

Civil Forfeitures in Nevada

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Historical Use of Forfeiture

In rem - legal fiction that property is tainted

Biblical

Exodus 21:28: "If an ox gore a man or a woman, that they die; then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox will be quit"

England

- Deadly objects were forfeited to the Crown through the process of "Deodand."
- Persons convicted of felonies and treason generally forfeited all real and personal property to the king.

America

- Maritime Law, contraband
- Drugs
- Other crimes

Legitimate Purpose Long Recognized by Courts

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

Nevada Law Recognizes Legitimate Goals of Forfeiture

“The proceeds from forfeiture actions go toward **crime prevention** and help **defray the costs of court proceedings and law enforcement. Its purpose is remedial and not punitive.**” *Sparks, Police Dep’t v. Nason*, 107 Nev. 202, 204, 807 P.2d 1389, 1390 (1991) (holding that money can be seized from minor even though minor cannot be charged with a felony).

“By linking the forfeiture of property to illegal drug activity that occurs in or on that property, forfeiture **encourages property owners to responsibly manage their property** and ensures that owners will not permit illegal activities on or in that property.” *Levingston v. Washoe County*, 114 Nev. 306, 311, 956 P.2d 84, 87 (1998) (holding that house used for illegal drug sales could be forfeited).

Controversy

- Right meets Left; i.e., Justice Thomas meets ACLU
- Sheriff’s deputy in Humboldt County
- SB 358 (see below)

Controversy, cont'd

Criticisms

- Due process
 - Notice and opportunity to be heard
 - Civil versus criminal: Burden of Proof and Right to Counsel
- Law enforcement money maker

Applicable Law

NRS 179.1156, *et seq.*

"Forfeitures"

PROCEEDS

- ▶ NRS 179.1164(1)(a) – “Any proceeds attributable to the commission or attempted commission of any **felony**”
- ▶ NRS 179.1164(1)(b) – Specific crimes that reference NRS Chapter 179, including drug crimes under NRS Chapter 453

NRS 179.1156, *et seq.*

"Forfeitures"

INSTRUMENTALITIES

- ▶ NRS 179.121(1) – “all personal property” (including money) “used as an instrumentality” in felonies and specifically-enumerated crimes (large list includes murder, larceny, pandering, operating a business without a license, etc.)

NRS 179.1156, et
seq.

"Forfeitures"

CONVEYANCES

- ▶ NRS 179.121(2) –(boats, cars, planes, etc.) used "during the commission" of most felonies



Firearms

NRS 202.340

- ▶ Confiscation and disposition of dangerous weapons by law enforcement agencies (prohibited persons)

NRS 453.301(10)

- ▶ Forfeiture of firearms possessed by a person arrested for controlled substances violation (possession of controlled substance is sufficient)

Drug-related property or proceeds: NRS 453.301 (9)

1. "Everything of value furnished or intended to be furnished **in exchange for a controlled substance** in violation of the provisions of [NRS 453.011](#) to [453.552](#), inclusive, or a law of any other jurisdiction which prohibits the same or similar conduct," [so could include money seized before actual purchase]
2. "all **proceeds traceable** to such an exchange," [after purchase]
3. "and all other property used or intended to be used **to facilitate** a violation of the provisions of [NRS 453.011](#) to [453.552](#), inclusive, except [NRS 453.336](#), or used or intended to be used to facilitate a violation of a law of any other jurisdiction which prohibits the same or similar conduct as prohibited in [NRS 453.011](#) to [453.552](#), inclusive, except [NRS 453.336](#)."
 - ▶ "If an amount of cash which exceeds \$300 is found in the possession of a person who is arrested for a violation of [NRS 453.337](#) or [453.338](#), then there is a rebuttable presumption that the cash is traceable to an exchange for a controlled substance and is subject to forfeiture pursuant to this subsection."

Real Property and Rental Proceeds

NRS 453.301 (8)

All **real property** and mobile homes **used or intended to be used by any owner or tenant** of the property or mobile home **to facilitate** a violation of the provisions of NRS 453.011 to 453.552, inclusive, except NRS 453.336, or used or intended to be used to facilitate a violation of a law of any other jurisdiction which prohibits the same or similar conduct as prohibited in NRS 453.011 to 453.552, inclusive, except NRS 453.336. As used in this subsection, "**tenant**" means any person **entitled, under a written or oral rental agreement, to occupy real property** or a mobile home to the exclusion of others.

Real Property

NRS 179.1164(1)(a)

"Any **proceeds attributable** to the commission or attempted commission of any felony" are subject to forfeiture.

"Proceeds" – "any property, or that part of an item of property, derived directly **or indirectly** from the commission or attempted commission of a crime."
NRS 179.1161

"Property" – "...real property, **any interest in real property ... money,** security and **negotiable instruments.**"
NRS 179.1162.

Rent Money

NRS 453.301 (9)

"... **all proceeds traceable** to such an exchange [for controlled substances], and **all other property** used or intended to be used to **facilitate** a violation

The Process - "Seizure" ≠ "Forfeiture"

- ▶ Three Distinct Phases

The Process - "Seizure" ≠ "Forfeiture"

Step 1: Seizure

The actual taking of money or property that is traceable to an enumerated crime

Provides safeguards to ensure probable cause before money or property can actually be taken

Step 2: Civil Action

A lawsuit filed by law enforcement entity

Provides all sorts of protections to possible claimants

Step 3: Forfeiture

A court order

Only after all possible claimants have had the opportunity to appear in the civil action to claim the money or property

BUT, criminal charge or conviction not required. NRS 179.1173(6)

Subject to appeal



Step 1 (the Seizure) - Safeguards

- ▶ Must be "with process;" i.e., with a written warrant founded upon probable cause
- ▶ But, can be "without process;" e.g....
 - Incident to an arrest, a search warrant, or an administrative inspection
 - Subject to final judgment
 - Probable cause to believe the property is dangerous to health or safety
 - Probable cause to believe the property is subject to forfeiture

NRS 179.1165

Step 1 Safeguards, Cont'd

- ▶ Worst case: 42 U.S.C. §1983
 - Civil rights violation (probable cause, due process);
 - Provides private cause of action, with attorneys' fees and costs

- Even worse: crime itself (theft, etc)

Safeguards at Steps 2 and 3

1. Personal service. NRS 179.1171(5).
2. Law enforcement must act quickly. 120-day limitation period if seizure was "without process." NRS 179.1171(2).
3. Court must proceed "as soon as practicable" and with "priority over other civil actions." NRS 179.1173(1).
4. Relatively easy to appear *pro se* (self-help, including in jails)
5. Plaintiff-driven process (NRCP required per NRS 179.1171(1)); so default procedures, etc.

Safeguards Cont'd

6. Burden of proof is on law enforcement, and by "clear and convincing" evidence (higher than "preponderance"). NRS 179.1173(4)
7. Must be nexus between the crime and the money/proceeds – *Ferguson v. LVMPD, infra*.
8. "Innocent Owner" defense ("without knowledge, consent, or willful blindness"). NRS 179.1164(2)
9. Eighth Amendment defense (excessive fine). *Levingston, infra*.
10. If related criminal case is set for trial, civil forfeiture must be stayed. NRS 179.1173(2).

Safeguards Cont'd

11. If related criminal case is "denied or dismissed," money/property must be returned within 7 days. NRS 179.1173(3) (added in 2015)
12. If money must be returned, claimant must receive interest. NRS 179.1173(8).
13. Claimant would also be entitled to costs, like any prevailing party in litigation. NRS 18.020
14. Claimant could also seek fees, if law enforcement brought the civil forfeiture action in bad faith. NRS 18.010(2)(b).
15. Right to appeal

Alternative: RICO

NRS 207.350, *et seq.*

- ▶ Two or more crimes (racketeering activities)
- ▶ Profiting therefrom, conspiring, re-investing
- ▶ Multiple penalties, including civil forfeiture

RICO, cont'd

Differences between NRS 179.1156, *et seq.*

- ▶ Limitation period (2 years vs. 120 days, in some cases)
 - ▶ Criminal case being “denied or dismissed” is irrelevant
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Examples

Ferguson v. LVMPD, --- Nev. ---, 364 P.3d 592 (2015)

- ▶ Very successful and elaborate burglary ring
- ▶ \$280,000 seized from bank accounts
- ▶ Convicted of burglary and larceny
- ▶ In civil action, district court entered summary judgment, based on criminal conviction
- ▶ Convicted felons, appearing *pro se*, appealed
- ▶ Supreme Court reversed in large part: Metro must do more to prove that money in bank accounts was directly linked to the larceny; i.e., that money came from the sale of stolen property, versus some legitimate source

Ferguson v. LVMPD - Lessons

- ▶ Supreme Court will scrutinize these cases and hold law enforcement to an appropriate level of proof
 - ▶ Case provides blueprint of how to proceed in litigation
1. Clear and convincing proof that applicable crime committed
 2. Clear and convincing proof that property seized is related to that crime

Ferguson v. LVMPD - Lessons

Posted April 23, 2009 - 12:14pm

Man guilty in plot to kill judge, prosecutor, police officer



Typical case – Drugs

- ▶ Traffic stops
- ▶ Pedestrian stops
- ▶ Controlled buys (search warrants)
- ▶ Task Force Investigations (search warrants)

Several paths can be taken in a typical case

Typical case – Paths to resolution

Settlement

Plea Agreement (contemplated by statute)

Before criminal case

After criminal case

No criminal case

Default (no Answer)

Before criminal case

After criminal case

No criminal case

Litigation

Civil discovery

Motion for Summary Judgment

Trial... (?)

Typical case – Traffic stops with drugs and drug busts

- ▶ Property is either legitimate or not.
- ▶ Discovery could be required.
- ▶ Note: NRS 179.1171(6) provides for interrogatories to be served with complaint.

Other examples

Instrumentality

- ▶ Vehicle used to deliver drugs
- ▶ Vehicle used drive around to find targets for auto thefts
- ▶ Vehicle used in DUI

▶ Issues:

- ▶ innocent owner defense
- ▶ Liens
- ▶ Cost of towage and storage

Restitution

- ▶ Bribery, public corruption
- ▶ NRS 179.118: "protected interest" must be paid first

More examples

Vice

- ▶ Money taken from abusive pimp
- ▶ Problem: criminal case often dismissed
- ▶ NRS 201.351 (pandering); NRS 207.350 (RICO)

Legitimate Business Hiding Crimes

- ▶ e.g., Smoke shop selling Spice
- ▶ \$\$ taken from bank account
- ▶ Co-mingling

More examples

Firearms

- ▶ Not the owner
- ▶ Prohibited persons
- ▶ Many guns taken off the street

Interdiction

- ▶ Airport; Fed Ex
- ▶ Big \$\$
- ▶ No criminal prosecution, generally

More examples – Real Property

Levingston v. Washoe County, 112 Nev. 479, 916 P.2d 163 (1996),
petition for rehearing granted, 114 Nev. 306, 956 P.2d 84 (1998)

- ▶ Kids using parent's home as crack house
- ▶ No double jeopardy problem
- ▶ Innocent owner and 8th Amendment defenses on remand

- ▶ NRS 453.305 (requiring letter to owner)
- ▶ *Lis Pendens*

Bigger Real Property

Kenmore Hotel, 77 F.3d 648 (2nd Cir. 1996)

- ▶ 22-story residential hotel in Manhattan was a "beehive of criminal activity"
- ▶ After 8th Amendment analysis, hotel forfeitable because:
 1. harshness not so great
 2. direct relationship between property and crime
 3. owner's culpability

- ▶ See also *Von Hofe v. United States*, 492 F.3d 175 (2nd Cir. 2007) (husband's half of house forfeitable; wife's may be)
- ▶ *United States v. Ferro*, 681 F.3d 1105 (9th Cir. 2012) (9th Circuit cites to 2nd Circuit in this area) (wife's interest in husband's extensive firearms collection forfeitable, but remanded to conduct updated excessiveness inquiry)

Bigger Real Property, cont'd

Federal statute, 21 USC § 881 very similar to NRS 453.301 (8)

Significant overlay with chronic nuisance law

Motel, once a haven, now a crime-ridden jungle in downtown Las Vegas



More examples – Rental Proceeds

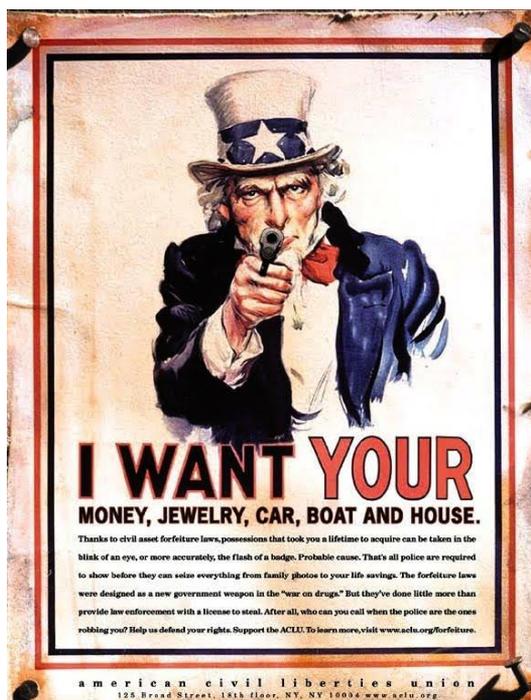
Home or small apartment complex

- ▶ Theory: “facilitate” or “proceeds”
- ▶ Defense: Innocent owner



Large, extended stay suites

- ▶ Defense: Add 8th Amendment



Misconceptions Fuel SB 358

- ▶ Criminal procedure only
- ▶ Criminal conviction absolutely required
- ▶ All money goes to state

- ▶ More or less adopted in NM and NE

Misconceptions Fuel SB 358

- ▶ Compare, Civil Asset Forfeiture Reform Act (CAFRA), [18 U.S.C.S. § 983\(d\)\(1\)](#), (2000)
 - ▶ Introduces innocent owner defense
 - ▶ Shifts burden from claimant to gov't

Misconceptions

1. Forfeitures are not a significant revenue source
 - By statute, money can be used to pay costs; then 70% to school district
 - Remainder in F2015 was \$400K (\$2.0M collected)
 - Metro's overall budget in F2015 was \$1B
2. Forfeitures are not abused
 - No evidence
 - One notorious case is an anomaly (and remedies exist)
3. Forfeitures are effective

CRIME SHOULD NOT PAY

- ▶ Law enforcement tool
- ▶ Overcrowded jails
- ▶ What is the alternative?



Questions?
