IN THE SUPREME COURT OF THE STATE OF NEVADA

EFREN AGUIRRE, JR.,

Appellant,

vs.

ELKO COUNTY SHERIFF'S OFFICE,

Respondent,

Supreme Court No. 82445

APPELLANT'S OPENING BRIEF

Appeal from Fourth Judicial District Court, Department 1
Case No. CV-FR-17-687

APPELLANT'S OPENING BRIEF

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NRAP 26.1
DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. There is no such corporation.

DATED this 22nd day of June, 2021.

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I.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this case pursuant to NRAP 17(a)(11) because it is an appeal regarding a matter raising as a principal issue a question of first impression involving the United States or Nevada Constitution or common law, as it raises issues as to: 1) whether a sheriff can forfeit a person's homestead protected under the Constitution of the State of Nevada, 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 of $100 imposed on the homeowner. Further, this Court has appellate jurisdiction over this case pursuant to NRAP 17(a)(12) because it is an appeal regarding a matter raising as a principal issue a question of statewide public importance, as it raises an issue as to whether an incarcerated person may establish and preserve their homestead exemption from forfeiture.

The appeal is timely because the Findings of Fact, Conclusions of Law, and Judgment of Forfeiture was entered on December 31, 2020, which was the final judgment in the case below; Notice of Entry of Order was served on January 4, 2021; and the Notice of Appeal was filed on January 28, 2021.

II.

ROUTING STATEMENT

This is a matter that is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11) and NRAP 17(a)(12), as more fully explained in the Jurisdictional Statement, above.

III.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether Appellant's homestead is exempt from the Elko County Sheriff's forfeiture.

B. Whether the Elko County Sheriff's forfeiture of Appellant's home valued at $298,000 is an excessive fine in comparison to the fine imposed on Appellant of $100.

III.

STATEMENT OF THE CASE

This is an action for the forfeiture of the residence and homestead of an incarcerated man and his thirteen-year-old son by the Elko County Sheriff. The homeowner, Efren Aguirre, Jr., was arrested and detained by the Elko County Sheriff. While detained and before final process of law and any court, Mr. Aguirre recorded a Declaration of Homestead to declare and preserve his right to homestead pursuant to the Constitution of the State of Nevada.

First, Mr. Aguirre's home is exempt from forfeiture because the homestead is protected by Mr. Aguirre's constitutionally protected homestead right. The District Court erroneously ruled that the homeowner could not maintain his homestead right because the man is detained and incarcerated. Mr. Aguirre has been detained and incarcerated since October 19, 2017, and will be released this year on October 19, 2021. Mr. Aguirre's home is his only residence, he intends to return to his home upon his release, and he has recorded a valid Declaration of Homestead, which exempts his home from forfeiture.

Second, the forfeiture of Mr. Aguirre's home is an excessive fine because it is grossly disproportionate in comparison to the $100 fine and criminal penalty imposed upon Mr. Aguirre. The District Court failed to recognize the disproportionality of the forfeiture of the home when in fact the home's value is

2,980 times greater than the actual fine imposed upon the homeowner, 15 times greater than the maximum fine that could be imposed under current law, and three times greater than the statutory maximum fine that could have been imposed upon the homeowner at the time of sentencing.

The District Court entered its Findings of Fact, Conclusions of Law and Judgment of Forfeiture on the 31st day of December, 2020, which should be reversed.

IV.

STATEMENT OF FACTS

1. The residence owned by Efren Aguirre, Jr., at the time of his arrest and the subject residence in the forfeiture action, which is located at 743 Devon Drive, Spring Creek, Nevada, was purchased on May 10, 2016, for $261,000 by Efren M. Aguirre and Maria Del Refugio Garcia De Aguirre, and was gifted to their son Efren Aguirre, Jr. by deed, recorded on May 17, 2016. (hereinafter "Aguirre Home"). (2 JA 463-466).

2. On October 19, 2017, Efren Aguirre, Jr. was arrested and detained on controlled substance charges.

3. On November 2, 2017, while the Elko County Sheriff detained Efren Aguirre, Jr., the Elko County Sheriff's Office filed a Complaint for Forfeiture and

Motion for Stay of Proceedings, which initiated this case against Mr. Aguirre's Home. (1 JA 1-6.)

4. On November 22, 2017, Efren Aguirre, Jr., recorded a Declaration of Homestead on the residence, and acknowledged that he is the resident of the home and that it is his "intention to use and claim the real property and residence as a homestead." (2 JA 467-468.)

5. On October 16, 2018, a Judgment of Conviction was entered against Efren Aguirre, Jr., wherein he was sentenced to pay a $100.00 fine and required to serve 48-120 months in prison pursuant to a plea deal, wherein he plead to trafficking in a Schedule I controlled substance, a category B felony under NRS 453.3385(1)(b). (2 JA 486-494.)

6. On July 1, 2020, AB 236 went into effect, which substantially reduced the culpability and sentence for Mr. Aguirre's crime.

7. On May 18, 2020, Efren Aguirre, Jr., recorded an Amended Declaration of Homestead on the residence. (3 JA 497.)

8. On September 24, 2020, the District Court held an evidentiary hearing in the case, and the parties submitted briefs on issues presented in the case. (2 JA 287-381.)

9. On October 1, 2020, the Sheriff's Office filed its Closing Response, wherein it agreed that the value of the Aguirre Homestead was $298,000; on

October 15, 2020, Mr. Aguirre filed the Claimant's Closing Response; and on October 22, 2020, the Sheriff's Office filed its Rebuttal to Claimant's Closing Argument. (2 JA 382-439.)

10. On November 6, 2021, the Supreme Court of Nevada entered Order No. 21-00153, Memorandum of Temporary Assignment, which stated that District Judge Porter was "unavailable" and ordered that Senior Judge Maddox "shall hear any and all matters in Department 1 from November 16 to December 31, 2020, and shall have the authority to sign any orders arising out of this assignment." (3 JA 521-522.)

11. On December 31, 2021—the last day of the year when Supreme Court Order No. 21-00153 was still in effect and Judge Maddox was appointed to hear all matters—Judge Porter who was "unavailable" under the Supreme Court Order returned to court and entered Findings of Fact, Conclusions of Law and Judgment of Forfeiture, which ruled that the Sheriff's forfeiture of Mr. Aguirre's home was valid. (2 JA 440-448.) This appeal is taken therefrom.

12. Mr. Aguirre's mother, Maria died on October 25, 2020, from Covid-19. Maria Aguirre was a caregiver for Mr. Aguirre's minor son during Mr. Aguirre's incarceration.

13. Mr. Aguirre will be released from incarceration on October 19, 2021, and intends to return to physically reside in the Aguirre Homestead with his son. (2 JA 298:1-3, 300:1-4, 302:1-7, 318:23-25, 319:4-20, 322:9-24.)

V.

SUMMARY OF THE ARGUMENT

First, Mr. Aguirre's Homestead is exempt from forfeiture by the Elko County Sheriff pursuant to Nevada's constitutionally protected homestead right. Mr. Aguirre maintains a valid homestead because he recorded a valid Declaration of Homestead before final process of law, he intends to return to his Homestead on October 19, 2021, after he is released from incarceration, and the Aguirre Homestead is his legal residence. The District Court incorrectly rested its decision on a non-binding federal bankruptcy case ruling that Mr. Aguirre cannot declare and maintain a homestead because he is an incarcerated person. Mr. Aguirre's homestead right is valid, and the Constitution of the State of Nevada protects his homestead right.

The Elko County Sheriff is prohibited from forfeiting Mr. Aguirre's home because the forfeiture would be an excessive fine that violates the Constitution of the State of Nevada and Eighth Amendment of the Constitution of the United States of America. The parties agree that the Aguirre Home is worth at least $298,000 and Mr. Aguirre had a fine imposed upon him of $100. The District

Court erroneously relied upon cases that used the federal Sentencing Guidelines as a standard for gross disproportionality and failed to recognize the true disproportionality in value. Therefore, the Sheriff's forfeiture must be denied because the forfeiture would result in an excessive fine of 2,980 times the value of the home, which is not permitted under the Nevada and United States Constitutions.

The December 31, 2021 Findings of Fact, Conclusions of Law and Judgment of Forfeiture is a rogue order. The Supreme Court ordered that Senior Judge Maddox was to hear any and all matters in Department 1 and had the authority to sign orders until December 31, 2021. Judge Maddox did not sign or enter the order. Instead, Judge Porter, who was unavailable, returned for a single day to Department 1 on the last day of the year and last day of her term and signed the order that stripped Mr. Aguirre of his constitutional right to preserve his home in violation of this Court's Order No. 21-00153 that Judge Maddox was to hear any and all matters in Department 1. (3 JA 521-522.)

VI.

STANDARD OF REVIEW ON APPEAL

The issue of whether Mr. Aguirre's homestead is exempt from the Sheriff's forfeiture is a question of law, which is reviewed de novo. *See Lift Certification Co. Inc. v. Thomas*, 127 Nev. 1155, 373 P.3d 936 (2011). There are no disputed

facts. Mr. Aguirre resided in his home until he was detained by the Sheriff, the Sheriff commenced a forfeiture action, and before final process of law, Mr. Aguirre recorded a Declaration of Homestead that complies with the terms of NRS 115.020. Mr. Aguirre is incarcerated and will be released on October 19, 2021, and intends to return to his homestead to reside with his minor son.

The legal issues are whether Mr. Aguirre has a valid homestead, and whether his incarceration precludes Mr. Aguirre from asserting his constitutionally protected homestead right, which are reviewed de novo.

The second issue, whether the Sheriff's forfeiture of the Aguirre Home is an excessive fine and is grossly disproportionate to the crime, is also reviewed "de novo." *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). "Whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *Id.* at 337, ft. 10.

VII.

ARGUMENT

A. Efren Aguirre, Jr.'s homestead is exempt from the Elko County Sheriff's attempted forfeiture.

The Aguirre Homestead is exempt from the Elko County Sheriff's attempted forfeiture. In contravention of Mr. Aguirre's constitutional homestead right, the

District Court relied upon a federal bankruptcy case with an erroneous finding, and thereby reached the wrong result. The Court should find that a person does not change their place of residence or lose their constitutionally protected homestead right when incarcerated. The District Court also failed to liberally construe Mr. Aguirre's homestead rights in his favor, as required by law.

1. The Aguirre Home is exempt from forfeiture by the Elko County Sheriff pursuant to Nevada's constitutionally protected homestead right.

The Constitution of the State of Nevada provides that "**[a] homestead as provided by law, shall be exempt from forced sale under any process of law . . .**" Nev. Const. art. IV, § 30 (emphasis added). Further, NRS 115.010(1) provides that "**[t]he homestead is not subject to forced sale on execution or any final process from any court . . . .**" (emphasis added.) These constitutional and statutory provisions are absolute and provide homestead protections to Nevada residents by protecting them in their homes from process of law that would otherwise deprive them of their homestead.

Forfeiture is a "process of law," and homesteads are exempt from forfeiture under the Constitution of the State of Nevada. (2 JA 251:9 ("forfeiture is not an exception to homestead protection."))

To assert a homestead right in Nevada, the person must, "prior to final process from any court," "sign[ ] . . . and acknowledge[ ] and record[ ] as conveyances affecting real property" a declaration that states that the person, "if not married, that he or she is a householder" and that it is "his or her intention to use and claim the property as a homestead." NRS 115.010(1) and 115.020(2)-(3). The recordation of a declaration of homestead prior to final process of any court in a forfeiture proceeding, "is not ineffective because of its timing." (2 JA 252:19-21.)

Mr. Aguirre timely recorded his Homestead prior to "final process of any court." NRS 115.010(1). Mr. Aguirre's home is protected by his valid homestead right and therefore is exempt from forfeiture. It is undisputed that Mr. Aguirre owns his home and resided there until his incarceration. (2 JA 248:16; 2 JA 465-466.) It is also undisputed that on November 22, 2017, Efren Aguirre, Jr., recorded a Declaration of Homestead on the residence, and acknowledged that he is the resident of the home and that it is his "intention to use and claim the real property and residence as a homestead." (2 JA 467-468.) On May 18, 2020, Efren Aguirre, Jr., recorded an Amended Declaration of Homestead on the residence, and acknowledged that he is a "householder." (3 JA 497.) Mr. Aguirre intends to return to reside in his homestead on October 19, 2021. (2 JA 319:4-9, 322:9-24.) Mr. Aguirre's Declaration of Homestead was filed prior to final process from any

court. Therefore, Mr. Aguirre has complied with the Nevada Constitution Art. IV, § 30 and NRS Chapter 115. Consequently, the Aguirre Home is exempt from the Elko County Sheriff's forfeiture.

2. The District Court incorrectly rested its decision on a non-binding federal bankruptcy case ruling that Mr. Aguirre cannot declare and maintain a homestead only because he is an incarcerated person.

Despite Mr. Aguirre's valid homestead right, the District Court relied upon the federal bankruptcy case *In re Ellis*, No. 19-14495-MKN, 2019 WL 11590521, at *3 (Bankr. D. Nev. Nov. 25, 2019), to reach the wrong result. (2 JA 442:20-443:6.)

The District Court's reliance on *In re Ellis* was improper and should be reversed. First, *In re Ellis* is an unpublished, interlocutory order from the United States Bankruptcy Court, District Nevada, and has no binding precedent on the case at hand.

Second, the bankruptcy judge expressly stated in the interlocutory order that the residency issue before his bankruptcy court in that case "may be 'much ado about nothing'" and "may have minimal impact on the relief" because the homeowner in that case was already released from incarceration and was free to simply record a declaration of homestead to protect her home from a forced sale. *Ellis*, No. 2019 WL 11590521, at *3. Thus, the Court acknowledged that its

decision carried little to no weight because of the circumstances, that the debtor was not in jeopardy of losing her home given the circumstances, and that the issue was made irrelevant by the timing of the litigation. *Id.* It was error for the District Court to base the enormous decision of stripping Mr. Aguirre of his home, residency, and constitutionally protected homestead right on a nonbinding, unpublished bankruptcy interlocutory order with inapposite facts that the judge expressly stated was "much ado about nothing." In the present case, Mr. Aguirre is still incarcerated until October 19, 2021. In *In re Ellis*, the bankruptcy court did not consider the issue of whether a presently incarcerated person could declare and maintain a homestead.

Third, the bankruptcy court in *In re Ellis* improperly applied Nevada case law. In *In re Ellis* the federal bankruptcy judge ruled that the debtor homeowner would need to re-record her homestead declaration because she originally recorded it while she was incarcerated and that she was then free to re-record. Citing to *In re Nilsson*, 129 Nev. 946, 952, 315 P.3d 966, 970 (2013), the bankruptcy court reasoned that she was a constructive occupant of the home while incarcerated and not a bona fide resident. *Id.* However, this is error.

In *In re Nilsson*, the bankruptcy debtor had a choice to leave the family home which was clearly distinct from Mr. Aguirre and the *In re Ellis* debtor's compelled incarceration. The bankruptcy debtor in *In re Nilsson* was divorced and

moved from his family's home in Reno to his travel trailer in Sparks, where he resided for five years before filing for bankruptcy. *In re Nilsson*, 129 Nev. at 948. The debtor filed a document with the bankruptcy court stating that he actually lived in the Sparks travel trailer, and he never recorded a declaration of homestead. *Id.* The bankruptcy debtor never stated any intention to return to the Reno home, and he argued, himself, that he held "constructive occupancy" of the Reno home solely because his children resided in the home with his ex-wife; thus, he acknowledged that he did not reside in the home nor have any intent to actually reside there. *Id.* at 948-952. The Supreme Court of Nevada correctly found that the bankruptcy debtor's constructive occupancy argument was insufficient because his children's home was different than his actual residence, because he had no intent to reside with his children, and he did not record a homestead declaration. *Id.*

Therefore, the court in *In re Ellis* incorrectly relied upon *In re Nilsson* because the facts were so dissimilar. The Court in *In re Ellis* never reached the true issue of whether an incarcerated person can declare and maintain their residences as a homestead.

Fourth, Mr. Aguirre's home is his bona fide residence and is protected by his homestead right. The Supreme Court of Nevada has determined that a bona fide resident must have the intent to reside in his home and his home must be his actual

residence. *See In re Nilsson*, 129 Nev. 946 (2013). Mr. Aguirre intends to reside in his home and his home is his actual and only residence.

There is no dispute that Mr. Aguirre intends to reside in his home. Mr. Aguirre has set forth his intent in his recorded Declaration of Homestead and Amended Declaration of Homestead. (2 JA 467-468; 3 JA 497.) Mr. Aguirre testified at trial in this case that he intends to reside in his home upon his release from incarceration. (2 JA 319:4-20, 322:9-24.) Mr. Aguirre's brother, Noel, testified regarding Mr. Aguirre's intent to return and reside in his home following his incarceration. (2 JA 298:1-3, 300:1-4, 302:1-7.) The Sheriff has presented no evidence showing that Mr. Aguirre has a contrary intent, nor has the Sheriff disputed Mr. Aguirre's intent to reside in his home. Consequently, it is an undisputed fact that Mr. Aguirre intends to reside in his home.

It is undisputed that Mr. Aguirre was a resident of his home and physically resided in his home from the time he acquired his home in May 2016 until he was detained by the Sheriff. (2 JA 385:16-17.) Mr. Aguirre and his brother, Noel, testified, and it is undisputed, that Mr. Aguirre has no other ownership interest in any other real property or residence other than 743 Devon Drive, Spring Creek, Nevada 89815, and that if Mr. Aguirre's home were forfeited, he would be homeless and have no legal right to live anywhere else. (2 JA 308:5-13, 319:21-320:1.) Mr. Aguirre and Noel also testified, and their testimony was undisputed,

that "but for" Mr. Aguirre's incarceration, Mr. Aguirre would now be physically residing in his home. (2 JA 298:1-3, 300:1-4, 302:1-7, 319:4-20, 322:9-24.) Therefore, Mr. Aguirre's only residence since May 2016 is and remains 743 Devon Drive, Spring Creek, Nevada 89815.

The Sheriff's sole objection to Mr. Aguirre's homestead exemption is that he was imprisoned by the Sheriff and therefore not physically present in his home when the Declaration of Homestead was recorded.[1] (2 JA 385:4-386:18.) As part of this argument, the Sheriff contends that because Mr. Aguirre is prohibited from physically occupying his home due to incarceration, he should be considered a "constructive occupan[t]" of his home. No law or case law of the State supports the Sheriff's position. A person's residency does not change because of incarceration. The Nevada Constitution, Nevada Revised Statutes, and case law all hold that a person's residency does not change when a person is incarceration.

The Constitution of the State of Nevada states:

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[1] The Sheriff's argument and actions are against public policy. If the Sheriff's position is accepted, the Sheriff will be motivated to detain arrestees in order to forfeit their homestead while detained in order to obtain over $100,000 in value from the forfeited homestead. NRS 179.1187(2)(d). This position prohibits homeowners from exercising their constitutional homestead right simply because they are temporarily detained for the financial benefit of the Sheriff's Office. This is directly contrary to the liberal homestead protection found in Nevada's Constitution.

> For the purpose of voting, no person shall be deemed to have gained or lost a residence solely by reason of his presence or absence... while confined in any public prison.

Nev. Const., Article II, §2.

NRS 11.180 protects an incarcerated person's right to defend real property while imprisoned by tolling the time to make a "defense founded on the title to real property" for two years after they "cease" to be imprisoned. Thus, NRS 11.180 protects Mr. Aguirre's right to defend his home from forfeiture and other claims "founded on the title" to his home up to two years after he is released from incarceration. Mr. Aguirre raised this defense to the District Court, but the District Court proceeded to rule on the case during Mr. Aguirre's incarceration without affording him homestead protection during his incarceration. The result is especially ironic because the Court rested its decision on *In re Ellis* that involves a released prisoner with the opposite result of preserving the homestead against forced sale. By comparing *In re Ellis* and the present case of Mr. Aguirre, it is plain to see that the only difference is whether the appellant is incarcerated or not, and despite the similar fact patterns, the results are exactly opposite based only on the timing of the person's incarceration. This is bad law. Therefore, this Court should find that the law protects the rights of individuals even during their incarceration.

Federal case law has determined that incarceration does not strip a person of residency or change the person's residency. The Ninth Circuit Court of Appeals has ruled that an inmate's "residence" did not change due to incarceration. *Cohen v. United States*, 297 F.2d 760, 773 (9th Cir. 1962). Furthermore, federal courts maintain that diversity jurisdiction is based upon an incarcerated person's residence and does not change when a person is physically confined. *See Stifel v. Hopkins*, 477 F.2d 1116 (1973) ("We recognize the importance of considering physical or legal compulsion in determining whether domicile is gained or lost, but we limit the application of involuntary presence to its operation as a presumption ordinarily requiring more than unsubstantiated declarations to rebut"; *quoting* Note, Domicile as Affected by Compulsion, supra, 13 U.Pitt.L.Rev. at 699; See also 1 J. Beale, supra, Sec. 21.1, at 154 "this rule was doubtless designed to help persons who presumably would prefer to retain their old domicile in spite of enforced presence elsewhere. It is also based on the proposition that, if a person is forced to do a certain act, he cannot at the same time be doing the thing of his own free will. Intent, which is of its very nature voluntary cannot co-exist with compulsion.")[2]

[2] The Nevada Rules of Civil Procedure 30-32(a) also incorporate this principle to grant discovery rights to incarcerated persons to comply with discovery rules.

Courts throughout the country have consistently held that a homestead right is not stripped when a person is incarcerated, and courts have found that a person can file a homestead while incarcerated. *In re Smith*, 22 B.R. 866 (VA Bnk. 1982) (court allowed debtor to file homestead while incarcerated citing to the sound public policy of conserving the family home which underlies the purpose of homestead exemptions); *In re Crabb*, No. BKR. 05-02594-H7, 2007 WL 7209436, at *1 (Bankr. S.D. Cal. June 21, 2007) (debtor was incarcerated at the time of filing for homestead and court found that her six-year incarceration was a temporary absence because debtor always regarded residence as her home and intended to return and reside at the residence with her daughter following her incarceration); *Shumway v. Betty Black Living Trust*, 321 P.3d 372 (SC Ala. 2014) (incarceration is considered in the context of all other facts and circumstances in determining residency, for purposes of the homestead exemption to a levy, and will constitute abandonment of residence only if other facts and circumstances support that conclusion); *Driver v. Conley*, 320 S.W.3d 516 (TX Ct. App. 2010) (abandonment of homestead requires both the cessation or discontinuance of use of the property as a homestead, coupled with the intent to permanently abandon the homestead); *In re Gerholdt*, Bankruptcy No. 11-01321 (Bankr. N.D. Iowa Sep. 16, 2011) (Kansas courts have concluded that the fact the owner was incarcerated did not result in voluntary abandonment of the homestead); *Allen v. Holt County*, 81 Neb. 198

(1908) (while owner retains a continuing intention to return to home, if he is prevented from so doing, his homestead rights will continue for a reasonable time after the removal of the preventing cause; elected official temporary left homestead while serving in a state elected office); *Florey v. Estate of McConnell*, 212 S.W.3d 459 (TX Ct. App. 2006) (constitutional homestead rights protect citizens from losing their homes; accordingly, statutes relating to homestead rights are liberally construed to protect the homestead); *Schaf v. Corey*, 196 N.W. 502 (ND 1923) (after a thorough fact analysis, court found that homestead had not been abandoned when resident was incarcerated); *In re Estate of Eckley*, 780 N.W.2d 407 (Minn. 2010) (mental incapacity did not constitute abandonment of homestead even when resident was physically absent from property); *In re Estate of Mueller*, 215 B.R. 1018, 1025 (8th Cir.BAP 1998) (Minnesota courts have found exception to the physical occupancy requirement in cases involving imprisonment or mental incapacity, because a mentally incapacitated or incarcerated person may be unable to take the statutory steps necessary to preserve his or her homestead rights). Thus, these courts regarded the homeowners as residents of their homes during their incarceration and temporary absences, which supports the proposition that Mr. Aguirre remains a bona fide resident of his home even during incarceration.

In this case, Mr. Aguirre has only one residence, which he declared to be his homestead. Mr. Aguirre lived in his home until he was arrested and compelled to

leave his home due to his arrest.[3] Mr. Aguirre then recorded a Declaration of Homestead and Amended Declaration of Homestead claiming his home as his homestead. (2 JA 467-468; 3 JA 497.) The evidence in this case, including the maintenance of his insurance, taxes, and a temporary lease that will expire upon his release, all show that Mr. Aguirre is maintaining his home until he is released from prison where he intends to return, reunite, and resume living with his minor son. (2 JA 475-478, 495-496; 3 JA 498-506.) Mr. Aguirre has no other location to claim as his residence, and he will actually return to reside in the home in October 2021 pending this appeal. Thus, Mr. Aguirre's sworn testimony, intent, and all facts show that Mr. Aguirre is a bona fide resident of his home. By contrast, in *In re Ellis* the debtor was free and there was no consequences to re-recording a homestead. By further contrast, in *In re Nilsson* the bankruptcy debtor's testimony, intent, and all facts showed that the bankruptcy debtor left the home and established a new residence apart from where he actually resided for five years

[3] The Sheriff contends that Mr. Aguirre is not a resident of his home because he "was removed from the home and was living in the Elko County Jail when the original Declaration was filed in 2017." The Sheriff's claim that Mr. Aguirre is "living in" the jail is not the true test of residency. Living in a location for a temporary period, such as a hospital, vacation, military deployment, or temporary incarceration, does not deprive or change a person's residency. Otherwise, thousands of people would have been stripped of their residency during the current pandemic because they were temporarily detained in foreign lands or countries or quarantined in hospitals without the ability to return to their homes. The correct test of residency is the person's bona fide intent and actual residence regardless of their temporary absence or detention.

prior to filing for bankruptcy with no intent to return. Consequently, *In re Nilsson* actually supports the inevitable finding that Mr. Aguirre's only residence is his actual bona fide residence at 743 Devon Drive, Spring Creek, Nevada 89815, which he declared as his homestead.

The District Court erroneously relied upon the unpublished, non-binding interlocutory order in *In re Ellis* in its Judgment of Forfeiture, which is a rogue document as explained above, to strip Mr. Aguirre of his residency and constitutionally protected homestead right while incarcerated. The Court should find that Mr. Aguirre has a valid homestead right because he remained a bona fide resident of his home even while incarcerated.

3. The District Court failed to liberally construe Mr. Aguirre's homestead rights in his favor and instead ruled on a technicality.

The Supreme Court of Nevada stated that "while the statutory provisions relating to homesteads should be liberally construed, this liberal interpretation 'can be applied only where there is a substantial compliance with [the homestead] provisions.'" *In re Nilsson*, 129 Nev. at 949 (quoting *McGill v. Lewis*, 61 Nev. 28, 40 (1941)); *see also In re Canino*, 185 B.R. 584, 586 (B.A.P. 9th Cir. 1995) (homestead statutes should be liberally construed and not decided on technicality).

Mr. Aguirre's Declaration of Homestead and Amended Declaration of Homestead comply with NRS 115.020(2)(a) and specifically declare that Mr. Aguirre is "a householder" of his home and intends for his home to be protected as a homestead. (2 JA 467-468; 3 JA 497.) The District Court found that Mr. Aguirre complied with the declaration, signing, and recording requirements of NRS 115.020, and the only issue was his physical presence while detained. Mr. Aguirre is a bona fide resident despite his incarceration, and has complied with NRS 115.020 in all respects, and because of his compliance, the homestead laws should be liberally construed in his favor.

The Sheriff contends, however, that, despite Mr. Aguirre's compliance with NRS 115.020, the homestead laws should not be liberally construed in his favor because policy allegedly "favors forfeiture and not homestead protection in criminal forfeiture under Nevada law." (2 JA 387:3-5.) This statement is not supported by law and is contrary to public policy and the Nevada Constitution. The Nevada Legislature enacted NRS 179.1173(5), which states that the "law that forfeitures are not favored does not apply." However, this should not be misconstrued to mean that forfeitures are somehow more favorable than homesteads.[4] In fact, the legislature specifically addressed whether the homestead

[4] The Sheriff claims that forfeiture is an exception to the homestead protections, but there is no authority to support this position. The Supreme Court of

laws preempt forfeitures in NRS 115.010(5), which provides that homesteads are exempt from forfeitures except in the case of allodial title. Thus, the legislature created broad homestead protections under the Homestead Act, but specifically carved out a minor exception for allodial titles, which are expressly subject to forfeiture. Mr. Aguirre does not have allodial title. Thus, Homesteads under all other forms of title, including, Mr. Aguirre's fee simple title, are entitled to homestead protection against forfeiture. Therefore, the law of the state of Nevada protects all homesteads, including Mr. Aguirre's homestead, against forfeiture, except in the rare case of allodial title, which was a rare exception expressly carved out by the legislature and is not at issue in this case.

Consequently, the homestead laws should be liberally construed in Mr. Aguirre's favor and the Court should find that Mr. Aguirre is a bona fide resident and entitled to homestead protection that exempts his home from the Sheriff's attempted forfeiture.

4. Mr. Aguirre recorded his Declaration of Homestead, will be released from incarceration and will be physically residing in his home prior to "forced sale

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Nevada has found very few exceptions, such as, child support debts (*Breedlove v. Breedlove*, 100 Nev. 606, 609 (1984)) and equitable liens created by fraud (*Maki v. Chong*, 119 Nev. 390, 394 (2003)) as exceptions to homestead protection. In those cases, the Court uses equity to prevent injustice, where in contrast, a forfeiture is punishment for a crime.

under any process of law" and "any final process from any court."

Mr. Aguirre will be released from incarceration on October 19, 2021. He intends to immediately return to his homestead and resume residing there with his son. Therefore, Mr. Aguirre is expected to be physically residing in his home prior to final process of this Court.

The Constitution of the State of Nevada provides that a homestead is "exempt from forced sale under **any process of law** . . ." and NRS 115.010(1) further provides that a "homestead is not subject to forced sale on execution or **any final process from any court** . . . ." (emphasis added.) These phrases set forth the broad reach of the constitutional homestead right, which includes Mr. Aguirre's right to homestead. Mr. Aguirre's case is still in the appeal process, which appeal process is included in the broad phrase "any process of law" adopted by the legislature. The appeal process has not reached "final process" and will not reach "final process" until this Court, which is certainly included in the broad phrase "any court," makes a final determination in this case. Thus, "final process from any court" is ongoing and Mr. Aguirre is expected to be physically residing in his home prior to "final process" from this Court.

Furthermore, the phrase "any process of law" found in the Constitution of the State of Nevada and the phrase "any final process from any court . . . ." found

in NRS 115.010(1) are unique to Nevada homeowner's homestead right. These unique and extremely broad phrases show that the legislature of the State of Nevada expressly intended to preserve Nevada homeowner's homestead rights to the greatest and furthest extent possible in any legal proceeding, extending to Mr. Aguirre's appeal rights to the Supreme Court of Nevada. Thus, Mr. Aguirre's homestead is exempt from the Sheriff's forfeiture because it was declared prior to any final process from any court.

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

The United States Constitution's Eighth Amendment and Nevada's Constitution provide that excessive fines shall not be imposed. "The purpose of the Excessive Fines Clause is to limit the government's power to extract payments as punishment for an offense." *United States v. Meisinger*, No. EDCV 11-00896 VAP, 2011 WL 4526082, at *5 (C.D. Cal. Aug. 26, 2011). The Excessive Fines Clause applies to the Sheriff's claim of forfeiture against the Aguirre homestead. The forfeiture of Mr. Aguirre's homestead is an excessive fine.

The Supreme Court of the United States ***unanimously*** ruled on February 20, 2019, that:

> The Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment . . . .

Timbs v. Indiana, 139 S. Ct. 682 (2019).[5]

"Two questions are pertinent when determining whether the Excessive Fines Clause has been violated: (1) Is the statutory provision a fine, i.e., does it impose punishment? and (2) If so, is the fine excessive?" *Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000) (*See Austin v. United States*, 509 U.S. 602, 619, 622, (1993)). "[T]he first question determines whether the Eighth Amendment applies; the second determines whether the Eighth Amendment is violated." *Id.*

First, the Sheriff's attempted forfeiture of Mr. Aguirre's homestead constitutes a heavy fine and a punishment and therefore the Excess Fines Clause applies in this case. "[T]he question of whether a payment is 'punishment' is a question of law decidable on a motion to dismiss." *Grove v. Kadlic*, 968 F. Supp. 510, 517 (D. Nev. 1997). "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Austin*, 509 U.S. at 621 (internal citations omitted). A claim of forfeiture

[5] Prior to the 2019 ruling in *Timbs*, the Sheriff argued in its first Motion for Summary Judgment, which was denied, that the Eighth Amendment is not applicable to Mr. Aguirre and his home. The Supreme Court of the United States subsequently ruled in *Timbs* during the pendency of this case, unanimously finding that the Eighth Amendment is applicable to forfeitures.

serves the purpose to punish, and therefore "is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Id.* The forfeiture of Mr. Aguirre's home would serve as a fine and punishment, and therefore the first question of the analysis is resolved by finding that the Excessive Fines Clause applies to the Sheriff's claim of forfeiture.

Second, the Sheriff's forfeiture claim is excessive. This step involves a determination of whether "the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense," if it is, then it is "unconstitutional." *Bajakajian*, 524 U.S. at 337. The Sheriff's attempted forfeiture of Mr. Aguirre's home is egregious and grossly disproportional to the $100 fine imposed by the State in this case. The Aguirre Homestead is the bona fide residence of Mr. Aguirre. Furthermore, the Aguirre Homestead is valued at $298,000, and thus its value is 2,980 times greater than the fine imposed upon him. The forfeiture is grossly disproportionate and therefore unconstitutional.

The Supreme Court of the United States has set forth the standard to determine whether a forfeiture is excessive as follows: "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. The Court reasoned that:

> "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the

> forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."
>
> . . .
>
> If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."

Id. at 334, 337.

In weighing the gravity of the defendant's offense, the *Bajakajian* Court reviewed the culpability of the defendant, including the penalties that were imposed, the Sentencing Guideline recommendations, and the maximum penalties that could have been imposed; the relation of the crime to other illegal activity; the type of crime; and the harm caused by the crime.[6] *Id.* at 338-339.

1. The forfeiture of the Aguirre Home is grossly disproportional to the criminal penalties imposed or that may have been imposed.

In determining disproportionality, federal courts review the actual criminal penalty imposed, the maximum statutory penalty that may have been imposed, and the maximum penalties that may have been imposed under the Sentencing Guidelines versus the value of the property that is sought to be forfeited. The federal courts maintain that "the maximum penalties under the Sentencing

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[6] Although there is no "rigid set of factors," the Ninth Circuit Court of Appeals typically "consider[s] four factors in weighing the gravity of the defendant's offense: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." *United States v. $132,245.00 in U.S. Currency*, 764 F.3d 1055, 1058 (9th Cir. 2014) (internal citations omitted).

Guidelines should be given greater weight than the statutory maximum because the Guidelines take into account the specific culpability of the offender." *$132,245.00*, 764 F.3d at 1060.

In similar fashion the Nevada Division of Parole and Probation, a state agency, was charged with the responsibility of preparing a pre-sentence report to assist the court in sentencing. (*See* 3 JA 507-510.) The pre-sentence report includes a recommended sentence. *Id.* The sentencing recommendations were based on a uniform scoring system, which is calculated to provide an objective basis so that similarly situated defendants may receive equal justice.[7] *Id.*

In this case, it is undisputed that the maximum fine that could have been imposed on Mr. Aguirre in 2018 was $100,000.[8] (2 JA 390:11.) By way of public

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[7] The Sheriff contends that Nevada does not have anything equivalent to the Sentencing Guidelines because the federal Sentencing Guidelines are based upon a "published Manual wherein policy makers have determined the parameters of an appropriate sentence for an offense." However, the Nevada Division of Parole and Probation's recommendations were based on "a uniform scoring system," which "take into account the specific culpability of the offender" just as the federal sentencing guidelines. *$132,245.00*, 764 F.3d at 1060. Therefore, similar to federal cases, the Parole and Probation recommendations that were relied on in Mr. Aguirre's sentencing decision are acutely relevant and "should weigh heavier than statutory fines" because the recommendations were tailored specifically to his case and were "more particularized." *United States v. Riedl*, 164 F. Supp. 2d 1196, 1200 (D. Haw. 2001), aff'd, 82 F. App'x 538 (9th Cir. 2003).

[8] The Sheriff contends that the Court should review the "original" crime that was charged by the State. (2 JA 390:1-5.) However, there is no support for this claim by any authority. Reviewing a sentence for a crime that a person was never convicted of would require the Court to determine that the defendant was guilty of

policy, the legislature dramatically reduced sentencing and penalties for drug crimes in 2019, and today the maximum fine imposed under current law would be $20,000. (2 JA 390:15.) As stipulated at trial, the Nevada Division of Parole and Probation recommended a maximum fine of $2,000 in Mr. Aguirre's case, which is a "more particularized" number based upon the specific culpability of his offense. Mr. Aguirre was actually sentenced with a fine of $100. Therefore, whether using $100,000, $20,000, $2,000, or $100, the forfeiture of Mr. Aguirre's homestead is grossly disproportional to his offense under any analysis.

Furthermore, the evidence at trial showed that Mr. Aguirre's home would likely sell at or above $298,000 at the time of trial, and the Sheriff does not dispute that value. (2 JA 390:4; 3 JA 511-520.)

Analyzing the maximum statutory sentence, recommendation, and the actual sentence imposed compared to the value of Mr. Aguirre's home, it is clear that the Sheriff's forfeiture is grossly disproportional. Mr. Aguirre's home value is:

- 2,980 times greater than the actual fine imposed on Mr. Aguirre;

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any crime charged without the State meeting its burden of proving such a crime. Accepting such an argument would further encourage prosecutors to charge a defendant with a major crime, settle for a lessor crime, and then attempt to forfeit property that has no proportionality to the actual conviction. Such an analysis is untenable and should be soundly rejected.

- 149 times greater than the maximum sentencing guidelines, which, as explained above, the federal courts recommend the Court should give the greatest weight;
- 15 times greater than the maximum statutory fine that could have been imposed today; and
- 3 times greater than the maximum statutory fine that could have been imposed in 2018.

The disparity between the maximum and actual fines and the value of Mr. Aguirre's home is "many orders of magnitude"; therefore, the fine is grossly disproportional and excessive and therefore the Sheriff's attempted forfeiture must be denied. *Bajakajian*, 524 U.S. at 340.

This analysis is further supported by cases implementing the proportionality test. The *Bajakajian* Court ruled that a forfeiture of cash was unconstitutional when the cash value was 1.4 times (compare Aguirre: 3x) greater than the maximum statutory penalty and 71 times (compare Aguirre: 149x) greater than the maximum Sentencing Guideline. *Id.* at 321. The Ninth Circuit also found that a forfeiture of cash was unconstitutional when the cash value was 0.4 times (compare: Aguirre 3x) greater than the maximum statutory penalty and 3.3 times (compare: Aguirre 149x) greater than the maximum Sentencing Guideline. *US v. $100,348*, 354 F.3d

1110 (9th Cir. 2004). Given that the United States Supreme Court and the Ninth Circuit found the above forfeitures to be unconstitutional because the forfeiture is disproportional by many orders of magnitude, the forfeiture of the Aguirre Home is clearly disproportional because the magnitude is double that of the above cases, which cases only involve cash forfeitures, not the forfeiture of a homestead. Moreover, as a matter of public policy, the Court should recognize that the legislature has significantly reduced the penalty for drug related possession offenses in 2019 during the pendency of this forfeiture case.

Ninth Circuit cases and federal District Court of Nevada cases in which the courts found forfeitures not to be disproportional also support the finding that the forfeiture of Mr. Aguirre's house is disproportional. The federal district court of Nevada found forfeitures of cash not to be disproportional when the cash value was 0.01 and 0.06 times (compare: Aguirre 3x) greater than the maximum statutory penalties and 0.03 and 0.1 times (compare: Aguirre 149x) greater than the maximum Sentencing Guidelines. *US v. Brandel*, No. 2:13-CR-439-KJD-VCF(D. Nev. May 14, 2019). The Ninth Circuit found the forfeiture of cash not to be disproportional when the cash value was 0.4 times (compare: Aguirre 3x) greater than the maximum statutory penalty and 0.355 times (compare: Aguirre 149x) greater than the maximum Sentencing Guideline. *United States v. Beecroft*, 825 F.3d 991, 1001 (9th Cir. 2016).

By comparing the proportionality of the cases above to the attempted forfeiture of Mr. Aguirre's home, it is clear that Mr. Aguirre's home is grossly disproportional to the maximum statutory and recommended fine, and therefore the forfeiture should be found to be unconstitutional.

Moreover, of all the excessive fines cases cited herein, Mr. Aguirre's case is unique because it is the only one that deals with the attempted forfeiture of a homestead. The homestead was not the instrument of the crime or obtained with illegal proceeds. Consequently, the Court should first find that the forfeiture of Mr. Aguirre's home is protected by Mr. Aguirre's homestead right, and second that the forfeiture, if allowed, would be grossly disproportional to the fine imposed upon him or that may have been imposed upon him and is excessive.

2. The District Court analyzed the proportionality of the crimes in error, and its decision must be reversed.

The District Court failed to properly conduct the proportionality test and its erroneous findings must be reversed.

First, the District Court refused to acknowledge that the legislature amended the criminal code in 2019 and reduced the maximum fine to $20,000 for the same offense. (2 JA 445:11-13.) The Supreme Court of the United States has found that:

> judgments about the appropriate punishment for an offense belong in the first instance to the legislature. See, *e.g.*, *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 637 (1983) ("Reviewing courts ... should grant substantial deference to the broad authority that

> legislatures necessarily possess in determining the types and limits of punishments for crimes"); see also *Gore v. United States*, 357 U.S. 386, 393, 78 S.Ct. 1280, 1285, 2 L.Ed.2d 1405 (1958) ("Whatever views may be entertained regarding severity of punishment, ... these are peculiarly questions of legislative policy").

Bajakajian, 524 U.S. at 336.

Given that the legislature amended the penal laws in 2019 passing significant changes in legislation regarding the severity of drug possession crimes, during the pendency of this forfeiture action, the Court "should grant substantial deference to the broad authority that the legislatures possesses in determining the types and limits of punishments for crimes." *Id.* The Claimant agrees that he is not being sentenced today; however, the severity of his crime is being determined today at a time when the legislature has recently exercised its authority to determine the severity of the crime. Therefore, deference should be given to the legislature. It was error for the District Court to simply refuse to acknowledge the legislature's broad judgment, which should be reviewed in the "first instance."

Second, it was error for the District Court to refuse to review the Parole and Probation recommendations, which were relevant and tailored to this particular case. (2 JA 445:14-24.) Federal cases that undertake the grossly disproportional test give greater weight to Sentencing Guidelines because they are specific to a given case. These courts agree that the Sentencing Guidelines are a better standard because "the Guidelines take into account the specific culpability of the offender."

$132,245.00, 764 F.3d at 1060. Despite the fact that the Nevada Division of Parole and Probation's recommendations were utilized and relied upon in Mr. Aguirre's case for the same purpose, the District Court refused to acknowledge the relevance of the recommendations by claiming that "they are not the same" as the federal Sentencing Guidelines without any analysis or explanation as to why it rejected their relevance. (2 JA 445:18.) The Nevada Division of Parole and Probation's recommendations were based on "a uniform scoring system," which "take into account the specific culpability of the offender" just as the federal sentencing guidelines. *$132,245.00*, 764 F.3d at 1060. Therefore, similar to federal cases, the Parole and Probation recommendations "should weigh heavier than statutory fines" because the recommendations "are more particularized" than the maximum penalty that may have been imposed. *Riedl*, 164 F. Supp. 2d at 1200.

Third, even though the District Court erroneously refused to grant the legislature deference and refused to consider the Nevada Division of Parole and Probation's recommendations, the District Court missed the mark and made substantial errors in conducting the grossly disproportional analysis. Immediately after making the claim that Nevada did not have a system similar to the federal Sentencing Guidelines, the District Court cited to the Sentencing Guidelines in five different federal cases and then compared the Sentencing Guidelines in those cases to the maximum statutory sentence in Mr Aguirre's case. (2 JA 445:25 - 446:9

("Aguirre's forfeiture of approximately $298,000 is approximately three times the **maximum statutory fine**. Forfeiture does not per se violate the Eight Amendment simply because the amount to be forfeited exceeds the maximum fine under the **federal sentencing guidelines**.") (emphasis added).) The District Court erred in this regard by improperly comparing the maximum statutory fine to the federal sentencing guidelines. The standards are not even remotely the same and do not provide a fair comparison for determining the excessiveness of a forfeiture, especially in the case of homestead, which should be construed liberally in favor of the homeowner. The District Court did not do that.

In fact, a comparison of the maximum statutory fines to the value of the forfeited property in all of the federal cases that the District Court cited show that the forfeiture of Mr. Aguirre's home is grossly disproportional to the maximum sentence that could have been imposed. *$132,245.00*, 764 F.3d at 1060 (maximum statutory fine **0.53** times the cash value to be forfeited); *Brandel*, No. 2:13-CR-439-KJD-VCF, 2019 WL 2110504, at *13 (D. Nev. May 14, 2019) (maximum statutory fine **0.01** times the cash value to be forfeited); *United States v. Mackby*, 339 F.3d 1013, 1015 (9th Cir. 2003) (no analysis of the maximum statutory fine); *United States v. Riedl*, 82 F. App'x 538, 540 (9th Cir. 2003) (maximum statutory fine **0.95** times the cash value to be forfeited); and *United States v. Beecroft*, 825 F.3d 991, 1001 (9th Cir. 2016) (maximum statutory fine **0.35** times the cash value

to be forfeited). **In none of these cases that the District Court relied upon was the value of the cash that was forfeited greater than the maximum statutory fine.** Thus, the District Court made a major error in relying on these cases because Mr. Aguirre's case is the only case where the value of the property—Mr. Aguirre's home—is greater than the maximum statutory fine that could have been imposed. In fact, Mr. Aguirre's home is **three times the value** of the maximum statutory fine that could have been imposed upon him.

Therefore, the District Court made substantial errors in evaluating the gross disproportionality between the value of the property to be forfeited and the maximum fines that could have been imposed.[9] The District Court's erroneous calculations and determinations must be overturned.

3. Other factors show that the gravity of the crime is grossly disproportionate to the forfeiture.

First, the property to be forfeited is Mr. Aguirre's only home. Forfeitures are discouraged if they strip a person of his or her livelihood. *Bajakajian*, 524 U.S. at 335. A forfeiture of Mr. Aguirre's home would leave Mr. Aguirre homeless and destitute, which will significantly affect his livelihood.

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[9] The District Court was not alone in making this error. The Sheriff instituted this mistake by arguing that Parole and Probation recommendations should not be used and then immediately compared federal cases analyzing the sentencing guidelines to Mr. Aguirre's case utilizing the maximum statutory fines. (2 JA 389:8-11.) Thus, the Sheriff's briefings mislead the District Court with this error and the District Court followed and relied on the error.

Second, the culpability of Mr. Aguirre relative to other violators of the same crime is relatively low. In *Bajakajian*, 524 U.S. at 339, fn. 14, the Court found that the culpability of the defendant was low because the sentence that the defendant actually received was "but a fraction of the penalties authorized." Here, Mr. Aguirre was sentenced to 48 to 120 months in prison and, as the Sheriff characterized, "a nominal fine of $100." (2 JA 384:2-3.) This was "a fraction of the penalties" that could have been authorized of up to 15 years in prison and a fine of $100,000. Thus, the comparably small sentence to what could have been imposed shows that Mr. Agurre's "culpability relative to other potential violators . . . is small indeed." *Bajakajian*, 524 U.S. at 339, fn. 14.

Third, the Nevada Legislature's 2019 amendment of the statutes under which Mr. Aguirre was convicted and sentenced, which, as a matter of public policy, significantly reduced the level of culpability of Mr. Aguirre's conviction. Mr. Aguirre was convicted of trafficking in a Schedule I controlled substance, a category B felony under NRS 453.3385(1)(b) in 2018. As explained, in 2018, the crime held a maximum penalty of 15 years in prison and a maximum fine of $100,000. However, the Nevada legislature "dramatically amended the Trafficking statute," which, as a matter of law and public policy, significantly and dramatically reduced the culpability of the nature and extent of the crime during the pendency of this action. (3 JA 507-510.) Under the legislative amendment, "[t]he amount of

heroin in this case would not qualify for any level of Trafficking. . . it would be considered Possession With Intent to Sell . . . ." (*Id.*) Under current law, the maximum penalty for Mr. Aguirre's crime would be 15 years in prison and a $20,000 fine, which shows that the public policy of the state of Nevada has significantly reduced the level of culpability relating to the nature of Mr. Aguirre's crime. *See Bajakajian*, 524 U.S. at 336 ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."); *see also $132,245.00*, 764 F.3d at 1058. This significant and dramatic change during the pendency of this case by the Nevada Legislature "provides an unmistakable view of what the legislature has decided in terms of justice and the efficacy of punishment as it relates to societal harm resulting from the possession of certain quantities of controlled substances." (3 JA 507-510.)

Fourth, the forfeiture of Mr. Aguirre's home "bears no articulable correlation to any injury suffered by the Government." *Bajakajian*, 524 U.S. at 340. Although drugs were found in Mr. Aguirre's home, it is undisputed that the house was not purchased with drug money. There is no correlation to show that the house is part of the drug trade. There is no evidence that the home was a "drug house." However, forfeiting the house would carry an especially cruel result of leaving Mr. Aguirre and his son homeless when he is released from prison on October 19, 2021. (2 JA 308:5-13, 319:21-320:1.)

Fifth, Mr. Aguirre was convicted of possession of a firearm by a prohibited person; however, as the Sheriff admits, "the crime is not directly related to trafficking controlled substances." (2 JA 391:18-19.) Therefore, it is undisputed that other than possession, the firearms were not used in relation to the drug offense.

Sixth, Mr. Aguirre entered into a plea agreement and admitted to the drug and firearm possession charges. The drug activities were stopped and a sentence was entered. Mr. Aguirre is now serving his sentence. Mr. Aguirre is scheduled to be released on October 19, 2021, which will be the minimum bounds of the sentence that was imposed upon him, in part because of his good behavior. At that point, Mr. Aguirre will have fulfilled his sentence and debt to society. Further punishment of forfeiting his homestead would be grossly excessive, especially in light of recent legislative changes in favor of criminal justice reform.

Seventh, forfeiting Mr. Aguirre's homestead and leaving him homeless upon his release from incarceration is against the public policy of rehabilitating incarcerated persons and reducing recidivism. The Sheriff contends that the fight against drug use is serious, that its purpose is to seek to stop drug use, and that it and the county expend substantial resources in stopping drug use. (2 JA 391-392.) However, the Sheriff's actions in seeking to forfeit Mr. Aguirre's homestead, which will leave him homeless upon his release from incarceration, do not support

the Sheriff's stated purpose. It has been well documented for decades in the United States of America that homelessness is linked to recidivism. Stephen Metraux, *Incarceration and Homelessness*, 2007 National Symposium on Homelessness Research, https://www.huduser.gov/portal/publications/pdf/p9.pdf; Patricia McKernan, *Homelessness and Prisoner Re-Entry, Examining Barriers to Housing*, Volunteers of America (June 10, 2021, 4:06 PM), https://www.voa.org/homelessness-and-prisoner-reentry#Homelessness (citing Andrews & Bonta, 1995 ("Being homeless, unstably housed, or living in a high crime neighborhood all heighten an individual's risk of reoffending."); Sarah Gillespie, *Five Charts That Explain the Homelessness-Jail Cycle—and How to Break It*, Urban Institute (June 10, 2021, 4:21 PM), *https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it*; Bailey Gray, Return to Nowhere, The Revolving Door Between Incarceration and Homelessness, Texas Criminal Justice Coalition (2019).

Eighth, the forfeiture would have an extreme affect on Mr. Aguirre's life. If the forfeiture is allowed, Mr. Aguirre will be homeless in October 2021, which will greatly affect the life of Mr. Aguirre and his minor son.

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VIII.

CONCLUSION

For the foregoing reasons, Efren Aguire, Jr. respectfully requests that this Honorable Court reverse the District Court's Findings of Fact, Conclusions of Law and Judgment of Forfeiture and deny the Sheriff Office's forfeiture, and grant such other relief as the Court deems just and proper.

DATED this 22nd day of June, 2021.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 360 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because it does not exceed 9,618 words.

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

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of GERBER LAW OFFICES, LLP, and that on this date, I caused the foregoing document to be served on all parties to the action by:

- ✓ E-filing pursuant to the Nevada Filing and Conversion Rules
- ✓ Placing a true copy thereof in a sealed postage prepaid envelope in the United States Mail in Elko, Nevada.

fully addressed as follows:

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DATED this 22nd day of June, 2021.

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