UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

RONALD C. WILLIAMS, Plaintiff-Appellant, v. WILLIAM HUTCHINGS; et al., Defendants-Appellees.	No. 21-16367 D.C. No. 2:21-cv-00123-KJD-DJA District of Nevada, Las Vegas ORDER

Before: PAEZ, RAWLINSON, and WATFORD, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On August 23, 2021, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's August 23, 2021 order, and the opening brief filed on September 27, 2021, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 4) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions are denied as moot.

DISMISSED.

KWH/MOATT

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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RONALD WILLIAMS, Plaintiff, v. WILLIAM HUTCHINGS, *et al.*, Defendants.	Case No. 2:21-cv-00123-KJD-DJA ORDER

Plaintiff, who is incarcerated in the custody of the Nevada Department of Corrections ("NDOC"), has submitted a second amended[1] civil rights complaint pursuant to 42 U.S.C. § 1983, and has filed an application to proceed *in forma pauperis* and a motion for appointment of counsel. (ECF Nos. 4, 14, 25, 26). Plaintiff's application to proceed *in forma pauperis* (ECF No. 4 is granted). Based on the information regarding Plaintiff's financial status, the Court finds that Plaintiff is not able to pay an initial installment payment toward the full filing fee pursuant to 28 U.S.C. § 1915. Plaintiff will, however, be required to make monthly payments toward the full $350.00 filing fee when he has funds available. The Court now screens Plaintiff's second amended civil rights complaint under 28 U.S.C. § 1915A and addresses the motion for appointment of counsel.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which an incarcerated person 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

[1] An amended complaint replaces an earlier complaint. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989). Therefore, the operative complaint is the Second Amended Complaint (ECF No. 26).

immune from such relief. *See id.* §§ 1915A(b)(1), (2). *Pro se* pleadings, however, must be liberally construed. *See 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, under the Prison Litigation Reform Act ("PLRA"), a federal court must dismiss an incarcerated person'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 Am.*, 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. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *See 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 an incarcerated person may be dismissed *sua sponte* if that person'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 SECOND AMENDED COMPLAINT

In his Second Amended Complaint ("SAC"), Plaintiff sues Sherry Williams for events that allegedly took place while Plaintiff was incarcerated by the Nevada Department of Corrections. (ECF No. 26 at 1-2). Plaintiff brings three counts, and he seeks monetary damages as well as injunctive relief in the form of a transfer to a prison in California.[2] (*Id.* at 16-21).

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[2] Under the Prison Litigation Reform Act ("PLRA"), preliminary injunctive relief must be "narrowly drawn," must "extend no further than necessary to correct the harm the court finds requires preliminary relief," and must be "the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). There "must be a relationship between the *(fn. cont…)*

Because Plaintiff's three claims appear to be overlapping, the Court will analyze all three claims together.

Claim 1 alleges the following: Defendant Shelly Williams, a records specialist/program officer at O.M.D., has caused Plaintiff "to do excessive prison time by not applying the proper credits to Plaintiff's minimum and maximum sentences. (ECF No. 26 at 5). The NDOC takes six days a month from Plaintiff "without notice or due process of law" even when Plaintiff does not have any serious violations of the prison rules. (*Id.*) Plaintiff has not been given the 20 days of deductions from his sentences each month that is due to him under Nevada statutes.[3] (*Id.*) For each month Plaintiff does not work or go to school, he "loses" 6 days a month without "due process of law," resulting in a longer stay in prison. (*Id.*)

Plaintiff asserts that Shelly Williams knows that a "policy" would "subject Plaintiff to a liberty interest" by not applying good time credits or recalculating Plaintiff's sentence in the proper fashion. (*Id.* at 6). Plaintiff asserts that, under NRS 209.4465, he is entitled to good time/work time credits even if the NDOC does not have enough jobs and programs for every prisoner. (*Id.*) Although Plaintiff's allegations are not clear, he appears to be alleging that he is being subjected to cruel and unusual punishment because he has to spend most of his time alone in his cell with no programs, so he cannot earn "good time/work time credits" and will stay in prison longer. (*Id.* at 7-8).

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injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint. This requires a sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 635–36 (9th Cir. 2015). Based on these legal requirements, it is apparent from the allegations in the Second Amended Complaint that Plaintiff could not obtain a transfer to a California prison as relief in this case.

[3] Although it is not entirely clear, Plaintiff's reference to 6 days per month appears to be a reference to credits for work and study that may be allowed under NRS 209.4465(2), and his reference to 20 days appears to be about good time credits earned under NRS 209.4465(1). Prior to an amendment to the law, the statutory good time credits were 10 days per month, but while Plaintiff was in prison, on July 1, 2007, the statutory good time credits then increased to 20 days per month. 2007 Nev. Stat., ch. 525, § 5, at 3176.

Plaintiff acknowledges that Nevada prisoners have no liberty interest in parole, but he maintains that the "policy" of the NDOC should be rendered unconstitutional because prisoners have a right to address the court under the due process guarantees of the Fifth and Fourteenth Amendments. (*Id.* at 8). According to Plaintiff, this means that he has a due process right not to have his § 1983 complaint dismissed.[4] (*Id.*)

Plaintiff maintains that he has exhausted all administrative remedies through the NDOC grievance procedures. (*Id.* at 9). The grievance procedures do not work, and Plaintiff appears to conclude that he has a "liberty interest" associated with the grievance procedures. (*Id.*) Shelly Williams had 17 years to correct the "violations of this liberty interest," and the Fourteenth Amendment prohibits a state from depriving any person of liberty without due process of law. (*Id.*)

Plaintiff concludes that the denial of "access to work and education to earn good time" is a violation of due process because Plaintiff must be provided notice or a hearing before "the prison" does anything that harms life or liberty. (*Id.*) Plaintiff further concludes that this has caused him atypical hardship or excessive confinement. (*Id.*)

Plaintiff also asserts that he was sentenced to consecutive prison terms from a single incident and that the "redundant charges" are a violation of the Double Jeopardy Clause and the Fifth and Fourteenth Amendments. (*Id.*)

Based on these allegations in Claim 1, Plaintiff concludes that his Fifth Amendment, Eighth Amendment, and Fourteenth Amendment rights have been violated. (*Id.* at 5).

Claim 2 alleges the following: Shelly Williams has been employed as a record specialist/program officer for the NDOC since 1998 and knew that the violations were illegal and would subject Plaintiff to "excessive prison time." (ECF No. 26 at 11). Plaintiff asserts that, under NRS 209.4465, he is entitled to good time/statutory credits and that he is being penalized by the NDOC without due process of law or any notice, in violation

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[4] To the extent Plaintiff is alleging that he has a due process right not to have this action dismissed by the Court, he is incorrect. Moreover, any such claim would not properly be brought against Defendant Shelly Williams.

of his Fifth Amendment, Eighth Amendment, and Fourteenth Amendment rights. (*Id.*) "Taking" 6 days per month is causing Plaintiff to do "excessive prison time." (*Id.* at 12). Plaintiff further alleges that NRS 209.4465 provides that earned credits of 20 days must be deducted from Plaintiff's minimum and maximum terms of imprisonment. (*Id.*) He concludes that Defendant violated his Fourteenth Amendment right to due process. (*Id.* at 13).

In addition, Plaintiff alleges that his Fourteenth Amendment right to equal protection has been violated. He makes the conclusory assertion that Defendant "acted with intent and purpose to discriminate" against Plaintiff "based upon membership in a protected class" and that Defendant purposely treated him "differently than similarly situated individuals without any rational basis." (*Id.*) However, he alleges no facts at all that would show that he is a member of a protected class. Rather, Plaintiff appears to be pursuing a class of one equal protection claim and explicitly asserts that the Supreme Court has recognized that there can be class of one equal protection claims. (*Id.* at 14, 15). Plaintiff alleges that he received responses from "N.D.O.C. case workers" stating that they would not apply the Nevada Supreme Court's decision in *Vonseydewitz v. Legrand*, Dkt No. 66159, 2015 WL 3936827 (Nev. June 24, 2015) (unpublished disposition) to inmates other than Vonseydewitz without a court order. (*Id.* at 13). In *Vonseydewitz*, the Nevada Supreme Court held that good time credits should be applied to Vonseydewitz's minimum sentence because the sentencing statute did not state that Vonseydewitz had to serve a specified minimum sentence before becoming eligible for parole. (*Id.* at 14). Plaintiff asserts that he is in a class of one because the defendants[5] knew that his sentencing statute permitted good time credits to be deducted from his minimum and maximum sentences in light of *Vonseydewitz,* but "they" refused to apply credits correctly "solely because Plaintiff did not have a court order requiring them to do so, as Vonseydewitz did." (*Id.* at 15). Plaintiff asserts that there is no rational basis for distinguishing between inmates with court orders and those without court orders. (*Id.*)

[5] Although Plaintiff repeatedly refers to multiple defendants, the SAC includes just one defendant.

Based on these allegations in Claim 2, Plaintiff concludes that his Fifth Amendment, Eighth Amendment, and Fourteenth Amendment rights have been violated. (*Id.* at 11).

Claim 3 alleges the following: Plaintiff committed attempted murder with the use of a deadly weapon on May 19, 2002, which "falls under NRS 209.4465(7)(b) between 1997 and 2007." (ECF No. 26 at 16). Plaintiff alleges that the district court[6] erred and violated Plaintiff's due process rights by denying Plaintiff's application of credits due to NRS 209.4465. (*Id.*)

In addition, in Claim 3, Plaintiff alleges that there was an ex post facto violation. Plaintiff alleges that he committed his crimes before the enactment of "the amendment." (*Id.* at 17). He further alleges: "By applying subsection 8 to Plaintiff Ronald C. Williams causes me a liberty interest, which the state has increased Plaintiff punishment because the statute NRS 209.4465 section 8 appears to eliminate the good time credits Plaintiff suppose to earn prior to enactment." (*Id.*) Plaintiff asserts that such laws are prohibited by the Ex Post Facto Clause in Article 1 of the United States Constitution. (*Id.*)

Plaintiff also once again asserts that "Defendants and the N.D.O.C." have made him serve excessive prison time on all the charges that came out of a single act when he should have been charged with just one count of attempt murder with the use of a deadly weapon. (*Id.* at 18).

Plaintiff again asserts that he is entitled to "credits" to both minimum and maximum sentences under NRS 209.4465(7)(b).[7] (*Id.* at 18).

Plaintiff asserts that all his claims are supported by attached exhibits. (*Id.*)

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[6] This appears to be a reference to a Nevada state district court. Plaintiff does not allege what the error was. More importantly, the district court is not a defendant in this action and cannot be a defendant in this action.

[7] The Court notes that, by its terms, NRS 209.4465(7)(b) affects only minimum sentences and parole eligibility dates, not maximum sentences and sentence expiration dates.

Based on these allegations, Plaintiff concludes that his Fifth Amendment, Eighth Amendment, and Fourteenth Amendment rights have been violated and that there has been an ex post facto violation. (*Id.* at 16).

A. *Heck* Bar

Throughout the SAC, Plaintiff alleges that conduct has affected his maximum sentence and that he has served excessive time in prison. As the Court previously explained, such allegations must survive the *Heck* bar. (ECF No. 24 at 5). In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that "in order to recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87. "A claim for damages bearing that relationship to a conviction or sentence that has not been . . . invalidated is not cognizable under § 1983." *Id.* at 487. "Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* As a result, the Supreme Court has held that a state prisoner's § 1983 action is barred (absent prior invalidation)–no matter the relief sought (damages or injunctive relief) if success in that action necessarily would demonstrate the invalidity of confinement or its duration. *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005).[8]

[8] However, if a civil claim merely would speed up the plaintiff's consideration for parole and would not necessarily imply the invalidity of the duration of confinement, then that claim may proceed in a § 1983 action. *Id.* at 82. Thus, to the extent Plaintiff is merely challenging the calculation of his parole eligibility date only and that any such claim would not necessarily directly or indirectly affect the fact or duration of his confinement, such a claim is not barred by *Heck* and *Wilkinson*. That does not mean, however, that Plaintiff has stated a colorable claim against any of the named defendants concerning his parole eligibility date. As discussed below, he has not.

The Court previously advised Plaintiff that, if Plaintiff wished to pursue any claims that explicitly or implicitly necessarily challenge the fact or duration of his confinement, then any second amended complaint must show that a court already has invalidated the fact or duration of confinement. (ECF No. 24 at 6). The Court explicitly informed Plaintiff that invalidation or recalculation of a parole eligibility date would not be sufficient to permit Plaintiff to raise any claim that necessarily calls into question the fact or duration of his confinement, regardless of whether such a claim relates to past, current, or pending sentences. (*Id.*)

Plaintiff has not shown that the fact or duration of his confinement already has been invalidated by a court. Although the SAC includes documents concerning a state court habeas matter, that matter concerned the calculation of Plaintiff's minimum sentence and parole eligibility date. (ECF No. 26-1 at 5-15). Despite the Court's previous advisement, Plaintiff has not shown that a court has ruled that Plaintiff impermissibly was charged, convicted, and sentenced[9] in violation of the Double Jeopardy Clause and has not shown that any court has ruled that the length of any of his sentences have had improper expiration dates or that he otherwise has spent too much time in prison. Accordingly, all of the claims in the SAC that explicitly or implicitly challenge the fact of Plaintiff's convictions or the duration of his confinement are barred. This includes all claims that he improperly was charged, convicted, and sentenced for multiple crimes arising out of the same incident and all claims that explicitly or implicitly allege that his maximum sentence or expiration date were improperly calculated or affected. The Court dismisses these claims with prejudice, as amendment would be futile.

The Court will address below any claims that necessarily challenge only the application of credits to Plaintiff's minimum sentence and parole eligibility date as such claims are not barred by *Heck*. Because an earlier parole hearing would not necessarily

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[9] Plaintiff also has not alleged facts sufficient to show that Shelly Williams was responsible for charging, convicting, or sentencing him, so he necessarily does not state a claim against Shelly Williams for such conduct. As the Court previously informed Plaintiff, *see* ECF No. 24 at 4, a plaintiff must plead facts sufficient to show that each particular Government-official defendant, through the official's own individual actions, has violated the Constitution. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

lead to the grant of parole at that parole hearing or necessarily imply the invalidity of the duration of Plaintiff's confinement, to the extent Plaintiff is challenging only the application of credits to determine his parole eligibility date, such claims are not barred by *Heck* or *Wilkinson*. The Court therefore will screen Plaintiff's claims that concern Shelly Williams's alleged actions affecting only the application of credits to his parole eligibility date.

B. Fifth Amendment Due Process Claims

Plaintiff repeatedly asserts that his Fifth Amendment rights have been violated. The Fifth Amendment's Due Process Clause applies to the federal government, not the States, while the Fourteenth Amendment's Due Process Clause applies to the states. *See Castillo v. McFadden,* 399 F.3d 993, 1002 n.5 (9th Cir. 2005). Plaintiff has not alleged actions by a federal employee. Therefore, to the extent Plaintiff is seeking to bring any Fifth Amendment due process claim, any such claim is dismissed with prejudice, as amendment would be futile.

C. Fourteenth Amendment Due Process Claims

The United States Constitution does not create a liberty interest in a job, educational program, prison classification, or assignment to a particular prison. *See Collins v. Palczewski*, 841 F.Supp. 333, 336, 340 (D. Nev. 1993) (finding that neither the U.S. Constitution, Nevada statutory law, nor the state's prison administrative regulations create a protected liberty or property interest in prison employment); *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976) (holding that prisoners have no liberty interest in their classification status or in rehabilitation programs); *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983) (holding that "an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State"). Therefore, Plaintiff's classification, prison assignment, and lack of job and programming opportunities are not sufficient to state a colorable liberty interest.

Allegations that a defendant violated state law are not sufficient to state a claim for violation of the Fourteenth Amendment's Due Process Clause. *Swarthout v. Cooke*, 562 U.S. 216, 222 (2011); *see also Young v. Williams*, No. 2:11-CV-01532-KJD, 2012 WL

1984968, at *3 (D. Nev. June 4, 2012) (holding that alleged error in applying good time credits to sentence was an error of state law that did not constitute a due process violation). In order to state a Fourteenth Amendment due process claim, a plaintiff must adequately allege that he was denied a specified liberty interest and that he was deprived of that liberty interest without the *constitutionally* required procedures. *Swarthout*, 562 U.S. at 219.

Nevada state prisoners do not have a liberty interest in the grant of parole. *See Moor v. Palmer*, 603 F.3d 658, 661-62 (9th Cir. 2010). Because the grant of parole is discretionary in Nevada, state statutes creating procedures concerning the discretionary grant of parole, such as parole eligibility provisions in NRS 209.4465, do not create a liberty interest. *Chaziza v. Stammerjohn*, No. 19-17506, 2021 WL 2139080, at *1–2 (9th Cir. May 26, 2021) (holding that Nevada prisoner did not establish a due process claim where NDOC officials failed to properly apply NRS 209.44654 and *Vonseydewitz* to deduct time credits and calculate his parole eligibility date*); see also Olim v. Wakinekona*, 461 U.S. 238, 250–51 (1983) (recognizing that where state officials have discretion and prisoner does not a constitutional substantive right, the prisoner has no related constitutional procedural right, and holding that state may choose to require certain procedures but doing so does not create an independent constitutional substantive right in those procedures).

Thus, to the extent Plaintiff is alleging that he was deprived of the ability to earn credits and that credits were not properly applied to his parole eligibility date, in violation of state law, he does not and cannot state a liberty interest. Accordingly, Plaintiff's allegations that Defendant Shelly Williams violated state law, including state procedures, such as by not giving Plaintiff credits, jobs, and educational opportunities and by not applying credits to his parole eligibility date, are not sufficient to state a due process claim.

In addition, to the extent Plaintiff alleges that his due process rights were violated because there was not an effective grievance procedure or because he has a liberty interest in a grievance procedure, he does not and cannot state a colorable due process claim. Prisoners have no liberty interest in a grievance procedure or due process rights to the handling of grievances in any particular manner. *See Mann v. Adams,* 855 F.2d 639, 640 (9th Cir.1988) (holding that a state's unpublished policy statements establishing a grievance procedure do not create a constitutionally protected liberty interest because there is no legitimate claim of entitlement to a grievance procedure); *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (recognizing that there is no liberty interest in the processing of appeals because prisoners are not entitled to a specific grievance process); *Patterson v. Kane*, No. 06-15781, 2006 WL 3698654, at *1 (9th Cir. Dec. 13, 2006) (recognizing that denial of a grievance does not rise to the level of a constitutional violation); *LeBlanc v. Tabak*, No. CV1603270JLSAFM, 2016 WL 6102327, at *6 (C.D. Cal. Oct. 18, 2016) (holding that prisoner could not state a colorable due process claim based on a defendant's denial of a grievance or failure to adequately investigate a grievance).

Accordingly, the Court dismisses the Fourteenth Amendment due process claims with prejudice, as amendment would be futile.

D. Fourteenth Amendment Equal Protection Claims

Plaintiff brings a class of one equal protection claim, alleging that it was a violation of equal protection for NDOC officials to apply the Nevada Supreme Court's ruling in *Vonseydewitz v. Legrand*, 131 Nev. 1360 (2015) (unpublished disposition) to Mr. Vonseydewitz but not apply it to other prisoners, including Plaintiff, who did not have court rulings in their own cases but had criminal sentences comparable to Mr. Vonseydewitz's.

In *Olech*, the Supreme Court explicitly addressed "whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The Supreme Court ruled in the affirmative and "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.*; *see also Engquist v. Oregon Dep't of Agr.*, 553

U.S. 591, 601 (2008) (recognizing that an equal protection claim may be maintained in some circumstances even if the plaintiff does not allege class-based discrimination, "but instead claims that she has been irrationally singled out as a so-called 'class of one'").

Where a class of one equal protection claim is at issue, the Plaintiff must allege facts sufficient to identify the group of individuals with whom he is similarly situated, identify the allegedly intentional and disparate treatment, and allege that there was no rational basis for the different treatment. *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011); *Chappell v. Bess*, No. 2:01-CV-01979 KJN P, 2012 WL 3276984, at *19–21 (E.D. Cal. Aug. 9, 2012). "Similarly situated" persons are those "who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

The Court finds that Plaintiff does not state a colorable equal protection claim. As was allegedly the case with Plaintiff, NDOC officials took the position that Mr. Vonseydewitz was not entitled under the law to have earned credits applied to his minimum sentence under NRS 209.4465(7)(b). *Vonseydewitz*, 131 Nev. 1360 at *1. However, in the unpublished disposition in Mr. Vonseydewitz's case, the Nevada Supreme Court ruled that NDOC officials had misinterpreted NRS 209.4465(7)(b) and reversed and remanded for proceedings consistent with the unpublished disposition. *Id.* at *3. Plaintiff alleges that the NDOC did not apply the Nevada Supreme Court's unpublished *Vonseydewitz* disposition to Plaintiff. However, under Nevada Rule of Appellate Procedure 36(c), an unpublished disposition by the Nevada Supreme Court in one person's case establishes mandatory precedent in that particular person's case but does <u>not</u> establish mandatory precedent for another person's case. Thus, although this understandably would be frustrating for Plaintiff, under the law, the Nevada Supreme Court's unpublished disposition in *Vonseydewitz* was mandatory precedent for Mr. Vonseydewitz, but the unpublished decision was not mandatory precedent for any NDOC official's decisions regarding Plaintiff. Plaintiff therefore has not alleged facts sufficient to show that Mr. Vonseydwitz was in all relevant respects alike. Accordingly, Plaintiff does not and cannot state a colorable equal protection claim. The Court therefore dismisses the equal protection claim with prejudice, as amendment would be futile.

E. Eighth Amendment

Plaintiff appears to be alleging that his Eighth Amendment rights were violated because he was not given a job and programming such as educational opportunities and because he did not have credits applied to his minimum sentence or minimum sentences when calculating his parole eligibility date.

As the Court explained in its previous screening order[10], a plaintiff must plead facts sufficient to show that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Although the SAC vaguely alleges that Defendant Shelly Williams did not apply the proper credits to his sentences, the SAC does not allege that she denied him a job or programming. Even if the SAC did include such allegations, this would not be sufficient to state a colorable Eighth Amendment claim against her. It is not an Eighth Amendment violation to deny a prisoner a job, education, or other programming. *See Rhodes v. Chapman*, 452 U.S. 337, 348 (holding that deprivation of rehabilitation and educational programs does not violate Eighth Amendment); *Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 846 (9th Cir.1985) (holding that general limitation of jobs and educational opportunities is not considered punishment); *Hoptowit v. Ray*, 682 F.2d 1237, 1254–55 (9th Cir.1982) (holding that "there is no constitutional right to rehabilitation").

To the extent Plaintiff alleges that failing to apply the proper credits to his parole eligibility date violated his Eighth Amendment rights, Plaintiff fails to state a colorable Eighth Amendment claim. Because imprisonment is punitive, officials who detain a person beyond the termination of a sentence may violate that person's rights under the Eighth Amendment if they act with deliberate indifference to the prisoner's liberty interest. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985). For the reasons discussed

[10] ECF No. 24 at 4.

above, any claim that Plaintiff necessarily served excessive time in prison is *Heck* barred, and Plaintiff has not adequately alleged a liberty interest and cannot do so.

Accordingly, the Court dismisses the Eighth Amendment claims with prejudice, as amendment would be futile.

F. Ex Post Facto Claim – Parole Eligibility Dates

Although his theory is not clear, it appears that Plaintiff is alleging that there was an ex post facto violation as a result of NRS 209.4465(8). It may be that Plaintiff is alleging that he did not have any credits applied to his minimum sentences and parole eligibility dates after July 1, 2007 due to the enactment of NRS 209.4465(8). Or, it may be that he is alleging that he has received only ten good time credits per month for the time before the enactment of NRS 209.4465(8). The Court therefore will address both theories.

Article I of the United States Constitution prohibits states from passing Ex Post Facto laws. U.S. Const. Art. I, § 10, cl. 1. The Ex Post Facto Clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Weaver v. Graham*, 450 U.S. 24, 30 (1981); *see also Garner v. Jones,* 529 U.S. 244 (2000). The Ex Post Facto Clause does not forbid changes in the law. To fall within the *ex post facto* prohibition, a law must be applied retrospectively, which means that it must apply to events occurring before its enactment. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997). Thus, the incorrect interpretation and misapplication of a law that does <u>not</u> apply retrospectively to a person does not constitute a violation of the Ex Post Facto Clause. *See, e.g., Vonseydewitz*, 2015 WL 3936827 at *3 (rejecting ex post facto claim where official incorrectly applied NRS 209.4465(b), which was not applied retroactively).

Plaintiff refers to NRS 209.4465(8) in his allegations of an ex post facto violation. In 2002, when Plaintiff alleges that he committed his offense, NRS 209.4465(7) provided:

"Credits earned pursuant to this section:

(a) Must be deducted from the maximum term or the maximum aggregate term imposed by the sentence, as applicable; and

(b) Apply to eligibility for parole unless the offender was sentenced pursuant to a statute which specifies a minimum sentence that must be served before a person becomes eligible for parole." NRS 209.4465(7) (emphasis added).

NDOC prison officials interpreted the limiting language in NRS 209.4465(7)(b) narrowly. In *Vonseydewitz v. Legrand*, Dkt No. 66159, 2015 WL 3936827 (Nev. June 24, 2015) (unpublished disposition), the Nevada Supreme Court considered this limiting language when addressing the issue of whether Vonseydewitz, a habeas petitioner, was entitled under the language of NRS § 209.4465(7)(b) to have his earned credits applied to his parole eligibility date. *Id.* The court interpreted the limiting language in NRS § 209.4465(7)(b) more broadly than NDOC officials had and held that Vonseydewitz was entitled to have statutory credits applied to his parole eligibility dates because he had committed an offense that required a minimum sentence but that did not explicitly require the offender to serve a minimum period of time before being considered for parole. (Id. at **2-3). Later, in a 2017, in a published opinion, the Nevada Supreme Court reached the same conclusion regarding the proper interpretation of NRS 209.4465(7)(b) as it had in *Vonseydewitz*. *See Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1262 (Nev. 2017).

The Nevada Legislature amended NRS 209.4465 in A.B. 510 and, on July 1, 2007, these amendments went into effect. One of these amendments was to add subsection 8, which affected how earned credits were to be applied to some people. NRS 209.4465(8) provides:

8. Credits earned pursuant to this section by an offender who has not been convicted of:

(a) Any crime that is punishable as a felony involving the use or threatened use of force or violence against the victim;

(b) A sexual offense that is punishable as a felony;

(c) A violation of NRS 484C.110, 484C.120, 484C.130 or 484C.430 that is punishable as a felony; or

(d) A category A or B felony,

apply to eligibility for parole and must be deducted from the minimum term imposed by the sentence until the offender becomes eligible for parole and must be deducted from the maximum term imposed by the sentence.

NRS 209.4465(8) (2007) (emphasis added).

At the same time that the statute was amended to add NRS 209.4465(8), NRS 209.4465(7) was amended to begin, "Except as otherwise provided in subsection 8." Thus, under the amended statute, category B felons (including attempted murderers) who committed their offenses after the effective date of that amendment are not eligible to have good time credits applied when determining their maximum terms or when determining the minimum terms they are required to serve before being eligible for parole.

But, because of how NDOC officials were interpreting NRS 209.4465(7)(b), there also were offenders, such as the petitioners in *Vonseydewitz* and *Williams*, who unquestionably committed their crimes before the effective date of the amendment who also were not having credits applied to their minimum eligibility parole dates, not because of the amendment, but due to the way that prison officials were interpreting and applying the limiting language in NRS 209.4465(7)(b), a statutory provision that was being applied incorrectly but not retrospectively. In *Vonseydewitz*, the Nevada Supreme Court rejected the petitioner's claim that NDOC officials were retroactively applying NRS 209.4465(8) in violation of the ex post facto clause. *Vonseydewitz v. Legrand*, Dkt No. 66159, 2015 WL 3936827 *3 (Nev. June 24, 2015) (unpublished). The Nevada Supreme Court found that the responses to Plaintiff's grievances showed that officials were not retroactively applying NRS 209.4465(8) to deny the petitioner credits towards his parole eligibility date but instead were misinterpreting and misapplying the exception in the limiting language of NRS 209.4465(7)(b), which was in effect when he committed his offense.[11] *Id.*

In the instant case, it may be that Plaintiff is alleging that he was not having any good time credits applied to his sentence after the enactment of NRS 209.4465(8) because NRS 209.4465(8) was applied to him even though he committed his crimes

[11] *Williams* did not involve any ex post facto issues or NRS 209.4465(8).

before its enactment.[12] Plaintiff makes the conclusory allegation that the Ex Post Facto Clause was violated, cites to NRS 209.4465(8), and refers to the exhibits attached to the SAC. Merely amending the law is not a violation of the Ex Post Facto Clause. The new law must be applied to him retrospectively by the defendant. Plaintiff does not allege any facts that would show that Shelly Williams found Plaintiff ineligible to ever have good time credits applied to his parole eligibility date because she applied NRS 209.4465(8) to him and did not apply 209.4465(7)(b). In fact, Plaintiff appears to be alleging that she was applying NRS 209.4465(7)(b) to him, but that she was applying it incorrectly, and he alleges that NDOC officials refused to change this even after the *Vonseydewitz* decision because Plaintiff did not yet have a court order comparable to the order Mr. Vonseydewitz had.

Furthermore, although Plaintiff asserts that the exhibits to the SAC support his claim, they do not. Nothing in the attachments to the SAC even mentions NRS 209.4465(8). Rather, the attachments support Plaintiff's allegations that NRS 209.4465(7)(b), which was in effect at the time he committed his offenses, was applied to him and that it was applied incorrectly. According to the exhibits, following the Nevada Supreme Court's published opinion in *Williams* concerning NRS 209.4465(7)(b), NDOC officials conceded in a state court habeas proceeding filed by Plaintiff that Plaintiff's sentence must be recalculated in light of the *Williams* opinion (which did not involve any *ex post facto* issues) and the proper interpretation of NRS 209.4465(7)(b), and Sherry Williams submitted a document in that habeas case stating that Plaintiff's parole eligibility date had been adjusted. (ECF No. 26-1 at 5-15). There is nothing in the exhibits to indicate that Sherry Williams refused to make the adjustment on the grounds that NRS 209.4465(8) applied to him and that NRS 209.4465(7)(b) did not and there is nothing that to indicate that she ever applied NRS 209.4465(8) to him to find him ineligible to have good time credits applied to his parole eligibility date for any period of time. Thus, there

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[12] It seems doubtful that such a claim could survive the *Heck* bar because the retrospective application of NRS 209.4465(8) would affect not only Plaintiff's minimum sentence but also his maximum sentence. The Court need not resolve this issue because Plaintiff does not otherwise state a colorable Eighth Amendment claim.

is nothing in the SAC alleging facts sufficient to show that Sherry Williams retroactively applied 209.4465(8) to find Plaintiff ineligible to have time credits applied to his parole eligibility dates for any period of time.

In addition, Plaintiff appears to believe that because NRS 209.4465(8) was added after he committed his offense, "the state" increased his punishment by eliminating his good time credits. Although it is not clear, it may be that Plaintiff is alleging that he should have received 20 good time credits for every month that he has been in prison but that he received only ten good time credits for months prior to July1, 2007 as a result of NRS 209.4465(8). The exhibits to the SAC would support such a factual allegation. (*See* ECF No. 26-1, at 17-20 showing increase in number of monthly statutory good time credits from 10 to 20 beginning July 2007). The 2007 Nevada Legislature amended NRS 209.4465 to increase the amount of statutory good time credits that could be earned by an offender, from 10 days per month to 20 days per month. 2007 Nev. Stat., ch. 525, § 5, at 3176. The Legislature also provided that, for offenders who had not been convicted of the offenses listed in the newly adopted NRS 209.4465(8), this beneficial increase in the number of credits would be applied retroactively to July 1, 2000. 2007 Nev. Stat., ch. 525, § 21, at 3196. Thus, Plaintiff, who alleges that he was convicted of attempted murder, would not be eligible to have this benefit applied retroactively. *See Wellington v. State*, 238 P.3d 865 at *1 (unpublished disposition).

However, to the extent Plaintiff is alleging that the failure to retroactively apply this increase in good time credits was a violation of the Ex Post Facto Clause, he is incorrect.[13] As discussed above, the Ex Post Facto Clause forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Although Plaintiff may not have been treated as favorably as others with the increase in the number of credits, his punishment after the amendment was not more severe than the law that was in effect at the time he committed his offenses. Therefore, Plaintiff does

[13] In addition, if the increase in the number of credits necessarily would affect both maximum and minimum sentence, this claim may be barred by *Heck*.

not and cannot state a colorable *ex post facto* claim based on this theory and any such claim is dismissed with prejudice, as amendment would be futile.

Accordingly, Plaintiff fails to state a colorable ex post facto claim. The Court therefore dismisses this claim with prejudice, as amendment would be futile.

III. MOTION FOR APPOINTMENT OF COUNSEL

Like many prisoners, Plaintiff has limited library access and has filed a motion for appointment of counsel. (ECF No. 25). Because the Court is dismissing this action, the Court denies the motion as moot.

IV. CONCLUSION

It is therefore ordered that Plaintiff's application to proceed *in forma pauperis* (ECF Nos. 4, 14) without having to prepay the full filing fee is **granted**. Plaintiff will **not** be required to pay an initial installment fee. Nevertheless, the full filing fee will still be due, pursuant to 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act. The movant herein is permitted to maintain this action to conclusion without the necessity of prepayment of fees or costs or the giving of security therefor.

It is further ordered that, pursuant to 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act, the Nevada Department of Corrections will forward payments from the account of Ronald C. Williams, # 87832 to the Clerk of the United States District Court, District of Nevada, 20% of the preceding month's deposits (in months that the account exceeds $10.00) until the full $350 filing fee has been paid for this action. The Clerk of the Court will send a copy of this order to the Finance Division of the Clerk's Office. The Clerk will send a copy of this order to the attention of **Chief of Inmate Services for the Nevada Department of Corrections,** P.O. Box 7011, Carson City, NV 89702.

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

It is further ordered that the operative complaint is the Second Amended Complaint (ECF No. 26).

It is further ordered that the entire Second Amendment complaint is dismissed with prejudice, as amendment would be futile.

It is further ordered that the motion for appointment of counsel (ECF No. 25) is denied.

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

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

DATED THIS 13 day of August 2021.

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 21 2022

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

RONALD C. WILLIAMS, Plaintiff-Appellant, v. WILLIAM HUTCHINGS; et al., Defendants-Appellees.	No. 21-16367 D.C. No. 2:21-cv-00123-KJD-DJA District of Nevada, Las Vegas ORDER

Before: PAEZ, RAWLINSON, and WATFORD, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On August 23, 2021, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's August 23, 2021 order, and the opening brief filed on September 27, 2021, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 4) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions are denied as moot.

DISMISSED.

KWH/MOATT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 11 2021

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

RONALD C. WILLIAMS,

Plaintiff-Appellant,

v.

WILLIAM HUTCHINGS; NEVADA DEPARTMENT OF CORRECTIONS, Offender Management Dept.,

Defendants-Appellees.

No. 21-15795

D.C. No.
2:21-cv-00123-KJD-DJA
District of Nevada,
Las Vegas

ORDER

Before: SILVERMAN, NGUYEN, and R. NELSON, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the district court vacated the April 2, 2021 order and judgment challenged in this appeal and reopened the case.

Because the action is still pending in the district court, this appeal is dismissed for lack of jurisdiction. *See* 28 U.S.C. § 1291.

All pending motions are denied as moot.

DISMISSED.

DA/Pro Se

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 23 2021

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

RONALD C. WILLIAMS, Plaintiff-Appellant, v. WILLIAM HUTCHINGS; et al., Defendants-Appellees.	No. 21-16367 D.C. No. 2:21-cv-00123-KJD-DJA District of Nevada, Las Vegas ORDER

A review of the district court's docket reflects that the district court has certified that this appeal is not taken in good faith and has revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

(1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), or

(2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant files a statement that the appeal should go forward, appellant also must:

(1) file in this court a motion to proceed in forma pauperis, OR

(2) pay to the district court $505.00 for the filing and docketing fees for this appeal AND file in this court proof that the $505.00 was paid.

JW

If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. *See* 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice. If the court dismisses the appeal as frivolous, this appeal may be counted as a strike under 28 U.S.C. § 1915(g).

The briefing schedule for this appeal is stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, (2) a form statement that the appeal should go forward, and (3) a Form 4 financial affidavit. Appellant may use the enclosed forms for any motion to dismiss the appeal, statement that the appeal should go forward, and/or motion to proceed in forma pauperis.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Joseph Williams
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 30 2021

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

RONALD C. WILLIAMS,

Plaintiff - Appellant,

v.

WARDEN WILLIAM HUTCHINGS and NEVADA DEPARTMENT OF CORRECTIONS, Offender Management Dept.,

Defendants - Appellees.

No. 21-15795

D.C. No. 2:21-cv-00123-KJD-DJA
U.S. District Court for Nevada, Las Vegas

ORDER

A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days after the date of this order, appellant shall pay to the district court the $505.00 filing and docketing fees for this appeal and file in this court proof of such payment or file in this court a motion to proceed in forma pauperis.

The filing of a motion to proceed in forma pauperis will automatically stay the briefing schedule under Ninth Circuit Rule 27-11.

The Clerk shall serve a Form 4 financial affidavit on appellant.

If appellant fails to comply with this order, this appeal may be dismissed by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 23 2021

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

RONALD C. WILLIAMS, Plaintiff-Appellant, v. WILLIAM HUTCHINGS; et al., Defendants-Appellees.	No. 21-16367 D.C. No. 2:21-cv-00123-KJD-DJA District of Nevada, Las Vegas ORDER

A review of the district court's docket reflects that the district court has certified that this appeal is not taken in good faith and has revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

(1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), or

(2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant files a statement that the appeal should go forward, appellant also must:

(1) file in this court a motion to proceed in forma pauperis, OR

(2) pay to the district court $505.00 for the filing and docketing fees for this appeal AND file in this court proof that the $505.00 was paid.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 13 2022

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

RONALD C. WILLIAMS, Plaintiff - Appellant, v. WARDEN WILLIAM HUTCHINGS; et al., Defendants - Appellees.	No. 21-16367 D.C. No. 2:21-cv-00123-KJD-DJA U.S. District Court for Nevada, Las Vegas **MANDATE**

The judgment of this Court, entered April 21, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rebecca Lopez
Deputy Clerk
Ninth Circuit Rule 27-7