

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

EFREN AGUIRRE, JR.,
Appellant,
vs.
ELKO COUNTY SHERIFF'S OFFICE,
Respondent.

No. 82445

Electronically Filed
Feb 24 2021 09:52 a.m.

Elizabeth A. Brown
Clerk of the Supreme Court

**DOCKETING STATEMENT
CIVIL APPEALS**

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Fourth Department 1

County Elko Judge Honorable Nancy Porter

District Ct. Case No. CV-FR-17-687

2. Attorney filing this docketing statement:

Attorney Travis W. Gerber & Zachary A. Gerber Telephone (775) 738-9258

Firm GERBER LAW OFFICES, LLP

Address 491 4th Street
Elko, Nevada 89801

Client(s) EFREN AGUIRRE JR., Appellant

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Rand J. Greenburg Telephone (775) 738-3101

Firm ELKO COUNTY DISTRICT ATTORNEY'S OFFICE

Address 540 Court Street, 2nd Floor
Elko, Nevada 89801

Client(s) ELKO COUNTY SHERIFF'S OFFICE, Respondent

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input checked="" type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

State of Nevada v. Efren Aguirre, Jr.

Case No. CR-FP-17-7971

Fourth Judicial District Court, Elko County, State of Nevada

October 16, 2018 - Judgment of Conviction

8. Nature of the action. Briefly describe the nature of the action and the result below:

This is an action for the forfeiture of a home of an incarcerated man and his twelve year old son by the Elko County Sheriff. The homeowner was arrested and detained by the Sheriff and while detained recorded a Declaration of Homestead to preserve his home pursuant to the Constitution of the State of Nevada. The District Court ruled that the homeowner could not maintain his homestead right because the man is incarcerated or detained until his release in October of 2021. The District Court ruled that the forfeiture of the home was not an excessive fine pursuant to the Constitutions of the United States and State of Nevada despite the home's value being 2,980 times greater than the actual fine imposed upon the homeowner and 3 times greater than the statutory maximum fine that could have been imposed upon the homeowner. The District Court entered its Findings of Fact, Conclusions of Law and Judgment of Forfeiture on the 31st day of December, 2020.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Whether Efren Aguirre's homestead is exempt from the Elko County Sheriff's forfeiture.
2. Whether the Elko County Sheriff's forfeiture of Efren Aguirre's home valued at \$298,000 is an excessive fine in comparison to Efren Aguirre's \$100 fine.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: This appeal involves two constitutional issues and issues of public importance that are of first impression in the state of Nevada:

1. Whether an incarcerated person may establish and preserve their homestead exemption from forfeiture, and

2. Whether the forfeiture of a home valued at \$298,000 is an excessive fine pursuant to the Constitutions of the State of Nevada and United States in comparison to the actual fine imposed on the homeowner of \$100.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

The Appeal is presumptively retained by the Supreme Court pursuant to NRAP 17(11) (matter raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law) and NRAP 17(12) (matter raising as a principal issue a question of statewide public importance). See Answer to 12 above for further explanation.

14. Trial. If this action proceeded to trial, how many days did the trial last? 1

Was it a bench or jury trial? Bench trial.

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 12/31/2020

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served 01/04/2021

Was service by:

☒ Delivery

☐ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed 01/28/2021

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:
n/a

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The District Court entered a final judgment on December 31, 2020, which resolved the only claim of forfeiture in the case. Given that the case was commenced in the District Court and fully resolved by the District Court, NRAP 3A(b)(1) grant the Supreme Court jurisdiction to review the final judgment.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

ELKO COUNTY SHERIFF'S OFFICE, Plaintiff

Real Property Located at 743 Devon Drive, Spring Creek, Nevada 89815,

Respondent

EFREN AGUIRRE JR., Claimant.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

n/a

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Plaintiff/Respondent Claim: Forfeiture

Date of formal disposition: December 31, 2020

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

EFREN AGUIRRE JR.

Name of appellant

Travis W. Gerber & Zachary A. Gerber

Name of counsel of record

February 23, 2021

Date

Travis Gerber

Signature of counsel of record

Nevada, Elko County

State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 23rd day of February, 2021, I served a copy of this completed docketing statement upon all counsel of record:

- ☒ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Rand J. Greenburg, Esq.
Deputy District Attorney
Elko County District Attorney's Office
Clerk's Box
540 Court Street, 2nd Floor
Elko, Nevada 89801

Dated this 23rd day of February, 2021

[Signature]

Signature

INDEX TO QUESTION 27

<u>Exhibit</u>	<u>Description</u>
1	Complaint for Forfeiture and Motion for Stay of Proceedings
2	Findings of Fact, Conclusions of Law, and Judgment of Forfeiture
3	Notice of Entry of Order for Exhibit 2

EXHIBIT 1

EXHIBIT 1

FILED

2017 NOV -2 PM 3:50

ELKO COUNTY DISTRICT COURT

CLERK _____ DEPUTY *Br*

1 CASE NO.: CV-FR-17-687

2 DEPT. NO.: 1

3
4
5 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA
7

8 Elko County Sheriff's Office,

9 Plaintiff,

10 vs.

COMPLAINT FOR FORFEITURE

11 Real Property Located at 743 Devon Dr.,

AND MOTION FOR

12 Spring Creek, NV 89815,

STAY OF PROCEEDINGS

13 Respondent,

14 EFREN AGUIRRE Jr.,

15 Claimant.
16

17 Elko County Sheriff's Office by and through TYLER J. INGRAM, Elko County District
18 Attorney, and CURTIS F. MOORE, Deputy District Attorney, on information and belief,
19 alleges as follows:

20 I.

21 This is a civil action for the forfeiture of Respondent property, filed pursuant to NRS
22 179.1156 to NRS 179.121, and is exempt for mandatory arbitration pursuant to Nevada
23 Arbitration Rule 3(a), as a matter of public policy.

24 II.

25 This is an in rem proceeding and has been filed in the county where the Respondent
26 property is being held, giving this Court Jurisdiction under NRS 179.1171(3). The Nevada
27 Rules of Civil Procedure, except as otherwise provided in NRS 179.1156 to 179.119, are
28

1 applicable to and constitute the rules of practice for this case¹. This proceeding is entitled to
2 priority over other civil proceedings which are not otherwise entitled to priority.²

3 III.

4 Respondent property is subject to forfeiture pursuant to NRS 179.1164 and/or NRS
5 453.301, and title to respondent property vested in Plaintiff when it a) became proceeds to
6 the commission or attempted commission of a felony, b) was used or was intended for use to
7 facilitate the commission or attempted commission of a felony, and/or c) was property
8 otherwise subject to forfeiture and the event giving rise to the forfeiture occurred.

9 IV.

10 Plaintiff is required to establish proof by clear and convincing evidence that the
11 Respondent property is subject to forfeiture.³

12 V.

13 The sole claimant to Respondent property is EFREN AGUIRRE JR.

14 VI.

15 On or about October 19, 2017, within the County of Elko, State of Nevada, duly
16 authorized law enforcement officers executed a search warrant on respondent property and
17 arrested Claimant after a determination that probable cause existed to arrest Claimant.

18 VII.

19 On or about October 19, 2017, members of the Elko Combined Narcotics Unit, Elko
20 SWAT, and Elko County Sheriff's Office executed a search warrant upon respondent
21 property. The search warrant authorized the officers to search for evidence of "controlled
22 substances, paraphernalia, contraband, and any other items used in the Sales/Trafficking of
23 a Controlled Substance..." As a result of the search, the officers discovered:

- 24 1. A plastic bag containing 5.98 grams of heroin, another plastic bag containing 74.84
25 grams of heroin, two separate packages of three hydrocodone 7.5mg pills, a bag
26 containing twenty-five hydrocodone 10mg pills, and an American Weights and
27

28 ¹ NRS 179.1171(1)

² NRS 179.1173(1)

³ NRS 179.1173(3)

1 Scales digital scale. All of these items were located in the residence located on
2 respondent property in a closet.

- 3 2. A plastic bag containing .34 grams of methamphetamine, located in the residence
4 located on respondent property on the dining room table.
- 5 3. A plastic bag containing 2.67 grams of heroin, located in the residence located on
6 respondent property in a jacket pocket on the couch in the living room.
- 7 4. One digital scale, located in the residence located on respondent property in a
8 dresser drawer.
- 9 5. 2.67 grams of loose methamphetamine, located in an outbuilding located on
10 respondent property in a red toolbox.
- 11 6. A plastic bag containing .27 grams of methamphetamine, located in the residence
12 located on respondent property in a drawer underneath a bed.
- 13 7. One glass pipe, located in the residence located on respondent property
14 underneath a bed.
- 15 8. A plastic bag containing .34 grams of methamphetamine, located in the residence
16 located on respondent property in a zippered purse in a bedroom.
- 17 9. One Savage Arms 5.56 caliber assault rifle, one .22 caliber rifle, one rifle magazine
18 loaded with 5.56 caliber ammunition, one rifle magazine loaded with .22 caliber
19 ammunition, one pistol magazine loaded with .22 caliber ammunition, one box of
20 5.56 caliber ammunition, and one box of .22 caliber ammunition. All of these items
21 were located in the residence located on respondent property in the closet in the
22 laundry room.
- 23 10. A plastic bag containing .09 grams of methamphetamine, and a plastic bag
24 containing 1.22 grams of heroin. These items were located on the person of Kaila
25 Leyva, who was found in the residence located on respondent property when the
26 search warrant was executed.

27 In addition to these items found during the execution of the search warrant, Claimant
28 admitted to ownership of both respondent property and ownership of the items found during

1 the search.

2 VIII.

3 Plaintiff incorporates paragraphs I-VII and alleges that Respondent property is real
4 property that was used or intended to be used to facilitate a violation of the provisions of NRS
5 453.011 to 453.552, inclusive, except NRS 453.336.⁴

6 X.

7 Plaintiff moves for the Court to enter an order staying these proceedings that shall
8 remain in effect while the criminal action which is the basis of these proceedings is pending,
9 and which will automatically lift after the pending criminal action(s) have been completed in
10 accordance with NRS 179.1173(2).

11 XI.

12 WHEREFORE, Plaintiff prays as follows:

- 13 1. That the Court enter an order staying these proceedings until the criminal action
14 which is the basis of these proceedings has been completed.
- 15 2. Judgment of forfeiture of Respondent property be entered in favor of Plaintiff to be
16 distributed in the manner set forth in NRS 179.118 and 179.1185 and any other
17 applicable statutes;
- 18 3. Any and all claimants be divested of any right, title or interest in the Respondent
19 property;
- 20 4. Plaintiff be awarded such other and further relief as the Court deems just and
21 proper.

22 Dated this the 02 day of November, 2017

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⁴ NRS 453.301(8).

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TYLER J. INGRAM
Elko County District Attorney

By:



CURTIS F. MOORE
Civil Deputy District Attorney
State Bar Number: 13543

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 7th day of November, 2017, I served the foregoing COMPLAINT FOR FORFEITURE AND MOTION FOR STAY OF PROCEEDINGS, by mailing, or causing to be mailed, a copy of said document, to the following addresses:

Efren Aguirre Jr.
743 DEVON ST
SPRING CREEK, NV 89815

Karena Dunn, Esq.
1188 CALIFORNIA AVE
RENO, NV 89509

Efren Aguirre Jr.
775 WEST SILVER STREET
INMATE #PP147


TASHA N. STARR
Caseworker

EXHIBIT 2

EXHIBIT 2

FILED

2020 DEC 31 PM 1:06

ELKO CO DISTRICT COURT

CLERK _____ DEPUTY *VB*

1 Case No. CV-FR-17-687

2 Dept. No. 1

3
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5
6 IN THE FOURTH JUDICIAL DISTRICT COURT
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO
8

9 ELKO COUNTY SHERIFF'S OFFICE,

10 Plaintiff,

11 V.

12 REAL PROPERTY LOCATED AT 743
13 DEVON DRIVE, SPRING CREEK,
NEVADA 89815,

14 Respondent,

15 EFREN AGUIRRE JR.,

16 Claimant.
17 _____ /

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
JUDGMENT OF FORFEITURE**

18 On November 2, 2017, Plaintiff (hereinafter "Sheriff") filed his Complaint for Forfeiture
19 and Motion for Stay of Proceedings. On November 22, 2017, Claimant (hereinafter "Aguirre")
20 filed his Answer to Complaint for Forfeiture and Motion for Stay of Proceedings. On March 14,
21 2018 this Court issued its Order Staying Proceedings, effectively staying this action pending the
22 conclusion of Aguirre's underlying criminal case.

23 After the conclusion of the criminal case, Sheriff filed a Motion for Summary Judgment
24 Pursuant to NRCP 56. Aguirre opposed. In the meantime, this Court set aside the Clerk's
25 Default, which Plaintiff had requested, because Aguirre had in fact answered the complaint. The
26 parties filed supplements to the summary judgment documents. The Court heard oral argument

1 on Sheriff's motion on June 27, 2019. The Court denied Sheriff's motion; Sheriff did not comply
2 with NRCP 56 and, thus, failed to meet his burden that no genuine issue of material fact existed.

3 On March 6, 2020, Sheriff filed his Second Motion for Summary Judgment pursuant to
4 NRCP 56, without first seeking leave of court as required by DCR 13(7). On March 16, 2020,
5 Aguirre filed Claimant's Motion for Summary Judgment. Thereafter, the parties filed various
6 responsive documents. Oral argument was had on the competing motions via Zoom, due to the
7 Coronavirus pandemic, on April 21, 2020. The Court denied the motions but narrowed the
8 factual issues for trial. The factual issues concerned Aguirre's Amended Declaration of
9 Homestead and whether forfeiture of Aguirre's home would be an excessive fine. For further
10 clarification, *see Order Granting, in Part, Claimant's Motion for Leave to Reconsider Order*
11 *Denying Motions for Summary Judgment.*

12 The case proceeded to trial on September 24, 2020. Sheriff did not appear but was
13 represented by his attorney Rand J. Greenburg, Elko County Deputy District Attorney. Aguirre
14 appeared by phone from prison and was represented by Travis Gerber, Esq. and Zachary Gerber,
15 Esq. The Court took evidence, after which the parties were given the opportunity to file written
16 closing arguments.

17 On October 1, 2020, Sheriff filed Sheriff's Closing Argument. Thereafter, Aguirre filed
18 Claimant's Closing Response. In response, Sheriff then filed Sheriff's Rebuttal to Claimant's
19 Argument on October 22, 2020.

20 This case presents two distinct issues: (1) whether Aguirre's interest in the real property
21 located at 743 Devon Drive, Spring Creek, NV 89815 is a protected interest under Nevada's
22 homestead protection enumerated in NRS 115.010, and (2) whether the forfeiture of Aguirre's
23 property violates the Eighth Amendment's Excessive Fines Clause. This Court will address each
24 issue in turn.

25 //

26 //

1 **1. Aguirre's Homestead Declaration**

2 Constitutional and statutory provisions relating to homesteads "should be liberally
3 construed . . . only where there has been substantial compliance with those provisions." McGill
4 v. Lewis, 61 Nev. 28, 40. Claimant cites *Jackman v. Nance*, which states that, "The wealth of
5 case law concerning homesteads reflects a judicial tendency to construe homestead laws liberally
6 in favor of the persons for whose benefits they were enacted." 109 Nev. 716, 718, 857 P.2d 7, 8,
7 1993 Nev. LEXIS 119, *4. The Nevada Supreme Court has reiterated the "liberal favor"
8 construction more recently in *In re Nilsson*, stating "that statutory provisions relating to
9 homesteads should be liberally construed only where there has been substantial compliance with
10 the homestead statutory provisions." 129 Nev. 946, 949, 315 P.3d 966, ____ (2013).

11 The Nevada Supreme Court defines *householder* as "one who keeps house," further
12 stating that a householder "must be in actual possession of the house" and must be "the occupier
13 of a house." Id. at 969. Based on the language of NRS 115.020(2)(a), a single person declaring an
14 intention to claim a property as a homestead must be "in actual possession of the house." Id.; see
15 also Goldfield Mohawk Mining Co. v. Frances-Mohawk Mining & Leasing Co., 31 Nev. 348,
16 354, 102 P. 963, 965 (1909). The court in *Nilsson* expressly rejected the concept of "constructive
17 occupancy," declaring that "[i]t is axiomatic there can not be a homestead absent residence[,] . . .
18 when a declaration of homestead is filed the declarant must be residing on the premises with the
19 intent to use and claim the property as a homestead." 129 Nev. at 951.

20 In *In re Ellis*, the Nevada Bankruptcy Court found that a person could not declare
21 homestead while residing in prison because the declarant was not physically residing in the
22 home. The Court held, "Despite the Debtor's unfortunate recent circumstances in the instant
23 case, the court concludes that her argument is the legal equivalent of asserting constructive
24 occupancy of the Residence that simply does not constitute bona fide residency as of the Petition
25 Date." 2019 Bankr. LEXIS 3694, *7.

26 In the case at hand, similar to the facts of *In Re Ellis*, Aguirre, an unmarried man, filed his

1 original and amended homestead declarations while incarcerated. Aguirre was not in actual
2 possession of the residence for purposes of the homestead declarations and thus asserts a
3 constructive possession claim, which the Nevada Supreme Court has expressly rejected. Because
4 Aguirre was not in actual possession of the property at the time of the homestead declaration, he
5 does not “substantially comply” with the homestead provisions. This Court will not liberally
6 construe the homestead provisions in his favor. His claim for homestead protection is denied.

7 **2. Eighth Amendment Violation**

8 “[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional
9 to the gravity of a defendant's offense.” U.S. v. Bajakajian, 524 U.S. 321, 334, 141 L. Ed. 2d 314,
10 330-331 (1998). When examining the proportionality of a forfeiture to the gravity of the offense,
11 courts are not required to consider “any rigid set of factors.” United States v. Mackby, 339 F.3d
12 1013, 1017 (9th Cir. 2003). However, Courts primarily consider four factors when weighing the
13 gravity of an offense: “(a) the nature and extent of the crime, (b) whether the violation was
14 related to other illegal activities, (c) the other penalties that may be imposed for the violation, and
15 (d) the extent of the harm caused.” United States v. \$100,348.00 in U.S. Currency, 354 F.3d
16 1110, 1122 (9th Cir. 2004).

17 **a. Nature and Extent of the Crime**

18 In the case at hand, law enforcement seized 80.82 grams of heroin, as well as
19 methamphetamine, marijuana, hydrocodone pills, and several firearms from Aguirre’s home.
20 Thereafter, Aguirre pleaded guilty to trafficking in a Schedule I controlled substance, a category
21 B felony under NRS 453.3385(1)(b). It is unknown to this Court how long Aguirre had been
22 trafficking drugs.

23 Aguirre argues that the house was not an “instrumentality” to the crime, erroneously
24 analogizing this case to *Timbs v. Indiana*, 139 S. Ct. 682, 684, 203 L. Ed. 2d 11 (2019). Citing
25 the syllabus, Aguirre incorrectly contends that the Court in *Timbs* held that a “Range Rover was
26 not an instrumentality of a drug crime even though drugs were found in the vehicle.” In *Timbs*,

1 the United States Supreme Court answered the question of “whether the Eighth Amendment’s
2 Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment,” and
3 never addressed the assertions now made by Aguirre in this matter. Id. at 690. In fact, on remand,
4 the Indiana Supreme Court found that “[Timbs] used the vehicle . . . to get himself and the drugs
5 to the location where the deal would take place. . . The Land Rover was the actual means by
6 which the predicate crime was committed, making the vehicle an instrumentality.” State v.
7 Timbs, 134 N.E.3d 12, 31, 2019 Ind. LEXIS 835, *24, 2019 WL 5540987.

8 Aguirre acquired the home where the drugs and firearms were found in May of 2016,
9 later being arrested in October, 2017. Because a large quantity of drugs and numerous firearms
10 were located in the home, which is a hallmark of drug trafficking, it is clear to this Court that
11 Aguirre was using his home as part of his criminal activities. *See* United States v. Kennedy, 32
12 F.3d 876, 882-83 (4th Cir. 1994); United States v. Thomas, 913 F.2d 1111, 1115 (4th Cir. 1990);
13 United States v. Johnson, 26 Fed. Appx. 111, 119 (4th Cir. 2001). The nature and extent of
14 Aguirre’s crime is of the kind that the Nevada forfeiture statutes were designed to prevent.

15 **b. Whether the Violation was Related to Other Illegal Activities**

16 In this matter, the only related crime was possession of a firearm by a prohibited person,
17 pursuant to NRS 202.360. As stated above, possession of firearms, in addition to other factors,
18 such as large quantities of drugs being found in the home, is a hallmark of drug trafficking.
19 Kennedy, 32 F. 3d at 882-83.

20 **c. Other Penalties that may be Imposed for the Violation**

21 In considering an offense’s gravity, the other penalties that the legislature has authorized
22 are relevant evidence, as are the maximum penalties that could have been imposed under federal
23 sentencing guidelines. United States v. Riedl, 164 F. Supp. 2d 1196, 1199 (2001); *see* United
24 States v. 3814 NW Thurman St., Portland, Oreg., a Tract of Real Property, 164 F.3d at 1197. If
25 the value of forfeited property is within the range of fines prescribed by Congress, a strong
26 presumption arises that the forfeiture is constitutional. Riedl, 164 F. Supp. 2d at 1199.

1 Aguirre's original Criminal Information charged him with Trafficking in a Schedule 1
2 Controlled Substance, a Category A Felony, pursuant to NRS 453.3385(1)(c). On August 10,
3 2018, an Amended Criminal Information was filed pursuant to a plea agreement, charging
4 Aguirre with Trafficking in a Schedule 1 Controlled Substance, a Category B Felony, as defined
5 by NRS 453.3385(1)(b). A Judgment of Conviction was entered against Aguirre, sentencing him
6 to a minimum of 48 months and a maximum of 120 months for the trafficking charge. Aguirre
7 also received a nominal fine of \$100.00. The penalty for NRS 453.3386(1)(b) at the time of
8 Aguirre's conviction was 2 to 15 years imprisonment and a fine of not more than \$100,000. The
9 Nevada Division of Parole and Probation recommended that Aguirre be sentenced to 36 to 120
10 months with a fine of \$2,000.

11 Aguirre argues that if he were sentenced today under the dramatically revised Nevada
12 drug laws, he would face a maximum fine of \$20,000. However, Aguirre was not convicted
13 under the newly revised drug statutes, and these revised statutes are not retroactive.

14 Additionally, Aguirre contends that the Nevada Division of Parole and Probation
15 recommendations are comparable to the federal sentencing guidelines. In this case, Parole and
16 Probation recommended a maximum fine of \$2,000, which would be vastly disproportionate to
17 the value of Aguirre's home, which is worth approximately \$298,000. However, Parole and
18 Probation's recommendations and the federal sentencing guidelines are not the same, and there is
19 no applicable case law treating them as such. Thus, this Court will not consider Parole and
20 Probation recommendations when assessing the proportionality of Aguirre's forfeiture. Because
21 the \$2,000 Parole and Probation recommendation and the \$20,000 maximum fine under the
22 newly revised Nevada drug laws are not applicable to this case, this Court will consider the
23 \$100,000 maximum fine, which was the maximum fine imposed by NRS 453.3385(1)(b) at the
24 time of Aguirre's conviction, to determine the forfeiture's proportionality.

25 Aguirre's forfeiture of approximately \$298,000 is approximately three times the
26 maximum statutory fine. Forfeiture does not per se violate the Eighth Amendment simply

1 because the amount to be forfeited exceeds the maximum fine under the federal sentencing
2 guidelines. \$132,245 in U.S. Currency, 764 F.3d at 1060. *see United States v. Brandel*, 2019 U.S.
3 Dist. LEXIS 88245, *35-36, 2019 WL 2110504 (*citing United States v. Mackby*, 339 F.3d 1013,
4 1018 (9th Cir. 2003)) (holding that a fine 12.5 times greater than the maximum fine proscribed
5 by the federal sentencing guidelines was not excessive); *see also Riedl*, 82 F. App'x at 540
6 (holding that in a drug and money laundering case, a forfeiture order that was 12 to 13 times the
7 maximum sentencing guideline fine was not excessive).

8 Here, Aguirre's forfeiture is not "many orders of magnitude" larger than the maximum
9 fine. *United States v. Beecroft*, 825 F.3d 991, 1001-1002, 2016 U.S. App. LEXIS 10659, *24-25.

10 4. A forfeiture of three times greater than the statutory maximum does not per se make the fine
11 excessive under the Eighth Amendment Excessive Fines Clause. The proportionality of Aguirre's
12 forfeiture must be examined together with each *Bajakajian* factor, similar to *Riedl*, where the
13 Court found a forfeiture of 12 to 13 times greater than that proscribed in the federal sentencing
14 guidelines was not excessive when considering the link between defendant's illegal activity and
15 the forfeited property, the level of harm caused by the defendant, and the gravity of the offense
16 weighed against the size of the forfeiture. Thus, although Aguirre's forfeiture is three times
17 greater than the statutory maximum, this does not necessarily make the forfeiture excessive when
18 viewed together with the other *Bajakajian* factors.

19 **d. Extent of the Harm Caused**

20 The extent of the harm caused by Aguirre's crime is immeasurable. The heroin epidemic
21 is destroying lives across the country . . . not just those of heroin users. *State v. Parisi*, 2016 WI
22 10, P59, 367 Wis. 2d 1, 32, 875 N.W.2d 619, 634 (2016); *see Krystle Kacner, It's a Nightmare:*
23 *Menomonee Falls Father Wants to Help Others After Son Dies of Overdose*.

24 Drugs, specifically heroin and methamphetamine, have plagued communities in
25 Northeastern Nevada, resulting in family separation, death, and moral decay. Aguirre's
26 trafficking of heroin is a serious offense with likely irreversible repercussions.

1 Although the forfeiture of Aguirre's home is approximately three times greater than the
2 maximum fine proscribed by statute, this Court cannot conclude that the forfeiture is an
3 excessive fine. It is clear that the harm caused to the community by Aguirre's criminal activities is
4 vast and his home, which is the subject of this forfeiture, is inextricably linked to his illegal acts.
5 Taking the *Bajakajian* factors into consideration, this Court concludes, as a matter of law, that
6 the forfeiture of Aguirre's home is not an excessive fine in violation of the Eighth Amendment.

7 Therefore, Sheriff is hereby awarded a **JUDGMENT** of forfeiture against the real
8 property located at 743 Devon Dr., Spring Creek, NV 89815.

9 DATED this 31 day of December, 2020.

10 
11 NANCY PORTER
12 DISTRICT JUDGE - DEPT. 1
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CERTIFICATE OF HAND DELIVERY

Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 31 day of December, 2020, I personally hand delivered a copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT OF FORFEITURE** addressed to:

Tyler J. Ingram, Esq.
Elko County District Attorney
540 Court Street, 2nd Floor
Elko, Nevada 89801
[Box in Clerk's Office]

Zachary A. Gerber, Esq.
GERBER LAW OFFICES, LLP
491 4TH Street
Elko Nevada 89801
[Box in Clerk's Office]




EXHIBIT 3

EXHIBIT 3

FILED

2021 JAN -4 PM 3:03

ELKO DISTRICT COURT

CLERK _____ DEPUTY 11

1 CASE NO.: CV-FR-17-687

2 DEPT. NO.: 1

3
4
5 IN THE FOURTH JUDICIAL DISTRICT COURT
6 IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

7
8 THE ELKO COUNTY SHERIFF,

9 Plaintiff,

NOTICE OF ENTRY OF ORDER

10 vs.

11 Real Property Located at 743 Devon Dr.,
12 Spring Creek, NV 89815

13 Respondent,

14 EFREN AGUIRRE

15 Claimant.

16
17 TO: ZACHARY A. GERBER and Clerk of the Fourth Judicial District Court

18
19 You, and each of you, please take notice that on the 31st day of December, 2020, the
20 Findings of Fact, Conclusions of Law, and Judgment of Forfeiture was entered and filed in
21 the records of the Clerk of the above-entitled Court. A true copy of said Order is served
22 herewith.

23 DATED this 4 day of January, 2021.

24 TYLER J. INGRAM
25 Elko County District Attorney

26 By

27 RAND J. GREENBURG 10248
28 Deputy District Attorney
State Bar Number: 13881 For

CERTIFICATE OF SERVICE


I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 4th day of January, 2021, I served the foregoing NOTICE OF ENTRY OF ORDER, by delivering, mailing or by facsimile transmission or causing to be delivered, mailed or transmitted by facsimile transmission, a copy of said document to the following:

By delivering to:

HONORABLE KRISTON N. HILL
ELKO COUNTY COURTHOUSE
FOURTH JUDICIAL DISTRICT COURT
ELKO, NV, 89801

By x delivery mailing facsimile transmission:

ZACHARY A. GERBER
ATTORNEY AT LAW
(BOX IN CLERK'S OFFICE)


SHAUNA L. PLUNKETT
CASEWORKER

DA# FR-17-03152

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EXHIBIT A

Case No. CV-FR-17-687

Dept. No. 1

2021 JAN -4 AM 10:54

RECEIVED
ELKO CO. DISTRICT ATTORNEY

FILED
2020 DEC 31 PM 1:06
ELKO CO. DISTRICT COURT
CLERK DEPUTY *[Signature]*

IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

ELKO COUNTY SHERIFF'S OFFICE,

Plaintiff,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
JUDGMENT OF FORFEITURE**

V.

REAL PROPERTY LOCATED AT 743
DEVON DRIVE, SPRING CREEK,
NEVADA 89815,

Respondent,

EFREN AGUIRRE JR.,

Claimant.

On November 2, 2017, Plaintiff (hereinafter "Sheriff") filed his Complaint for Forfeiture and Motion for Stay of Proceedings. On November 22, 2017, Claimant (hereinafter "Aguirre") filed his Answer to Complaint for Forfeiture and Motion for Stay of Proceedings. On March 14, 2018 this Court issued its Order Staying Proceedings, effectively staying this action pending the conclusion of Aguirre's underlying criminal case.

After the conclusion of the criminal case, Sheriff filed a Motion for Summary Judgment Pursuant to NRCP 56. Aguirre opposed. In the meantime, this Court set aside the Clerk's Default, which Plaintiff had requested, because Aguirre had in fact answered the complaint. The parties filed supplements to the summary judgment documents. The Court heard oral argument



1 on Sheriff's motion on June 27, 2019. The Court denied Sheriff's motion; Sheriff did not comply
2 with NRCP 56 and, thus, failed to meet his burden that no genuine issue of material fact existed.

3 On March 6, 2020, Sheriff filed his Second Motion for Summary Judgment pursuant to
4 NRCP 56, without first seeking leave of court as required by DCR 13(7). On March 16, 2020,
5 Aguirre filed Claimant's Motion for Summary Judgment. Thereafter, the parties filed various
6 responsive documents. Oral argument was had on the competing motions via Zoom, due to the
7 Coronavirus pandemic, on April 21, 2020. The Court denied the motions but narrowed the
8 factual issues for trial. The factual issues concerned Aguirre's Amended Declaration of
9 Homestead and whether forfeiture of Aguirre's home would be an excessive fine. For further
10 clarification, *see Order Granting, in Part, Claimant's Motion for Leave to Reconsider Order*
11 *Denying Motions for Summary Judgment.*

12 The case proceeded to trial on September 24, 2020. Sheriff did not appear but was
13 represented by his attorney Rand J. Greenburg, Elko County Deputy District Attorney. Aguirre
14 appeared by phone from prison and was represented by Travis Gerber, Esq. and Zachary Gerber,
15 Esq. The Court took evidence, after which the parties were given the opportunity to file written
16 closing arguments.

17 On October 1, 2020, Sheriff filed Sheriff's Closing Argument. Thereafter, Aguirre filed
18 Claimant's Closing Response. In response, Sheriff then filed Sheriff's Rebuttal to Claimant's
19 Argument on October 22, 2020.

20 This case presents two distinct issues: (1) whether Aguirre's interest in the real property
21 located at 743 Devon Drive, Spring Creek, NV 89815 is a protected interest under Nevada's
22 homestead protection enumerated in NRS 115.010, and (2) whether the forfeiture of Aguirre's
23 property violates the Eighth Amendment's Excessive Fines Clause. This Court will address each
24 issue in turn.

25 //

26 //

1 **1. Aguirre's Homestead Declaration**

2 Constitutional and statutory provisions relating to homesteads "should be liberally
3 construed . . . only where there has been substantial compliance with those provisions." McGill
4 v. Lewis, 61 Nev. 28, 40. Claimant cites *Jackman v. Nance*, which states that, "The wealth of
5 case law concerning homesteads reflects a judicial tendency to construe homestead laws liberally
6 in favor of the persons for whose benefits they were enacted." 109 Nev. 716, 718, 857 P.2d 7, 8,
7 1993 Nev. LEXIS 119, *4. The Nevada Supreme Court has reiterated the "liberal favor"
8 construction more recently in *In re Nilsson*, stating "that statutory provisions relating to
9 homesteads should be liberally construed only where there has been substantial compliance with
10 the homestead statutory provisions." 129 Nev. 946, 949, 315 P.3d 966, ___ (2013).

11 The Nevada Supreme Court defines *householder* as "one who keeps house," further
12 stating that a householder "must be in actual possession of the house" and must be "the occupier
13 of a house." Id. at 969. Based on the language of NRS 115.020(2)(a), a single person declaring an
14 intention to claim a property as a homestead must be "in actual possession of the house." Id.; see
15 also Goldfield Mohawk Mining Co. v. Frances-Mohawk Mining & Leasing Co., 31 Nev. 348,
16 354, 102 P. 963, 965 (1909). The court in *Nilsson* expressly rejected the concept of "constructive
17 occupancy," declaring that "[i]t is axiomatic there can not be a homestead absent residence[.] . . .
18 when a declaration of homestead is filed the declarant must be residing on the premises with the
19 intent to use and claim the property as a homestead." 129 Nev. at 951.

20 In *In re Ellis*, the Nevada Bankruptcy Court found that a person could not declare
21 homestead while residing in prison because the declarant was not physically residing in the
22 home. The Court held, "Despite the Debtor's unfortunate recent circumstances in the instant
23 case, the court concludes that her argument is the legal equivalent of asserting constructive
24 occupancy of the Residence that simply does not constitute bona fide residency as of the Petition
25 Date." 2019 Bankr. LEXIS 3694, *7.

26 In the case at hand, similar to the facts of *In Re Ellis*, Aguirre, an unmarried man, filed his

1 original and amended homestead declarations while incarcerated. Aguirre was not in actual
2 possession of the residence for purposes of the homestead declarations and thus asserts a
3 constructive possession claim, which the Nevada Supreme Court has expressly rejected. Because
4 Aguirre was not in actual possession of the property at the time of the homestead declaration, he
5 does not "substantially comply" with the homestead provisions. This Court will not liberally
6 construe the homestead provisions in his favor. His claim for homestead protection is denied.

7 **2. Eighth Amendment Violation**

8 "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional
9 to the gravity of a defendant's offense." U.S. v. Bajakajian, 524 U.S. 321, 334, 141 L. Ed. 2d 314,
10 330-331 (1998). When examining the proportionality of a forfeiture to the gravity of the offense,
11 courts are not required to consider "any rigid set of factors." United States v. Mackby, 339 F.3d
12 1013, 1017 (9th Cir. 2003). However, Courts primarily consider four factors when weighing the
13 gravity of an offense: "(a) the nature and extent of the crime, (b) whether the violation was
14 related to other illegal activities, (c) the other penalties that may be imposed for the violation, and
15 (d) the extent of the harm caused." United States v. \$100,348.00 in U.S. Currency, 354 F.3d
16 1110, 1122 (9th Cir. 2004).

17 **a. Nature and Extent of the Crime**

18 In the case at hand, law enforcement seized 80.82 grams of heroin, as well as
19 methamphetamine, marijuana, hydrocodone pills, and several firearms from Aguirre's home.
20 Thereafter, Aguirre pleaded guilty to trafficking in a Schedule I controlled substance, a category
21 B felony under NRS 453.3385(1)(b). It is unknown to this Court how long Aguirre had been
22 trafficking drugs.

23 Aguirre argues that the house was not an "instrumentality" to the crime, erroneously
24 analogizing this case to *Timbs v. Indiana*, 139 S. Ct. 682, 684, 203 L. Ed. 2d 11 (2019). Citing
25 the syllabus, Aguirre incorrectly contends that the Court in *Timbs* held that a "Range Rover was
26 not an instrumentality of a drug crime even though drugs were found in the vehicle." In *Timbs*,

1 the United States Supreme Court answered the question of “whether the Eighth Amendment’s
2 Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment,” and
3 never addressed the assertions now made by Aguirre in this matter. Id. at 690. In fact, on remand,
4 the Indiana Supreme Court found that “[Timbs] used the vehicle . . . to get himself and the drugs
5 to the location where the deal would take place. . . . The Land Rover was the actual means by
6 which the predicate crime was committed, making the vehicle an instrumentality.” State v.
7 Timbs, 134 N.E.3d 12, 31, 2019 Ind. LEXIS 835, *24, 2019 WL 5540987.

8 Aguirre acquired the home where the drugs and firearms were found in May of 2016,
9 later being arrested in October, 2017. Because a large quantity of drugs and numerous firearms
10 were located in the home, which is a hallmark of drug trafficking, it is clear to this Court that
11 Aguirre was using his home as part of his criminal activities. See United States v. Kennedy, 32
12 F.3d 876, 882-83 (4th Cir. 1994); United States v. Thomas, 913 F.2d 1111, 1115 (4th Cir. 1990);
13 United States v. Johnson, 26 Fed. Appx. 111, 119 (4th Cir. 2001). The nature and extent of
14 Aguirre’s crime is of the kind that the Nevada forfeiture statutes were designed to prevent.

15 **b. Whether the Violation was Related to Other Illegal Activities**

16 In this matter, the only related crime was possession of a firearm by a prohibited person,
17 pursuant to NRS 202.360. As stated above, possession of firearms, in addition to other factors,
18 such as large quantities of drugs being found in the home, is a hallmark of drug trafficking.
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20 **c. Other Penalties that may be Imposed for the Violation**

21 In considering an offense’s gravity, the other penalties that the legislature has authorized
22 are relevant evidence, as are the maximum penalties that could have been imposed under federal
23 sentencing guidelines. United States v. Riedl, 164 F. Supp. 2d 1196, 1199 (2001); see United
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9 DATED this 31 day of December, 2020.

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12 NANCY PORTER
13 DISTRICT JUDGE - DEPT. 1
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