

No. 85590

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

In re: 3587 Desatoya Drive

ELVIN FRED

Petitioner,

v.

THE FIRST JUDICIAL DISTRICT COURT STATE OF NEVADA, IN AND
FOR THE COUNTY OF CARSON CITY, THE HONORABLE JAMES
WILSON,

Respondent,

and

STATE OF NEVADA, ex rel, INVESTIGATION DIVISION OF THE
DEPARTMENT OF PUBLIC SAFETY (TRI-NET NARCOTICS TASK FORCE),

Real Party in Interest.

**AMICUS BRIEF OF THE NEVADA ATTORNEYS FOR CRIMINAL
JUSTICE IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF
PROHIBITION AND WRIT OF MANDAMUS**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NEV. RULE. APP. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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IDENTITY OF AMICUS CURIAE AND STATEMENT OF IDENTITY

Nevada Attorneys for Criminal Justice (NACJ) is a state-wide, nonprofit organization of criminal defense attorneys in Nevada. Our mission is to ensure accused persons receive effective, zealous representation through shared resources, legislative lobbying, and intra-organizational support. NACJ have long advocated for civil forfeiture reform and its members have experience representing individuals in civil forfeiture actions. NACJ's input can assist this Court in deciding the important issues presented here. Our members practice in both state and federal court and have experience directly related to the issues presented by the Petitioner and addressed herein.

ARGUMENT

I. The archaic civil forfeiture process was originally designed for customs and revenue regulation, and it has no contemporary relevance

In our historical jurisprudence, the United States Supreme Court has often upheld the unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding. English law provided for statutory forfeitures of objects used in violation of customs and revenue laws, which typically meant boats and ships and other vessels of cargos. *Bennis v. Michigan*, 516 U. S. 442, 446–448 (1996); *Austin v. United States*, 509 U.S. 602, 618-619 (1993). This practice took hold in the United States when the first congress

passed laws subjecting ships and cargos involved in customs offenses to forfeiture. *Austin, supra*, at 613; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). Other early statutes also provided for the forfeiture of pirate ships. *United States v. Parcel of Rumson, N. J., Land*, 507 U. S. 111, 119 (1993) (plurality opinion).

These early statutes permitted the government to proceed in rem under the fiction that the thing itself, rather than the owner, was guilty of the crime. See *Calero-Toledo, supra*, at 684–685; Act of Aug. 4, 1790, §67, 1 Stat. 176–177. Because these suits were in rem rather than in personam, they proceeded civilly rather than criminally. See *United States v. La Vengeance*, 3 Dall. 297, 301 (1796).

We no longer have a pirate problem, and we have no ports in Nevada. As acknowledged by Justice Thomas in *Leonard v. Texas*:

‘[M]odern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes. See, e.g., *Austin v. United States*, 509 U. S. 602, 618–619 (1993). When a state wishes to punish one of its citizens, it ordinarily proceeds against the defendant personally (known as “in personam”), and in many cases it must provide the defendant with full criminal procedural protections. Nevertheless, for reasons discussed below, this Court permits prosecutors seeking forfeiture to proceed against the property (known as “in rem”) and to do so civilly. See, e.g., *United States v. James Daniel Good Real Property*, 510 U. S. 43, 56–57 (1993). In rem proceedings often enable the government to seize the property without any predeprivation judicial process and to obtain forfeiture of the property even when the owner is personally innocent (though some statutes, including the one here, provide for an innocent-owner defense). Civil proceedings often lack certain procedural protections

that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof.

Leonard v. Texas, cert. denied, 137 S. Ct. 837, 197 L. Ed 2d 474 (2017)(Thomas, J. statement).

Civil forfeiture threatens not only property rights but also due process rights and other constitutional guarantees, including guarantees under the Excessive Fines clause of the Eighth Amendment and the Double Jeopardy clause of the Fifth Amendment. For these reasons, Justice Thomas questioned whether modern civil forfeiture laws “can be squared with the Due Process Clause and our Nation’s history,” as today’s civil forfeiture laws have expanded far beyond their once-narrow historical purposes – specifically taking property in piracy and customs cases when the owner was overseas and outside of the jurisdiction of the United States. *Leonard v. Texas, supra.*¹

Recent rulings from the U.S. and Indiana Supreme Courts highlight another constitutional problem with forfeiture: If disproportionate to the alleged crime, a forfeiture can violate the Eighth Amendment’s prohibition on excessive fines. *Timbs v. Indiana*, 139 S. Ct. 682 (2019). And forfeiting an innocent person’s property is always disproportionate.

¹ See also: Ellis, M. (2019, Feb. 10). From pirates to kingpins, the strange legal history of civil forfeiture. *The Greenville News*. <https://www.greenvilleonline.com/in-depth/news/taken/2019/02/10/civil-forfeiture-history-pirate-privateers-organized-crime-drug-kingpins/2458836002/>

Here, the legitimate question raised by the Petitioner-- whether this separate civil proceeding violates the Double Jeopardy clause of the Fifth Amendment by imposing another punishment for the same offense – is an issue that centers with NACJ’s ongoing efforts, both before the legislature and before this Court, to have all matters of forfeiture addressed within the criminal case. This does two things: (1) it provides due process protections and counsel to the defendant/claimant, and (2) it permits the criminal court to properly assess forfeiture within the full context of punishment—to include both the length of the sentence, fines, and forfeitures. Federal courts have largely handled forfeiture this way for years and state courts do it to some extent already with the forfeiture of items like firearms regularly contemplated as part of a plea agreement. Where a criminal case has been filed, any related forfeiture issue(s) should be handled within the criminal case that gives rise to the forfeiture allegations. A civil forfeiture proceeding should be reserved for those instances in which there is no criminal case, or when a defendant cannot be identified.

II. Law enforcement agencies directly profit from the forfeiture of property, even if there is no legal basis, exacerbating the inequities of a separate civil proceeding, inequities imposed primarily upon indigent defendants

Law enforcement agencies have large financial stakes in forfeiture proceeds. Except in limited circumstances, the proceeds from forfeitures go back to the law

enforcement agency in Nevada. *See* NRS 179.1182(b). In 2015, the Legislature enacted a requirement for law enforcement agencies to report to the Attorney General data involving seizures and forfeitures. NRS 179.1205. Recent filings between 2017 and 2021 reflect the following for all Nevada law enforcement agencies: ²

Reporting period	Amount Seized	Amount Forfeited
7/1/2017 to 6/30/2018	\$3.569 million	\$4.910 million
7/1/2018 to 6/30/2019	\$6.698 million	\$2.637 million
7/1/2019 to 6/30/2020	\$3.175 million	\$3.016 million
7/1/2020 to 6/30/2020	\$5.833 million	\$3.218 million

While it is true that seventy percent above \$100,000 in the account must be redistributed to the school district, this only occurs with the money left in the law enforcement agency's account at the end of the fiscal year. *See* NRS 179.1187(2). Thus, there is an incentive for a law enforcement agency to not only seize assets and then seek forfeiture, but to quickly spend the money once forfeited. Law

² [2019 AG Annual Forfeiture Aggregate Report \(Fiscal Year July 1, 2017 to June 30, 2018\) Revised.xlsx \(nv.gov\)](#) Period – July 1, 2017 to June 30, 2018; [Forfeiture Report Updated 1.31.20.pdf \(nv.gov\)](#) Period – July 1, 2018 to June 30, 2019; [Aggregate Report FY 7119 to 63020.pdf \(nv.gov\)](#) Period July 1, 2019 to June 30, 2020; [Aggregate Forfeiture Report 2020-2021.pdf \(nv.gov\)](#) Period – July 1, 2020, to June 30, 2021. *See also* Pet. Writ, 12 at n. 6.

enforcement agencies reimburse themselves for any amount they deem appropriate to allocate for “attorney’s fees” related to the forfeiture proceedings. There are no audits of forfeiture accounts in Nevada, and it is impossible to correlate any given seizure or forfeiture to any particular criminal case because of the inadequate reporting requirements. *See* Pet. Writ at 12 n.7 (detailing that the property in question here has never been reported). As can be gleaned from the chart, the amount forfeited can exceed the amount seized for any given year because there is a delay in the forfeiture proceedings that is often stayed until the conclusion of the criminal case. The median forfeiture in Nevada is \$906.00.³ There is no logical reason for this amount to be the subject of a separate civil proceeding, resulting in a waste of judicial resources. More importantly, by proceeding in a separate civil proceeding, it is unlikely that the defendant/claimant would be represented by counsel because it would cost more money to litigate the amount at issue in most instances. Additionally, many defendants are indigent and are represented by a public defender or appointed counsel who currently are not authorized to represent them in a separate civil proceeding.

Law enforcement agencies are incentivized to seek forfeiture from indigent defendants because they often prevail by default. Law enforcement agencies are

³ Institute for Justice, “Policing for Profit, The Abuse of Civil Asset Forfeiture,” at 117 (3d ed. Summer 2020) (“IJ Report”) (available at <https://bit.ly/3djQwvK>) (last visited November 9, 2022)

acutely aware of the difficulties indigent defendants have in navigating the civil forfeiture system as this has repeatedly been brought to their attention by NACJ.

The United States Supreme Court has repeatedly acknowledged that civil forfeitures of property are oppressive and constitutionally troubling. *See, e.g., Timbs v. Indiana*, 586 U.S. ___, ___, 139 S.Ct. 682, 687-89; *Sessions v. Dimaya*, 584 U.S. ___, 138 S.Ct. 1204, 1229 (2018); *Leonard v. Texas, cert denied*, 137 S.Ct. 837, 849-50 (2017); *Krimstock v. Kelly*, 306 F.3d 40, 58 (2d Cir. 2002). In Nevada, the number of forfeiture cases that take place is unknown because of inadequate and incomplete reporting requirements. *See* NRS 179.1205. But since the Legislature imposed mandatory reporting requirements in 2015, it is clear that there have been thousands of forfeitures, many for small amounts.

III. All forfeitures matters should be handled within the criminal case where a judge imposing punishment can properly assess whether forfeiture is not only applicable, but whether it is excessive or appropriate at all

Any issue relating to punishment is rightfully addressed within the criminal proceeding because this is where we adjudicate criminal liability and “punish” defendants deemed to be in violation of a criminal statute. As noted above, federal prosecutions have consistently done this for years, an allegation for forfeiture is made in the indictment or complaint as a means of providing notice and the forfeiture element is addressed by virtue of a plea agreement and stipulation between the parties, or it is addressed by the court after a jury trial where a defendant has the

right to have a jury make certain findings that may be relevant to forfeiture. This provides the defendant with notice, due process, and importantly counsel. Federal Rules of Criminal Procedure 32.2 permits a third party to make claims to property within the context of the criminal proceeding. Forfeiture is determined by the sentencing court, just like restitution is determined by the sentencing judge. Both are aspects of a punishment and sentence imposed upon a criminal defendant.

A. Blockburger is Applicable to Forfeiture Proceedings Because Forfeiture Proceedings Constitute Punishment

Unlike in federal court, Nevada uses a separate proceeding to address the same offense. NRS 453.301; NRS 179.1173. However, the separate proceeding is also punishment for the same offense. Under *Blockburger v. United States*, 284 U.S. 299 (1932) a defendant may not be prosecuted twice for offenses containing the same elements. In this case, the district court's determination that *Blockburger* is not applicable because two criminal statutes are not at issue is an erroneous decision because the forfeiture provision is a criminal statute imposing a punishment. NRS 179.1173 falls under Chapter 14 of the Nevada Revised Statutes, the entire chapter is entitled "Procedure in Criminal Cases." The following Chapter, Chapter 15, is devoted to "Crimes and Punishments." As any criminal practitioner will know, all things related to criminal proceedings are found in Chapters 14 and 15. Accordingly,

the *Blockburger* test should be applied to all forfeiture matters under NRS 179, *et seq.*

B. Nevada’s Constitution provides broader protections than the United States Constitution

The United States Supreme Court’s determination that double jeopardy guarantees are not violated by a separate civil forfeiture proceeding are not applicable to Nevada because the Nevada Constitution provides broader protections than the United States Constitution. *United States v. Ursery*, 518 U.S. 267, 274 (1996), is the case where the United States determined that the Double Jeopardy clause was not implicated by a separate civil forfeiture proceeding, but the Court’s analysis in *Ursery* did not make that analysis from the framework of the Nevada Constitution and the legislative history of civil forfeiture in Nevada.

Article 1, Section 8 of the Nevada constitution provides that “No person shall be subject to be twice put in jeopardy for the same offense.” This Court has interpreted that to mean that all defendants are protected from (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.” *Sweat v. Eighth Jud. Dist. Ct.*, 133 Nev. 602, 604(2017); *see also Jackson v. State*, 128 Nev. 598, 604 (2012).

Here, the separate forfeiture proceeding constitutes an additional punishment for the same offense. There is no rational interpretation that the taking of one’s home

is not a “punishment.” Because this forfeiture was not addressed in the criminal case, it should not be the subject of a separate proceeding now as doing so would violate the Double Jeopardy clause of Nevada’s Constitution.

IV. Other states prohibit civil forfeiture and conduct forfeiture within criminal cases, and they do not have any adverse impact on public safety

In 2015, the New Mexico Legislature overhauled the state’s forfeiture laws, passing the nation’s strongest reform package. Police and prosecutors warned public safety would be compromised and urged the governor to veto the bill, saying it would “take money out of (law enforcement agencies’) hands” and “[y]ou’ll get less law enforcement.”⁴ In fact none of that happened, the sky has not fallen in New Mexico and eliminating civil forfeiture did not lead to an increase in crime in that state.

The Institute for Justice (“IJ”) did an extensive analysis five years after New Mexico rid itself of civil forfeiture. The analysis used five different measures of crime, data from the FBI’s Uniform Crime Reporting Program and four measures of

⁴Dewan, S. (2015, Apr. 9). Bill to end civil forfeiture in New Mexico awaits move by Governor Martinez. *The New York Times*

<https://www.nytimes.com/2015/04/10/us/civil-forfeiture-new-mexico-bill-governor-martinez.html>;

Boetel, R., & Boyd, D. (2015, Mar. 28). Bill would kill ‘policing for profit.’ *Albuquerque Journal*

<https://www.abqjournal.com/561411/bill-on-seizures-would-kill-policing-for-profit.html>

arrests – all arrests, arrests for driving under the influence of alcohol or drugs, drug possession arrests, and drug sales arrests.⁵

Those adverse to eliminating civil forfeiture in New Mexico (primarily law enforcement) argued that doing so would result in (1) a significant increase in the number of crimes committed because forfeiture was no longer deterring crime and (2) a significant decrease in the number of arrests because police are unable to solve crimes without forfeiture. *Id.* IJ used Colorado and Texas to control for general crime rates not related to forfeiture reform. *Id.* Compared to Colorado and Texas, New Mexico’s overall crime rate did not rise following the elimination of civil forfeiture. Rather, the trends across all five of the crime measures remained consistent. *Id.* Both the arrest rate and the conviction rate remained flat. *Id.* The hypothesis that this would somehow negatively affect public safety has simply not borne out in New Mexico.

Nebraska and Maine have also enacted similar reforms in 2016 and 2021 respectively. What we know is that civil forfeiture is the darling of law enforcement agencies because it is “Policing for Profit,” and indigent criminal defendants remain the most vulnerable to this outdated legal principal that has set its modern sights not

⁵ [Sidebar: New Research: Eliminating Civil Forfeiture Does Not Increase Crime - Institute for Justice \(ij.org\)](https://www.instituteforjustice.org/sidebar-new-research-eliminating-civil-forfeiture-does-not-increase-crime)

on pirates or seafaring and tax avoiding contraband smugglers, but instead, ordinary street criminals.⁶

CONCLUSION

This is not the first civil forfeiture matter to come before this Court recently and there is an ongoing theme with which this Court is no doubt by now well aware: (1) civil forfeiture is a cumbersome and unnecessary separate procedure; all of this could be handled in the criminal case with one judge; (2) the statutory scheme for civil forfeiture is set up to benefit law enforcement at the expense of typically indigent defendants. Petitioner presents this Court with a Double Jeopardy argument that is supported by Nevada's Constitution. All forfeiture matters should be addressed in the criminal case. This does not mean that there will not be forfeitures. But it does mean that forfeiture will be handled in a criminal case, a defendant will have notice with the charging instrument, he or she will have counsel, and the parties will either negotiate forfeiture as an element of a plea agreement or a court will decide forfeiture as an element of punishment when imposing sentence. This is not a unique or novel idea; federal courts already do this, and several states do it as well. This court should determine that forfeiture under NRS Section 179 is

⁶ Policing for Profit, *supra*.

indeed a punishment because the taking of one's property cannot be construed any other way.

Dated this 9th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14-point font: or

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

☒ Proportionately spaced. Has a typeface of 14 points or more and contains 3100 words; or

☐ Does not exceed ____ pages.

3. Finally, I hereby certify that I have read this Amicus brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated November 9, 2022.

Respectfully submitted,
/s/ Randolph M. Fiedler
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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2022, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system. Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include:

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I further certify that I served a copy of the foregoing via United States Mail, addressed to the following persons, on November 9, 2022:

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