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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN FERGASON,

Appellant,

vs.

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,

Respondent.

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Tracie K. Lindeman
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Case No.: 62357

Appeal from The Eighth Judicial
District Court, The Honorable Douglas
E. Smith Presiding

MOTION FOR COURT TO TAKE JUDICIAL NOTICE

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1 **I. INTRODUCTION**

2 This is a civil forfeiture appeal in which the Defendant/Appellant, Bryan
3 Fergason (“Fergason”), has challenged the District Court’s order granting
4 summary judgment to LVMPD following the conclusion of Fergason’s criminal
5 cases.¹ LVMPD moves this Court to take judicial notice of five criminal trial
6 transcripts,² as well as three previous orders of affirmance from Fergason’s
7 prior appeals before this Court.³ LVMPD’s motion is based upon the fact that
8 the District Court specifically looked at the criminal files,⁴ the law-of-the-case
9 doctrine,⁵ NRS 47.130,⁶ NRS 179.1173(5),⁷ and Supreme Court Rule 123.⁸

10 _____
11 ¹ Record on Appeal (“ROA”) 4:704–710.

12 ² Respondent’s Appendix (“RA”) 1:1–10, 11–195; 2:196–3:507; 3:508–596,
13 597–677.

14 ³ RA 3:678–685, 686–687, 688–692.

15 ⁴ Appellant’s Appendix (“AA”) 1:134:2–3.

16 ⁵ See *Pellegrini v. State*, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001) (“The law
17 of a first appeal is the law of the case on all subsequent appeals in which the
18 facts are substantially the same.”) (citations and internal quotation marks
19 omitted).

20 ⁶ **NRS 47.130 Matters of fact.**

21 1. The facts subject to judicial notice are facts in issue or facts from which
22 they may be inferred.

23 2. A judicially noticed fact must be:

(a) Generally known within the territorial jurisdiction of the trial court; or

(b) Capable of accurate and ready determination by resort to sources whose
accuracy cannot reasonably be questioned,

➡ so that the fact is not subject to reasonable dispute.

⁷ **NRS 179.1173(5):** “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

1 Therefore, in resolving Ferguson's appeal from the District Court's summary
2 judgment order, the Court should grant this motion for judicial notice and
3 consider the transcripts and orders that are included as Respondent's Appendix,
4 which was filed on July 15, 2014.

5
6 **II. LEGAL ARGUMENT**

7 **A. THE DISTRICT COURT ALREADY TOOK JUDICIAL
8 NOTICE OF THE RELATED CRIMINAL CASES.**

9 This Court previously decided in In re AMERCO that this Court may
10 take judicial notice of facts that are "[g]enerally known within the territorial
11 jurisdiction of the trial court," as well as those that are "[c]apable of accurate
12 and ready determination . . . [and] not subject to reasonable dispute."⁹ One
13 example provided by the Court in the AMERCO opinion where this exception
14 was satisfied was the Occhiuto v. Occhiuto¹⁰ case where judicial notice was

15
16 has become final, the proof is, as against any claimant, conclusive evidence of
all facts necessary to sustain the conviction."

17 ⁸ **Rule 123. Citation to unpublished opinions and orders.** An
18 unpublished opinion or order of the Nevada Supreme Court shall not be
19 regarded as precedent and shall not be cited as legal authority except when the
20 opinion or order is (1) relevant under the doctrines of law of the case, res
judicata or collateral estoppel; (2) relevant to a criminal or disciplinary
21 proceeding because it affects the same defendant or respondent in another such
proceeding; or (3) relevant to an analysis of whether recommended discipline is
consistent with previous discipline orders appearing in the state bar publication.

22 ⁹ 252 P.3d 681, 699, n. 9 (Nev. 2011).

23 ¹⁰ 97 Nev. 143, 145, 625 P.2d 568, 569 (1981).

1 taken of previous divorce proceedings.¹¹ The district court judge in Occhiuto
2 took judicial notice of prior divorce proceeding, which caused this Court to
3 elaborate upon the exception to taking judicial notice in related proceedings: “It
4 is a general rule that courts should not take judicial notice of their records in
5 another and different case, even though the cases are connected, but this rule is
6 not so inflexible in its application that under no circumstances can judicial
7 notice be invoked to take cognizance of the record in another case.”¹² The
8 Court further explained, “The close relationship between this case and the
9 previous divorce proceeding brings it within the exception to the general rule
10 and justifies the district court taking judicial notice of the prior proceedings.”¹³

11 In the instant case, the District Court already took judicial notice of the
12 proceedings in the related criminal cases. After the District Court heard
13 argument on the issues briefed for summary judgment, but before the Court
14 issued a decision, the Court acknowledged that it would “review the criminal
15 stuff.”¹⁴ This was significant because NRS 179.1173(5) specifically linked the
16 previous criminal proceedings with this civil forfeiture action, as stated in the
17 language of the statute: “If proof of such a conviction is made, and it is shown
18 that the judgment of conviction has become final, the proof is, as against any
19 claimant, conclusive evidence of all facts necessary to sustain the conviction.”

20 ¹¹ Id.

21 ¹² Id. (citation omitted).

22 ¹³ Id. (citation omitted).

23 ¹⁴ AA 1:134:2–3.

1 Additionally, NRS 47.130, regarding judicial notice of facts, permits
2 facts to be judicially noticed that are “[c]apable of accurate and ready
3 determination by resort to sources whose accuracy cannot reasonably be
4 questioned, so that the fact is not subject to reasonable dispute.” Certainly,
5 Ferguson cannot question the accuracy of the five trial transcripts and three
6 orders from this Court. Therefore, in line with Occhiuto, NRS 179.1173(5), and
7 NRS 47.130, this Court should take judicial notice of all the documents
8 included in Respondent’s Appendix.

9
10 **B. THE DOCTRINE OF THE LAW OF THE CASE ALSO
 SUPPORTS THE COURT TAKING JUDICIAL NOTICE.**

11 Generally, the law-of-the-case doctrine provides that where an appellate
12 court deciding an appeal states a principle or rule of law, necessary to the
13 decision, the principle or rule becomes the law of the case and must be adhered
14 to throughout its subsequent progress both in the lower court and upon
15 subsequent appeal.¹⁵ Additionally, the law-of-the-case doctrine counsels that
16 courts “need not and do not consider a new contention that could have been but
17 was not raised on the prior appeal.”¹⁶ This principle is also applicable to
18 criminal proceedings. As such, the “doctrine of the law of the case cannot be
19 avoided by a more detailed and precisely focused argument subsequently made
20

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22 ¹⁵ See, e.g., LoBue v. State ex rel. Dep’t Hwys., 92 Nev. 529, 532, 554 P.2d
258, 260 (1976).

23 ¹⁶ See Munoz v. County of Imperial, 667 F.2d 811, 817 (9th Cir. 1982).

1 after reflection upon the previous proceedings.”¹⁷ In essence, the “doctrine of
2 the law of the case prevents relitigation” of claims.¹⁸ The Third Circuit has also
3 described the law of the case as “an estoppel” to revisit those issues that were
4 either argued or could have been argued in a prior appeal.¹⁹

5 This case presents a unique application of the doctrine because the
6 controlling rulings from this Court actually occurred in the context of the
7 companion criminal cases.²⁰ Yet, this Court’s conclusions in Ferguson’s direct
8 appeal from his criminal convictions are not only relevant, but dispositive of the
9 instant appeal according to the Court’s conclusions in Case No. 52877,

10 The officers who executed search warrants on Ferguson’s storage
11 units, apartment, **bank accounts**, and safety deposit box also
12 testified. These searches resulted in the discovery of **evidence that**
13 **directly or inferentially linked Ferguson to the crimes of burglary**
14 **and/or possession of stolen property**. . . . From this evidence the
15 jury could have concluded Ferguson conspired with all three of his
16 alleged accomplices to commit burglary and/or possess stolen
17 property.²¹

15 The specific mention of Ferguson’s bank accounts and the fact that LVMPD
16 discovered evidence, directly or inferentially, not only supports Ferguson’s
17 convictions for burglary and/or possession of stolen property, but this

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19 ¹⁷ Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

20 ¹⁸ State v. Bennett, 119 Nev. 589, 605, 81 P.3d 1, 12 (2003).

21 ¹⁹ See Cowgill v. Raymark Indus., Inc., 832 F.2d 798, 802–803 (3d Cir. 1987)
(citations omitted).

22 ²⁰ RA 3:678–685.

23 ²¹ RA 3:678–685; see especially RA 3:680 (emphasis added).

1 conclusion similarly supports the presumption that these convictions are
2 “conclusive evidence” of all the elements necessary for civil forfeiture.²²

3 In addition to taking judicial notice of this Court’s own previous orders,
4 case law construing the law-of-the-case doctrine also prohibits re-litigation of
5 issues in collateral cases, such as the instant case. For example, this Court
6 explained that the doctrine of the law of the case applies in the context of a
7 binding decision on direct appeal, when reviewed in a petition for post-
8 conviction relief: “The law of a first appeal is the law of the case on all
9 subsequent appeals in which the facts are substantially the same.”²³ Likewise,
10 the Seventh Circuit has applied this doctrine in similar contexts: “Invoking the
11 doctrine of the law of the case, the courts, including our court, forbid a prisoner
12 to relitigate in a collateral proceeding an issue that was decided on his direct
13 appeal.”²⁴ The Ninth Circuit also prohibited a re-litigation of facts established
14 on direct appeal through a subsequent attack on sentencing: “Having raised this
15 point unsuccessfully on direct appeal, appellant cannot now seek to relitigate it
16”²⁵

17 Aside from the application of the law-of-the-case doctrine, SCR 123 also
18 specifically permits reference to previous unpublished orders as a function of

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20 ²² See NRS 179.1173(5).

21 ²³ Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001) (citations and
internal quotation marks omitted).

22 ²⁴ White v. U.S., 371 F.3d 900, 902 (7th Cir. 2004) (citations omitted).

23 ²⁵ Olney v. U.S., 433 F.2d 161, 162 (9th Cir. 1970) (citation omitted).

1 this doctrine: “An unpublished opinion or order of the Nevada Supreme Court
2 shall not be regarded as precedent and shall not be cited as legal authority
3 except when the opinion or order is (1) relevant under the doctrines of law of
4 the case, res judicata or collateral estoppel . . .” Similarly, SCR 123(2) allows
5 the citation to unpublished orders that are “relevant to a criminal or disciplinary
6 proceeding because it affects the same defendant or respondent in another such
7 proceeding . . .” Thus, SCR 123(2) is also relevant to the instant case because
8 this civil forfeiture proceeding directly bears upon the previous criminal
9 proceedings involving Ferguson.

10 Therefore, based upon the doctrine of the law of the case and SCR 123,
11 the Court should grant LVMPD’s motion for this Court to take judicial notice of
12 all the documents included in Respondent’s Appendix.

13 **III. CONCLUSION**

14 In summary, this Court should take judicial notice of all the documents in
15 Respondent’s Appendix based upon Occhiuto, NRS 179.1173(5), NRS 47.130,
16 the law-of-the-case doctrine, and SCR 123. The documents contained within
17 Respondent’s Appendix include five transcripts from the related criminal
18 proceedings and three orders previously issued by this Court in related
19 proceedings.

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1 Therefore, LVMPD respectfully requests that this Court grant its motion
2 for this Court to take judicial notice of these specific documents in deciding the
3 merits of this appeal.

4 Dated this 23rd day of July, 2014.

5
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing **MOTION FOR COURT TO TAKE**
3 **JUDICIAL NOTICE** was filed electronically with the Nevada Supreme Court
4 on the 23rd day of July, 2014. Electronic Service of the foregoing document
5 shall be made in accordance with the Master Service List as follows:

6 Ryan Daniels, Esq.

7 I further certify that I served a copy of this document by mailing a true
8 and correct copy thereof, postage prepaid, addressed to:

9 Thomas J. Moreo
10 Chief Deputy District Attorney
11 Clark County District Attorney
12 200 Lewis Ave., 3rd Floor
13 Las Vegas, NV 89155
14 *Co-counsel for Respondent, LVMPD*

15 /s/ Rebecca Post

16 Rebecca Post, an employee of
17 Marquis Aurbach Coffing
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