXTEND COPY WORK LIMIT

Plaintiff has filed a motion to extend his copy work limit. (ECF No. 8.) An inmate has no constitutional right to free photocopying. *Johnson v. Moore*, 948 F.2d 517, 521 (9th Cir. 1991). Pursuant to NDOC administrative regulation 722.01(7)(D), inmates "can only accrue a maximum of $100 debt for copy work expenses for all cases, not per case." In this district, courts have found that they can order a prison to provide limited photocopying when it is necessary for an inmate to provide copies to the court and other parties. *See Allen v. Clark Cnty. Det. Ctr.*, 2:10-CV-00857-RLH, 2011 WL 886343, *2 (D. Nev. Mar. 11, 2011). The Court denies Plaintiff's motion at this time. If this case does not settle during mediation, Plaintiff may move for an extension of copy work limit at that time.

V. CONCLUSION

For the foregoing reasons, it is ordered that the operative complaint is the first amended complaint (ECF No. 1-2).

It is further ordered that the motion to strike the State of Nevada and the NDOC as defendants (ECF No. 6) from this case is granted. The Clerk of the Court will terminate the State of Nevada and the NDOC as parties on the docket.

It is further ordered that the motion to extend time to serve (ECF No. 7) and the motion to produce last known addresses (ECF No. 9) are denied as premature.

It is further ordered that the motion for status check (ECF No. 18) is denied as moot.

It is further ordered that the retaliation claim (Counts I and II) will proceed against Defendants Cox, Molnar, Churchward, McDaniels, Brooks, Baker, Willis, Oxborrow, Huston, Martin, Koehn, Carpenter, and Magnum.

It is further ordered that the due process-administrative segregation claim (Count I) will proceed against Defendants Cox, Molnar, Churchward, McDaniels, Brooks, Baker, Willis, Oxborrow, Huston, Martin, Koehn, Carpenter, and Magnum.

It is further ordered that the due process-disciplinary hearing claim (Count II) will proceed against Defendants Huston and Churchward.

It is further ordered that the Eighth Amendment cruel and unusual punishment claim (Counts I and II) will proceed against Defendants Cox, Molnar, Churchward, McDaniels, Brooks, Baker, Willis, Oxborrow, Huston, Martin, Koehn, Carpenter, and Magnum.

It is further ordered that the denial of access to the grievance process claim (Counts I and II) will proceed against Defendants Cox, Molnar, Churchward, McDaniels, Brooks, Baker, Willis, Oxborrow, Huston, Martin, Koehn, Carpenter, and Magnum.

It is further ordered that the claim for violations of 5 U.S.C. § 552a is dismissed, with prejudice, as amendment would be futile.

It is further ordered that the motions for temporary restraining order/preliminary injunction (ECF No. 19, 20) are denied.

It is further ordered that the motion to dispense of security requirement (ECF No. 21) is denied as moot.

It is further ordered that the motion for extension of copy work limit (ECF No. 8) is denied at this time.

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

or other response. Following the filing of an answer, the Court will issue a scheduling order setting discovery and dispositive motion deadlines.

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

It is further ordered that if any party seeks to have this case excluded from the inmate mediation program, that party must file a "motion to exclude case from mediation" on or before twenty-one (21) days from the date of this order. The responding party will have seven (7) days to file a response. No reply will be filed. Thereafter, the Court will issue an order, set the matter for hearing, or both.

It is further ordered that the Clerk of the Court electronically serve a copy of this order and a copy of Plaintiff's complaint (ECF No. 1-1) on the Office of the Attorney General of the State of Nevada, attention Traci Plotnick.

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

DATED THIS 22nd day of June 2017.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ENOMA IGBINOVIA, Plaintiff, v. STATE OF NEVADA ex rel NEVADA DEPARTMENT OF CORRECTIONS, *et al.*, Defendants.	Case No. 3:16-cv-00497-MMD-VPC 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.]

APPENDICE — F

KEVIN JAMES LISLE, Plaintiff-Appellant, v. E. K. MCDANIELS; et al., Defendants-Appellees.
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
681 Fed. Appx. 611; 2017 U.S. App. LEXIS 4027
No. 13-16921
December 30, 2016, Submitted, San Francisco, California**
**** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).**
March 7, 2017, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

Appeal from the United States District Court for the District of Nevada. D.C. No. 3:10-cv-00064-LRH-VPC. Larry R. Hicks, District Judge, Presiding.Lisle v. McDaniel, 2013 U.S. Dist. LEXIS 131954 (D. Nev., Sept. 13, 2013)Lisle v. McDaniel, 2013 U.S. Dist. LEXIS 131953 (D. Nev., Sept. 13, 2013)

Disposition:

AFFIRMED.

Counsel KEVIN JAMES LISLE, Plaintiff - Appellant, Pro se, Ely, NV.

For E. K. MCDANIELS, RENEE BAKER, Warden, DEBRA BROOKS, ROBERT CHAMBLISS, JAMES COX, WILLIAM DONAT, MARK DRAIN, BLAKE KERR, DWIGHT NEVEN, Warden, MICHAEL OXBORROW, HARRY PELTZER, ZOETTA WAGGENER, DRUGH WAGGENER, JEREMIAH HALL, ADAM ENDEL, Defendants - Appellees: Clark G. Leslie, Esquire, Deputy Assistant Attorney General, AGNV - Nevada Office of the Attorney General, Carson City, NV.

Judges: Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit Judges.

Opinion

{681 Fed. Appx. 612} MEMORANDUM*

Kevin James Lisle, an inmate at Ely State Prison ("Ely"), appeals the district court's grant of summary judgment in favor of the defendants as to Lisle's due process and excessive force claims, and its denial of Lisle's request for a preliminary injunction regarding his transfer to a different cell. We have jurisdiction under 28 U.S.C. § 1291. We review a district court's summary judgment decision de novo, *Nev. Dep't of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011), and its denial of a preliminary injunction for an abuse of discretion, *Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012). We affirm.

I

APPENDICE - F

Lisle's claim regarding his High Risk Potential ("HRP") status between 1996 and 2001 is barred by the statute of limitations. In Nevada, the statute of limitations for § 1983 actions is two years. *See* Nev. Rev. Stat. § 11.190(4)(e); *McIntyre v. Bayer*, 339 F.3d 1097, 1099 (9th Cir. 2003).

Lisle argues that his due process claims involve continuing violations, which are not subject to the statute of limitations. A continuing violation can be established either through "'a series of related acts, one or more of which falls within the limitations period,'" or by "a systemic policy or practice of discrimination" that exists both before and during the limitations period. *Gutowsky v. County of Placer*, 108 F.3d 256, 259 (9th Cir. 1997) (citation omitted). A "mere 'continuing impact from past violations is not actionable.'" *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) (emphasis omitted) (citation omitted). Even if Lisle's HRP status between 1996 and 2001 is a continuing violation, it ceased to be a continuing violation when it was removed on March 22, 2001, at which point the statute of limitations began to run.

Therefore, Lisle's due process claim as to his HRP status between 1996 and 2001 is barred by the statute of limitations.

II

Lisle's due process claims as to his placement in the Condemned Men's Unit ("CMU") and current HRP status fail because the defendants are entitled to qualified immunity. Viewing the facts in the light most favorable to the plaintiff, we must determine whether Lisle's factual allegations "make out a violation of a constitutional **{681 Fed. Appx. 613}** right," and whether that right "was 'clearly established' at the time of defendant[s'] alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)).

With regard to Lisle's CMU placement, the defendants did not violate his due process rights. Because all prisoners sentenced to death are housed in the CMU, considering Lisle's conviction and death sentence, his CMU placement does not impose "atypical and significant hardship." *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

With regard to his HRP status, Lisle is only constitutionally entitled to "some notice of the charges against him and an opportunity to present his views," as well as to periodic status reviews. *See Hewitt v. Helms*, 459 U.S. 460, 476, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), *overruled in part on other grounds by Sandin*, 515 U.S. at 472. The prison officials provided Lisle with both, thereby satisfying the requirements of due process.

Lisle's HRP status was reinstated in 2002 because he assaulted a fellow inmate, which is a criterion listed for HRP status in Ely State Prison Operational Procedure 434. Lisle was aware of the requirement that he must remain discipline free for at least one year to avoid HRP classification. He also received several periodic reviews after his HRP status was reinstated, with prior verbal or written notice for each. Moreover, Lisle could request and receive a status review hearing at any time under Operational Procedure 501.

Thus, Lisle's alleged facts do not "make out a violation of a constitutional right," and the defendants are entitled to qualified immunity for Lisle's due process claims regarding his placement in CMU and current HRP status. Accordingly, the district court properly granted summary judgment as to these claims.

III

The district court properly granted summary judgment as to Lisle's excessive force claim. In an Eighth

Amendment excessive force claim, the question is whether the force resulted in the unnecessary and wanton infliction of pain or suffering. *Hudson v. McMillian*, 503 U.S. 1, 5, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992). The "core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 7. In resolving that question, courts consider (1) the extent of the injury suffered by the inmate, (2) the need for application of force, (3) the relationship between the need and the amount of force used, (4) the threat reasonably perceived by the responsible officials, and (5) any efforts made to temper the severity of a forceful response. *Id.*

In this case, it is uncontested that an argument arose between Plaintiff and a guard about what type of leg shackles should be used. Plaintiff admits that he turned toward the guard and did not comply with orders. He does not contest the fact that the guard perceived a threat or that the guard tried to temper the situation by ordering him back to his cell. Plaintiff did not suffer injury. Therefore, the district court did not err in its *Hudson* analysis. Whether Lisle should have been given larger shackles is a disputed fact; however, the claim is based on excessive force, not on the choice of shackles.

IV

The district court did not abuse its discretion in denying Lisle's motion for a **{681 Fed. Appx. 614}** preliminary injunction for conduct unrelated to the underlying lawsuit. Lisle's other contentions are either unpersuasive or inappropriate for review.

AFFIRMED.

Footnotes

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*

This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Additional material from this filing is available in the Clerk's Office.