No. 83515

IN THE SUPREME COURT OF THE STATE OF NEVADA

Las Vegas Metropolitan Police Department,

Petitioner,

v.

The Eighth Judicial District Court of the State of Nevada, County of Clark, The Honorable Erika D. Ballou, District Court Judge,

Respondent,

And
Terrenie D. McDowell,
Real Party in Interest.

Amicus Brief of Nevada Attorneys for Criminal Justice, Nevada Policy Research Institute, and American Civil Liberties Union of Nevada in support of Respondent's Answer

Rene L. Valladares
Federal Public Defender, Dist. of Nevada
*Jonathan M. Kirshbaum
Assistant Federal Public Defender
NACJ Amicus Chairperson
Nevada State Bar No. 12908C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577

*Counsel for Amici Curiae

Layla A. Medina
NACJ Member
Nevada State Bar No. 14740

Christopher M. Peterson
Staff Attorney
Nevada State Bar No. 13932
ACLU of Nevada
601 S. Rancho Drive, Suite B-11
Las Vegas Nevada 89106
(702) 366-1226

Deanna L. Forbush
Nevada State Bar No. 6646
Nevada Policy Research Institute
7130 Placid St.
Las Vegas, NV 89119
(702) 222-0642

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.

1. Jonathan M. Kirshbaum
2. Layla A. Medina
3. Christopher M. Peterson
4. Deanna L. Forbush
5. NACJ
6. ACLU of Nevada
7. NPRI

/s/Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Assistant Federal Public Defender

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IDENTITY OF AMICUS CURIAE & STATEMENT OF INTEREST

Nevada Attorneys for Criminal Justice (NACJ) is a state-wide, non-profit 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 members have experience litigating return of property motions and representing individuals in civil forfeiture actions and its input can assist this Court in deciding important issues presented here.

The American Civil Liberties Union of Nevada (ACLUNV) is a nonprofit, nonpartisan organization dedicated to defending constitutional and civil rights principles. The ACLUNV advocates on behalf of Nevadans impacted by the criminal justice system and works to advance racial justice and individual privacy interests. The ACLUNV, its civil rights clients seeking justice, and its members and donors are concerned about the inequitable civil forfeiture scheme.

The Nevada Policy Research Institute (NPRI) is a nonpartisan education and research organization dedicated to advancing the principles of individual freedom and constitutionally limited and accountable government in Nevada. NPRI is a non-profit, tax exempt

organization under Section 501(c)(3) of the IRC based in Las Vegas, Nevada. NPRI's research indicates that the challenged forfeiture scheme effectively deprives low-income Nevadans of their constitutionally protected due process and property rights, which directly implicates the Institute's core mission of ensuring Nevadans are served by a government that operates in accordance with the Nevada Constitution.

ARGUMENT

I. Civil Forfeiture Disproportionately Impacts Indigent Defendants.

A. LVMPD's use of the civil forfeiture system disproportionately targets small amounts of currency from low-income defendants

In 2015, the Legislature enacted Senate Bill 138, which now compels law enforcement agencies to report, annually, on the civil forfeitures they initiate during the fiscal year.

Once these numbers began to be reported, it became clear the Las Vegas Metro Police Department's (LVMPD) use of the civil forfeiture scheme had a disproportionate impact on low-income, minority defendants. According to a report done by NPRI, sixty-six percent of

forfeitures instituted by LVMPD occurred in just twelve zip codes.[1] The average poverty rate in those zip codes is 27 percent, well above the countywide poverty rate of 16 percent.[2] The average non-white population in those targeted zip codes is 42 percent, above the countywide rate of 36 percent.

Thus, LVMPD's use of the civil forfeiture system has targeted the poorest, most racially diverse areas in Clark County. Individuals living in the targeted geographic areas lack the knowledge and resources to effectively combat a civil forfeiture action, even in those instances where little evidence exists against them.

But the more concerning issue is not just who LVMPD targets, but what it targets. There is a myth that civil forfeiture fights crime by targeting drug lords' significant assets. However, this is not the reality.

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[1] NPRI, "Who Does Civil Asset Forfeiture Target Most? A review of LVMPD's forfeiture activities for Fiscal Year 2016," at 3 (Summer 2017) ("NPRI Report") (available at https://bit.ly/3rvFZWw) (last visited December 3, 2021).

[2] *Id.*

In Nevada, the median value of forfeitures is **$908**.[3] From 2016 through 2018, half of Nevada's forfeitures were worth less than that amount.[4] Incredibly, this included a forfeiture action by LVMPD for four cents.[5] And ninety-two percent of Nevada's forfeitures are currency.[6]

As can be seen, civil forfeiture lands heavily on the shoulders of indigent defendants, who, in most cases, have had a relatively small amount of currency seized from them.

B. The civil forfeiture system is unworkable for indigent defendants

Because most forfeitures concern less than $1,000, there is often no practical recourse for criminal defendants, particularly indigent defendants. The Institute for Justice estimates it costs at least $3,000 for a criminal defendant to fight a relatively simple state forfeiture case.[7]

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[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 December 3. 2021).

[4] *Id.*

[5] *See* LVMPD, NRS Chapter 179 Annual Asset Seizure and Forfeiture Reporting, Fiscal Year 2018, at 20.

[6] IJ Report at 117.

[7] IJ Report at 6.

This is over three times the median value of forfeitures in Nevada. Hiring an attorney to fight a forfeiture case is not economically practical. An indigent defendant does not have those resources. And the cost of litigation outweighs the value of the seized asset. There is also little to no chance of finding an attorney who is willing to work on a contingency-fee basis for these types of cases because they are not economical for the attorney. The law enforcement agency typically succeeds in the civil forfeiture, particularly after a criminal conviction.

As a result, most civil forfeiture proceedings end up in a default judgment in favor of the law enforcement agency. Although the Eighth Amendment Excessive Fines Clause applies to a civil forfeiture proceeding, *Timbs v. Indiana*, 139 S. Ct. 682, 689-91 (2019), this protection rarely matters for indigent defendants due to the economic challenges of fighting a civil forfeiture action.

At bottom, indigent defendants simply do not have the resources to contest civil forfeiture. Although the majority of the amounts at issue in civil forfeiture in Nevada are under $906, even that amount of money represents a significant asset for indigent defendants. Yet, they are nearly powerless to prevent its forfeiture by an agency, which as

discussed below, has the motive to seize and keep the property.

C. Law enforcement agencies can directly profit from the forfeiture of property, even if there is no legal basis, exacerbating the inequity imposed 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 179.118(2)(b). During the last fiscal year, LVMPD obtained over two million dollars in forfeited assets with nearly 1.8 million available for distribution after expenses.[8] 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. Indeed, there are no audits of forfeiture accounts in Nevada.

There is an additional incentive for a law enforcement agency to

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[8] Nevada Attorney General Aggregate Report, NRS Chapter 179 Annual Asset Seizure and Forfeiture Reporting, Fiscal Year Reporting Period – July 1, 2019, to June 30, 2020, at 55-56.

seek forfeiture from indigent defendants—the ease in which law enforcement agencies can obtain possession of the assets. Law enforcement agencies are acutely aware of the difficulties indigent defendants have in navigating the civil forfeiture system. As discussed above, these defendants do not have the means to fight a civil forfeiture. Because the amount of the proceeds is typically low and the rate of success for law enforcement so high, there is no economic incentive for any attorneys to assist an indigent defendant in the proceedings. [9]

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[9] Although not relevant to this case, the federal equitable sharing program provides an additional financial incentive for local law enforcement agencies to seize assets. Under this program, local law enforcement can share seized assets with federal agencies, who will seek forfeiture under the highly permissible federal civil forfeiture scheme. *See* IJ Report at 5-6. Once forfeited, the federal agencies will give a percentage of the seized assets back to local law enforcement. *Id.* This dubious practice recently was in the news when the Nevada Highway Patrol seized over $87,000 from a retired marine during a traffic stop. The money was shared with the DEA, who sought forfeiture, even though no charges were filed. As the Las Vegas Review Journal stated, "the victim refused to go quietly, and the resulting embarrassment led the government to beat a hasty retreat when the story hit the media." *Editorial: Civil asset forfeiture horror story shows need for reform*, Las Vegas Review Journal, Sept. 8, 2021 (available at https://bit.ly/3rBUB6S) (last visited Nov. 26, 2021). That case shows why law enforcement has an incentive to target smaller amounts from indigent defendants. These defendants don't have the resources or the economic incentive to fight the forfeiture, making the transfer easy to accomplish.

Thus, the system is geared towards law enforcement agency easily obtaining possession of an indigent defendant's seized assets. As discussed below, these equitable considerations justify granting a district court judge the authority to assess the validity of a civil forfeiture in the context of a return of property motion.

II. District court judges should be given the power to assess the merits of civil forfeiture proceedings under the return of property statute

A. Power of district court and scope of return of property statutory scheme under *Maiola v. State*

In *Maiola v. State*, this Court considered the sole issue of whether the district court that heard the criminal proceeding had jurisdiction to hear a motion for return of property. 120 Nev. 671, 99 P.3d 227 (2004). After considering a petition for rehearing, this Court held the district court does have jurisdiction. *Id.* This holding remains binding precedent. In fact, it is more on point with the merits of this petition than the facts and holding in *Las Vegas Metro. Police Dep't v. Anderson*, 134 Nev. 799, 425 P.3d 672 (Ct. App. 2018).

In his motion for return property, Maiola asserted that under NRS 179.085(a) he was entitled to $543 because the court had previously suppressed the evidence as unlawfully seized. 120 Nev. at 674, 99 P.3d

at 229. However, unbeknownst to Maiola, a different district court had already entered a judgment by default against him based on notice to seek forfeiture filed by the State on behalf of LVMPD. 120 Nev. at 673, 99 P.3d at 228. In an effort to diminish the criminal court's power to hear the motion for return of property, the State unsuccessfully argued that the proper procedural mechanism was for Maiola to file a motion to set aside a default judgment pursuant to NRCP 60(b) in the forfeiture action. 120 Nev. at 676, 99 P.3d at 230. While this Court acknowledged that remedy existed, it stressed that "as in many forfeiture actions, NRCP 60(b) does not offer a remedy that is, as a practical matter, economically feasible. In fact, the more equitable and economically feasible remedy, is for the same court that heard issues of unlawfully seized evidence, to rule on issues of return of property." *Id.*

Consistent with *Maiola*, a district court clearly has the power under the return of property statute to consider the validity of a civil forfeiture action. As discussed earlier and emphasized in *Maiola*, the civil forfeiture scheme disproportionately impacts indigent criminal defendants. Indeed, many are homeless or transient, making it nearly impossible for them to receive notice of a civil forfeiture action, always giving LVMPD an

advantage in the civil matter because most proceedings will result in a judgment by default. These considerations render inequitable LVMPD's argument that the civil case is the most appropriate venue to litigate issues of property obtained through criminal investigations. LVMPD's argument encourages forum shopping, undermines NRS 179.085, and is contrary to this Court's holding in *Maiola*.

B. Criminal courts should have equitable jurisdiction in a return of property action to resolve meritless forfeiture issues quickly to protect indigent litigants

Nevada's current civil forfeiture scheme is highly inequitable. It ignores the troubling realities of indigent defendants who are disproportionately affected by the process. Indigent defendants simply do not have the necessary means to fight civil forfeitures.

Granting equitable jurisdiction to the criminal court on a motion for return of property ensures that indigent defendants are not trampled by a civil forfeiture action. First, an indigent criminal defendant has been assigned counsel in the criminal proceeding. Appointed counsel can potentially file a return of property on a defendant's behalf. At the very least, it is far easier for a criminal defendant to file a return of property motion in the criminal case than it is to fight a forfeiture action in civil

court. When brought before the criminal judge, no issues will arise on whether the defendant has notice of the proceeding because he is the moving party. Furthermore, this Court rightfully found that "requiring the owner of illegally seized property to file motions or independent actions is often not an adequate remedy, and the Legislature has made it clear in NRS 179.085 that property illegally seized should be returned to its owner." *Maiola*, 120 Nev. at 678, 99 P.3d at 231. Litigating these issues in an independent civil forfeiture action as opposed to the criminal case burdens everyone—the moving party, the court, and most importantly, the real-party-in-interest.

Second, filing a return of property motion does not prevent the State from obtaining forfeiture. It is important to remember that just because a defendant has recourse for return of property under NRS 179.085 does not mean the request will be automatically granted. Not every defendant has property seized, and even if they do, the defendant bears the initial burden of showing that one of the delineated exceptions for return applies. Subsections (a)-(d) specifically deal with the invalidity of search warrants or unlawfully seized evidence. See NRS 179.085(1). Subsection (e) states "retention of the property by law enforcement is not

reasonable under the totality of the circumstances." *Id.* (emphasis added).

Nonetheless, when a motion for return of property is filed in front of the criminal judge, that judge is best suited to provide a fair remedy, regardless of whether a civil forfeiture matter is pending or can be filed. The criminal judge knows the facts of the case better than any other judge. He or she receives the declaration of arrest, makes rulings on Fourth Amendment suppression issues, and accepts pleas. LVMPD's current practice of rushing to file a civil forfeiture action simply to prohibit the criminal judge from hearing a motion for return of property, even in criminal cases that have not resulted in convictions, or convictions that have no relation to the evidence seized, creates an inequitable system that should not be allowed.

No published Nevada case has ever held that that the civil forfeiture statutory scheme takes precedence over a motion for return of property. In fact, *Maiola* acknowledged that NRS 179.085 creates an expeditious method for determining whether property should be returned. A criminal court judge has jurisdiction in such a proceeding to determine the merits of a civil forfeiture action. It is the most expedient

and equitable approach for indigent criminal defendants, who are disproportionately affected by civil forfeiture.

C. Alternatively, this Court should clarify that if law enforcement wants to proceed with a civil forfeiture in response to a motion for return of property, it must demonstrate in the return of property action that it could prevail in a civil forfeiture action

In *Las Vegas Metro. Police Dep't v. Anderson*, the Nevada Court of Appeals decided whether the district court erred in awarding fees pursuant to NRS 18.010(2) when a defendant's motion for return of property was granted under NRS 179.085. 134 Nev. 799, 425 P.3d 672. *Anderson* does not stand for the proposition that the mere filing of a civil forfeiture action will automatically prevent the criminal judge from hearing a motion for return of property. Rather, as explained by Real Party in Interest, *Anderson*'s discussion of the parties' burdens in return of property motions was nonbinding dicta.

In dicta, the *Anderson* court attempted to clarify the procedures that should be followed by district courts when evaluating return of property motions filed pursuant to NRS 179.085(1)(e). *Anderson* posited that the moving party would bear "the initial burden to show that the government's retention of his or her property is facially unreasonable

under the totality of all of the circumstances that then exist." 134 Nev. at 805, 425 P.3d at 678. If the defendant failed to meet that burden, the criminal court can deny his motion. 134 Nev. at 806, 425 P.3d at 678. However, if the defendant made the required showing, the burden would shift to the government to show that it did have a legitimate reason to retain the property. *Id.*

While *Anderson* opined that the mere existence of a civil forfeiture proceeding would be a "legitimate reason" for the State to retain the property, this result would be patently inequitable if it were clear that the forfeiture proceeding was meritless or frivolous. To put it another way, if LVMPD could not prevail, as a matter of law, in a civil forfeiture action, then the mere existence of that civil forfeiture action cannot be a "legitimate reason" for it to retain an indigent defendant's property. Simply stating on the record that the evidence seized may be subject to civil forfeiture claim without showing the legitimacy of that proceeding grants the law enforcement agency the unchecked power to foreclose a potentially meritorious return of property motion.

To the extent this Court may choose to adopt the legal framework that was proposed by the Court of Appeals in *Anderson*, this Court should

place the burden on the law enforcement agency to establish the validity of a civil forfeiture action—namely, how the property is connected to criminal activity—in front of the criminal judge. If the law enforcement agency meets its burden, then the return of property motion should be stayed until the civil forfeiture proceedings has ended. However, if the law enforcement agency is unable to meet its burden, then the return of property motion should be granted.

To help district courts make these determinations, Amici propose adopting a similar standard to the one utilized in resolving summary judgment motions. As this Court has explained in the civil context,

> Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.

Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (internal citations omitted).

Under this standard, if LVMPD seeks to defeat a return of property motion on the basis that it has filed or will file a civil forfeiture action, then it "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue of material fact" that must be resolved in the civil forfeiture action. *Wood*, 121 Nev. at 732, 121 P.3d at 1031. The evidence proffered by LVMPD in opposition to a return of property motion, and any reasonable inferences drawn from it would be viewed in the light most favorable to LVMPD. *Id.* at 729, 121 P.3d at 1029. If the evidence proffered by LVMPD is insufficient to establish by clear and convincing evidence that the property must be forfeited pursuant to *Fergason v. Las Vegas Metropolitan Police Department*, 131 Nev. 939, 944, 364 P.3d 592, 595-96 (2015), then the civil forfeiture action cannot be a basis to deny a motion for return of property.

Applying this standard here, Mr. McDowell would still prevail. Even assuming the truth of the evidence presented by LVMPD in its opposition to Mr. McDowell's motion, and even if all reasonable inferences are drawn from those statements in favor of LVMPD, LVMPD *still* could not establish that the funds seized from Mr. McDowell were "attributable to" or "derived directly or indirectly from" his attempts to

pander to Detective Tafesh, as required by *Fergason*. 131 Nev. at 944, 364 P.3d at 595-96 (citing NRS 179.1161; NRS 179.1164(1)(a); NRS 179.1173(4)). Because there was no genuine issue of material fact to be resolved in the civil forfeiture action, the case was properly resolved by the criminal court under the return of property motion.

This structure is consistent with equitable considerations as well as judicial economy. It avoids an improper incentive system for LVMPD to usurp a district court judge's power in return of property actions—where an indigent defendant may have a chance of succeeding—by shifting the power to the civil forfeiture proceeding where LVMPD has built-in, inequitable advantages. The criminal court has already heard issues of suppression and evidence seized; there is no reason a civil court should be hearing the same issues simply because a law enforcement agency is unsatisfied with the result. Further, this approach avoids rewarding the party who rushes to the courthouse, where one party can game the system and dictate whether the matter is civil or criminal. Rather, the district court should have the power to decide which court is in the better position to decide it.

CONCLUSION

For all the foregoing reasons, we respectfully request that this Court deny LVMPD's petition.

Dated December 6, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Assistant Federal Public Defender

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:

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

[ ] This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14 point font.

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:

[X] Proportionately spaced. Has a typeface of 14 points or more and contains 3490 words; or

[ ] Does not exceed pages.

3. Finally, I hereby certify that I have read this appellate 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, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 December 6, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2021, 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: Liesl Freedman; Jeremy Woods; Scott Greenberg; Frank Logrippo.

I further certify that I served a copy of this document by email to: dept24lc@clarkcountycourts.us for – Honorable Erika Ballou, District Court, Department XXIV.

/s/Richard Chavez
An Employee of the
Federal Public Defender