Case No. 85590

In the Supreme Court of Nevada

In re 3587 Desatoya Drive, Case No. 15 0C 00741B
Related to Case No. 15 CR 00384 1C 004

ELVIN FRED,

Petitioner,

v.

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

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,

ELVIN FRED'S REPLY IN SUPPORT OF HIS PETITION FOR EXTRAORDINARY RELIEF

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I. INTRODUCTION

What is left unsaid in Tri-Net's Answer speaks volumes to the unconstitutionality of Nevada's civil forfeiture laws. Procedurally, Tri-Net failed to dispute *any* of Elvin's arguments related to mandamus relief and thus conceded the validity of his request. As a result, even if this Court agrees with Tri-Net's incorrect arguments opposing Elvin's request for a writ of prohibition, Tri-Net's concession paves the way for mandamus relief to be provided.

Substantively, Tri-Net's attempt to wave this Court off any review of history, tradition, and precedent that displays Nevada's robust protection of property rights is unpersuasive. But even as Tri-Net tries to direct this Court away from reviewing the constitutionality of Nevada's forfeiture laws, Tri-Net *never* rebuts or supplants Elvin's historical review of legislative enactments going back to the founding. Thus, Tri-Net conceded that Nevada's founding era law is quite distinct from that of the federal government. Indeed, as Amicus Nevada Attorneys for Criminal Justice ("NACJ") point out, the federal government "no longer h[as] a pirate problem" and Nevada never had any ports. Amici at 2. This concession regarding founding era precedent conclusively

demonstrates that the two-part test enunciated in *Ursery* does not mirror Nevada's history, tradition, and precedent.[1] In other words, the silence in Nevada's law demonstrates the current scheme is a *criminal punishment* and therefore violates Elvin's double jeopardy rights.

What Tri-Net does say in its Answer can be interpreted only as a desperate plea for this Court to abdicate its Constitutional role and instead violate the separation of powers. Tri-Net argues this Court should simply leave the Legislature to its own devices, adopt a nearly impossible system of constitutional review under the double jeopardy clause, and recede from this Court's past precedent providing greater protections under Nevada's constitution as compared to the federal Constitution. In sum, the *Blockburger/Schwartz*[2] three-part test should be installed in Nevada rather than the two-part *Ursery* test.

Most fatal for the continued reliance on civil forfeitures in Nevada is Tri-Net's argument claiming the Legislature's intent to establish a civil punishment is *clear*. For example, Elvin pointed to two provisions—NRS

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1 *United States v. Ursery*, 518 U.S. 267, 274 (1996).

2 *Blockburger v. United States*, 284 U.S. 299 (1932); *Schwartz v. Kennedy*, 904 P.2d 1044 (N.M. 1995).

179.1173(9)-(10) which were added to the scheme in 2015 long after *Levingston II*—to demonstrate the Legislature intended to make forfeitures of property a criminal punishment by requiring a criminal conviction. In response, Tri-Net points to NRS 179.1173(4)-(5) to claim that the Legislature intended to create a civil punishment. Hardly. Each of these provisions are unconstitutional.

In other words, the only way for Tri-Net's *Ursery* step one analysis to be meritorious requires this Court to subject those provisions to constitutional review. This is because Tri-Net should not escape double jeopardy scrutiny under *Ursery* by relying on other unconstitutional provisions simply because those provisions present a purportedly clear and unambiguous intent to create a civil punishment. Thus, and on top of all the reasons Elvin provided in his petition, Nevada's civil forfeiture laws fail *Ursery*'s first prong under Tri-Net's arguments as well.

Tri-Net's claim under step two of *Ursery* is not any better. As a threshold matter, Tri-Net does not even seek to combat the historical evidence supplied in Elvin's Petition—and thus conceded those points as well. What Tri-Net does argue is that forfeitures are remedial, non-

punitive, and require property owners to be responsible with their property.

But like the problems under prong one, the provisions in the law Tri-Net relies on violate the separation of powers. Even if that were not the case, Tri-Net supplies *zero* empirical evidence to support its claims while the amicus provided ample evidence that these policy goals will not be thwarted by a criminal forfeiture scheme. Thus, prong two of *Ursery* also fails under Tri-Net's arguments.

Accordingly, because Elvin met his burden showing Nevada's civil forfeiture laws are clearly unconstitutional, Elvin asks this Court to issue the writ and instruct the district court to dismiss Tri-Net's forfeiture complaint with prejudice.

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II. TRI-NET ONLY FOCUSED ON ELVIN'S REQUEST FOR A WRIT OF PROHIBITION BUT FORGOT THAT HE ALSO REQUESTED MANDAMUS RELIEF.

A. Prohibition and Mandamus Relief are Equally Available to Guard Elvin's Rights.[3]

Tri-Net focuses its rebuttal on whether this Court should issue a writ of prohibition by pointing out that Elvin possesses a right to an appeal and that right is purportedly speedy and adequate enough to remedy his double jeopardy violation.[4] *See* Answer at 10-12. Elvin does not dispute he has an appellate right, but as explained below, he disputes that it is speedy and adequate. *See* Pet. at 5 ("The constitutional authority to provide writ relief to Elvin is purely discretionary and 'is not a substitute for an appeal.'" (quoting *Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 819 (2017))). But Elvin did not solely rely on prohibition as he simultaneously brought a mandamus challenge. Pet.

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[3] The Honorable Judge James Wilson recused and the matter has been transferred to the Honorable Judge James Russell. Supp. App'x at 1-2; *see* NRAP 21(a)(2).

[4] Although Tri-Net makes general references to "writ relief," and generically references both writs of prohibition and mandamus, Tri-Net only cites authority in support of its position on the writ of prohibition—and fails to address large swaths of Elvin's rationale claiming he is entitled to mandamus relief. *Compare* Answer at 10–12, *with* Pet. at 6-13.

at 5-13. By not challenging Elvin's request for mandamus relief, Tri-Net conceded the merits of his arguments.

First, prohibition is proper. Tri-Net confuses the vehicle (a request for a writ of prohibition) with the merits (whether a double jeopardy violation occurred). *See* Answer at 12. This confusion demonstrates the error in Tri-Net's Answer. Just because Elvin's Petition raises an issue of first impression (whether civil forfeitures violate double jeopardy) does not mean a writ of prohibition is an incorrect vehicle for Elvin to seek extraordinary relief from this Court under Nevada law. *See*, *e.g.*, *Sweat v. Eighth Jud. Dist. Ct.*, 133 Nev. 602, 604 (2017) ("A writ of prohibition is an appropriate vehicle to address double jeopardy claims."). Thus, Tri-Net's arguments lack merit.

Second, Tri-Net failed to *ever* discuss or rebut Elvin's request for mandamus relief other than claiming Elvin possesses a plain, adequate, and speedy appellate right. *See* Pet. at 6 ("Mandamus relief may also be available 'where the district court judge has committed clear and indisputable legal error.' (quoting *Archon*, 133 Nev. at 820)). Elvin additionally argued that the district court's decision was arbitrary and capricious and an abuse of discretion. *See* Pet. at 8 (citing to *Int'l Game*

Tech., Inc. v. Second Jud. Dist. Ct., 122 Nev. 132, 142 (2006)). Elvin explained that absent mandamus relief the district court's error "will wreak irreparable harm" because the decision violates Elvin's constitutional and property rights. Pet. at 7-9 (quoting *Int'l Game Tech*, 122 Nev. at 142). In addition to those mandamus grounds, Elvin also contended that his Petition presented "legal issues of statewide importance requiring clarification" and the Court's writ relief will "promote judicial economy and administration by assisting other jurists, parties, and lawyers." Pet. at 9-15 (quoting *Walker v. Second Jud. Dist. Ct.*, 136 Nev. 678, 683 (2020) (cleaned up)).

Elvin was explicit in his Petition that the question presented is an issue of first impression.[5] *See*, *e.g.*, Pet. at 13-15. Tri-Net rebutted *none*

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[5] Tri-Net neither rebutted this contention nor cited to precedent to demonstrate that Elvin was incorrect. *See generally* Answer. This is because Elvin's challenge is an issue of first impression. Instead, Tri-Net makes several odd statements in its Answer including that: (1) "de novo review does not mean recreating the wheel and ignoring established precedent regarding civil forfeitures," *id*. at 14, (2) "*Levingston II* refutes" Elvin's "contention" that "the scope of double jeopardy protection under the Nevada Constitution is broader than the protection afforded by the Fifth Amendment," *id*. at 15, and (3) "[a]lthough not stated explicitly, [Elvin] is essentially asking this Court to overrule *Levingston II*.," *id*. at 28. Tri-Net is wrong. *Levingston II* only applied the Fifth Amendment, not Nevada's constitution.

of Elvin's mandamus arguments in its Answer. *See generally* Answer. Nevada law holds that when a party "does not dispute" a moving party's arguments, the party in opposition "concede[s] the point." *Ozawa v. Vision Airlines*, 125 Nev. 556, 563 (2009). Because of Tri-Net's "lack of challenge" to Elvin's mandamus relief arguments, Tri-Net conceded that "there is merit in" Elvin's request for mandamus relief. *Colton v. Murphy*, 71 Nev. 71, 72 (1955).

Thus, Elvin's petition "raises legal questions of first impression and statewide importance that are likely to recur in other cases" such that this Court should "address the rare question that is likely of significant repetition prior to effective review so that [this Court's] opinion would assist other jurists, parties, or lawyers." *Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 136 Nev. 155, 160-61 (2020) (cleaned up). Tri-Net is wrong that a writ of prohibition is not the appropriate vehicle to resolve this matter, but that dispute does not matter because Tri-Net conceded that mandamus relief is available to Elvin.

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B. Tri-Net Glosses Over the Oppressive Nature of Civil Forfeitures Because It Cannot Respond to the Truth About this Unconstitutional Scheme.

Tri-Net attempts to shift the blame onto Elvin for delaying resolution of the underlying civil forfeiture proceeding for filing this Petition. *See* Answer at 12 (claiming that "this petition has been severely disruptive" in the proceeding such that it "necessitate[ed] a stay" and that "[j]udicial economy is best served by allowing the district court case to proceed to completion"). For several reasons, Tri-Net's arguments are disingenuous and incorrect when viewed through the lens of the oppressive scheme that is a civil forfeiture of property..

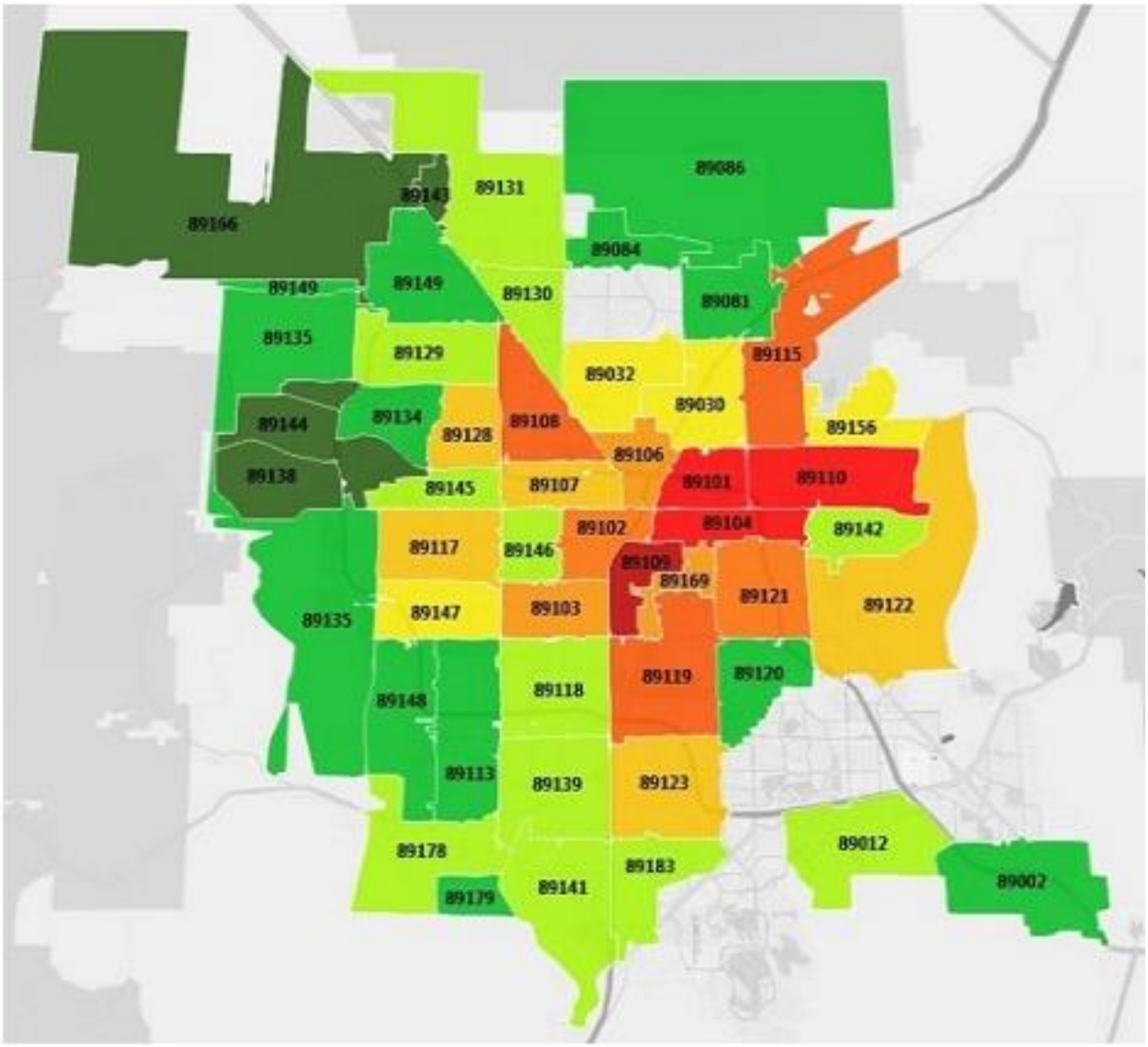
First, Tri-Net forgets that this litigation began in 2015. PA1-4. Elvin and Sylvia endured three years of a statutorily imposed stay. *Id*. at 5-10; 73-75. Elvin and Sylvia then endured another four years of delays when Tri-Net intentionally did not serve its motion to lift the stay, notices of default, default judgments, and amended default judgments on either Elvin and Sylvia. *See id*. at 73-85. Only after Sylvia successfully challenged the default judgment to this Court and prevailed did the Freds obtain the Home again. *See In re: 3587 Desatoya Drive*, Case No. 80194, 2021 WL 4847506 (Order of Reversal and Remand, Oct. 15, 2021).

But that provided little relief to the family as Tri-Net's failure to maintain the property has destroyed the Home such that it is uninhabitable now. Thus, Tri-Net's contention about the speed and adequacy of Elvin's appellate rights is incorrect as applied to these facts.

Second, and conceded by Tri-Net's failure to discuss Elvin's mandamus arguments, civil forfeitures of property target and affect one of the most cherished individual liberty rights guaranteed by Nevada's constitution—property ownership. *See*, *e.g.*, Nev. Const. art. I, § 1 (guaranteeing inalienable property rights to Nevadans); *see also State v. Nunez*, 2 P.3d 264, 275 (N.M. 1999) ("Forfeiture is the complete divestiture of the ownership of property without compensation. Thus, it extinguishes one of the most fundamental liberty interests." (cleaned up)); *see id.* (citing to N.M. Const. art. III § 4 (New Mexico's inalienable property rights clause)). These rights should guarantee *more* Constitutional scrutiny, *not less*, since Tri-Net will obtain complete control over Elvin's Home if it prevails below, and the Home is forfeited. *See Timbs v. Indiana*, 139 S.Ct. 682, 687-89 (2019) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit." (cleaned up)).

Finally, Elvin already detailed the oppressive nature of forfeitures as recognized both by United States Supreme Court justices on both ends of the spectrum. *See* Pet. at 9-13. He also explained Nevada's forfeiture statistics demonstrating its oppressive qualities. *Id*. This is because forfeiture actions do not afford the guarantee of counsel in Nevada, and it is not economical to retain counsel since forfeitures typically involve low dollar amounts. *See* Amici Br. at 7-8. Therefore, the structure of civil forfeitures permits the practice to evade constitutional review—demanding this Court's intervention on an interlocutory petition for mandamus and prohibition relief.

If all of this did not convince this Court to review and grant Elvin relief, there is further statistical support that the Nevada Public Research Institute ("NPRI") performed that demonstrates forfeitures target those most vulnerable in Clark County. *See* Daniel Honchariw, *Who Does Civil Asset Forfeiture Target Most*, NPRI (Summer 2017) (heat map showing that forfeitures take place in higher numbers in areas with lower incomes). Based on Elvin's statistical analysis performed in his Petition, it is reasonable to assume that these statistics of targeting those most vulnerable in our society permeate across Nevada. *See* Pet. at 9-13.



For all these reasons, Tri-Net's argument that Elvin should wait for resolution in district court and appeal that ruling is incorrect. Because the district court's order violates Elvin's double jeopardy rights, this Court should issue the writ and instruct the district court to dismiss the civil forfeiture proceeding with prejudice.

III. Nevada's civil forfeiture laws violate Elvin's double jeopardy rights.[6]

Tri-Net did not dispute that Elvin must make a "clear showing of invalidity" that Nevada's civil forfeiture laws are unconstitutional. *Silvar v. Eighth Jud. Dist. Ct.*, 122 Nev. 289, 292 (2006). Tri-Net likewise did not dispute that this Court analyzes constitutional questions de novo. *See Educ. Freedom PAC v. Reid*, 512 P.3d 296, 302 (Nev. 2022).

A. *Nunez* and *Blockburger/Schwartz* Supply the Correct Framework for Nevada's Double Jeopardy Analysis.

Article 1, Section 8(1) "protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Sweat*, 133 Nev. at 604 (cleaned up). The third protection is presented by Elvin's Petition.

"To determine whether two statutes penalize the 'same offense'" this Court applies the *Blockburger* test. *Jackson v. State*, 128 Nev. 598,

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[6] Tri-Net spends an exorbitant amount of time recounting for the Court the minute, factual background of Elvin's crimes. *See* Answer at 7-10. These facts are inconsequential to the question presented mainly because, once "the judgment of conviction has become final" that conviction is "conclusive evidence of all facts necessary to sustain the conviction." NRS 179.1173(6).

604 (2012) (detailing *Blockburger* requires "each offense to contain an element contained in the other" and if each does, then double jeopardy bars "additional and successive punishment" in a separate proceeding).

"The most obvious distinction between these two tests," *Blockburger/Schwartz*[7] and *Ursery*, is the former "includes two factors left unexpressed by *Ursery* that, to us seem indispensable"—(1) separate proceedings for (2) one offense. *Nunez*, 2 P.3d at 276. The *Ursery* test obscures these core double jeopardy questions because if a court applies *Blockburger/Schwartz* it will conclude that "these are separate proceedings seeking separate punishments for a single offense, *there is no question* that the prohibition against multiple prosecutions has been violated." *Id*. at 277 (emphasis added). Thus, and as shown below, *Blockburger/Schwartz* presents the correct test for this Court to adopt and apply.

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[7] New Mexico's Supreme Court adopted *Blockburger* with largely stylistic and pedantic alterations. *See Schwartz*, 904 P.2d at 1051. For simplicity, Elvin refers to the *Blockburger/Schwartz* tests interchangeably because the tests are functionally the same.

1. NRS 453.301 and NRS 179.1173 violate the three-part Blockburger/Schwartz test.

Both the plain language of Nevada law and Tri-Net's own motion practice confirm that this forfeiture proceeding meets two of the three elements—"same offense" and "separate proceedings."[8] *See*, *e.g.*, NRS 453.301; NRS 179.1173; PA73. Thus, the only remaining question is whether the forfeiture is a criminal punishment. As Elvin exhaustively detailed (and Tri-Net did not rebut), Nevada's history, tradition, and precedent is dissimilar to that of the federal government.[9] *See*, *e.g.*, Pet. at 19-28. Indeed, Tri-Net never challenged Elvin's arguments (nor did it provide any contrary legislative enactments) that the "Legislature did

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[8] *See Nunez*, 2 P.3d at 280 ("If there were only one proceeding, these cases would not be before us."); *id.* at 281 ("We conclude that an examination of the Controlled Substances Act reveals *there is no fact* needed to prove the drug trafficking violation that is not also needed to prove the grounds for forfeiture." (emphasis added)).

[9] *See Nunez*, 2 P.3d at 283 ("Moreover, the presumption that forfeiture is punitive can be traced to the earliest opinions of the Territorial Supreme Court, prior to our statehood."); *id.* (detailing that "over a quarter century of consistent and unequivocal statements by the New Mexico appellate courts" hold "that civil forfeiture is indeed quasi-criminal, penal, and punitive in nature"); *see also A 1983 Volkswagen v. Cnty. of Washoe*, 101 Nev. 222, 224 (1985) (explaining that Nevada law has "implicitly recognized the quasi-criminal nature of forfeiture actions" and required "proof beyond a reasonable doubt").

not enact criminal penalties coupled with *in rem* civil penalties."[10] Pet. at 27. *Cf. Ursery*, 518 U.S. at 274 ("Since the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events."). Thus, a review of Nevada's history, tradition, and precedent conclusively demonstrates that *Blockburger/Schwartz* should control—not *Ursery*.

2. Tri-Net incorrectly claims there is no difference between the federal and Nevada Constitutions' protection of double jeopardy rights.

Despite all of the history, tradition, and precedent Elvin provided (and Tri-Net never rebutted) reflecting Nevada's robust protections of property rights generally, and disfavoring forfeitures specifically, Tri-Net contends that Elvin failed to detail why Nevada's Constitution should "be different" from the federal Constitution. Answer at 13. To be sure, Tri-Net cherry-picks a singular line out of a decades-old case to support its claim. *See id.* at 14 (claiming that Fifth Amendment's double jeopardy

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[10] Tri-Net only challenged Elvin's reliance on the common law—it failed to adequately discuss the historical burden of proof and founding era legislative enactments. All these problems are examined below in the *Ursery* section and incorporated here.

protections have "been incorporated into the Nevada Constitution" (quoting *State v. Lomas*, 114 Nev. 313, 315 (1998))). Tri-Net contends that because of *Lomas* both the United States and Nevada Constitutions "guarantee[] the same protections." *Id.* at 14. Tri-Net is wrong.

a. ***Adopting* Blockburger/Schwartz *will not affect Lomas.***

Lomas involved a challenge to the revocation of a privilege—a driver's license—after a DUI and whether a criminal punishment and a civil revocation of a privilege by an agency violated double jeopardy. 114 Nev. at 315. To analyze this question, this Court applied a two-part test from *Hudson v. United States*, 522 U.S. 93 (1997), which is much like *Ursery*. *See Lomas*, 114 Nev. at 315. This Court correctly determined "that an administrative driver's license revocation proceeding is 'civil in nature, not criminal.'"[11] *Id.* at 317 (quoting *State, Dep't of Mtr. Vehicles*

[11] The analysis in *Lomas* distinctly contrasts with NRS 453.301 and NRS 179.1173. "[T]he revocation of a privilege voluntarily granted, such as the privilege to drive, is a sanction characteristically free of the punitive criminal element." *Lomas*, 114 Nev. at 317. The Nevada Attorney General provides the rebuttal necessary for this Court to distinguish *Lomas* because "every citizen" possesses "the inalienable right to protect his or her life, property and interest" and "[i]t is a right *not a privilege*, to which all citizens are entitled." Nevada AG Opinion, No. 47-425, Constitutional Law (1947) (emphasis added). Thus, *Lomas* should not alter this Court's conclusion that Nevada's civil forfeiture laws violate double jeopardy.

v. Frangul, 110 Nev. 46, 50 (1994)). Elvin does not dispute this holding in any way. This logical conclusion is because "the legislature's decision to confer authority to impose a civil sanction on an administrative agency is prima facie evidence that the [L]egislature intended to provide a civil sanction." *Id.* at 317.

Lomas does not affect this Court's adoption of *Blockburger/Schwartz*. "*Schwartz* addressed 'whether double jeopardy prohibits the State from subjecting an accused drunk driver to both an administrative driver's license revocation proceeding and a criminal prosecution.'" *Nunez*, 2 P.3d at 279 (quoting *Schwartz*, 904 P.2d at 1048). The New Mexico Supreme Court "concluded that the administrative license revocation was not punishment for double-jeopardy purposes." *Id.* In other words, there are no slippery slope concerns by adopting *Blockburger/Schwartz* because it would not overturn or affect other Nevada precedent.[12]

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[12] Tri-Net's reliance on and citation to *Nelson v. State*, Case No. 65012, 2015 WL 4507715 (Order of Affirmance, Jul. 15, 2015), violates NRAP 36(c). Elvin thus does not distinguish or discuss that matter.

b. <u>This Court routinely provides greater protections as compared to the United States Supreme Court's retraction of rights.</u>

Tri-Net asserts that "the Nevada Constitution and the United States Constitution is one in the same" with guarding Nevadans' double jeopardy protections. Answer at 20. This is not just inaccurate for the double jeopardy question, but also incorrect more broadly to the robust protections afforded under Nevada's Constitution as compared to the federal Constitution.

As this Court noted "states are free to provide additional constitutional protections." *Wilson v. State*, 123 Nev. 587, 595 (2007); *see id.* (analyzing Nevada's double jeopardy clause and explaining "[v]iewed in this light, our decision" today "is consistent with our past practice of affording *more citizen protections* under the Nevada Constitution than are afforded under the federal Constitution." (emphasis added)).[13] Thus,

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[13] The State's failures in *Wilson* and Tri-Net's nonsensical arguments about why *Ursery* should apply are nearly identical. *See Wilson*, 123 Nev. at 595 ("We hesitate to trade Nevada's double jeopardy protections for a divergent approach whose applicability to Nevada the State has far from completely explained."). To be sure, Tri-Net's citation to *Wilson* only shores up Elvin's arguments as the differences between sentencing guidelines on the federal level unlike Nevada's sentencing requirements is analogous to the differences between parallel criminal and civil

in the double jeopardy sphere, Nevadans possess greater protections—confirming why *Blockburger/Schwartz* should be adopted rather than *Ursery*.

But as Tri-Net conceded, "the law is not static." Answer at 25. Since *Ursery*, the United States Supreme Court has retracted individual rights. *See*, *e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2242 (2022). In contrast, this Court has consistently provided greater constitutional protections in various contexts. *See*, *e.g.*, *Valdez-Jimenez*, 136 Nev. at 160 (bail); *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645 (2006) (takings); *State v. Bayard*, 119 Nev. 241 (2003) (search and seizure).

Indeed, just last year this Court and the United States Supreme Court reached *completely opposite conclusions* about obtaining a remedy for constitutional rights violations. *Compare Mack v. Williams*, 138 Nev., Adv. Op. 86, 2022 WL 17998520, at *12 (2022) ("[W]e do not create a new cause of action. We simply recognize the long-standing legal principle that a right does not, as a practical matter, exist without any remedy for

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forfeiture proceedings being enacted on the federal level at the founding as compared to none being enacted in Nevada at the founding. *Id*.

its enforcement."), *with Egbert v. Boule*, 142 S.Ct. 1793, 1809 (2022) ("[W]e have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution.").

In other words, Tri-Net's unsupported contentions and reliance on an incorrect statement of law in *Lomas* hardly bolsters its claim that this Court should blindly adopt *Ursery* and provide *fewer* Constitutional protections for Nevadans. Indeed, *Wilson* and the other cases cited above provide ample support that this Court should "renew its commitment *to strong* double jeopardy protections." 123 Nev. at 591 (emphasis added)

In sum, this Court should adopt *Blockburger/Schwartz* and conclude that Nevada's civil forfeiture laws violate Elvin's double jeopardy protections because NRS 453.301 and NRS 179.1173 are criminal punishments, based on the same criminal conduct, and occur in a second, successive, and separate proceeding.

B. To Rule in Tri-Net's Favor Requires this Court to Opine on the Constitutionality of Several Other Provisions in Nevada's Civil Forfeiture Laws.

Even if this Court disagrees with all of Elvin's arguments for adopting *Blockburger/Schwartz* and applies *Ursery*, the result remains

the same—Nevada's civil forfeiture laws violate Elvin's double jeopardy rights. For the first *Ursery* prong, Tri-Net points to blatantly unconstitutional provisions in Nevada's civil forfeiture law to allege "the Court does not need to look to common law in order to interpret intent, the statute is clear on its face." Answer at 24. Under the second, Tri-Net claims forfeitures require responsible property management, it serves non-punitive goals by preventing further illicit use of the property, and the proceeds go toward crime prevention and help defray the cost of court proceedings and law enforcement budget. *Id*. at 28. Tri-Net provides no empirical support for its claims, and so this Court lacks substantial evidence to credit *any of* Tri-Net's policy arguments—despite almost 25 years post-*Ursery* and *Levingston II* for the government to gather data. Of course, NACJ brought more than sufficient evidence for this Court to conclude that the sky will not fall, and crime rates will not increase as this Court guarantees the protections provided under Nevada's Constitution. Thus, Tri-Net's arguments should be rejected.

Ursery is a two-part test. First, it "requires an examination of legislative intent to ascertain whether the forfeiture statutes were intended to be civil or criminal. If this examination discloses a legislative

intent to create civil *in rem* forfeiture proceedings, a presumption is established that the forfeiture is not subject to double jeopardy." *Levingston v. Washoe Cnty.*, 114 Nev. 306, 308 (1998) ("*Levingston II*"). Second, *Ursery* "requires an analysis of whether the proceedings are so punitive in fact as to demonstrate that the forfeiture proceedings may not legitimately be viewed as civil in nature, despite legislative intent to be contrary."[14] *Id.* at 308. "The 'clearest proof' is required to establish that the forfeiture proceedings are so punitive in form and effect as to render them criminal despite legislative intent to the contrary."[15] *Id.* at 308-09.

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[14] "The immediate virtue of the *Schwartz* test over [*Ursery*'s] two-part test is that there is no deference to legislative intent regarding the determination of fundamental constitutional rights." *Nunez*, 2 P.3d at 278; *see id.* ("The *Ursery* Court's willingness to cede to Congress so much of its control over fundamental constitutional protections is contrary to New Mexico law."); *see also Legislature of State v. Settelmeyer*, 137 Nev. 231, 234 (2021) ("Consonant with the axiomatic principle that it is emphatically the province and duty of the judicial department to say what the law is, Nevada courts are the ultimate interpreter of the Nevada Constitution." (cleaned up)).

[15] "In the context of all the other arguments in *Ursery*, 'clearest proof' is such an inaccessible standard that it requires the judiciary to suspend its own interpretation of the constitution in favor of that of the legislature." *Nunez*, 2 P.3d at 277.

1. Tri-Net's reliance on unconstitutional statutory provisions does not support Tri-Net's claim that *Ursery*'s first prong is met.

Tri-Net fails to appreciate the precariousness of its arguments.[16] *See* Answer at 26-28 (arguing "[t]here is nothing ambiguous about NRS 179.1173" because the "Legislature intended the statute to be civil"). To agree with Tri-Net's position, the Court must examine the constitutionality of these unambiguous provisions. *See Soldal v. Cook Cnty*. 506 U.S. 56, 70 (1992) ("Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather we examine each constitutional provisional in turn.").[17]

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[16] Oregon joined New Mexico and Nebraska this month in determining Oregon's civil forfeiture laws violate double jeopardy. *See Yamhill Cnty. v. Real Prop.*, ___ P.3d ___, 324 Or.App. 412 (2023).

[17] Because Tri-Net provided no rebuttal to the expansive historical record demonstrating that Nevada's history, tradition, and precedent is distinct from the federal government, Tri-Net conceded the validity of Elvin's claims detailing why he prevails under *Ursery*. *Ozawa*, 125 Nev. at 563. For brevity, this concession applies to all of Tri-Net's arguments under its *Ursery* argument and to reduce the need for Elvin to point every concession, it is a standing point applying throughout this section.

This is because Tri-Net cannot evade double jeopardy scrutiny by bolstering its arguments with otherwise unambiguous yet unconstitutional provisions the Legislature installed to assist thwarting double jeopardy review. *See Nunez*, 2 P.3d at 278-79 ("If an action by the government violates a constitutional prohibition, no amount of evidence manifesting the legislature's purportedly benign intent in authorizing that action can render the action constitutional." (cleaned up)). Justice Kennedy summed this concept up best—"[w]e would not allow a State to evade its burden of proof by replacing its criminal law with a civil system in which there is no presumption of innocence."[18] *Foucha v. Louisiana*, 504 U.S. 71, 94 (1992) (Kennedy, J. dissenting). In reviewing NRS 179.1173, it is clear the provisions Tri-Net relies on are unconstitutional.

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[18] Tri-Net holds up Nevada's innocent property owner protections several times as proof that these provisions are civil and not criminal. Answer at 26-27. But even those provisions of Nevada law, NRS 179.1163; NRS 179.1173(8); NRS 179.118, are unconstitutional as they are affirmative defenses and place the burden on the property owner—not the government—to prove their innocence. *See*, *e.g.*, *Nelson v. Colorado*, 137 S.Ct. 1249, 1256 (2017) ("Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary execution." (emphasis in original)); *see also Harjo v. City of Albuquerque*, 326 F.Supp.2d 1145 (D.N.M. 2018) ("The Forfeiture Ordinance independently violates due process by depriving car owners of their property unless they prove their innocence.").

a. NRS 179.1173(5) violates Article 1, Section 1.

Tri-Net claims "[t]here 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." Answer at 27; *see also* NRS 179.1173(5). Elvin does not dispute that this provision is unambiguous. Elvin disputes its constitutionality based on the plain language of Nevada's Constitution. *See*, *e.g.*, Nev. Const. art. 1 § 1 ("All men are by nature free and equal and have certain inalienable rights among which are those of . . . Acquiring, Possessing and Protecting Property . . . "); *see Nevadans for Nevada v. Beers*, 122 Nev. 930, 942 (2006) ("Unless ambiguous, the language of a constitutional provisions is applied in accordance with its plain meaning.").

To recap, as a matter of common law, Nevada "d[id] not favor forfeitures" and district courts needed to "strictly construe[ ]" statutes authorizing forfeitures. *One 1978 Chevrolet Van v. Churchill Cnty.*, 97 Nev. 510, 512 (1981) (quoting *Ind. Nev. v. Gold Hill*, 35 Nev. 158, 166 (1912)).[19] Tri-Net is incorrect when it comes to this Court's review of the

[19] Tri-Net confuses Elvin's citation to *One 1978 Chevrolet* (as a standard of common law) as opposed to relying on the facts to support his double jeopardy challenge. *See* Answer at 24. Indeed, by reviewing Tri-

constitution as compared to the Legislature's power. *Compare* Answer at 24 ("[I]t is absolutely within the Nevada Legislature's purview to state what the intent is behind a statute and that the forfeiture at issue is not the kind of forfeiture that is disfavored."), *with supra* n. 14 (citing *Nunez* and *Settelmeyer*).

As Elvin explained, through *One 1978 Chevrolet* along with *A 1983 Volkswagen*, this Court incorporated and applied other property owner protections in the mining context to civil forfeitures of property as it interpreted NRS 453.301. *See*, *e.g.*, Pet. at 20-27; *see also id*. at 27 n.13 (detailing that the LCB incorrectly interpreted *One 1983 Volkswagen* as a common law requirement and not a constitutional one). While none of the cases suggesting Nevada's common law disfavored forfeitures cited to or relied on Article 1, Section 1, the spirit of that constitutional right flows throughout those decisions. More importantly for this Court, Elvin now argues that NRS 179.1773(5)—while unambiguous—violates

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Net's arguments about the application of *One 1978 Chevrolet* and *A 1983 Volkswagen*, Tri-Net puts on full display its abhorrence of this Court relying on any of its prior decisions. *See*, *e.g.*, Answer at 24 ("[T]he Court does not need to look to common law in order to interpret intent, the statute is clear on its face.").

Nevada's Constitution and cannot be relied on to violate his double jeopardy rights under *Ursery*.

This is because Nevada law is as unambiguous on the limits of the Legislature's authority. *See In re Sang Man Shin*, 125 Nev. 100, 102 (2009) ("In the absence of a specific constitutional limitation to the contrary, the power to enact laws is vested in the Legislature."). In other words, Article 1, Section 1 limits the Legislative branch's authority to enact laws—like NRS 179.1173(5)—to make it easier for the Executive branch to alienate property rights.

If there is some ambiguity (which there is not), then the Constitutional debates in Nevada and California resolve in favor of striking down NRS 179.1173(5). For example, during Nevada's 1864 constitutional debates, several members of the convention "urged with a great deal of force the propriety and importance of adopting the [1849] Constitution of the State of California as a basis for the framing of the new Constitution." Andrew Marsh, *Nevada Constitutional Debates and Proceedings*, Official Reporter at 18 (1866). Indeed, the language of Article 1, Section 1 was taken directly from California's 1849

Constitution without debate or amendment by the 1864 Convention. *See generally id.*

Importantly, during California's 1849 debates, as a delegate introduced the inalienable rights clause, he explained that "[t]he declaration of the sovereignty of the people, emanates from the foundation of our Republic. It has been adhered to ever since, and he trusted, would be adhered to in all time to come." John Browne & John Ross, *Report of the Debate in the Convention of California, on the Formation of the State Constitution,* at 34 (1850). Other members thought the provision "superfluous" and secured rights that the "Convention has no power to deprive" the People of as property rights are absolute. *Id.*

In response, another delegate stood, opposed those sentiments, and explained that "he considered [the inalienable rights clause] an essential principle to be incorporated in a bill of rights. It takes precedence [above] all others and places those that follow it in a higher point of view." *Id.* Following this rebuttal, the clause was adopted and enshrined in California's constitution and later adopted without amendment by Nevada. Thus, this is a robust constitutional protection to which "[t]here

is no corollary provision in the United States Constitution."[20] *Sisolak*, 122 Nev. at 669. The Legislature may not abrogate Constitutional provisions by legislative fiat.

When viewed under the Constitution's protections and guarantee of inalienable property rights—the Legislature's enactment of NRS 179.1173(5) is unconstitutional. Thus, Tri-Net's reliance on this provision as an unambiguous source of the Legislature's intent to create a civil proceeding cannot help the Agency escape double jeopardy review under *Ursery*.

b. NRS 179.1173(4) violates Due Process.

Tri-Net argues "[t]he fact that the [L]egislature imposed a lower burden of proof than beyond a reasonable doubt is also evidence that the statute was intended to be civil."[21] Answer at 26. As Elvin detailed in his Petition, this aspect of the 1987 enactments also defies Nevada's

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[20] "Our conclusion about this matter is strongly influenced by the fact that the purpose the sanction is to deprive the defendant of the fundamental constitutional right of 'acquiring, possessing and protecting property.' N.M. Const. art. II, § 4. This creates a strong presumption that the sanctions is punitive." *Nunez*, 2 P.3d at 282.

[21] Tri-Net incorrectly claims that the burden of proof is preponderance of the evidence. *Compare* Answer at 18, *with* NRS 179.1173(4) (clear and convincing).

Constitution. *See* Pet. at 25-27; *see also A 1983 Volkswagen*, 101 Nev. at 224 (imposing a "reasonable doubt" burden of proof). Again, while this Court's common law precedent did not rely on Nevada's due process (or the Fourteenth Amendment) rights, Elvin argues NRS 179.1173(4) clearly violates due process, and unless it passes constitutional muster, NRS 179.1173(4) cannot assist Tri-Net under prong one of *Ursery*.

"[A] criminal procedure violates due process if it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." *Nelson*, 137 S.Ct. at 1256 (cleaned up). The history, tradition, and precedent under both the federal and Nevada Constitutions demonstrate that the burden of proof for forfeitures of property *must* be reasonable doubt. *See*, *e.g.*, *Leonard v. Texas*, 137 S.Ct. 847, 848 (2017) (Thomas, J.) ("Whether forfeiture is characterized as civil or criminal carries important implications for a variety of procedural protections . . . as relevant in this case, there is some evidence that the government was historically required to prove its case beyond a reasonable doubt."); *United States v. Brig Burdett*, 34 U.S. 682, 690 (1835) ("The object of this prosecution was to enforce a forfeiture of the vessel and all that pertains to her, for a violation of revenue. The

prosecution was a highly penal one, and the penalty should not be inflicted unless the infractions of the law shall be established beyond a reasonable doubt."); *see also A 1983 Volkswagen*, 101 Nev. at 224.

Because the burden of proof imposed by NRS 179.1173(4) is unconstitutional, however unambiguous that provision might be, Tri-Net cannot rely on it to escape double jeopardy scrutiny.[22] Therefore, and because none of the unambiguous statutory provisions Tri-Net relies on to claim *Ursery's* first prong is met are constitutional, Tri-Net failed to rebut Elvin's claim that NRS 179.1173(9)-(10) demonstrate the law imposes a criminal punishment. Tri-Net fails to satisfy *Ursery*'s first prong.

2. Tri-Net fairs no better under *Ursery*'s second prong.

Tri-Net adopts wholesale the rationale of *Levingston II* and *Ursery*'s claims that forfeitures encourage property owners to "responsibly

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[22] As demonstrated above, the statutory provisions reviewed by *Levingston II* under the Fifth Amendment are no longer operative such that *Levingston II* is simply inapposite to the question presented here. Moreover, by applying *Blockburger/Schwartz*, the rationales this Court provided in *Levingston v. Washoe Cnty*, 112 Nev. 479 (1996) ("*Levingston I*") and *Wright v. State*, 112 Nev. 391 (1996) which *Levingston II* overruled, provides the correct Constitutional perspective for this Court to apply to Nevada's double jeopardy clause.

manage their property," it forecloses further "illegal activities," it precludes profiting from illegal conduct, and that "proceeds from civil forfeiture actions go toward crime prevention." Answer at 27-28. *Levingston II* and *Ursery* occurred in 1998—yet Tri-Net points this Court to *zero* empirical evidence since those decisions to support its claims.[23] That is because this policy rationale is outdated and anecdotal at best.

NACJ on the other hand provided ample empirical evidence demonstrating that New Mexico implemented criminal forfeiture proceedings, which by extension guaranteed the right to counsel, and crime did not increase nor did the collection of forfeiture proceeds decrease. *See* Amici Br. at 10-13. Meaning that guaranteeing the correct constitutional protections will not affect the policy goals of forfeitures of property (however attenuated from reality those policy goals might be).

But to rule in Tri-Net's favor, its claims about the recoupment of costs and use of forfeiture proceeds trigger this Court's constitutional analysis again. *See* NRS 179.118; NRS 179.1187 (mandating that all

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[23] "There is no claim that forfeiture reimburses the government dollar for dollar, even if a specific dollar amount could be determined. Rather, forfeiture is defended as a 'rough justice' remedy or a 'reasonable form of liquidated damages' designed to indemnify the costs related to the trafficking of controlled substances." *Nunez*, 2 P.3d at 282.

forfeiture proceeds are retained by the agency and are not placed in the State's general treasury fund).

"No money shall be drawn from the treasury but in consequences of appropriations made by law." Nev. Const. art 4, § 19; *id*. art 9, § 3 ("Every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein."); *see also id*. art. III, § 1 (enshrining the separation of powers in Nevada's Constitution). Relying on a provision in the law that is unambiguous and provides an amply supported policy choice—reducing the cost of the drug war—may be a laudable legislative goal. But that righteous purpose does not make the statutory provision Constitutional for Tri-Net to rely on to avoid double jeopardy scrutiny. *See State v. Snodgrass*, 4 Nev. 524, 526 (1869) ("This power can only be exercised by the legislative branch of the government, and when as in this case, the constitution has clearly declared that legislature shall do a certain thing, that thing must be done as the constitution has said."). Tri-Net therefore cannot save Nevada's civil forfeiture laws under prong two of *Ursery* by relying on unconstitutional provisions.

Because all of Tri-Net's arguments trying to shore up support under *Ursery* fail, this Court can reject Tri-Net's request to adopt *Ursery* under Nevada's Constitution, apply *Blockburger/Schwartz*.

IV. CONCLUSION

Elvin asks this Court to exercise its discretion and grant him relief.

Dated this 17th day of March 2023.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Petition complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared with a proportionally spaced typeface in 14-point, double-spaced, Century Schoolbook font.

2. I certify that this Petition complies with type-volume limitations of NRAP 21(d) because it contains 6,827 words which is less than the 7,000 word limit.

3. I certify that I have read this Petition, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedures, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 17th day of March 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 17th day of March 2023, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing properly addressed to the following:

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