**IN THE SUPREME COURT OF THE STATE OF NEVADA**

SYLVIA FRED,

Petitioner,

vs.

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

Respondent,

and

STATE OF NEVADA *EX REL*. INVESTIGATION DIVISION OF THE DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF NEVADA (TRI-NET NARCOTICS TASK FORCE),

Real Party in Interest.

Docket No. 85590

District Court Case 15 OC 00074 1B



**REAL PARTY IN INTEREST TRI-NET NARCOTICS TASK FORCE'S ANSWER TO PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS**

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## STATEMENT OF ISSUES PRESENTED

Whether the district court erred in denying Petitioner Elvin Fred's motion to dismiss after finding that the First Amended Complaint does not constitute double jeopardy under article 1, section 8 of the Nevada Constitution.

## STATEMENT OF THE CASE

This is an improper appeal from the First Judicial District Court's order denying a motion to dismiss a civil forfeiture complaint under the guise of a writ for prohibition and writ of mandamus.

The pending forfeiture proceedings were initiated on April 1, 2015, with the filing of a *Complaint for Forfeiture* and recording of a *Notice of Lis Pendens* on 3587 Desatoya Drive, Carson City, NV (the "Desatoya residence"). PA 5-10. The *Complaint* alleged, "ELVIN FRED is the owner of the [Desatoya Residence] and the Claimant in this action as defined by NRS 179.1158." PA at 6, ¶4. The *Complaint* further alleged, "Upon information and belief, Plaintiff has no knowledge and no reason to believe that any person or entity other than ELVIN FRED has any ownership interest in the Property." *Id.* at ¶5.

ELVIN FRED was served with the *Complaint* and a summons on April 3. PA at 118. No answer or response to the *Complaint* was filed by ELVIN FRED or anyone else purporting to be a claimant to the Desatoya residence. *Id.* As a result, a Default Judgment was entered on January 4, 2019 and an Amended Default

Judgment was entered on May 8, 2019. PA at 75-78, 118. That default judgment was subsequently set aside. PA 79-85. On March 22, 2022, the *First Amended Complaint* for Forfeiture ("FAC") was filed. PA 86-92.

On July 15, 2022, Elvin moved to dismiss the FAC. PA 98-109. After the motion was fully briefed, the district court correctly applied *Levingston v. Washoe Cty.*, 114 Nev. 306, 956 P.2d 84 (1998) ("*Levingston II*") (adopting the two-part test from *United States v. Ursery*, 518 U.S. 267 (1996) for analyzing whether a forfeiture constitutes "punishment") and held that the civil forfeiture of the Desatoya residence did not violate the double jeopardy clause and denied the motion. PA 143-156.

## STATEMENT OF FACTS

A Complaint for Forfeiture was filed in the First Judicial District Court as Case No. 15 OC 00074 1B on April 1, 2015 against 3587 Desatoya Drive ("Desatoya"), Carson City, Nevada and named Elvin Fred as the owner and claimant of the property. PA 5-10.

The complaint was based on an investigation by Tri-Net through which a confidential source purchased methamphetamine from Elvin on numerous occasions from the Desatoya house. PA 116-117. Between February 13 and March 19, 2015, ELVIN FRED owned and occupied the Desatoya residence. PA 116. During that time, an individual named James Tito was a drug seller in Carson City. *Id.* ELVIN FRED was Mr. Tito's supplier, using the Desatoya residence to store, conceal, and

protect the drugs that Mr. Tito sold and to collect a cut of the proceeds resulting from Mr. Tito's sales. *Id.*

On February 13, 2015, Mr. Tito agreed to sell nearly an ounce of methamphetamine to a TRI NET confidential source for $700. *Id.* The source met with Mr. Tito and gave him $700. *Id.* Mr. Tito then went to the Desatoya residence and went inside for a brief period. *Id.* He then met again with the source and provided him with 27 grams of methamphetamine. *Id.* These circumstances strongly support the reasonable inference that Mr. Tito acquired the methamphetamine from ELVIN FRED inside the Desatoya residence. *Id.*

On February 19, 2015, Mr. Tito agreed to sell the source nearly an ounce and a half of methamphetamine from ELVIN FRED for $1,000. *Id.* After agreeing to the transaction, Mr. Tito contacted ELVIN FRED and then went to the Desatoya residence and again went inside for a brief period. *Id.* He and ELVIN FRED emerged from the Desatoya Residence, and Mr. Tito left to meet with the source. *Id.* During that meeting Mr. Tito provided the source with approximately 41.2 grams of methamphetamine. *Id.* These circumstances strongly support the reasonable inference that Mr. Tito acquired the methamphetamine for the February 19 transaction from ELVIN FRED inside the Desatoya residence. *Id.* at 116-117.

On March 12, 2015, the source made arrangements with Mr. Tito for a third transaction, this time for the sale of nearly an ounce of methamphetamine for $900.

PA at 117. In preparation for the transaction, Mr. Tito again contacted ELVIN FRED and met with him inside the Desatoya Residence. *Id.* Thereafter, Mr. Tito met with the source and provided the source with 27.5 grams of methamphetamine. *Id.* These circumstances strongly support the reasonable inference that Mr. Tito acquired the 27.5 grams of methamphetamine from ELVIN FRED inside the Desatoya residence. *Id.* Additionally, a week later, $300 of the $900 utilized to purchase the methamphetamine was discovered at the Desatoya residence. *Id.*

On March 19, 2015, well over a quarter pound of methamphetamine, 150.7 grams, was located inside the Desatoya residence. *Id.* $5,090 in currency was found in the residence as well. *Id.* Also in the residence were numerous items associated with drug activity, including marijuana, digital scales, packaging material, firearms, and documents reflecting payments and amounts owed for drug transactions. *Id.* All the items discovered, together with the circumstances of the three transactions discussed above, strongly support the reasonable inference that ELVIN FRED was substantially and directly involved in significant drug activities in Carson City, using the Desatoya residence as an essential instrumentality in those activities.

Upon a subsequent search of the Desatoya house, officers found large sums of cash, including marked bills used by the confidential source to purchase methamphetamine from Elvin. PA at 117. Paraphernalia and other indicia associated

with the possession, use and sale of controlled substances were discovered in the house. *Id.*

As a result of his conduct, ELVIN FRED was charged with Trafficking in a Schedule I Controlled Substance Weighing 28 Grams or More, a Category A felony under NRS 453.3385(3) at the time. *Id.* He admitted that he was guilty of the charge, and he was later sentenced. *Id.* The underlying criminal proceeding concluded with an Order of Affirmance dated March 14, 2018.

## STANDARD FOR EXTRAORDINARY WRITS

Writs of mandamus, prohibition, and certiorari are extraordinary remedies, and the Nevada Supreme Court's decision whether to consider writ petitions is discretionary. *See Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (A writ is "an extraordinary remedy that is reserved to the sound discretion of the issuing court."). A writ is available only where the district court manifestly abused its discretion. *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (A writ "will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously."); *see* NRS 34.160. The writ petitioner bears the burden to demonstrate that extraordinary relief is warranted. *See Pan v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

## LEGAL ARGUMENT

### I. WRIT RELIEF IS IMPROPER BECAUSE ELVIN HAS A SPEEDY AND ADEQUATE REMEDY AT LAW WITH AN APPEAL

It is well established law that "writ relief is not available . . . when an adequate and speedy legal remedy exists." *Int'l Game Tech., Inc. v. District Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This Court has declined to "consider writ petitions that challenge interlocutory district court orders denying motions to dismiss" because an appeal from the final judgment "typically constitutes an adequate and speedy legal remedy." The Court further explained that

> Even when writ relief is available because an appeal from the final judgment is not an adequate and speedy legal remedy, this court's general policy . . . is to decline to consider writ petitions challenging district court orders denying motions to dismiss because such petitions rarely have merit, often disrupt district court case processing, and consume an 'enormous amount' of this court's resources.

*Id.*

Petitioner fails to demonstrate that the Court's intervention is necessary or that an appeal is not an adequate remedy to resolve any of the perceived harm that may occur if the Court declines to issue a writ of prohibition and mandamus. Elvin argues that a writ of prohibition is the appropriate vehicle to address double jeopardy claims but relies exclusively on cases involving a defendant being criminally charged twice or facing the threat of a subsequent prosecution. Pet. at 6. The Court in *Sweat* agreed that a writ prohibition was the appropriate mechanism to challenge double jeopardy

resulting from a second prosecution. *See Sweat v. Eighth Judicial Dist. Court of Nev.*, 133 Nev. 602, 604, 403 P.3d 353, 356 (2017) (citing *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 701, 220 P.3d 684, 692 (2009) ("A writ of prohibition will issue to interdict retrial in violation of a defendant's constitutional right not to be put in jeopardy twice for the same offense.")).

But Elvin is not facing a second prosecution or trial or the threat of longer imprisonment such that extraordinary relief is warranted. Therefore, Petitioner is not facing the same double jeopardy concerns as with a second prosecution or the imposition of a longer prison sentence. If Petitioner does not prevail in the district court, there is a speedy and adequate remedy in the form of an appeal.

As in *Int'l Game Tech., Inc*., this petition has been severely disruptive to the district court proceedings here, necessitating a stay due to Petitioner's attempts to litigate at multiple judicial levels. Although he now seeks extraordinary relief in this Court, Petitioner continued actively litigating in the district court.

Judicial economy is best served by allowing the district court case to proceed to completion. Then Petitioner will have the opportunity to appeal any adverse decisions or judgments. "A remedy does not fail to be speedy and adequate, because, by pursuing it through the ordinary course of law, more time probably would be consumed than in a mandamus proceeding." *County of Washoe v. Reno*, 77 Nev.

152, 156, 360 P.2d 602, 603 (1961). For these reasons, the Court should deny the writ petition so that the underlying forfeiture case can proceed to completion.

## II. THE DISTRICT COURT CORRECTLY APPLIED *URSERY* TO DENY THE MOTION TO DISMISS

### A. The Two-Part *Ursery* Test Applies to Civil Forfeitures for Determining When Double Jeopardy is Implicated

Petitioner begins with the premise that civil forfeitures constitute a punishment and then works backwards in an attempt to shoehorn the analysis into the framework established by *Blockburger v. U.S.*, 284 U.S. 299 (1932). But jumping to *Blockburger* skips a necessary step in the process. As Petitioner notes, *Blockburger* is a test for determining whether two criminal statutes penalize the same offense. Pet. at 8 (quoting *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012)). But that means *Blockburger* has no application here if the forfeiture is no punishment at all under the Double Jeopardy Clause.

For that reason, the starting point for the inquiry is determining whether a forfeiture is not just a punishment, but a "*criminal* punishment" that triggers protection of the Double Jeopardy Clause. *State v. Lomas*, 114 Nev 313, 315, 955 P.2d 678, 679 (1998) (emphasis in original). This Court's decision in *Levingston II* already identifies the framework for making that determination under the U.S. Constitution. And Petitioner fails to persuasively explain why the analysis under the Nevada Constitution ought to be different, particularly when this Court has

repeatedly recognized that Nev. Const. art. 1., § 8 guarantees the same protections provided by the Double Jeopardy Clause of the Fifth Amendment. *See Jackson*, 128 Nev. at 604, 291 P.3d 1277-78; *Lomas*, 114 Nev at 315, 955 P.2d at 679 (1998) (recognizing that the protections provided by the Double Jeopardy Clause of the Fifth Amendment "has been incorporated into the Nevada Constitution").

*De novo* review does mean recreating the wheel and ignoring established precedent regarding civil forfeitures. The logical approach here is to start with the *Ursery* test, as adopted in *Levingston II*, to determine if that test is compatible with analyzing a claim of double jeopardy under Nevada's Constitution.

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1277-78 (2012). The protection applies to the states through the Fourteenth Amendment to the U.S. Constitution and is additionally guaranteed by article 1, § 8 of the Nevada Constitution. *Id.*

Nevada's double jeopardy clause closely follows the language of the Fifth Amendment and states: "No person shall be subject to be twice put in jeopardy for the same offense." NEV. CONST. art. 1, § 8. Because a single act can violate more than one criminal statute, double jeopardy analysis determines whether a defendant

can be prosecuted and punished cumulatively when elements of two criminal statutes are met. *Jackson*, 128 Nev. at 601, 291 P.3d at 1276.

In *Ursery*, however, the U.S. Supreme Court addressed an entirely different question. There, the Court reversed two separate cases from the Sixth Circuit and Ninth Circuit Courts of Appeal that held double jeopardy prohibits the government from prosecuting a defendant for a criminal offense and also forfeiting their property in a separate civil proceeding. *Ursery*, 518 at 271. The question in those proceedings did not focus on whether the defendants' conduct satisfied the elements of two different offenses, which is what the *Blockburger* test addresses; the issue in *Ursery* was whether the forfeiture was a punishment for purposes of applying the Double Jeopardy Clause. *Id*. at 270-71.

In both cases, the lower appellate courts had found that the civil forfeitures constituted "punishment" and therefore violated double jeopardy. The U.S. Court disagreed and held that those specific civil forfeitures and civil forfeitures generally "do not constitute 'punishment' for the purposes of the Double Jeopardy Clause." *Id.* at 270.

The *Ursery* Court implemented a two-step test for analyzing civil *in rem* forfeitures. First, courts must examine legislative intent to ascertain whether the statute was intended to be civil or criminal. *Id.* at 288. Second, courts consider whether the proceedings are so punitive in fact as to demonstrate that the forfeiture

proceeding may not legitimately be viewed as civil in nature, despite legislative intent. *Id.*

In *Ursery*, the Court observed that an *in rem* civil forfeiture is a remedial civil action that is distinct from potentially punitive *in personam* penalties such as administrative fines and therefore do not constitute a punishment under double jeopardy. *Ursery*, 518 at 278. In one of the cases reviewed by *Ursery*, the federal government brought a civil forfeiture proceeding against a house that had been used for several years to facilitate the processing and distribution of a controlled substance. *Id.* at 271. In upholding the forfeiture, the Court found that it was clear that Congress intended forfeitures to be civil proceedings. *Id.* at 289. Under the second prong, the Court acknowledged that although certain aspects of a forfeiture may appear punitive, forfeitures serve important nonpunitive goals such as ensuring that property is not used for illegal purposes. *Id.* at 290. This includes preventing a building from being further used to sell narcotics. *Id.*

**B. *Ursery* is Compatible with Nevada's Double Jeopardy Jurisprudence**

Petitioner contends the scope of double jeopardy protection under the Nevada Constitution is broader than the protection afforded by the Fifth Amendment of the United States Constitution. Pet. at 20-27. However, *Levingston II* refutes this contention. As do cases like *Jackson* and *Lomas*. *Jackson*, 128 Nev. at 604, 291 P.3d 1277-78 (recognizing the Nev. Const. art. 1, § 8 provides for the same protection as

the Double Jeopardy Clause of the Fifth Amendment); *State v. Lomas*, 114 Nev at 315, 955 P.2d at 679 (same)

Like this case, *Levingston II* involved a civil *in rem* proceeding seeking forfeiture of a home that was utilized to facilitate illegal drug activity. *Levingston v. Washoe County*, 112 Nev. 479, 481-82, 916 P.2d 163, 165 (1996) ["*Levingston I*"], *modified and partially overruled on rehearing by Levingston II*, 114 Nev. 306, 956 P.2d 84. Initially, this Court held that the civil *in rem* forfeiture proceeding in *Levingston* violated Double Jeopardy in regard to two owners of the home because they had been previously convicted of offenses relating to the drug activity in the home. *Levingston I*, 112 Nev. at 488-89, 916 P.2d at 169-70.

Shortly after the decision in *Levingston I*, the United States Supreme Court issued its decision in *United States v. Ursery*, 518 U.S. 267 (1996). The *Ursery* Court determined civil *in rem* forfeiture proceedings do not violate Double Jeopardy protections of the United States Constitution *per se*, and prescribed a two-part test to analyze whether such proceedings are "punishment" and therefore violative of Double Jeopardy. *Levingston II*, 114 Nev. at 307-09, 956 P.2d at 85-86. In doing so, *Ursery* overruled the Ninth Circuit's analysis in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994) upon which *Levington I* had relied in reaching its conclusion. *Levingston II*, 114 Nev. at 309, 956 P.2d at 86. For this

reason, the Court granted rehearing to consider the impact of the *Ursery* decision on its analysis in *Levingston I*.

The *Levingston II* Court found *Ursery* dispositive in this regard. After applying *Ursery*'s two-part test to Nevada's civil *in rem* forfeiture process, the *Levingston II* Court determined that Nevada's process does not violate Double Jeopardy and reversed the *Levingston I* decision on that point, explaining:

> In sum, we conclude that the double jeopardy analysis articulated in our previous opinion is undermined by *Ursery*. The key determination in this court's double jeopardy analysis was whether Nevada's forfeiture statute constituted punishment. The court applied a test that the Supreme Court has now concluded is not applicable to civil *in rem* forfeitures. Accordingly, we grant the county's petition for rehearing, and reconsider this appeal under the guidance of *Ursery*.
>
> ….
>
> We conclude that the forfeiture in this case is virtually indistinguishable from the forfeiture in *Ursery* and is neither punitive nor criminal for purposes of the Double Jeopardy Clause of the United States Constitution.

*Levingston II*, 114 Nev. at 310, 312, 956 P.2d at 86-88 (footnote omitted).

In applying *Ursery*, the Court in *Levingston II* acknowledged that NRS Chapter 179 applies the rules of civil procedure to forfeiture actions, identifies the parties as plaintiff and claimant, provides that the proceeding is *in rem* and establishes the burden of proof as preponderance of the evidence, not beyond a reasonable doubt. *Id.* at 310, 956 P.2d at 87. And for those reasons, this Court already held that "it is clear the legislature intended Nevada's forfeiture statutes to be civil, not criminal, *in rem* proceedings." *Id.*

Under the second prong, the Court found no proof that Nevada's statutory forfeiture proceedings are so punitive as to render them criminal in nature. "[F]orfeiture encourages property owners to responsibly manage their property and ensures that owners will not permit illegal activities on or in that property." *Id.* at 311, 956 P.2d at 87 ("The forfeiture served non-punitive goals. It prevented the further illicit use of the house, thereby ensuring that the house would not be used again for illegal purposes and that [the defendants] particularly would not profit from illegal conduct."). The Court also pointed out that proceeds from civil forfeiture actions go toward crime prevention and help defray the cost of court proceedings and law enforcement. *Id.*

This is entirely in keeping with the Court's approach to Double Jeopardy questions. In *State v. Lomas*, 114 Nev. 313, 955 P.2d 678 (1998), the Court considered a Double Jeopardy challenge to Nevada's process for administrative revocation of a driver's license and its relationship to the prosecution of the same driver for driving under the influence of alcohol. This Court first described the nature of Nevada's constitutional provision regarding Double Jeopardy as follows:

> The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." *U.S. Const.* amend. V. *This protection* applies to the states through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784 (1969), and *has been incorporated into the Nevada Constitution*. *See Nev. Const.* art. 1, §8, cl. 1.

*Lomas*, 114 Nev. at 315, 955 P.2d at 679 (emphasis added). And the Court quoted federal case law in stating that the clause does not apply to "any additional sanction that could, in common parlance, be described as a punishment." *Id*. (quoting *Hudson v. United States*, 522 U.S. 93, 98-99 (1997)) (internal quotation marks omitted). The clause only guards against "'multiple *criminal* punishments for the same offense.'" *Id.* at 315, 955 P.2d at 679-80 (quoting *Hudson*, 522 U.S. at 99 (emphasis in original)).

Beyond this express language acknowledging uniformity between the federal and state provisions, the structure of the Court's ruling in *Lomas* demonstrates its commitment to that principle. In holding that administrative license revocations do not implicate Double Jeopardy concerns, the *Lomas* Court relied exclusively on federal precedents interpreting the Double Jeopardy Clause of the United States Constitution to provide the framework for its analysis of the issue under both federal *and* state constitutional provisions. *Lomas*, 114 Nev. at 315-19, 955 P.2d at 679-82 (*citing, e.g., Hudson v. United States*, 522 U.S. 93 (1997), *North Carolina v. Pearce*, 395 U.S. 711 (1969), *Witte v. United States*, 515 U.S. 389 (1995), *United States v. Ward*, 448 U.S. 242 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). This strongly indicates the scope of Double Jeopardy protection provided by the Nevada Constitution and the United States Constitution is one and the same.

There is but one context, readily distinguished from civil forfeiture, in which this Court has found Nevada's Double Jeopardy protection more expansive than that of the United States. If a defendant has been convicted of multiple criminal offenses and one of the sentences is later vacated, the defendant's remaining sentences which have not been vacated may not be increased. *See Dolby v. State*, 106 Nev. 63, 65, 787 P.2d 388, 389 (1990), *Wilson v. State*, 123 Nev. 587, 589, 170 P.3d 975, 976 (2007); *But see Nelson v. State*, 2015 Nev. Unpub. LEXIS 861, 131 Nev. 1326 (July 21, 2015) (allowing original sentence to be increased when conviction reversed and retrial results in conviction). Nevada's rule differs from federal jurisprudence which has adopted the "sentencing package doctrine" in cases involving multiple convictions. The federal rule allows sentencing courts to modify and increase existing sentences in cases when the sentence for one of the offenses is vacated. *Wilson*, 123 Nev. at 592-93, 170 P.3d at 978. However, as explained in *Wilson*, this divergence is due primarily to the "extremes of complexity" in determining sentences within the guidelines of federal law as compared with sentences under Nevada law. *Wilson*, 123 Nev. at 595-96, 170 P.3d at 980. In other words, the singular nature of a sentence package for multiple offenses under federal law necessitates a new evaluation of the entire sentence package if one of the sentences is removed from the package. On the contrary, sentences for multiple offenses under Nevada law are comparatively individualized as to each offense and not as

intertwined and complex. As such, the federal "sentencing package doctrine" is appropriately limited to sentences imposed under federal law.

This Court's unique divergence from federal law in the context of sentences in cases of multiple offenses is inconsequential in this case. The departure from the federal Double Jeopardy framework in that limited context is necessitated by the unusual characteristics of the federal sentencing guidelines. That peculiar necessity does not exist in the context of civil *in rem* forfeitures where there is no such conceptual distinction. This Court has never suggested that Nevada's Double Jeopardy protections diverge from the protection under the United States Constitution in this context. Indeed, abundant jurisprudence exists to the contrary. For this reason, this Court should reject the Petitioner's contention that it should suddenly expand the scope of Nevada's Double Jeopardy clause in the context of civil *in rem* forfeitures.

### C. Petitioner Misconstrues and Incorrectly Applies the *Ursery* Test

Petitioner misstates the test established by *Ursery* and argues that the district court was also required to engage in originalism analysis to determine the meaning of the term "punishment" from the founding of the state. Pet. at 8, 19-25. *Ursery* does not require the district court or this Court to engage in historical analysis going back to the founding to determine whether a particular statute creates a punishment under principles of double jeopardy. The *Ursery* Court engaged in a review of past

precedent to illustrate that Congress has long authorized the government to seek criminal prosecutions and *in rem* civil forfeitures based upon the same underlying events. *Ursery*, 518 U.S. at 278. The Court then reviewed previous cases to demonstrate how the two-part analysis was refined over time. *Id.* The Supreme Court did not at any point hold or otherwise direct lower courts to engage in similar historical analysis or require consideration of the history of civil forfeitures in order to apply adopted test.

Although forfeitures may have historically been *disfavored* in some contexts in this state, the Nevada Supreme Court has never categorically said that they are prohibited. More importantly, the Nevada Legislature has made it clear that any rule of law disfavoring forfeitures is *expressly* disavowed. "In a proceeding for forfeiture, the rule of law that forfeitures are not favored does not apply." NRS 179.1173. Therefore, this Court does not have to look to minutes from legislative hearings or to past Nevada case law to determine the intent behind the statute because the legislature wrote it explicitly into the statute. The Court does not have to infer intent because this is a bold statement by the legislature that any past rule of law disfavoring civil forfeiture or civil forfeitures in the context of drug related cases has been disavowed.

Petitioner's attempt to go back and find historical context to show that forfeitures are not favored based on previous case law unnecessary and improper

because it is absolutely within the Nevada Legislature's purview to state what the intent is behind a statute and that the forfeiture at issue in this case is not the kind of forfeiture that is disfavored. This express statement of intent by the Nevada Legislature takes precedence over any other common law analysis that Petitioner proposes. Therefore, the Court does not need to look to common law in order to interpret intent, the statute is clear on its face.

Many of the cases cited by Petitioner in support of his argument that forfeitures are distinguishable because they did not involve criminal prosecutions and instead involved mining contracts or other civil cases. Pet. at 20-22. The meaning of "forfeiture" in those cases is not the same as a civil forfeiture of an instrumentality of a crime following a criminal conviction. The one criminal case cited by Petitioner, *One 1978 Chevrolet Van v. Cty. of Churchill*, 97 Nev. 510, 634 P.2d 1208 (1981), is distinguishable on its facts.

In *One 1978 Chevrolet Van*, a forfeiture proceeding was instituted against a van used in the sale of amphetamines. *Id.* at 511, 634 P.2d at 1208. The defendant's wife contested the forfeiture on the grounds that she was also an owner and who had no knowledge of the illegal activity. *Id.* On appeal, the Court overturned the forfeiture and found that the district court had misapplied the plain language protecting an innocent owner. *Id.* The *One 1978* Court held that the statute must be strictly construed and ordered the van be returned to the wife. *Id.* at 514, 634 P.2d at

1210. The case did not involve double jeopardy and therefore does not support Petitioner's argument that civil forfeitures violate Nevada's Constitution.

Petitioner also incorrectly argues that *Ursery* violates Nevada precedent on statutory interpretation because courts should not consider the "intent" of the Legislature unless the statute is ambiguous. Pet. at 29-30. This directly contradicts Petitioner's previous argument that "punishment" was ambiguous and therefore the Court must engage in constitutional interpretation to determine the "original public understanding" of the term. Pet. at 18. The interpretation required by Ursery is different than looking to legislative history to determine the meaning of an ambiguous term or clause. Instead, the analysis is to look at the statute as a whole and its context to determine whether it is civil or criminal in nature. This is no different than the analysis that a court would apply to determine if two statutes constituted a punishment.

Regardless of how forfeitures were viewed historically, the law is not static, and this Court made clear that the treatment of civil forfeitures has changed. *See Levingston II*. As with any legal principles, Nevada's understanding of *in rem* civil forfeitures has evolved in the same way that the modern understanding of what constitutes "punishment" has changed over time. Petitioner largely ignores *Levingston II* and its application of *Ursery* and instead repeats arguments that were raised in *Levingston I* and later repudiated.

As explained above, this Court has consistently relied on federal precedent when analyzing cases involving Nevada's Double Jeopardy Clause. *See*, *e.g.*, *Lomas*, 114 Nev. at 315-16, 955 P.2d at 679-80. Therefore, the district court did not err in applying *Levingston II* and the *Ursery* test. Petitioner has failed to articulate how article 1, section 8 of Nevada's Constitution provides broader protection than the Fifth Amendment in the context of civil forfeitures.

To the contrary, Petitioner actually bolsters the argument for applying *Levingston II* and *Ursery* by pointing out the legislative history behind Chapter 179, where the bill's author identified that the admonition about forfeitures being disfavored did not apply to the statute. Pet. at 26-27. The fact that the legislature imposed a lower burden of proof than beyond a reasonable doubt is also evidence that the statute was intended to be civil. Pet. at 27, n. 13. Therefore, the first *Ursery* factor is met because the legislative history, lower burden of proof and *in rem* nature of the proceeding demonstrate the legislature's intent for forfeitures pursuant to NRS 179.1173 to be civil and not criminal proceedings. *See Levingston II*, 114 Nev at 310, 956 P.2d at 87.

Petitioner cites a 2015 legislative hearing as proof that the legislature intended for NRS 179.1173 to be criminal. Pet. at 31-32. The petition quotes dialogue between legislators where one senator confirms that the key point of the bill is to require a conviction before forfeiture takes place. *Id.* Contrary to Petitioner's

contention, this demonstrates a clear intent to protect innocent property owners from having their property seized absent a criminal conviction rather than a desire to punish someone already convicted. This dialogue is not evidence that the legislature intended to punish Nevadans, but rather it is evidence that innocent property owners should be protected.

Again, however, this Court need not look to the legislative history or minutes from legislative hearings because the intent is written expressly on the face of the statute. NRS 179.1173. There is absolutely no ambiguity in the legislature's intent that forfeitures are to be civil proceedings and that the rule of law disfavoring forfeitures is disavowed. The Court does not even reach legislative history because the language and intent is plainly written in the text of NRS 179.1173. As stated by Petitioner, the Court will look to the plain meaning of the statute and only if it is ambiguous will the court look to the history, public policy and reason for the provision. Pet. at 15. There is nothing ambiguous about NRS 179.1173 and it is dispositive that the Court is not required to look to the statute's history to find meaning. Therefore, under the first prong of the Ursery test, the Nevada Legislature intended the statute to be civil.

For the second prong of the *Ursery* test, the *Levingston II* Court observed "forfeiture encourages property owners to responsibly manage their property and ensures that owners will not permit illegal activities on or in that property." *Id.* at

311, 956 P.2d at 87. The facts of this case are nearly indistinguishable from *Levingston II* in that both involved forfeiture of a house that was used for the sale and distribution of a controlled substance. In upholding the forfeiture, the *Levingston II* Court noted that "[t]he forfeiture served non-punitive goals. It prevented the further illicit use of the house, thereby ensuring that the house would not be used again for illegal purposes and that [the defendants] particularly would not profit from illegal conduct." *Id.* The Court also pointed out that proceeds from civil forfeiture actions go toward crime prevention and help defray the cost of court proceedings and law enforcement. *Id.* The same non-punitive goals are accomplished by the forfeiture of the Desatoya residence.

Although not stated explicitly, Petitioner is essentially asking this Court to overrule *Levingston II*. This would necessarily prevent civil forfeitures in Nevada because every defendant would simply argue that it violates their right against double jeopardy under the Nevada Constitution. This would be an absurd result in the face of this Court's explicit adoption of *Ursery* in the context of civil forfeitures under the Fifth Amendment. The more logical result, and the one supported by this Court's previous embrace of federal precedent, is extending *Levingston II* to claims of double jeopardy under Nevada's Constitution.

Because both prongs of the *Ursery* test are satisfied, this Court should find that the forfeiture does not violate Petitioner's rights against double jeopardy and deny the petition.

### D. Case Law from New Mexico is Distinguishable and Not Applicable to Nevada

Petitioner invites this Court to adopt New Mexico's approach and its adoption of *Blockburger* to that conclude civil forfeitures violate double jeopardy. Petition at 16. But Petitioner utterly fails to explain New Mexico's approach or how it is applicable to Nevada beyond the fact that New Mexico adopted *Blockburger* and not *Ursery*.

Even a cursory review of the cases cited by Petitioner demonstrates that New Mexico's approach to application of federal law diverges greatly from Nevada. In *State v. Nunez*, five consolidated appeals challenged criminal convictions of defendants who were previously subject to civil forfeiture of property associated with the crime. *State v. Nunez*, 129 N.M. 63, 68 (1999). The New Mexico Supreme Court declined to adopt the *Ursery* test and instead held that the forfeitures were punitive and therefore violated New Mexico's constitutional protection against double jeopardy.

In doing so, the court explained that New Mexico interprets its state constitution using the interstitial approach:

> Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.

*State v. Nunez*, 129 N.M. 63, 71 (1999)

The court rejected *Ursery* "because of the distinctive characteristics of New Mexico's double-jeopardy and forfeiture jurisprudence." *Id.* Importantly the court emphasized:

> Moreover, the New Mexico and federal double-jeopardy protections are facially different and, recently, our double-jeopardy case law has departed from the federal standard. As the many New Mexico cases cited in this opinion demonstrate, *were we to follow Ursery, we would be in conflict with, and would be required to dismantle, a significant body of settled law, much of which was decided independently of federal case law*.

*State v. Nunez*, 129 N.M. at 71 (emphasis added).

New Mexico's double jeopardy provision does not mirror the federal counterpart in the same way that Nevada does. Instead, New Mexico's clause states:

> No person shall . . . be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he [or she] may not again be tried for an offense or degree of the offense greater than the one of which he [or she] was convicted.

*Id.* at 73.

Furthermore, New Mexico also has a double-jeopardy statute in addition to the constitutional provision. *Id.* The statute expands upon the constitutional language and adds in part that "The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment." *Id.* Therefore, on its face, New Mexico is of a different nature than the Fifth Amendment or article 1, section 8 of Nevada's constitution. Additionally, "[t]he *Blockburger* test has been augmented by our courts and is integral to New Mexico's double-jeopardy jurisprudence." *Id.* at 79.

As previously explained, Nevada's case law and interpretation of double jeopardy relies heavily on federal cases and adoption of *Ursery* would not cause dismantling of case law that was decided independently from the federal courts. *See supra* at 15-21. Therefore, this Court should decline to follow New Mexico's double jeopardy analysis because it is clearly distinguishable and conflicts with Nevada law.

## CONCLUSION

Based on the foregoing arguments, this Court should decline to provide extraordinary relief and deny Elvin Fred's Petition for Writ of Prohibition and/or Mandamus.

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## AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

DATED this 23rd day of February, 2023.

CARSON CITY DISTRICT ATTORNEY

By: /s/ Benjamin R. Johnson

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## CERTIFICATE OF COMPLIANCE

1. I 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 14 point, double-spaced, Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 21(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,228 words, excluding those sections identified in NRAP 32(7)(C).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of February, 2023.

CARSON CITY DISTRICT ATTORNEY

By: /s/ Benjamin R. Johnson
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## CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Carson City District Attorney, and that on this 23rd day of February, 2023, the above and foregoing RESPONDENT'S ANSWERING BRIEF was e-filed and e-served on all registered parties to the Supreme Court E-Flex system and with the Clerk of Court.

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