

IN THE SUPREME COURT OF THE STATE OF NEVADA

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BRYAN FERGASON,

Appellant,

vs.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Respondent.

Case No.: 62357

APPELLANT'S REPLACEMENT OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 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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There are no parties which are corporations

Dated this 28th day of April, 2014

Respectfully submitted,

/s/ Ryan W. Daniels

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JURISDICTIONAL STATEMENT

This appeal is taken from a final judgment pursuant to NRAP 3(A)(b)(1) in the case styled *Las Vegas Metropolitan Police Dept. vs U S Currency \$281,656.73* (Case no. A537416). On November 28, 2012, the district court entered an order granting Respondents' motion for summary judgment, and notice of entry of order was filed on November 29, 2012.

A timely Notice of Appeal/Proper Person Pilot Program was filed on December 28, 2012. An order to Proceed in Forma Pauperis was filed on February 26, 2013. On September 18, 2013 this Court filed an Order Regarding Pro Bono Counsel, staying this appeal and determining that the appointment of pro bono counsel to represent the appellant would benefit the Court's review.

ISSUE PRESENTED FOR REVIEW

1. The Nevada forfeiture statutes permit the state to acquire property that was “derived directly or indirectly from the commission or attempted commission of a crime.” Bryan Fergason was forced to forfeit all the money in his bank account solely because of his criminal convictions. The criminal convictions did not determine how his money was “derived.” Should the district court have entered summary judgment based only on his criminal convictions?
2. Issue Preclusion applies when the issues in an earlier case are identical to the issues in a later case. None of Bryan Fergason’s criminal convictions presented identical issues to the issues in the forfeiture proceeding. If NRS 179.1173(5) is a form of statutory issue preclusion, did the district court apply it correctly in the forfeiture proceeding?

STATEMENT OF THE CASE AND RELEVANT FACTS

On September 24, 2006 the Las Vegas Metropolitan Police Department (hereinafter “Metro”) responded to a burglary call and apprehended appellant Bryan Fergason (hereinafter “Mr. Fergason”) and Daimon Monroe (hereinafter “Mr. Monroe”) in a van containing stolen property. APP 31.¹ That same day, search warrants were served at 15004 Cutler Drive, Las Vegas, NV 89117 where police officers found suspected stolen property. APP 31. Mr. Fergason, Mr. Monroe, Tonya Trevarthen (hereinafter “Ms. Trevarthen”), and Robert Holmes, III (hereinafter “Mr. Holmes”) were charged with six counts of Felony Possession of Stolen Property and one count of conspiracy to Possess Stolen Property. APP 31—32.

For about a month after Metro apprehended Mr. Fergason, police officers monitored telephone calls between Mr. Monroe, Mr. Fergason, Mr. Holmes and Ms. Trevarthen. APP 32. In these telephone calls, Metro learned of residences and storage units controlled by Mr. Monroe, Mr. Fergason, and Mr. Holmes. APP 32. Obtaining search warrants, Metro found stolen property at these locations and \$13,825 in U.S. bills and \$1,040.22 in loose and rolled U.S. coins. APP32—33.

¹ All references to the Appendix will be to APP _____ indicating the page number in the Appendix

Through additional investigations, Metro learned that Mr. Ferguson held a bank account at Bank of America. APP 33. Police obtained a search warrant and seized \$121,216.36 from Mr. Ferguson's Account. APP 33.

On March 9, 2007 Metro filed a forfeiture complaint against \$281,656.73 that allegedly represented proceeds attributable to the commission or attempted commission of a felony. APP 30—31. \$121,216.36 of that amount was seized from Mr. Ferguson's bank account. APP 33.

On March 29, 2010, a jury convicted Mr. Ferguson of two counts of Burglary, one count of Grand Larceny, and one count of Possession of Burglary Tools. APP 71—72. On April 3, 2009 a jury convicted Mr. Ferguson of one count of Conspiracy to Possess Stolen Property and/or to Commit Burglary and 25 counts of Possession of Stolen Property. APP 64—68.

Mr. Ferguson's First Count of Burglary Conviction

The information on which Mr. Ferguson was found guilty for burglary, alleged that Mr. Ferguson: “[1.] did willfully, unlawfully, and feloniously enter [2.] with intent to commit larceny [3.] that certain building occupied by Anku Crystal Palace.” APP 13—14. In addition, the information required that Mr. Ferguson was “responsible under one or more of the following principles of criminal liability, to wit: (1) by [Mr. Ferguson] directly committing the crime; and/or (2) [Mr. Ferguson] aiding or abetting the other Defendant in the commission of the crime by

accompanying him to the crime scene where either one of them entered Anku Crystal Palace with intent to commit larceny; acting as lookout for each other; left the crime scene together; encouraging one another throughout by actions and words; acting in concert throughout each with intent to commit burglary; and/or (3) [Mr. Ferguson and the other Defendant] acting in furtherance of a conspiracy.” APP 14.

Mr. Ferguson’s Second Count of Burglary Conviction

The indictment on which Mr. Ferguson was found guilty for burglary, alleged that Mr. Ferguson: “[1.] did willfully, unlawfully, and feloniously enter [2.] with intent to commit larceny, [3.] that certain building occupied by Just for Kids Dentistry.” APP 15.

Mr. Ferguson’s Grand Larceny Conviction

The indictment on which Mr. Ferguson was found guilty for grand larceny, alleged that Mr. Ferguson: “[1.] did willfully, unlawfully, and feloniously [2] with intent to deprive the owner permanently thereof [3] steal, take, carry, lead, or drive away property owned by Anku Crystal Palace [4] having a value of \$2,500.00 or more [5] statues, a crystal fixture, bracelets, a laptop computer, a game cube video game, video games and lawful money of the United States.” App 14. Mr. Ferguson was required to be found “responsible under one or more of the following principles of criminal liability, to wit (1) by [Mr. Ferguson] directly committing the

crime; and/or (2) [Mr. Fergason] aiding or abetting the other Defendant in the commission of the crime by accompanying him to the crime scene where either one of them entered Anku Crystal Palace with intent to commit larceny; acting as lookout for each other; left the crime scene together; encouraging one another throughout by actions and words; acting in concert throughout each with intent to commit burglary; and/or (3) [Mr. Fergason and the other Defendant] acting in furtherance of a conspiracy. APP 14

Mr. Fergason's 25 Counts of Possession of Stolen Property Conviction

The indictment on which Mr. Fergason was found guilty, alleged that Mr. Fergason “did wilfully, unlawfully, and feloniously, for [his] own gain, possess property of a value of \$2500.00, or more, lawful money of the United States, wrongfully taken from [various businesses], which [Mr. Fergason] knew, or had reason to believe, that the following had been stolen: [various tangible items].” APP 1—12.

All 25 counts of Possession of stolen property consisted of tangible goods such as camping equipment, artwork, spa chemicals, and computers. *See* APP 2—7. Not one of the counts of Possession of stolen property referenced the \$121,216.36 seized from Mr. Fergason's Bank of America Account. During trial, Tonya Trevarthen testified that most of the money in *her* bank accounts “was just

cash that was made through selling the stolen property” but she never testified regarding the money in Mr. Ferguson’s account. *See* APP 25 and 120.

On June 5, 2012, plaintiff filed a motion for summary judgment and the motion was granted.

SUMMARY OF ARGUMENT

Under Nevada law, a person will forfeit his property to the State, if the State can show by clear and convincing evidence that the property was “derived directly or indirectly from the commission or attempted commission of a crime.” NRS 179.1161.

Bryan Ferguson was required to forfeit his property to the state based on nothing more than the fact that Metro offered evidence of Mr. Ferguson’s convictions. However, Metro offered no evidence that the money in Mr. Ferguson’s bank account was directly or indirectly derived from the crimes underlying those convictions. Thus, the money in Mr. Ferguson’s bank account should not be forfeited.

Citing NRS 179.1173(5), the district court granted Metro its summary judgment motion on the forfeiture proceeding, stating that “the proof of the facts necessary to sustain the conviction are, therefore, conclusive evidence in this forfeiture action.” APP140.

NRS 179.1173(5) is a statutory form of issue preclusion in forfeiture proceedings. It estops a defendant in the forfeiture proceeding from re-litigating certain relevant issues settled in a criminal conviction. However, the district court improperly applied NRS 179.1173(5) and precluded *all* forfeiture issues from litigation based on Mr. Ferguson's criminal conviction. Because Mr. Ferguson was improperly precluded from litigating relevant issues in the forfeiture proceeding, most importantly the issue of whether the money in his Bank Account was the proceeds of criminal activity, this case should be remanded and tried on the forfeiture issues that are not subject to estoppel under NRS 179.1173(5).

ARGUMENT

A. A BURGLARY CONVICTION, A POSSESSION OF STOLEN PROPERTY CONVICTION, OR A GRAND LARCENY CONVICTION, ARE INSUFFICIENT PROOF TO SUSTAIN A MOTION FOR SUMMARY JUDGMENT ON FORFEITURE PROCEEDINGS FOR MONEY IN A BANK ACCOUNT.

1. Standard of Review for Summary Judgment

This court reviews a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c). “[W]hen reviewing a motion for summary judgment, the evidence, and any

reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.” *Id.* at 121 Nev. at 729, 121 P.3d at 1029.

2. Introduction

In a forfeiture of proceeds lawsuit, the Nevada Revised Statutes require that a plaintiff prove by clear and convincing evidence that the property was “derived directly or indirectly from the commission or attempted commission of a crime.” NRS 179.1161, NRS 179.1173(3) and NRS 179.1164(a). Furthermore, NRS 179.1173(5) states that:

The plaintiff is not required to plead or prove that a claimant has been charged with or convicted of any criminal offense. If proof of such a conviction is made, and it is shown that the judgment of conviction has become final, the proof is, as against any claimant, **conclusive evidence of all facts necessary to sustain the conviction.** (emphasis added)

In this case, Metro was required to prove by clear and convincing evidence that the money in Mr. Ferguson’s bank account was “derived directly or indirectly from the commission or attempted commission of a crime.” Thus, plaintiffs were required to introduce substantial evidence that linked the money in Mr. Ferguson’s account to the commission of a crime. However, no link was ever made, or even attempted. Instead, the court ordered the forfeiture because Mr. Ferguson was convicted of attempted burglary, burglary, and possession of stolen property.

In support of its ruling, the Court cited NRS 179.1173(5) stating that because the judgments of conviction in the criminal cases were final, “the proof of

the facts necessary to sustain the conviction are, therefore, conclusive evidence in this forfeiture action.” APP 140.

3. The Standard of Review When Interpreting The Forfeiture Statute.

Determining the meaning of NRS 179.1173(5) is a function of statutory interpretation. “Statutory interpretation is a question of law, and review of the district court’s interpretation of [NRS 179.1173(5)] is also de novo.” *McDonald v. D.P. Alexander & Las Vegas Boulevard*, 121 Nev. 812, 815-16, 123 P.3d 748, 750 (2005) (citing *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004)). “When interpreting a statute, [the Court] must first determine whether the language is ambiguous.” *Id.* at 816, 750 (citing *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001)). “When the language of a statute is clear and unambiguous, [the Court] do[es] not look beyond its plain meaning, and [the Court] give[s] effect to its apparent intent unless that meaning was not clearly intended.” *Id.*

NRS 179.1173(5) is clear and unambiguous. The court need only look to its plain meaning when applying it to Mr. Ferguson’s case.

4. Nevada’s Forfeiture Statute has Three Components: Criminal Activity, Proceeds, Clear and Convincing Evidentiary Burden.

Nevada’s Forfeiture statute requires that a plaintiff: (1) prove by clear and convincing evidence that (2) the proceeds were “derived directly or indirectly” from (3) criminal activity. NRS 179.1161, NRS 179.1173(3) and NRS

179.1164(a). In granting plaintiff's motion for summary judgment, the district court incorrectly concluded that the plaintiff proved by clear and convincing evidence that the money in Mr. Ferguson's bank account was derived directly or indirectly from criminal activity. While elements (2) and (3) are discussed in the next section, the issue regarding the evidentiary burden will be addressed here.

In addition to viewing the evidence in a light favorable to Mr. Ferguson (as the non-moving party) this Court should view that evidence through the "prism" of the clear and convincing evidentiary burden.

When a court rules on a motion for summary judgment, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Thus, if the moving party must prove the prima facie elements of its case by clear and convincing evidence, then the judge must view the evidence and arguments in the motion for summary judgment through a clear and convincing evidentiary burden. *See Id.* In *Anderson*, the court reasoned that a judge reviewing a motion for summary judgment must consider whether a jury could reasonably find for either party "by the quality and quantity of evidence required by the governing law." *Id.* Thus, where a plaintiff had to prove actual malice by clear and convincing evidence "the appropriate summary judgment question [was] whether the evidence in the record could support a reasonable jury finding either that the plaintiff has

shown actual malice by clear and convincing evidence or that the plaintiff has not.”

Id. at 255—56.

Nevada courts have followed the United States Supreme Court in using the clear and convincing evidentiary burden in summary judgment orders, albeit *sub silentio*. In *Bulbman, Inc. v. Nevada Bell*, the plaintiff appealed an order for summary judgment on his fraud claim. 108 Nev. 105, 825 P.2d 588. The court reasoned that the plaintiff had the burden of proving each element of the fraud claim by clear and convincing evidence but failed to establish fraud under that standard. *See Id.* at 592. Indeed, the plaintiff had presented evidence to support his claim, but the Supreme Court agreed with the trial court that the evidence was insufficient. *Id.* (See also *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382, 1386 (1998) (The court again asserted that Nevada Law requires plaintiffs to prove fraudulent representation claims by clear and convincing evidence, and that plaintiff had “the burden of proving each and every element of his fraudulent misrepresentation claim by clear and convincing evidence.”)) In order to conclude the plaintiff had not met its clear and convincing evidentiary burden, the Court must have viewed plaintiff’s evidence through the “prism” of the clear and convincing evidentiary burden. How else could it have determined that the plaintiff had not met its burden?

In this case, Metro had the burden of proving by clear and convincing evidence that Mr. Ferguson was required to forfeit \$121,216.36. NRS 179.1173(3). Las Vegas Metro's only evidence at the hearing for summary judgment in the forfeiture proceeding consisted of (1) Mr. Ferguson's felony conviction and (2) Ms. Trevarthen's testimony at the Grand Jury, Mr. Monroe's trial, and Mr. Ferguson's trial. APP 24—28.

Metro used Ms. Trevarthen testimony to show that a majority of the items seized by Metro were stolen and that the money in her accounts "was just cash that was made through selling the stolen property." APP 93, 118, and 120. However, all of this testimony is directed at *Ms. Trevarthen's* bank account and the money in *her* house. Metro introduced no testimony regarding the origin of the money in Mr. Ferguson's Bank account. In fact, the only testimony regarding Mr. Ferguson in the forfeiture proceeding was that he never hid the fact that he was committing burglaries and that during the time Ms. Trevarthen knew Mr. Ferguson, he only worked for a moving company for a few months. APP 107—08.

This court, in reviewing the order for summary judgment, should view the evidence presented through the "prism" of the clear and convincing evidentiary burden. *See Bulbman*. With no evidence of the source of the money seized from Mr. Ferguson's account, the appropriate question for this court is whether a reasonable jury could find that the money in Mr. Ferguson's account was derived

from criminal activity by clear and convincing evidence. When viewed through this prism, this Court should conclude that there are genuine issues of material fact concerning the source of Mr. Ferguson's money and this Court should remand this case to the district court for a hearing on the facts.

B. NRS 179.1173(5) ESTOPS ONLY THE FACTS NECESSARY TO SUSTAIN A CONVICTION IN A CRIMINAL PROCEEDING FROM RE-LITIGATION IN THE FORFEITURE PROCEEDING.

1. The Factors Necessary for the Proper Application of Issue Preclusion

NRS 179.1173(5) states that:

The plaintiff is not required to plead or prove that a claimant has been charged with or convicted of any criminal offense. If proof of such a conviction is made, and it is shown that the judgment of conviction has become final, the proof is, as against any claimant, conclusive evidence of all facts necessary to sustain the conviction.

Under NRS 179.1173(5), if a claimant is convicted of a criminal offense, the statute precludes him from re-litigating the criminal offense in the forfeiture proceeding. Thus, if the claimant's criminal activity is connected to the seized property, the statute precludes him from challenging the criminal conviction in the civil forfeiture proceeding. In this manner, NRS 179.1173(5) is a codification of issue preclusion in forfeiture proceedings.

When a Court addresses issues in an earlier suit that arise in a later suit between the same parties, it must consider whether issue preclusion applies. *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 711 (2008) (citing *University of Nevada*

v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)). Courts apply issue preclusion to “conserve judicial resources, maintain consistency, and avoid harassment or oppression of the adverse party.” *Hiroko Alcantara v. Wal-Mart Stores, Inc.* 130 Nev., Adv. Op. 28, *6 (2014) (citing *Berkson v. LePome*, 126 Nev.____,____, 245 P.3d 560, 566 (2010)). A court may apply issue preclusion only when there is a common issue between two cases that “was actually decided and necessary to the judgment in the earlier suit.” *Five Star Capital Corp.* citing *Tarkanian* at 599, 879 P.2d at 1191. The doctrine of issue preclusion “provides that any issue that was *actually and necessarily litigated* in one action will be estopped from being relitigated in a subsequent suit.” *Id.* (emphasis added) Furthermore, “[i]ssue preclusion may apply ‘even though the causes of action are substantially different, if the same fact issue is presented.’” *Alcantara* at *8 quoting *LaForge v. State, Univ. and Cmty. Coll. Sys. Of Nev.*, 116 Nev. 415, 420, 997 P.2d 130, 134 (2000) (quoting *Clark v. Clark*, 80 Nev. 52, 56, 389 P.2d 69, 71 (1964)).

Courts apply the following factors in determining whether to preclude issues: “(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; [. . .] (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the

issue was actually and necessarily litigated.” *Five Star Capital Corp.* 194 P.3d at 713.

1. The District Court Incorrectly Applied the Factors for Issue Preclusion

In this case, the district court incorrectly applied the factors for issue preclusion and determined that Mr. Ferguson’s criminal conviction precluded *any* issues from being litigated in the forfeiture proceeding. The court’s incorrect application of the forfeiture issue preclusion statute led it to conclude that Metro was entitled to summary judgment. However, if applied correctly, the forfeiture issue preclusion statute reveals that issue preclusion does not apply and that Metro is not entitled to summary judgment as a matter of law.

Identical Issues

To apply the forfeiture issue preclusion statute, “the issue decided in the prior [proceeding] must be identical to the issue presented in the current proceeding.” *Alcantara* at 7 (citing *Holt v. Regional Tr. Servs. Corp.*, 127 Nev. ___, ___, 266 P.3d 602, 605 (2011) (alterations in original) quoting *Redrock Valley Ranch v. Washoe Cnty.*, 127 Nev. ___, ___, 254 P.3d 641, 646 (2011)).

In this case, there are no identical issues between the criminal proceeding and the civil forfeiture proceeding. All of Mr. Ferguson’s convictions related to physical property and Metro offered no evidence linking the physical property to

the money in Mr. Fergason's bank account. None of the elements in the criminal convictions satisfied any of the elements of the civil forfeiture.

The burglary elements were that Mr. Fergason (1) did willfully, unlawfully, and feloniously enter (2) with intent to commit larceny (3) Anku Crystal Palace's building and/or Just For Kids Dentistry. Though Mr. Fergason was convicted of these crimes, his convictions are not an issue in the forfeiture proceeding. The money in his Bank account could not have been proceeds from either of these burglary convictions because the convictions relate to physical property, not money. Furthermore, there are no allegations that anyone paid him to enter either business with intent to commit larceny. Neither burglary conviction required that he stole property that he could later convert to proceeds. Thus, the issue of his criminal conviction cannot be identical to a criminal activity issue in the forfeiture proceeding.

While the grand larceny issue may appear superficially to have identical issues in the forfeiture proceeding, it cannot be an issue in the forfeiture proceeding either. The issues in the grand larceny conviction were that Mr. Fergason (1) did willfully, unlawfully, and feloniously (2) with intent to deprive the owner permanently thereof (3) steal, take, carry, lead, or drive away property owned by Anku Crystal Palace (4) having a value of \$2,500.00 or more (5) statues, a crystal fixture, bracelets, a laptop computer, a game cube video game, video

games and lawful money of the United States. If Mr. Fergason sold the property he stole from Anku Crystal Palace and deposited the proceeds in his Bank Account, then the issue of the theft would be conclusive evidence for establishing that the proceeds derived directly from criminal activity and he would be precluded from re-litigating the issue in the forfeiture proceeding. But Metro did not offer any evidence that Mr. Fergason sold the statues, crystal fixture, bracelets, etc. That property was seized by Metro. Thus, the issue of his criminal conviction cannot be identical to a criminal activity issue in the forfeiture proceeding.

The possession of stolen property conviction contains no identical issues in the forfeiture proceeding for the same reason the grand larceny conviction lacked any identical issues. The issues in the possession of stolen property conviction were that Mr. Fergason (1) did wilfully, unlawfully, and feloniously, for his own gain, possess property of a value of \$2500.00, or more, lawful money of the United States, (2) wrongfully taken from several different businesses, (3) that he knew or had reason to believe had been stolen. Like the grand larceny conviction, this property was never sold with the proceeds deposited into Mr. Fergason's bank account. Nor was he charging rent or acquiring other funds from the property. Thus, the issue of his criminal conviction cannot be identical to a criminal activity issue in the forfeiture proceeding.

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The Initial Ruling Was Final and on the Merits

The second factor in applying the forfeiture issue preclusion statute is that “the initial ruling must have been on the merits and have become final.” *Five Star Capital Corp.* 194 P.3d at 713. Here, Mr. Ferguson’s criminal conviction had been on the merits and became final, so this factor is satisfied.

Same Parties or their Privies

“Issue preclusion can only be used against a party whose due process rights have been met by virtue of that party having been a party or in privity with a party in the prior litigation.” *Alcantara* at 9 *quoting *Bower v. Harrah’s Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009). Here, Mr. Ferguson has a claim to the money seized from his Bank Account and is therefore in privity with the in rem party in the forfeiture litigation.

Actually and Necessarily Litigated

“When an issue is properly raised . . . and is submitted for determination, . . . the issue is actually litigated.” *Alcantara* at 12—13 *quoting *Frei v. Goodsell*, 129 Nev. __, __, 305 P.3d 70, 72 (2013) (quoting Restatement (Second) of Judgments § 27 cmt. D (1982)). “Whether the issue was necessarily litigated turns on whether “the common issue was . . . *necessary to the judgment in the earlier suit.*” *Id.* at 13. (quoting *Tarkanian*, 110 Nev. At 599, 879 P.2d at 1191.)

Here none of the issues necessary for forfeiture were litigated in the criminal proceedings. The necessary issues for forfeiture are that a plaintiff: (1) prove by clear and convincing evidence that (2) the proceeds were “derived directly or indirectly” from (3) criminal activity. It was not necessary, nor did Metro attempt, to prove that there were any proceeds derived from criminal activity. Indeed, the prima face cases for burglary, grand larceny, and possession of stolen property do not require proof that the defendant derived proceeds from his criminal activity. Furthermore, as has already been stated, the issues that were litigated could not have been the same issues for forfeiting money in Mr. Fergason’s bank account.

Mr. Fergason does not argue that his criminal conviction should be re-litigated in the civil forfeiture proceeding. Rather he argues that the elements of forfeiture be *actually* litigated, namely whether the Money in his Bank Account was derived directly or indirectly from criminal activity. He argues that Metro did not introduce clear and convincing evidence that the Money in his Bank Account were proceeds of criminal activity. He argues therefore that he should not, as a matter of law, be forced to forfeit his property. Genuine issues of material fact remain in this case regarding the source of the money in Mr. Fergason’s account.

III. CONCLUSION

The ruling in Mr. Fergason’s civil forfeiture case creates a dangerous precedent. If “the proof of the facts necessary to sustain [a criminal] conviction are,

therefore, conclusive evidence in [a] forfeiture action,” what limits the State from seizing any property from a convicted felon and demanding that he forfeit it? APP140. What process protects legitimate funds from forfeiture?

The forfeiture statutes are meant to seize the ill-gotten assets of criminal activity. In order to seize a convicted felon’s property, the state must prove that the property was ill-gotten. If a criminal conviction is used to establish that the property was the proceeds of criminal activity, then the conviction must clearly link the criminal activity and the proceeds. The state must prove, for example, that the money in a felon’s bank account was the proceeds of the particular crime for which the felon was convicted. Metro did not prove this in Mr. Fergason’s case. It simply used Mr. Fergason’s unrelated criminal activity as an excuse to acquire all the money in Mr. Fergason’s bank account. It offered no evidence linking the money to Mr. Fergason’s particular criminal convictions.

This court should reverse the motion for summary judgment because Metro failed to produce evidence that demonstrates there is no genuine issue of any material fact.

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 size 14 Times New Roman font.

2. I further certify that the 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), it is proportionately spaced, has a typeface of 14 points or more, and contains 4,554 words.

3. Finally, I hereby certify that I have read this appellate brief, and 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 the page and volume number, if any, of the transcript or appendix where the matter relied on is 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.

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Dated this 28th day of April, 2014.

Respectfully submitted,

/s/ Ryan W. Daniels

Ryan W. Daniels, Esq.

Attorney for *Bryan Fergason*

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on April 28th, 2014. I forwarded a copy of the above APPELLANT'S REPLACEMENT OPENING BRIEF and APPELLANT'S APPENDIX VOLUME 1 by depositing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope to:

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