

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 28 2023

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

JUSTIN WEIBLE,

Plaintiff-Appellant,

v.

KEVIN PROVOST; et al.,

Defendants-Appellees.

No. 22-16736

D.C. No. 2:22-cv-00812-GMN-EJY
District of Nevada,
Las Vegas

ORDER

Before: CANBY, S.R. THOMAS, and CHRISTEN, 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 December 15, 2022, 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 and the response to the court's December 15, 2022 order, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 6) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions are denied as moot.

No further filings will be entertained in this closed case.

DISMISSED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JUSTIN WEIBLE,

Plaintiff,

vs.

KEVIN PROVOST, *et al.*,

Defendants.

Case No.: 2:22-cv-00812-GMN-EJY

ORDER

Pending before the Court is the Report and Recommendation (“R&R”), (ECF No. 11), of United States Magistrate Judge Elayna J. Youchah, which recommends dismissing certain claims in Plaintiff Justin Weible’s (“Plaintiff’s”) First Amended Complaint, (ECF No. 7), granting Plaintiff an opportunity to file a second amended complaint, and dismissing his First Amended Complaint if Plaintiff does not file a second amended complaint.

A party may file specific written objections to the findings and recommendations of a United States Magistrate Judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B); D. Nev. R. IB 3-2. Upon the filing of such objections, the Court must make a *de novo* determination of those portions to which objections are made. *Id.* The 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); D. Nev. R. IB 3-2(b). 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) (citing 28 U.S.C. § 636(b)(1)). Indeed, the Ninth Circuit has recognized that a district court is not required to review a magistrate judge’s R&R where no objections have been filed. *See, e.g., United States v. Reyna-Tapia*, 328 F.3d 1114, 1122 (9th Cir. 2003).

1 Here, no objections were filed, and the deadline to do so has passed. (*See* Min. Order,
2 ECF No. 11) (setting an October 11, 2022, deadline for objections). In addition, Plaintiff had
3 until October 31, 2022, to file his second amended complaint to avoid dismissal but did not do
4 so. (*See* R&R 12:9–21, ECF No. 11).

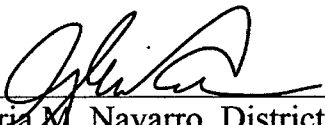
5 Accordingly,

6 **IT IS HEREBY ORDERED** that the Report and Recommendation, (ECF No. 11), is
7 **ACCEPTED and ADOPTED** in full.

8 **IT IS FURTHER ORDERED** that Plaintiffs' First Amended Complaint, (ECF No. 7),
9 is dismissed without prejudice and without leave to amend.

10 **IT IS FURTHER ORDERED** that the Clerk is instructed to close the case.

11 Dated this 1 day of November, 2022.

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15 Gloria M. Navarro, District Judge
16 United States District Court
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JUSTIN WEIBLE,

Plaintiff,

v.

KEVIN PROVOST et al.,

Defendants.

Case No.: 2:22-cv-00812-GMN-EJY

REPORT AND RECOMMENDATION

This matter comes before the Court on Plaintiff's First Amended Complaint under 42 U.S.C. § 1983. ECF No. 7.

I. INTRODUCTION

Plaintiff, a non-inmate, filed an application to proceed *in forma pauperis* ("IFP"). ECF No. 1. The IFP application demonstrated Plaintiff met the requirements to proceed without paying filing fees, and the application was granted. ECF No. 5. The Court screened Plaintiff's initial Complaint and recommended the Complaint be dismissed without prejudice and with leave to amend. *Id.* Pending before the Court is Plaintiff's First Amended Complaint (ECF No. 7) that is screened below.

II. SCREENING THE COMPLAINT

Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint under 28 U.S.C. § 1915(e)(2). In screening the complaint, a court must identify cognizable claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1 In determining whether Plaintiff's Amended Complaint is sufficient to state a claim, all
 2 allegations of material fact are taken as true and construed in the light most favorable to Plaintiff.
 3 *Wylar Summit P'ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
 4 Nonetheless, and while the standard under Rule 12(b)(6) does not require detailed factual
 5 allegations, Plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v.*
 6 *Twombly*, 550 U.S. 544, 555 (2007). The court liberally construes *pro se* complaints and may only
 7 dismiss them "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his
 8 claim which would entitle him to relief." *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014)
 9 (quoting *id.*).

10 III. DISCUSSION

11 Plaintiff's First Amended Complaint alleges violations of the Fourth, Fifth, Eighth, and
 12 Fourteenth Amendments of the U.S. Constitution as well as common law rights.¹ ECF No. 7 at 4.
 13 Plaintiff's constitutional claims are brought through 42 U.S.C. § 1983. Plaintiff names Kevin
 14 Provost, Thomas Conner, Lucien Lockhart, Richard Nelson Jr., Melanie Andress-Tobiasson,
 15 Stephen George, Richard Scotti, Crystal Eller, Pandora Leven, Damian Sheets, Kelsey Bernstein,
 16 Baylie Hellman, Alexis Minichini, Erik Zentz, Robert Zentz, the State of Nevada, Clark County, the
 17 City of Henderson, the Nevada Department of Motor Vehicles, the Nevada Department of Public
 18 Safety, the Las Vegas Metropolitan Police Department, the Henderson Detention Center, and Clark
 19 County Detention Center as Defendants. *Id.* at 2. Plaintiff also separately lists the Nevada Highway
 20 Patrol as a Defendant. *Id.* at 3.

21 Plaintiff avers that his Fourth, Fifth, Eighth, and Fourteenth Amendment rights were violated
 22 when Defendant Provost pulled him over without probable cause, unlawfully arrested him,
 23 unlawfully searched his vehicle, impounded his vehicle and personal property, and transported him
 24 to Henderson Detention Center. *Id.* at 15. Plaintiff alleges Defendants Provost and Nelson
 25 "unlawfully and unreasonably applied for a search warrant telephonically," obtained the warrant,

26
 27 ¹ The complete list of claims Plaintiff attempts to assert include: "negligence, perjury, police misconduct, police
 28 brutality, defamation of character, battery, assault, legal malpractice, judicial misconduct [under 18 U.S.C. § 241, 18
 U.S.C. § 242, and 18 U.S.C. § 245(b)(2)]...right to due process guaranteed by the 4th amendment, 5th amendment, 8th
 amendment, and the 14th amendment." ECF No. 7 at 4.

1 and took his blood without consent. *Id.* at 15-16. Plaintiff alleges that his driving privileges were
 2 subsequently revoked. *Id.* at 16. The order revoking Plaintiff's driver's license followed an
 3 administrative hearing and was signed by Thomas Conner. *Id.* at 17. Plaintiff asserts several
 4 contentions the Court interprets as judicial misconduct and attorney malpractice against judges and
 5 attorneys. *Id.* at 18-20.

6 Plaintiff alleges that on March 18, 2021, when he was released from Clark County Detention
 7 Center, he was assaulted by an unknown corrections officer resulting in hospital care for an orbital
 8 bruise. *Id.* at 19. Plaintiff alleges that the Nevada Highway Patrol, Henderson Police Department,
 9 and Las Vegas Metropolitan Police Department have "a custom, pattern, practice, and/or procedure
 10 of hiring police officers who have committed acts of violence and/or have a propensity to do so."
 11 *Id.* at 21. As a result of those policies, Plaintiff alleges his Fourth Amendment rights were violated.
 12 *Id.*

13 Following this wrongdoing by Defendants, Plaintiff claims he "has suffered and continues
 14 to suffer substantial past and future damages, both compensatory and general, including, but not
 15 limited to, medical bills, loss of income, severe emotional distress, mental anguish, embarrassment,
 16 humiliation, disfigurement, and physical pain and suffering." *Id.* at 23. Plaintiff asks the Court to
 17 restore his rights, order policy changes to be implemented at various Nevada state agencies, and
 18 award him \$100 million in compensatory, monetary, nominal, and punitive damages. *Id.* at 24.

19 A. The Court Recommends Dismissing With Prejudice Plaintiff's Section 1983 and
 20 Common Law Claims Against Judicial Officers Thomas Conner, Melanie Andress-
Tobiasson, Stephen George, Richard Scotti, and Crystal Eller.

21 "Judges and those performing judge-like functions are absolutely immune from damage
 22 liability for acts performed in their official capacities." *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir.
 23 1986) (citation omitted); *Burns v. Reed*, 500 U.S. 478, 501 (1991) (Scalia concurring) (judicial
 24 officers are immune from common law defamation claims); *Miller v. Davis*, 521 F.3d 1142, 1145
 25 (9th Cir. 2008) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871) ("[I]t
 26 has long been established that judges are absolutely immune from liability for acts 'done by them in
 27 the exercise of their judicial functions'"; thus supporting the Court's decision that the judicial
 28 officers named by Plaintiff cannot be sued in their judicial capacities).

1 In the instant case, the actions of each judge as described by Plaintiff in his Amended
 2 Complaint relate to acts performed in their official capacities. ECF No. 7 ¶¶ 62, 69, 71, 73, 75-77,
 3 80-81, 85, 88. Therefore, the Court recommends dismissal with prejudice of all claims against
 4 judicial officers Thomas Conner, Melanie Andress-Tobiasson, Stephen George, Richard Scotti, and
 5 Crystal Eller as amendment would be futile.

6 B. Plaintiff's Claims Against Pandora Leven, Damian Sheets, Kelsey Bernstein, Baylie
 7 Hellman, Alexis Minichini, Erik Zentz, and Robert Zentz.

8 1. *Plaintiff's § 1983 claims.*

9 In the Ninth Circuit, as in other circuits, "an attorney, whether retained or appointed, does
 10 not act under color of state law. Hence, the [§ 1983] claim is not one coming within the jurisdiction
 11 of the district court." *Szjarto v. Legeman*, 466 F.2d 864 (9th Cir. 1972) (internal quotations and
 12 citations omitted). *See also Polk County v. Dodson*, 454 U.S. 312, 318, 325 (1991). As such, all of
 13 Plaintiff's claims arising under § 1983 against the above named attorneys must be dismissed with
 14 prejudice as amendment would be futile.

15 2. *Plaintiff's common law malpractice claims.*

16 Plaintiff cannot state a common law malpractice claim against Ms. Leven, who is a public
 17 defender. ECF No. 7 ¶ 86. *Morgano v. Smith*, 879 P.2d 735, 737 (Nev. 1994) (internal citation
 18 omitted). Thus, the Court recommends this claim be dismissed with prejudice because amendment
 19 would be futile.

20 With respect to privately retained criminal defense counsel, a plaintiff must assert that he/she
 21 obtained post-conviction relief before a common law malpractice claim will lie. *Id.* at 737-78 (citing
 22 *Shaw v. State, Dept. of Admin., PDA*, 816 P.2d 1358, 1360 (Alaska 1991) (a convicted criminal must
 23 obtain post-conviction relief before pursuing a legal malpractice action against former defense
 24 counsel); *Stevens v. Bispham*, 851 P.2d 556, 561, 566 (Ore. 1993) (for a convicted criminal to
 25 maintain a legal malpractice action against former defense counsel, the plaintiff must allege
 26 exoneration of the underlying offense through reversal on direct appeal, post-conviction relief or
 27 other means)). Plaintiff makes no assertion of post-conviction relief in his Amended Complaint.
 28 Therefore, he fails to state a legal malpractice claim against Damian Sheets, Kelsey Bernstein, Baylie

Hellman, Alexis Minichini, Erik Zentz, and Robert Zentz. Nonetheless, because it is possible for Plaintiff to allege facts that could state such a claim, the Court recommends dismissing the common law malpractice claims against Damian Sheets, Kelsey Bernstein, Baylie Hellman, Alexis Minichini, Erik Zentz, and Robert Zentz without prejudice and with leave to amend.

C. Plaintiff's Section 1983 Claims Against the State of Nevada, the Nevada Department of Public Safety, the Nevada Department of Motor Vehicles, the Nevada Highway Patrol, the Clark County Detention Center, and the Henderson Detention Center.

1. *The State of Nevada and its subdivisions.*

The Eleventh Amendment bars citizens from suing a state. U.S. CONST. amend. XI. The United States Supreme Court holds that 42 U.S.C. § 1983 does not constitute an abrogation of a state's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 338-40 (1979). Absent waiver, a state is not subject to suit under Section 1983. *Id.*; *see also Alabama v. Pugh*, 438 U.S. 781, 782 (1978). The State of Nevada has declined to waive its immunity to suit under the Eleventh Amendment. NRS 41.031(3). Thus, to the extent Plaintiff seeks to sue the State of Nevada he is constitutionally barred from doing so and his claims must be dismissed. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984).

Further, in relevant part, § 1983 states that “[e]very *person* who, under color of [state law] ... causes to be subjected[] any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution ... shall be liable to the party injured.” (Emphasis added.) Federal law interprets the word “person” appearing in § 1983 as not including states or state agencies. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989). As subdivisions of the State of Nevada—which itself is immune—the Nevada Department of Public Safety, the Nevada Department of Motor Vehicles, and the Nevada Highway Patrol are also immune from suit under § 1983. *Meza v. Lee*, 669 F.Supp. 325, 328 (D. Nev. 1987). Thus, the Court recommends Plaintiff’s claims against these three state agencies be dismissed with prejudice as amendment would be futile. *Pennhurst*, 465 U.S. at 101-02.

2. *The Clark County and Henderson Detention Centers.*

The Clark County Detention Center is a building and is therefore not an entity subject to suit. *Ellis v. Clark County Detention Center Med.*, Case No. 2:19-cv-00320-JAD, 2019 WL 6828296, at

1 *2 (D. Nev. Dec. 12, 2019). The same principle is properly applied to the Henderson Detention
 2 Center. *Gonzalez v. Henderson Detention Center*, Case No. 2:11-cv-00789-RLH, 2011 WL
 3 4834461, at *2 (D. Nev. Oct. 12, 2011). Because amendment would be futile, the Court recommends
 4 dismissal with prejudice of all claims against the Clark County Detention Center and the Henderson
 5 Detention Center.

6 D. The Court Recommends Dismissing Plaintiff's Section 1983 Claims Against Clark
 7 County, the City of Henderson, and the Las Vegas Metropolitan Police Department
Without Prejudice.

8 A plaintiff seeking to hold a municipal defendant liable for constitutional violations under
 9 Section 1983 cannot do so arguing respondeat superior. Instead, a plaintiff must allege that his
 10 constitutional rights were violated pursuant to the defendant's custom, practice, or policy. *Monell*
 11 *v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690-91 (1978). Such a claim requires a
 12 "direct causal link between a municipal policy or custom and the alleged constitutional violation."
 13 *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1075 (9th Cir. 2016) (internal citation omitted) (en
 14 banc). An "act performed pursuant to a 'custom' that has not been formally approved by an
 15 appropriate decisionmaker may fairly subject a municipality to liability on the theory that the
 16 relevant practice is so widespread as to have the force of law." *Bd. of Cnty. Com'rs of Bryan Cnty.,*
 17 *Okl. v. Brown*, 520 U.S. 397, 404 (1997) (internal citation omitted).

18 Clark County, the City of Henderson, and the Las Vegas Metropolitan Police Department are
 19 all municipal defendants that may be held liable under the *Monell* framework. In the instant case,
 20 Plaintiff alleges that the Henderson Police Department and Las Vegas Metropolitan Police
 21 Department have "a custom, pattern, practice, and/or procedure of hiring police officers who have
 22 committed acts of violence and/or have a propensity to do so." ECF No. 7 ¶ 110. Plaintiff alleges
 23 no additional facts regarding the alleged policy to which he refers. Plaintiff makes no mention of
 24 any policy issued by or otherwise adopted by practice involving Clark County. Thus, Plaintiff fails
 25 to plead claims against all of these defendants. However, Plaintiff may be able to plead with more
 26 factual specificity in order to state a claim for which relief may be granted.

1 Because amendment is not necessarily futile, the Court recommends dismissal of Plaintiff's
 2 claims against Clark County, the City of Henderson, and the Las Vegas Metropolitan Police
 3 Department without prejudice and with leave to amend.

4 E. Plaintiff's Claims Against Kevin Provost, Lucien Lockhart, and Richard Nelson, Jr..

5 1. *Plaintiff's official capacity claims must be dismissed with prejudice.*

6 Plaintiff names Kevin Provost as a defendant in his official capacity. ECF No. 7 at 3. To
 7 ensure the Court is thorough, the Court interprets Plaintiff's Amended Complaint as though it names
 8 Lockhart and Nelson as defendants in their official capacities as well.

9 The Eleventh Amendment "bars actions against state officers sued in their official capacities
 10 for past alleged misconduct involving a complainant's federally protected rights, where the nature
 11 of the relief sought is retroactive, *i.e.*, money damages, rather than prospective, *e.g.*, an injunction."
 12 *Bair v. Krug*, 853 F.2d 672, 675 (9th Cir. 1988) (internal citations omitted). For this reason, the
 13 Court recommends dismissing with prejudice all of Plaintiff's claims seeking money damages for
 14 past harms allegedly caused by Kevin Provost, Lucia Lockhart, and Richard Nelson, Jr. in their
 15 official capacities.

16 2. *Plaintiff's individual capacity § 1983 and common law claims.*

17 a. Plaintiff's § 1983 claims.

18 The Court reasonably interprets Plaintiff's police misconduct and brutality claims as Fourth
 19 Amendment claims. However, Plaintiff's Amended Complaint fails to state a Fourth Amendment
 20 claim against Provost, Lockhart, and Nelson in their individual capacities. The Fourth Amendment
 21 guarantees a citizen's right to be free from "unreasonable searches and seizures." U.S. CONST.
 22 amend. IV. "[A]ll claims that law enforcement officers have used excessive force—deadly or not—
 23 in the course of an arrest ... should be analyzed under the Fourth Amendment and its
 24 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphasis in original).
 25 The "reasonableness" of a particular seizure, including an arrest of a person, "depends not only on
 26 *when* it is made, but also on *how* it is carried out." *Id.* at 395 (internal citations omitted) (emphasis
 27 in original). The relevant inquiry is "whether the officers' actions are 'objectively reasonable' in
 28 light of the facts and circumstances confronting them." *Id.* at 397. In determining the reasonableness

1 of a seizure effected by force, a court must balance the “nature and quality of the intrusion on the
2 individual’s Fourth Amendment interests against the countervailing government interests at stake.”
3 *Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir. 2003) (internal citation and quotation marks
4 omitted). Courts evaluate the strength of the government’s interest in using force—deadly or
5 otherwise—by examining three nonexclusive “*Graham* factors”: “(1) whether the suspect poses an
6 immediate threat to the safety of the officers or others, (2) the severity of the crime at issue, and (3)
7 whether he is actively resisting arrest or attempting to evade arrest by flight.” *Glenn v. Wash. Cnty.*,
8 673 F.3d 864, 872 (9th Cir. 2011) (internal citation and quotation marks omitted). These factors are
9 not exclusive. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). Instead, courts “examine
10 the totality of the circumstances and consider whatever specific factors may be appropriate in a
11 particular case.” *Id.* (internal citation and quotation marks omitted).

12 Plaintiff’s Amended Complaint not only fails to properly identify his claims, but he fails to
13 allege facts describing what, if anything, prompted the apparent traffic stop, the subsequent arrest,
14 the alleged illegitimate telephone warrant or how or when most of the Defendants engaged in wrongs
15 supporting the alleged constitutional violations. Instead, Plaintiff asserts conclusions that each event
16 and encounter with law enforcement violated his rights. In the absence of facts, the Amended
17 Complaint fails to put Defendants sufficiently on notice of the claims against them as required by
18 Rule 8 of the Federal Rules of Civil Procedure. *See, e.g., Benitez v. Schumacher*, Case No. 2:20-cv-
19 00396-FMO-SHK, 2020 WL 6526352, at *12 (C.D. Cal. May 4, 2020). Defendants cannot defend
20 themselves against Plaintiff’s conclusions. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (a
21 complaint “must contain sufficient allegations of underlying facts to give fair notice and to enable
22 the opposing party to defend itself effectively”). Therefore, the Court recommends Plaintiff’s Fourth
23 Amendment claims (asserted as police brutality and misconduct) against Kevin Provost, Lucien
24 Lockhart, and Richard Nelson, Jr. be dismissed without prejudice and with leave to amend.

25 The Court reasonably interprets Plaintiff’s constitutionally based assault and battery claim
26 as arising under the Eighth Amendment. The Eighth Amendment prohibits prison authorities from
27 inflicting cruel and unusual punishment on prison inmates. *Whitley v. Albers*, 475 U.S. 312, 318-19
28 (1986); *Ingraham v. Wright*, 430 U.S. 651, 669-70 (1977). Conduct by prison authorities constitutes

1 cruel and unusual punishment where it causes an “unnecessary and wanton infliction of pain” and,
2 thereby, offends “the evolving standards of decency that mark the progress of a maturing society.”
3 *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting
4 *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). The key inquiry under the Eighth Amendment is not the
5 nature of a defendant’s injury, but the reason for the infliction of that injury. “It is obduracy and
6 wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the
7 Cruel and Unusual Punishments Clause.” *Whitley*, 475 U.S. at 319.

8 Here, Plaintiff provides bare minimum facts regarding alleged events involving a corrections
9 officers. That is, Plaintiff alleges that while being released from the Clark County Detention Center,
10 an unknown corrections officer “assaulted” him causing an injury. ECF No. 7 ¶ 93. This single
11 allegation does not suffice to state a claim for violation of the Eighth Amendment. To the extent
12 Plaintiff intended to state a violation of his Eighth Amendment rights by virtue of the conduct alleged
13 by an unknown corrections officer, the Court recommends dismissal of the claim without prejudice,
14 but with leave to amend.²

15 b. Plaintiff’s common law claims of perjury and defamation.

16 Plaintiff’s claim of defamation and perjury, as asserted against the law enforcement officers,
17 fails as a matter of law. Witnesses, including police witnesses, are immune from liability for their
18 testimony in proceedings even if they committed perjury. *Briscoe v. LaHue*, 460 U.S. 325, 330-334,
19 345 (1983) (finding (1) defamation immunity sufficient to immunize witnesses for all in-court
20 statements, (2) extending defamation immunity to lawyers in presenting evidence, and (3) extending
21 witness immunity to conspiracy to commit perjury); *Franklin v. Terr*, 201 F.3d. 1098, 1102 (9th Cir.
22 2000). For this reason alone, the Court recommends dismissal of Plaintiff’s defamation and perjury
23 allegations against the police officer defendants.

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26 ² Plaintiff’s Fifth Amendment claims fail as a matter of law because it is well established that Plaintiff cannot
27 state such a claim against either a local governmental entity or its employees as the Fifth Amendment applies only to the
28 federal government. *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir.2001). Thus, Plaintiff’s Fifth Amendment
claims must be dismissed with prejudice. With respect to the Fourteenth Amendment, Plaintiff asserts no claim the
Court can discern from the facts alleged. In the absence of any identifiable claim under the Fourteenth Amendment, the
Court recommends dismissal without prejudice and with one opportunity to amend.

Further, a fair reading of Plaintiff's claims regarding perjured testimony necessarily implicates the validity of his underlying conviction and there is no evidence that this conviction was reversed, expunged, or impugned by a grant of writ of habeas corpus. This is a second reason Plaintiff's perjury claim is properly dismissed with prejudice. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 584 (9th Cir. 1995) (per curiam); *Holt v. Castaneda*, 832 F.2d 123, 126 (9th Cir. 1987).

c. Plaintiff's common law battery claim.

To state a common law claim of assault, a plaintiff must allege that the defendant: (1) intended to cause harmful or offensive physical contact; and (2) the victim was put in apprehension of such contact. *Estate of Saucedo v. City of North Las Vegas*, 380 F.Supp.3d 1068, 1088 (D. Nev. 2019) (internal citation omitted). To state a battery claim, a plaintiff must demonstrate that the defendant: (1) intended to cause harmful or offensive contact; and (2) such contact occurred. *Id.* (citation omitted). Plaintiff's allegations do not state a claim for assault. The Court presumes Plaintiff intended to state a claim for battery. "[U]nder Nevada law, a police officer is privileged to use the amount of force reasonably necessary." *Vasquez-Brenes v. Las Vegas Metropolitan Police Dept.*, 51 F.Supp.3d 999, 1014 (D. Nev. 2014) (citing *Yada v. Simpson*, 913 P.2d 1261, 1262 (Nev. 1996), *superseded by statute on other grounds as recognized by RTTC Commc'n, LLC v. Saratoga Flier, Inc.*, 110 P.3d 24, 29 (Nev.2005)). However, "[a]n officer who uses more force than is reasonably necessary is liable for battery." *Id.*; *see also Ramirez v. City of Reno*, 925 F.Supp. 681, 691 (D. Nev. 1996) (applying Nevada law). The standard for determining if a battery by a police officer occurred under Nevada law is the same standard as applied under § 1983. *Id.* at 1014; *see also Ramirez*, 925 F.Supp. at 691 ("The standard for common-law assault and battery by a police officer thus mirrors the federal civil rights law standard"). As alleged, Plaintiff fails to state sufficient facts to establish a claim of battery by the unknown corrections officer. However, upon amendment, Plaintiff may be able to do so. Accordingly, the Court recommends Plaintiff's common law battery claim be dismissed without prejudice and with leave to amend.

IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the following claims asserted by Plaintiff be dismissed with prejudice:

1 a. All claims against judicial officers Thomas Conner, Melanie Andress-Tobiasson,
2 Stephen George, Richard Scotti, and Crystal Eller as these Defendants are immune to suit;

3 b. All claims asserted against the State of Nevada, the Nevada Department of Public
4 Safety, the Nevada Department of Motor Vehicles, and the Nevada Highway Patrol as the
5 Defendants are immune from suit;

6 c. All claims against Public Defender Pandora Leven as a public defender cannot be
7 sued under Section 1983 or for malpractice;

8 d. Fourth Amendment, Fifth Amendment, Eighth Amendment, and Fourteenth
9 Amendment claims against retained or appointed counsel Damian Sheets, Kelsey Bernstein, Baylie
10 Hellman, Alexis Minichini, Erik Zentz, and Robert Zentz as these Defendants are not “persons”
11 under Section 1983;

12 e. All claims against the Clark County Detention Center and the Henderson Detention
13 Center;

14 f. Fourth Amendment, Fifth Amendment, Eighth Amendment, and Fourteenth
15 Amendment against Kevin Provost, Lucien Lockhart, and Richard Nelson, Jr. in their official
16 capacities;

17 g. Fifth and Eighth Amendment claims against Kevin Provost, Lucien Lockhart, and
18 Richard Nelson, Jr. in their individual capacities because the Fifth Amendment only applies to
19 federal actors; and any Eighth Amendment claim for police brutality is screened under the Fourth
20 Amendment; and

21 h. Common law claims of perjury and defamation Against law enforcement officers
22 Kevin Provost, Lucien Lockhart, and Richard Nelson, Jr. in their individual capacities.

23 IT IS FURTHER RECOMMENDED that the following claims be dismissed without
24 prejudice with leave to amend:

25 a. Plaintiff’s common law malpractice against Damian Sheets, Kelsey Bernstein, Baylie
26 Hellman, Alexis Minichini, Erik Zentz, and Robert Zentz;

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NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN WEIBLE,
Appellant,
vs.

THOMAS CONNER, ADMINISTRATIVE
LAW JUDGE; AND THE STATE OF
NEVADA DEPARTMENT OF MOTOR
VEHICLES,
Respondents.

No. 83057

FILED

AUG 19 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK 0

ORDER DISMISSING APPEAL


This is a pro se appeal from a district court order denying a petition for judicial review in a driver's license revocation matter. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.


According to the record before us, appellant's driver's license was revoked for 90 days beginning on September 2, 2020. Thus, the 90-day revocation period has expired. In *Langston v. State, Department of Motor Vehicles*, we recognized that after a driver's license revocation period has expired, this court is unable to grant any effective relief on appeal, such that, despite asserted potential collateral consequences, the appeal should

be dismissed as moot. 110 Nev. 342, 343, 871 P.2d 362, 363 (1994).

Accordingly, this appeal is moot, and we therefore

ORDER this appeal DISMISSED.¹

 J.
Parraguirre

 J.
Stiglich

 J.
Silver

cc: Hon. Crystal Eller, District Judge
Justin Weible
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk

¹In light of this order, appellant's emergency motions for stay are denied as moot.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN WEIBLE,
Appellant,

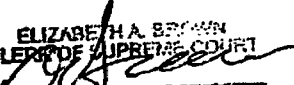
vs.

THOMAS CONNER, ADMINISTRATIVE
LAW JUDGE; AND THE STATE OF
NEVADA DEPARTMENT OF MOTOR
VEHICLES,
Respondents.

No. 83057

FILED

SEP 21 2021


ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

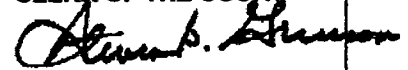
It is so ORDERED.

 J.
Farraguirre

 J.
Stiglich

 J.
Silver

cc: Hon. Crystal Eller, District Judge
Justin Weible
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk



1 **NEOJ**
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4 **Jared M. Frost (Bar No. 11132)**
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12 **E-Mail: jfrost@ag.nv.gov**

13 *Attorneys for Respondent Nevada*
14 *Department of Motor Vehicles*

15 **DISTRICT COURT**
16 **CLARK COUNTY, NEVADA**

17 **JUSTIN WEIBLE,**
18 **Petitioner,**

19 **Case No. A-20-821603-J**
20 **Dept. No. XIX**

21 **vs.**

22 **TOM CONNER, ADMINISTRATIVE**
23 **LAW JUDGE; NEVADA DEPARTMENT**
24 **OF MOTOR VEHICLES,**

25 **Respondents.**

26 **NOTICE OF ENTRY OF ORDER**

27 **PLEASE TAKE NOTICE** that an Order Denying Petition for Judicial Review was
28 entered in the above-entitled matter on the 14th day of May, 2021, a copy of which is
attached.

DATED this 19th day of May, 2021.

AARON D. FORD
Attorney General

By: /s/ Jared M. Frost
Jared M. Frost (Bar No. 11132)
Senior Deputy Attorney General
Attorneys for Respondent

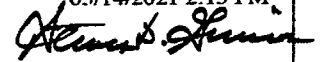
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on May 19, 2021, I electronically filed the foregoing **NOTICE OF ENTRY OF ORDER**, via this Court's electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically. For those parties not registered, service was made by depositing a copy for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada to the following:

Justin Weible
6560 Bucking Horse Ln.
Henderson, NV 89011
Petitioner, Pro Se

/s/ Diane Resch
An employee of the Office of
the Nevada Attorney General


 CLERK OF THE COURT

ORDER
AARON D. FORD
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Attorneys for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

JUSTIN WEIBLE,
 Petitioner,

Case No. A-20-821603-J
 Dept. No. XIX

vs.

**TOM CONNER, ADMINISTRATIVE
 LAW JUDGE; NEVADA DEPARTMENT
 OF MOTOR VEHICLES,**

Respondents.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

This matter came before the Court at a hearing on May 11, 2021, with Baylie Hellman, Esq., appearing for Petitioner Justin Weible, and Jared M. Frost, Senior Deputy Attorney General, appearing for Respondent Nevada Department of Motor Vehicles.

This is an action for judicial review of a final administrative decision pursuant to NRS 233B.130 *et seq.* On August 21, 2020, an Administrative Law Judge (ALJ) affirmed the Nevada Department of Motor Vehicles' (DMV) decision to revoke Petitioner Nicholas Ledoux's driving privileges for ninety (90) days. *See* Record on Appeal (ROA) at 001 to 005. Petitioner filed his Petition for Judicial Review on September 21, 2020, and subsequently filed an Opening Brief on March 15, 2021. On April 6, 2021, Respondent filed a Motion to Dismiss Administrative Appeal as Moot.

1 Pursuant to Nevada's Administrative Procedure Act, the Court may reverse a final
2 agency decision if, among other things, "substantial rights of the petitioner have been
3 prejudiced because the final decision of the agency is . . . [i]n violation of constitutional or
4 statutory provisions," NRS 233B.135(3)(a), "[a]ffected by . . . error of law," NRS
5 233B.135(3)(d), or "[c]learly erroneous in view of the reliable, probative and substantial
6 evidence on the whole record," NRS 233B.135(3)(e). "The burden of proof is on the party
7 attacking or resisting the decision to show that the final decision is invalid" NRS
8 233B.135(2).

9 Judicial review is limited to the record before the agency, NRS 233B.135(1)(b), and
10 the Court may overturn the agency's factual findings only if they are not supported by
11 substantial evidence, *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715,
12 718 (2011) (citation omitted). Substantial evidence is evidence a reasonable mind would
13 accept as adequate to support a conclusion. NRS 233B.135(4).

14 Here, the ALJ determined Trooper Provost had reasonable grounds to believe
15 Petitioner was driving or in actual physical control of a vehicle while under the influence
16 of alcohol or a controlled substance, and affirmed the 90-day revocation of Petitioner's
17 driver's license. ROA at 005. After reviewing the record on appeal and the pleadings and
18 papers on file, the Court agrees. The Court further concludes the ALJ's decision was
19 supported by substantial evidence, and that Petitioner has failed to meet his burden to

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1 show the final decision is invalid. Having reached a conclusion on the merits of the Petition,
2 the Court declines to rule on Respondent's Motion to Dismiss Administrative Appeal as
3 Moot and orders as follows:

4 IT IS HEREBY ORDERED that the Petition for Judicial Review is DENIED.

5 DATED this ____ day of _____, 2021.

6 Dated this 14th day of May, 2021

7 

8 DISTRICT COURT JUDGE

9 D6A E0B 23CC 22CA
10 Crystal Eller
District Court Judge

11 Submitted by:

12 /s/ Jared M. Frost

13 Jared M. Frost
14 Senior Deputy Attorney General
Nevada Bar No. 11132
555 E. Washington Avenue, Ste. 3900
Las Vegas, NV 89101
15 Attorney for Respondent

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1 Lucien Lockhart were present and testified in support of the revocations. Department Exhibits 1
2 through 5 were admitted into evidence and made a part of the record.

3 LIST OF EXHIBITS

4 Department's Exhibit 1: Form DP-45, Officer's Certification of Cause form for case
5 RT191217A (two pages)

6 Department's Exhibit 2: Form DP-45, Officer's Certification of Cause form for case IP191217B
7 (two pages)

8 Department's Exhibit 3: Declaration for the Withdrawal of Whole Blood Sample

9 Department's Exhibit 4: Forensic Scientist Lucien Lockhart's Curriculum Vitae (three pages)

10 Department's Exhibit 5: Forensic Laboratory Report of Examination

11 ISSUES

12 *Case RT191217A:*

- 13 1. Did Trooper Provost have reasonable grounds to believe Mr. Weible was driving or in
14 actual physical control of a vehicle while he was under the influence of alcohol?
- 15 2. After being informed by Trooper Provost that his license, permit, or privilege to drive
16 would be revoked if he failed to submit to an evidentiary test, did Mr. Weible fail to
17 submit to an evidentiary test?

18 *Case IP191217B:*

- 19 1. Did Trooper Provost have reasonable grounds to believe Mr. Weible was driving or in
20 actual physical control of a vehicle while he was under the influence of alcohol?
- 21 2. At the time of the evidentiary test, was Mr. Weible's blood alcohol concentration 0.08 or
22 more?

23 *****

FINDINGS OF FACTS

The record contains reliable, probative, and substantial evidence of a sufficient quality and quantity to conclude the existence of the following facts are more probable than their nonexistence:

On October 31, 2019, at approximately 2:41 AM, Trooper Kevin Provost of the Nevada Highway Patrol conducted a traffic stop on a vehicle driven by the Petitioner, Mr. Justin Weible. As Trooper Provost was speaking with Mr. Weible, he noticed the odor of marijuana and an alcoholic beverage coming from inside Mr. Weible's vehicle. Trooper Provost removed Mr. Weible from his vehicle and attempted to give him a three-part field sobriety test. However, Mr. Weible would not follow the instructions for the horizontal gaze nystagmus test; so, Trooper Provost discontinued that test. Mr. Weible did cooperate with the walk and turn and the one leg stand tests; he failed both. Trooper Provost then gave Mr. Weible a preliminary breath test. That test showed Mr. Weible's breath alcohol concentration was above 0.08%.

After Mr. Weible failed the preliminary breath test, Trooper Provost arrested him. Trooper Provost asked Mr. Weible if he would submit to an evidentiary blood or breath test. Mr. Weible initially agreed to take a test. Trooper Provost then took Mr. Weible to the Clark County Detention Center for testing and processing.

When they arrived at the Detention Center, Mr. Weible informed Trooper Provost that he would not submit to an evidentiary test. Trooper Provost then obtained a search warrant to withdraw Mr. Weible's blood.

At approximately 4:27 AM, Trooper Provost watched as Registered Nurse Richard Nelson withdrew two samples of whole blood from Mr. Weible. Mr. Nelson turned the blood samples over to Trooper Provost who then impounded them for analysis.

1 Trooper Provost then completed an Officer's Certification of Cause and Notice of
2 Revocation or Suspension form based upon Mr. Weible's failure to submit to evidential testing.
3 A copy of Trooper Provost's Certification of Cause form was sent to the Department of Motor
4 Vehicles. When the Department received the form, it revoked Mr. Weible's driving privileges
5 for one year.

6 On February 13, 2020, Forensic Scientist Lucien Lockhart analyzed a sample of whole
7 blood bearing the name of Justin Weible. That analysis showed Mr. Weible's blood contained
8 0.101 grams of alcohol per 100 milliliters of blood.

9 When Trooper Provost received the test results, he completed and signed a second
10 Officer's Certification of Cause form concerning Mr. Weible. When the Department received
11 the second Certification of Cause, it revoked Mr. Weible's driving privileges for an additional
12 ninety days.

13 ANALYSIS

14 *RT191217A:*

15 Under Nevada's implied consent law, every person who drives in this State is presumed
16 to have given their consent to an evidentiary test when requested to do so by a police officer.¹ A
17 driver may withdraw their consent, but there are consequences. If a driver fails to submit to an
18 evidentiary test, their license, permit, or privilege is revoked for a minimum of one year. This
19 sanction is severe enough that the Legislature requires the driver to be told about the revocation
20 in the admonishment. NRS 484C.160(2) states: "A police officer who requests that a person
21 submit to a test pursuant to subsection 1 shall inform the person that his or her license, permit or
22 privilege to drive will be revoked if he or she fails to submit to the test."²

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¹ See NRS 484C.160.

² NRS 484C.160(2).

There is no evidence in the record that Trooper Provost informed Mr. Weible that his driving privileges would be revoked if he failed to submit to an evidentiary test. Therefore, the one-year failure to submit revocation of Mr. Weible's driver's license in case number RT191217A is rescinded.

CONCLUSIONS OF LAW

Trooper Provost had reasonable grounds to believe the Petitioner, Mr. Justin Weible, was driving or was in actual physical control of a vehicle while he was under the influence of alcohol or a controlled or prohibited substance. Although Mr. Weible failed to submit to an evidentiary test requiring Trooper Provost to obtain a search warrant to withdraw his blood, there is insufficient evidence that Mr. Weible was advised that his license, permit, or privilege to drive would be revoked if he failed to submit to an evidentiary test. A later analysis of Mr. Weible's blood showed that it contained a concentration of alcohol of 0.08 or more at the time of the evidentiary test.

DECISION

The one-year failure to submit revocation of Mr. Weible's driving privileges in case number RT191217A is rescinded. The 90-day revocation of Mr. Weible's driving privileges in case number IP191217B is affirmed.

Dated this 2nd day of August, 2020

~~Tom Conner~~ Chief Administrative Law Judge