

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JUN 28 2023

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

JUSTIN WEIBLE,

No. 22-16736

Plaintiff-Appellant,

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

v.

KEVIN PROVOST; et al.,

ORDER

Defendants-Appellees.

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.**

1A

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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.

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

11 Dated this 1 day of November, 2022.

12  
13   
14 Gloria M. Navarro, District Judge  
United States District Court

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 \* \* \*

4 JUSTIN WEIBLE,

5 Plaintiff,

6 v.

7 KEVIN PROVOST et al.,

8 Defendants.

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

9

10 **REPORT AND RECOMMENDATION**

11 This matter comes before the Court on Plaintiff's First Amended Complaint under 42 U.S.C.  
12 § 1983. ECF No. 7.

13 **I. INTRODUCTION**

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

19 **II. SCREENING THE COMPLAINT**

20 Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint  
21 under 28 U.S.C. § 1915(e)(2). In screening the complaint, a court must identify cognizable claims  
22 and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be granted  
23 or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).  
24 Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state  
25 a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112  
26 (9th Cir. 2012). To survive § 1915 review, a complaint must "contain sufficient factual matter,  
27 accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S.  
28 662, 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 *Wyler 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.<sup>1</sup> 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           

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<sup>1</sup> 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.” *Szijarto 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

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

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

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

8       The Eleventh Amendment bars citizens from suing a state. U.S. CONST. amend. XI. The  
 9 United States Supreme Court holds that 42 U.S.C. § 1983 does not constitute an abrogation of a  
 10 state's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 338-40 (1979). Absent  
 11 waiver, a state is not subject to suit under Section 1983. *Id.*; *see also Alabama v. Pugh*, 438 U.S.  
 12 781, 782 (1978). The State of Nevada has declined to waive its immunity to suit under the Eleventh  
 13 Amendment. NRS 41.031(3). Thus, to the extent Plaintiff seeks to sue the State of Nevada he is  
 14 constitutionally barred from doing so and his claims must be dismissed. *Pennhurst State School &*  
*Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984).

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

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

27       The Clark County Detention Center is a building and is therefore not an entity subject to suit.  
 28 *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 granted.

27  
 28

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.<sup>2</sup>

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.

2 Plaintiff's Fifth Amendment claims fail as a matter of law because it is well established that Plaintiff cannot  
26 state such a claim against either a local governmental entity or its employees as the Fifth Amendment applies only to the  
27 federal government. *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir.2001). Thus, Plaintiff's Fifth Amendment  
28 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;

b. Plaintiff's Fourth Amendment and Fourteenth Amendment claims against Clark County, the City of Henderson, and the Las Vegas Metropolitan Police Department under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978);

c. Plaintiff's Eighth Amendment claims against the unknown Corrections Officers;

d. Plaintiff's Fourth Amendment and Fourteenth Amendment claims against Kevin Provost, Lucien Lockhart, and Richard Nelson, Jr. in their individual capacities; and

e Plaintiff's common law claims for battery against Kevin Provost, Lucien Lockhart, and Richard Nelson, Jr.

IT IS FURTHER RECOMMENDED that Plaintiff be given one additional opportunity to file what would be a second amended complaint. This would be Plaintiff's third chance to state claims against defendants who have not been dismissed with prejudice.

IT IS FURTHER RECOMMENDED that if Plaintiff chooses to file a second amended complaint, he be given through and including **October 31, 2022** to do so. The document filed by Plaintiff must be titled “SECOND AMENDED COMPLAINT” and must be complete in and of itself. This means it must include all facts Plaintiff believe supports the claims he seeks to assert. Plaintiff must identify which claims are asserted against which Defendant based on the facts alleged. Plaintiff must **not** reassert claims against Defendants who were dismissed with prejudice.

IT IS FURTHER RECOMMENDED that if Plaintiff fails to file a second amended complaint on or before **October 31, 2022**, or if Plaintiff timely files a second amended complaint, but the complaint fails to state a claim upon which relief may be granted, this case be dismissed without prejudice, but without leave to amend.

DATED this 27th day of September, 2022.

Elayna J. Youchah  
ELAYNA J. YOUCAH  
UNITED STATES MAGISTRATE JUDGE

## 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

***ORDER DISMISSING APPEAL***

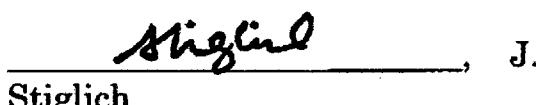
This is a pro se appeal from a district court order denying a petition for judicial review in a driver's license revocation matter. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

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.<sup>1</sup>

  
\_\_\_\_\_  
Parraguirre, J.

  
\_\_\_\_\_  
Stiglich, J.

  
\_\_\_\_\_  
Silver, J.

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

---

<sup>1</sup>In 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 *[Signature]*  
DEPUTY CLERK

***ORDER DENYING REHEARING***

Rehearing denied. NRAP 40(c).

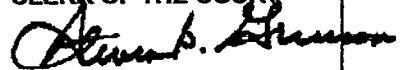
It is so ORDERED.

*Parraguirre*, J.  
Parraguirre

*Stiglich*, J.  
Stiglich

*Silver*, J.  
Silver

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



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3 Attorney General  
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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.

29 DATED this 19th day of May, 2021.

30 AARON D. FORD  
31 Attorney General

32 By: /s/ Jared M. Frost

33 Jared M. Frost (Bar No. 11132)  
34 Senior Deputy Attorney General  
35 *Attorneys for Respondent*

## **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

1 ORDR  
 2 AARON D. FORD  
 3 Attorney General  
 4 Jared M. Frost (Bar No. 11132)  
 5 Senior Deputy Attorney General  
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13 *Attorneys for Respondent*  
 14  
 15  
 16  
 17

18 **DISTRICT COURT**  
 19  
 20

21 **CLARK COUNTY, NEVADA**  
 22

23 JUSTIN WEIBLE,  
 24 Petitioner,

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

27 vs.  
 28

29 TOM CONNER, ADMINISTRATIVE  
 30 LAW JUDGE; NEVADA DEPARTMENT  
 31 OF MOTOR VEHICLES,

32 Respondents.

33 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**  
 34

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

38 This is an action for judicial review of a final administrative decision pursuant to  
 39 NRS 233B.130 *et seq.* On August 21, 2020, an Administrative Law Judge (ALJ) affirmed  
 40 the Nevada Department of Motor Vehicles' (DMV) decision to revoke Petitioner Nicholas  
 41 Ledoux's driving privileges for ninety (90) days. *See Record on Appeal (ROA) at 001 to 005.*  
 42 Petitioner filed his Petition for Judicial Review on September 21, 2020, and subsequently  
 43 filed an Opening Brief on March 15, 2021. On April 6, 2021, Respondent filed a Motion to  
 44 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  
11 District Court Judge

12 Submitted by:

13 /s/ Jared M. Frost  
14 Jared M. Frost  
15 Senior Deputy Attorney General  
16 Nevada Bar No. 11132  
17 555 E. Washington Avenue, Ste. 3900  
18 Las Vegas, NV 89101  
19 Attorney for Respondent

1 STATE OF NEVADA

2 DEPARTMENT OF MOTOR VEHICLES

3 IN THE MATTER OF THE REVOCATION OF THE DRIVING PRIVILEGES OF:

4 JUSTIN WEIBLE, ) Case Numbers: RT191217A

IP191217B

5 Petitioner )

6 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

7 STATEMENT OF THE CASE

8 The Petitioner, Mr. Justin Weible, requested an administrative hearing to challenge the  
9 revocation of his license, permit, or privilege to drive. There were two separate revocation  
10 actions based upon the same incident: RT191217A and IP191217B.

11 In RT191217A, Mr. Weible's license, permit, or privilege to drive was revoked for one  
12 year. The Department imposed that revocation after it received an Officer's Certification of  
13 Cause form from Trooper Kevin Provost of the Nevada Highway Patrol. In that Certification  
14 form, Trooper Provost claimed that he had reasonable grounds to believe Mr. Weible was driving  
15 or in actual physical control of a motor vehicle while he was under the influence of alcohol, and  
16 after being advised of the consequences. Mr. Weible failed to submit to an evidentiary test of his  
17 blood or breath to determine the alcohol content.

18 In IP191217B, the Department revoked Mr. Weible's license, permit, or privilege to drive  
19 for an additional ninety days. That revocation was based upon a second Certification of Cause  
20 form filed by Trooper Provost. In his second Certification form, Trooper Provost alleged Mr.  
21 Weible's blood alcohol concentration was 0.08 or above.

22 The Hearings Office consolidated the two revocations into a single hearing. Chief  
23 Administrative Law Judge Tom Conner conducted that hearing on August 20, 2020, in Las  
24 Vegas. Mr. Weible was present, unrepresented. Trooper Kevin Provost and Forensic Scientist

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:

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

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

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

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

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

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

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

## ANALYSIS

RTI91217A:

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

<sup>1</sup> See NRS 484C.160.

- 2 NRS 484C.160(2).

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

5 **CONCLUSIONS OF LAW**

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

14 **DECISION**

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

18 Dated this 21st day of August, 2020

19  
20  
21 Tom Conner Chief Administrative Law Judge  
22  
23  
24