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## 3 UNITED STATES DISTRICT COURT

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## DISTRICT OF NEVADA

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MICHAEL BERRY,

Case No. 3:22-CV-00079-ART-CSD

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Plaintiff,

ORDER

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v.

STATE OF NEVADA, *et al.*,

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Defendants.

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11 *Pro se* Plaintiff Michael Berry brings this action under 42 U.S.C. § 1983.  
12 Before the Court is the Report and Recommendation (“R&R” or  
13 “Recommendation”) of United States Magistrate Judge Craig S. Denney (ECF No.  
14 15), recommending Plaintiff’s IFP application (ECF No. 12) be granted, his  
15 complaint (ECF No. 1-1) be filed, that this action be dismissed with prejudice as  
16 to defendants Lucia, the State of Nevada, the Division of Parole and Probation,  
17 and Washoe County and Valencia insofar as Plaintiff seeks to sue Washoe  
18 County and Valencia under 42 U.S.C. § 1983. Insofar as Plaintiff seeks relief for  
19 ineffective assistance of counsel via a direct appeal of his conviction, State  
20 habeas proceeding, or federal habeas proceeding after he has exhausted State  
21 court remedies, Magistrate Judge Denney recommended dismissing Valencia  
22 and Washoe County without prejudice. Plaintiff had until August 17, 2022 to file  
23 an objection. To date, no objection to the R&R has been filed. For this reason,  
24 and as explained below, the Court adopts the R&R, grants Plaintiff’s IFP  
25 application, and dismisses defendants Lucia, the State of Nevada, and the  
26 Division of Parole and Probation with prejudice. The Court additionally dismisses  
27 Plaintiff’s action against Washoe County and Valencia with prejudice insofar as  
28

1 Plaintiff seeks to sue these defendants under 42 U.S.C. § 1983, and without  
 2 prejudice insofar as Plaintiff seeks relief for ineffective assistance of counsel.

3 The Court “may accept, reject, or modify, in whole or in part, the findings  
 4 or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where  
 5 a party fails to object to a magistrate judge’s recommendation, the Court is not  
 6 required to conduct “any review at all . . . of any issue that is not the subject of  
 7 an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also United States v.*  
 8 *Reyna-Tapia*, 328 F.3d 1114, 1116 (9th Cir. 2003) (“De novo review of the  
 9 magistrate judges’ findings and recommendations is required if, but *only* if, one  
 10 or both parties file objections to the findings and recommendations.”) (emphasis  
 11 in original); Fed. R. Civ. P. 72, Advisory Committee Notes (1983) (providing that  
 12 the Court “need only satisfy itself that there is no clear error on the face of the  
 13 record in order to accept the recommendation.”).

14 Because there is no objection, the Court need not conduct de novo review,  
 15 and is satisfied Magistrate Judge Denney did not clearly err. I incorporate  
 16 Magistrate Judge Denney’s analysis by reference here. (ECF No. 15). Here,  
 17 Plaintiff sues the State of Nevada, state prosecutor Travis Lucia, his trial counsel  
 18 Lorena Valencia, Washoe County, and the Division of Parole and Probation. (ECF  
 19 1-1 at 2). Plaintiff first alleges Deputy District Attorney Travis Lucia violated his  
 20 rights by recommending a consecutive sentence—a recommendation which  
 21 contravened the plea agreement which provided for a concurrent sentence.  
 22 Although the Nevada Supreme Court eventually altered Plaintiff’s sentence to  
 23 run concurrently, Plaintiff by that time had served an extra eight months in  
 24 prison. Second, Plaintiff alleges his counsel—Lorena Valencia—failed to object to  
 25 the breach of Plaintiff’s plea agreement and violated his right to effective  
 26 assistance of counsel. Plaintiff claims that Washoe County is responsible for  
 27 providing him with ineffective counsel. Third, Plaintiff alleges that when he was  
 28 improperly sentenced consecutively, his parole date was moved but Plaintiff was

1 never seen by the parole board and no parole decision was ever made. Plaintiff  
 2 alleges that the Division of Parole and Probation violated Plaintiff's due process  
 3 rights by not making a decision on his parole, causing Plaintiff to serve more  
 4 time in prison.

5 The State of Nevada is both not a person for purposes of section 1983 and  
 6 is immune from suit under the Eleventh Amendment. See U.S. Const. amend.  
 7 XI; *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997) ("§ 1983  
 8 actions do not lie against a State."). Therefore, this Court agrees with Magistrate  
 9 Judge Denney's recommendation that the State of Nevada be dismissed with  
 10 prejudice.

11 State prosecutor Travis Lucia is immune from suit under section 1983 for  
 12 recommending a sentence, a function "intimately associated with the judicial  
 13 phase of the criminal process." *Garmon v. Cnty. of Los Angeles*, 828, F.3d 842  
 14 (9th Cir. 2016) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Kalina v.*  
 15 *Fletcher*, 522 U.S. 118, 131 (1997)). Therefore, this Court agrees with Magistrate  
 16 Judge Denney's recommendation that Lucia be dismissed with prejudice.

17 Acting in the role of advocate, former defense counsel Lorena Valencia is  
 18 not a State actor under section 1983 as a public defender or private attorney.  
 19 See *Georgia v. McCollum*, 505 U.S. 42, 53 (1992) ("a public defender does not  
 20 qualify as a state actor when engaged in his general representation of a criminal  
 21 defendant."); *Szijarto v. Legeeman*, 446 F.2d 864, 864 (9th Cir. 1972) (per  
 22 curiam) ("an attorney, whether retained or appointed, does not act 'under color  
 23 of state law.'"). Therefore, this Court agrees with Magistrate Judge Denney's  
 24 recommendation that Valencia be dismissed with prejudice insofar as Plaintiff  
 25 sues Valencia under section 1983.

26 Plaintiff may, however, assert a Sixth Amendment ineffective assistance of  
 27 counsel argument against Valencia in a direct appeal, post-conviction or habeas  
 28 proceeding, but not in an action pursuant to section 1983. See *Nelson v.*

1     *Campbell*, 541 U.S. 637, 643 (“§1983 must yield to the more specific federal  
 2     habeas statute, with its attendant procedural and exhaustion requirements,  
 3     where an inmate seeks injunctive relief challenging the fact of his conviction or  
 4     the duration of his sentence.”). Therefore, this Court agrees with Magistrate  
 5     Judge Denny’s recommendation that Plaintiff’s ineffective assistance of counsel  
 6     claims against Valencia be dismissed without prejudice.

7             As Washoe County is a municipality, and municipalities may not be sued  
 8     under a *respondeat superior* theory, this Court agrees with Magistrate Judge  
 9     Denney’s recommendation that Washoe County be dismissed with prejudice,  
 10    except insofar as Plaintiff’s ineffective assistance of counsel claim may be raised  
 11    through the mechanisms described above, in which case dismissal is without  
 12    prejudice. *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 691  
 13    (1978) (“a municipality cannot be held liable under §1983 on a *respondeat*  
 14    *superior* theory.”).

15           Finally, Nevada’s Division of Parole and Probation is an agency that is an  
 16    arm of the state and is therefore immune from suit under section 1983. See  
 17    *Howlett v. Rose*, 496 U.S. 356, 365 (1990) (“the State and arms of the State,  
 18    which have traditionally enjoyed Eleventh Amendment immunity, are not subject  
 19    to suit under § 1983 in either federal court or state court.”). Because “parole  
 20    board officials are entitled absolute immunity for parole board decisions,” leave  
 21    to amend to identify individual officials would be futile. *Swift v. California*, 384  
 22    F.3d 1184, 1189 (9th Cir. 2004). Therefore, this Court agrees with Magistrate  
 23    Judge Denney that Plaintiff’s complaint should be dismissed with prejudice as  
 24    to the Division of Parole and Probation.

25           In sum, this Court agrees with Magistrate Judge Denney. Having reviewed  
 26    the R&R and the record in this case, the Court will adopt the R&R in full.

27           IT IS THEREFORE ORDERED that Magistrate Judge Denney’s Report and  
 28    Recommendation (ECF No. 15) is accepted and adopted in full.

1 IT IS FURTHER ORDERED that Plaintiff's IFP application (ECF No. 12) is  
2 GRANTED. Plaintiff is required to pay, through NDOC, an initial partial filing fee  
3 in the amount of \$14.76, within thirty days of this order. Thereafter, whenever  
4 his prison account exceeds \$10, he is required to make monthly payments in the  
5 amount of 20 percent of the preceding month's income credited to his account  
6 until the full \$350 filing fee is paid. This is required even if the action is dismissed  
7 or is otherwise unsuccessful.

8 IT IS FURTHER ORDERED that the Clerk send a copy of this order to the  
9 attention of Chief of Inmate Services for the Nevada Department of Corrections,  
10 P.O. Box 7011, Carson City, Nevada 89702.

11 IT IS FUTHER ORDERED that the Clerk FILE the complaint (ECF No. 1-  
12 1).

13 IT IS FURTHER ORDERED that the action be DISMISSED WITH  
14 PREJUDICE as to Lucia, the State of Nevada, and the Division of Parole and  
15 Probation. The action should be DISMISSED WITH PREJUDICE insofar as  
16 Plaintiff seeks to sue Valencia and Washoe County under 42 U.S.C. § 1983.  
17 Valencia and Washoe County are DISMISSED WITHOUT PREJUDICE only  
18 insofar as Plaintiff may seek relief for ineffective assistance of counsel via a direct  
19 appeal of his conviction, State habeas proceeding, or federal habeas proceeding  
20 after Plaintiff has sought and is denied habeas relief in State court.

21 IT IS FUTHER ORDERED that this action be administratively closed.

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23 IT IS SO ORDERED.

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25 DATED THIS 19th Day of September 2022.

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ANNE R. TRAUM  
UNITED STATES DISTRICT JUDGE