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**Criminal Procedure - Civil Forfeiture and Double Jeopardy: State v. Nunez**

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# CRIMINAL PROCEDURE—Civil Forfeiture and Double Jeopardy: *State v. Nunez*

## I. INTRODUCTION

In a unique decision, the New Mexico Supreme Court in *State v. Nunez*<sup>1</sup> held that civil forfeiture under the New Mexico Controlled Substances Act (the Act)<sup>2</sup> is “punishment” within the meaning of the New Mexico Double Jeopardy Clause.<sup>3</sup> The decision precludes the State from prosecuting individuals for criminal charges under the Act and bringing a civil forfeiture complaint in a separate proceeding.<sup>4</sup> After careful application of the three-part “multiple punishment” test articulated in *Schwartz v. Kennedy*,<sup>5</sup> the court determined that the New Mexico Double Jeopardy Clause provides greater protection than the Fifth Amendment of the United States Constitution in the area of multiple punishments. The court’s holding is significant because it rendered New Mexico the first state to deviate from federal jurisprudence regarding double jeopardy with respect to civil forfeiture under the Fifth Amendment, and established, once again, its willingness to depart from federal constitutional analysis where the right asserted is not protected by the U.S. Constitution.<sup>6</sup>

This Note will examine the analysis undertaken by the court in reaching its decision and will discuss the practical implications of the court’s holding. Part II of this Note sets out the factual and procedural background of the case, part III provides background to the issue raised in *Nunez*, and part IV details the rationale of the majority opinion. Finally, part V provides the author’s analysis of the court’s rationale and part VI provides an overview of the implications of the holding.

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1. 129 N.M. 63, 2 P.3d (1999).

2. N.M. STAT. ANN. § 30-31-1 to 41 (1999).

3. N.M. CONST. art. II, § 15 states that “[n]o person shall be compelled to testify against himself in a criminal proceeding, nor shall any person twice be put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.”

4. *Nunez*, 129 N.M. at 92, 2 P.3d at 293.

5. 120 N.M. 619, 904 P.2d 1044 (1995). The “multiple punishment” test requires the court to balance the remedial and punitive purposes underlying the statute in question to determine whether a sanction provided for by the statute is “punishment” under the Double Jeopardy Clause of the New Mexico Constitution. *Id.*

6. The New Mexico Supreme Court has departed from the federal analysis of constitutional issues in several cases, particularly in the area of search and seizure. *See, e.g., State v. Gomez*, 122 N.M. 777, 932 P.2d 1 (1997) (holding N.M. CONST. art. II, § 10 requires a showing of probable cause and exigent circumstances before a warrantless search of an automobile will be justified); *Campos v. State*, 117 N.M. 155, 158-59, 870 P.2d 117, 120-21 (1994) (holding warrantless arrest must be justified by probable cause and exigent circumstances pursuant to N.M. CONST. art. II, § 10); *State v. Attaway*, 117 N.M. 141, 151-52, 870 P.2d 103, 113-14 (1994) (holding N.M. CONST. art. II, § 10 requires police officers to “knock and announce” prior to entering a private dwelling to execute a warrant); *State v. Gutierrez*, 116 N.M. 431, 432, 863 P.2d 1052, 1053 (1993) (holding N.M. CONST. art. II, § 10 prohibits “good-faith” exception); *State v. Cordova*, 109 N.M. 211, 217, 784 P.2d 30, 36 (1989) (rejecting “totality of the circumstances” tests for assessing probable cause and retaining the two-prong *Aguilar-Spinelli* test under N.M. CONST. art. II, § 10).

## II. STATEMENT OF THE CASE

On April 7, 1995, Jesus Diaz Nunez<sup>7</sup> was arrested and, nearly a month later, was charged with possession of marijuana with intent to distribute.<sup>8</sup> Three days after his arrest, however, a complaint for forfeiture was filed to obtain Nunez's vehicle, which was allegedly used by Nunez to transport marijuana.<sup>9</sup> Because he was unable to afford a lawyer, Nunez failed to appear for the forfeiture hearing and as a result of his absence, the court entered a default judgment in May 1995.<sup>10</sup> In August 1995, after obtaining a public defender, Nunez moved the district court to dismiss the criminal charges against him under the Act.<sup>11</sup> Nunez claimed that the Double Jeopardy Clauses of the Federal and New Mexico Constitutions barred the criminal charges because the government had already forfeited his vehicle.<sup>12</sup> The Second Judicial District Court granted the motion to dismiss, concluding that the forfeiture of his vehicle was penal in nature and, therefore, the State could not seek a second punishment against Nunez in a criminal proceeding.<sup>13</sup> The State appealed the trial court's dismissal of the criminal charges. The New Mexico Supreme Court affirmed the dismissal,<sup>14</sup> holding that double jeopardy barred the second action<sup>15</sup> and that all complaints and criminal charges brought pursuant to the Act must be brought in one bifurcated trial.<sup>16</sup>

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7. The case was a consolidation of four separate cases in which the defendant-appellants were charged with possession with intent to distribute illicit substances in violation of New Mexico's Controlled Substances Act. In *State v. Chavez*, police seized over \$3,000 in currency and Chavez's van following his arrest on two separate occasions for possession of marijuana with intent to distribute. Later, the Albuquerque Police Department forfeited more than \$2,000 of the seized cash but returned the van to Chavez pursuant to compromise settlements. In *State v. Gallegos*, the police seized and later forfeited approximately \$300 found in Gallegos' home when he was arrested for possession of cocaine. In *State v. Edward Vasquez* and *State v. Marguerite Vasquez*, law enforcement officers seized and the State later forfeited the Vasquez' car and approximately \$80 following their arrest at a border patrol checkpoint for possession with intent to distribute various illegal substances. In each of the four cases, forfeiture of the defendants' property was followed by criminal charges against them and each of the defendants' motions to dismiss the charges was granted by the district court on double jeopardy grounds.

8. See *Nunez*, 129 N.M. at 69, 2 P.3d at 270.

9. See *id.*

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.*

14. The New Mexico Attorney General's Office originally appealed the district court's dismissal of the criminal proceeding against Nunez in the New Mexico Court of Appeals. The court of appeals joined this case with another pending appeal presenting the same double jeopardy issue. The matter was then briefed before the court of appeals in June 1996. In August 1996, the court of appeals certified the consolidated case to the New Mexico Supreme Court and combined it with six other cases and the Supreme Court granted certiorari soon thereafter. See State's Brief in Chief at 1, *State v. Nunez* (N.M. Ct. App. 1996) (No. 23,796).

15. Although in the present case double jeopardy barred criminal prosecution following a forfeiture action, the court's holding equally bars a civil forfeiture action following a criminal prosecution. See *id.*, 129 N.M. at 92, 2 P.3d at 293.

16. *Nunez*, 129 N.M. at 92, 2 P.3d at 293. A bifurcated trial is a single trial in which separate issues are adjudicated such as a criminal trial in which both guilt and punishment or guilt and sanity are determined. See BLACK'S LAW DICTIONARY 163 (6th ed. 1990). In the context of the *Nunez* case, if the state wishes to pursue both criminal charges and civil forfeiture under the Act, the issues of criminal guilt and civil liability must be determined in one trial.

### III. BACKGROUND

#### A. Civil Forfeiture and the Controlled Substances Act

The New Mexico Controlled Substances Act governs the possession and distribution of illegal narcotics in New Mexico. Like most state statutes related to controlled substances, and the federal Drug Abuse Prevention and Control Act (DAPCA),<sup>17</sup> New Mexico's Controlled Substances Act defines criminal conduct with regard to illegal narcotics and provides for the forfeiture of items such as vehicles, aircraft, and other vessels used to transport or otherwise aid in the transportation of illegal substances.<sup>18</sup> Though the forfeiture law is contained within what is otherwise a criminal statute, actions to forfeit property are governed by the Rules of Civil Procedure for the District Courts of New Mexico.<sup>19</sup> Because forfeiture proceedings were intended to be civil proceedings by the New Mexico Legislature, the state frequently brought criminal charges against defendants in one proceeding, and pursued civil forfeiture of their property in another. It was not until the New Mexico Supreme Court's decision in *Nunez* that a defendant could successfully raise the double jeopardy bar to a second proceeding concerning the same conduct.

In the years preceding *Nunez*, numerous state<sup>20</sup> and federal courts addressed the issue of whether civil forfeiture statutes related to controlled substance laws were "punishment" in the context of double jeopardy. Of those states that considered the issue, however, the overwhelming majority concluded such forfeitures were not "punishment" for double jeopardy purposes.<sup>21</sup>

In 1996, the same year in which the *Nunez* case was originally appealed to the New Mexico Supreme Court, the United States Supreme Court appeared to foreclose the decision reached by the *Nunez* court. In *United States v. Ursery*,<sup>22</sup> a case

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17. 21 U.S.C. §§ 801-971 (1999).

18. See N.M. STAT. ANN. § 30-31-34(A)-(F)(1978). The forfeiture statute under the New Mexico Controlled Substances Act is almost identical to the forfeiture statute found in the Federal Drug Abuse Prevention and Control Act.

19. See N.M. STAT. ANN. § 30-31-35(C)(1978).

20. These states include Alabama, Arkansas, Georgia, Idaho, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia.

21. See *Sims v. State*, 930 S.W. 2d 381, 382-83 (Ark. 1996) (affirming forfeiture of \$8,603 in cash seized from defendant's vehicle following defendant's guilty plea to criminal charges under the Arkansas Uniform Controlled Substances Act and holding "in rem forfeiture is neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause"); *Murphy v. State*, 465 S.E. 2d 907, 908 (Ga. 1996) (upholding criminal prosecution following civil forfeiture of over \$12,000 in currency seized pursuant to Georgia's Controlled Substances Act); *People v. P.S.* 676 N.E. 2d 656, 660 (Ill. 1997) (holding civil forfeiture under the Illinois Forfeiture Act is a remedial civil sanction, which does not bar criminal prosecution following forfeiture of defendant's vehicle); *State v. Predka*, 555 N.W. 2d 202, 213 (Iowa 1996) (upholding forfeiture of defendant's vehicle and \$2,147 in currency and concluding, "Iowa's civil forfeiture statute is neither 'punishment' nor criminal...."); *State v. Fleming*, 726 So. 2d 113, 115 (Miss. 1998) (holding forfeiture of defendant's motor home and \$3,300 in currency pursuant to Mississippi's Uniform Controlled Substances law was civil rather than criminal in nature). But see *State v. Franco*, 594 N.W. 2d 633, 640 (Neb. 1999) (holding prior forfeiture of defendant's pickup and \$2,190 in currency barred subsequent criminal prosecution because Nebraska's forfeiture statute has always been regarded as criminal in nature).

22. 518 U.S. 267 (1996). Guy Ursery was arrested after Michigan Police found marijuana growing outside his home and marijuana seeds and other items used to cultivate marijuana in his home. The government commenced forfeiture proceedings against Ursery's home pursuant to 21 U.S.C. § 881(a)(7), alleging that the house had been

concerning the civil forfeiture provision of DAPCA, the Supreme Court held that civil forfeiture was not "punishment" for double jeopardy purposes under the Fifth Amendment.<sup>23</sup> Although the United States Supreme Court had resolved the issue presented in *Nunez*, the New Mexico Supreme Court relied on the New Mexico Constitution and held that civil forfeiture pursuant to the New Mexico Controlled Substances Act was indeed "punishment" for double jeopardy purposes.<sup>24</sup>

### *B. New Mexico Courts and Constitutional Analysis: The Interstitial Approach*

In determining that the New Mexico Constitution provides a protection against multiple punishments that the Federal Constitution does not, the court employed the interstitial method of constitutional analysis. Utilizing the interstitial approach, states may add to the minimum protections provided by the Federal Constitution.<sup>25</sup> Courts in jurisdictions that apply the interstitial approach first examine the Federal Constitution to assess whether the asserted right is protected. If the court concludes that the government action at issue is invalid under the Federal Constitution according to the interpretations of the federal courts, then the inquiry ends and the analogous provision of the state constitution is not examined.<sup>26</sup> If, however, the court finds that the Federal Constitution does not protect the right asserted, it will engage in an independent analysis of the state constitution. The interstitial method is based on the premise that if the Federal Constitution protects a particular right, the state constitution must also recognize this right, and only in the event that the Federal Constitution does not recognize an asserted right will the court undertake an examination of the state constitution.<sup>27</sup>

Once the court examines the state constitution, it may deviate from the Federal constitutional analysis for three reasons.<sup>28</sup> First, the court may find the federal doctrine flawed: the court may be dissatisfied with either the reasoning or the result under federal analysis of the issue. This dissatisfaction with the federal interpretation is the most common reason that state courts engage in an independent analysis of their own constitutions.<sup>29</sup> Second, structural differences between the state and federal government may make the federal analysis less relevant at the state level. Third, a court may determine that its state possesses unique characteristics that

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used to facilitate the processing and distribution of marijuana. Shortly after, Ursery agreed to settle the forfeiture claim for \$13,250; he was indicted for manufacturing marijuana and was found guilty. *Id.* at 271. The Sixth Circuit Court of Appeals held that Ursery's conviction violated the Double Jeopardy Clause of the Fifth Amendment and reversed the jury's verdict. The government appealed to the U.S. Supreme Court, and the Court reversed the decision by the court of appeals. *Id.* at 272.

23. *See id.* at 292.

24. *See id.* at 287.

25. *See* Jennifer Cutcliffe Juste, Note, *Constitutional Law: The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure: State v. Gomez*, 28 N.M. L. REV. 355, 359 (1998) (discussing the interstitial approach and contrasting the approach to other methods of constitutional analysis employed by state courts and citing John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don't the "Primacy" States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 (1993)).

26. *See id.*

27. *See* Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 209 (1998) (discussing weaknesses of the interstitial method of constitutional analysis).

28. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1359.

29. *See id.* at 1360.

warrant a constitutional doctrine that is different from the federal doctrine. These unique factors may include (1) provisions of the state's constitution that provide rights not found in the Federal Constitution or that define specific rights differently, (2) unique aspects of a state's history used by the court for constitutional interpretation, (3) the existence of independent state law that establishes distinctive constitutional rights, or (4) unique attitudes of the people in a particular state.<sup>30</sup>

#### IV. RATIONALE

The *Nunez* court held that when property, other than contraband, is forfeited in an action separate from criminal prosecution pursuant to the Act, double jeopardy attaches.<sup>31</sup> The court's holding was based on its finding that the civil forfeiture provision of the Act is "punishment" for double jeopardy purposes.<sup>32</sup> The court concluded that civil forfeiture under the Act is "punishment" after it applied the three-prong "multiple punishment" test derived from the 1995 decision, *State ex rel. Schwartz v. Kennedy*.<sup>33</sup> The first and second prongs of the test are relatively simple. Under the first, the court asks whether each of the actions against the defendant constitutes single or separate proceedings.<sup>34</sup> If only one proceeding is involved, double jeopardy concerns do not arise. If more than one proceeding is involved, the court proceeds to the second prong and inquires whether the two actions constitute separate offenses using the *Blockburger*<sup>35</sup> test. If each of the statutory provisions requires proof of a fact that the other does not, then each is a separate offense for double jeopardy purposes.<sup>36</sup> Applying the first two prongs of the *Schwartz* test, the court found that a forfeiture hearing and a criminal action are two separate proceedings under the law of New Mexico<sup>37</sup> and that the defendant's conduct amounted to one offense under *Blockburger*.<sup>38</sup>

Assuming that the first two prongs reveal separate proceedings for a single offense, whether the state action runs afoul of the Double Jeopardy Clause will turn on the court's analysis of the third prong: whether both actions constitute "punishment."<sup>39</sup> Under the third prong, the determination of whether the state action

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30. See *id.* at 1361.

31. See *Nunez*, 129 N.M. at 75, 2 P.3d at 276.

32. The principles of double jeopardy protect against three types of abuse by the government: (1) prosecution for the same offense following an acquittal, (2) prosecution for the same offense following a conviction, and (3) multiple punishment for the same offense. See *United States v. Halper*, 490 U.S. 435, 440 (1989).

33. 120 N.M. 619, 904 P.2d 1044 (1995). In *Schwartz*, the Second Judicial District Attorney petitioned the New Mexico Supreme Court to direct Metropolitan Court Judge Kennedy to withdraw his dismissal of DWI charges against two defendants. The issue was whether criminal prosecution following the revocation of the defendants' driver's licenses pursuant to the Implied Consent Act was barred by double jeopardy. The court concluded that revocation of driver's licenses pursuant to the Implied Consent Act is not "punishment" for double jeopardy purposes.

34. See *id.*

35. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The *Blockburger* test asks whether each statutory provision requires proof of a material fact that the other does not.

36. See *Schwartz*, 120 N.M. at 626, 904 P.2d at 1051.

37. *Nunez*, 129 N.M. at 79, 2 P.3d at 280.

38. See *id.* at 281. The court found that there was no fact necessary to prove the criminal charges under the Act that was not also necessary in order to prove cause for forfeiture, noting that "[t]he forfeiture statute entirely subsumes the criminal offense." *Id.*

39. *Schwartz*, 120 N.M. at 628, 904 P.2d at 1053.

constitutes punishment requires the court to examine the purpose behind the statute in question.<sup>40</sup> Where the court concludes the legislative purpose underlying the action complained of is remedial in nature, the provision is not "punishment." However, where the underlying purpose of the statute is punitive, the provision is "punishment," and the Double Jeopardy Clause is implicated.<sup>41</sup>

#### A. *Balancing of Remedial versus Punitive Purposes*

Based on its findings under the first and second prongs of the *Schwartz* test, the court turned next to the third prong of the test, which required it to weigh the remedial against the punitive purposes underlying the statute.<sup>42</sup> In doing so the court explained that all of the purposes behind the statute must be balanced by examining the statutory scheme that provided the sanction, but further noted that where neither the remedial nor the punitive purposes outweigh the other, the inquiry should take into account whether the sanction impinges on a fundamental right.<sup>43</sup> Thus, the court held, where the sanction effects a mere statutory right, such as the privilege to drive, the proper conclusion would be that the sanction is remedial, and, conversely, where the sanction affects a constitutionally guaranteed right, such as the right to acquire and protect property,<sup>44</sup> a strong presumption that the sanction is punitive will arise.<sup>45</sup>

##### 1. Remedial Purposes

The court considered a number of remedial purposes typically associated with similar forfeiture laws, including government reimbursement, removal of harm, confiscation of harmful property, restitution, and the encouragement of proper management of one's property. Although it found that some of these purposes were encompassed in the Act, the court ultimately held they were outweighed by the punitive nature of the statute.<sup>46</sup>

The first remedial purpose addressed by the court was government reimbursement, or the idea that forfeiture reimburses the government for the expenses associated with its efforts to limit the availability of controlled substances by investigating, prosecuting, and incarcerating those who traffic drugs.<sup>47</sup> In addition, the court observed that forfeiture laws have been defended on the ground that they provide compensation for the societal costs of illegal drug activity, such as providing assistance to victims of drug-related crimes.<sup>48</sup> The court emphasized that forfeiture does not reimburse the government dollar for dollar and expressed doubt that the true cost of illegal drug activity could be ascertained.<sup>49</sup> Thus, the court

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40. See *id.* at 628-29, 904 P.2d at 1053-54.

41. See *id.* at 629, 904 P.2d at 1054.

42. See *Nunez*, 129 N.M. at 80, 2 P.3d at 281.

43. *Id.* at 282, 904 P.2d at 282.

44. Unlike the Federal Constitution, Article II, § 4 of the New Mexico Constitution provides that "[a]ll persons...have certain natural, inherent and inalienable rights, among which are...acquiring, possessing and protecting property...."

45. See *Nunez*, 129 N.M. at 81, 2 P.3d at 282.

46. *Id.*

47. *Id.*

48. See *id.*

49. See *id.*

concluded, this “rough justice”<sup>50</sup> remedy was not a purpose for which New Mexico’s forfeiture provision was created.<sup>51</sup>

The court next addressed the objective of removing harm from society and from the stream of commerce. Rather than punishment of the individual, this objective is one of social betterment by removing harmful substances, confiscating dangerous items, removing nuisances, and impounding illegal goods.<sup>52</sup> Although the court conceded that the removal of harm was one purpose behind the Act, it resolved that “this aspect, by itself, does not render forfeiture a predominately remedial sanction.”<sup>53</sup>

Similarly, the court recognized that the confiscation of harmful property, such as contraband and proceeds of drug trafficking, and property used to facilitate drug trafficking in order to protect society is a remedial goal of civil forfeiture. The court noted that because possession of controlled substances and other contraband is illegal for all citizens, as is property that is procured using the proceeds of illegal activities, forfeiture of these items is not punishment.<sup>54</sup> Nonetheless, the court expressed reservation regarding the remedial nature of the forfeiture of property that is used to facilitate crimes, such as vehicles.<sup>55</sup> Though the court agreed that the removal of harmful property might be beneficial, it did not believe that this remedial purpose, even combined with other remedial qualities, was enough to overcome the punitive nature of New Mexico’s civil forfeiture statute.<sup>56</sup>

The court proceeded to note that while forfeiture proceeds could provide restitution to victims of drug trafficking, nothing in New Mexico’s forfeiture law provided for restitution to such victims.<sup>57</sup> The court believed that the absence of a provision for restitution to specific victims of drug trafficking crimes demonstrates that the legislature had not meant for restitution to be a purpose underlying the Act.

Finally, the court examined the argument that forfeiture encourages property owners to take care of their property and to ensure that it is not used to commit crimes.<sup>58</sup> This rationale is apparent under federal forfeiture law,<sup>59</sup> where even innocent owners may lose their property, regardless of whether they consented to the use of their property or whether they were aware of its use in illegal activities. However, unlike federal law, the innocent owner provisions contained in the New Mexico Controlled Substances Act preclude forfeiture from third parties that were

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50. See *United States v. Halper*, 490 U.S. 435 (1989) (explaining the term, “rough justice” as a “sanction that does not remotely approximate the Government’s damages and actual costs....”).

51. See *Nunez*, 129 N.M. at 81, 2 P.3d at 282.

52. See *id.*

53. See *id.* at 282-83.

54. See *id.* at 283.

55. See *id.*

56. See *id.*

57. See *id.*

58. See *id.* at 302.

59. Despite innocent owner provisions found in federal forfeiture law, the U.S. Supreme Court has upheld the forfeiture of property from owners who had no knowledge of or had not consented to the illegal use of their property by others. See e.g., *Bennis v. Michigan*, 516 U.S. 442, 447 (1996) (forfeiture of innocent wife’s interest in car owned jointly with her husband after husband used the car to engage in illegal activity with a prostitute upheld); see also, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665 (1974) (forfeiture of a yacht from owner who leased it to two individuals who carried aboard a minute amount of marijuana without the owner’s knowledge upheld).



not involved in and had no knowledge of the illegal activity for which their property was used. Thus, according to the court, because the New Mexico Legislature chose to include an innocent owner exception in the civil forfeiture statute, encouraging owners to take care of property and ensure that it is not used in the illegal drug trade was not a purpose underlying the Act.

## 2. Punitive Aspects

Following its discussion of remedial purposes behind the Act, the *Nunez* court turned next to the factors that, in its view, demonstrate the punitive nature of the civil forfeiture provision.

### a. New Mexico Precedent

The court began this analysis by examining New Mexico precedent, which, according to the court, regards civil forfeiture as "quasi-criminal."<sup>60</sup> The court cited several New Mexico cases characterizing civil forfeiture laws as penal in nature as well as those holding that the exclusionary rule applies to forfeiture proceedings where police violate search and seizure provisions of the State and Federal constitutions.<sup>61</sup> Based on this precedent, the court determined that "[f]orfeitures are not favored at law and statutes are to be construed strictly against forfeiture."<sup>62</sup> Moreover, because forfeiture strips the individual of the "fundamental liberty interest" to obtain, possess, and protect property, the court noted it would regard such proceedings with mistrust.<sup>63</sup> Thus, the court reasoned, to conclude that the forfeiture provision was remedial rather than punitive would amount to a departure from a long line of New Mexico precedent that has consistently characterized forfeiture as penal, quasi-criminal, or punitive.<sup>64</sup>

### b. In Rem

The *Nunez* court rejected the suggestion by the United States Supreme Court in *United States v. Ursery*<sup>65</sup> that because civil forfeiture provides the court with *in rem* jurisdiction, it is a remedial sanction.<sup>66</sup> It pointed out that while *in rem* is defined as an action against a "thing" rather than a person, it noted that for practical purposes, this definition is no longer accurate.<sup>67</sup> The *Nunez* court noted the United States Supreme Court's concession that the purpose behind *in rem* proceedings is to dispose of property, or of some *interest* in the property belonging to parties to an action.<sup>68</sup> Thus, "[a]n *in rem* action is directed, not against the property per se, but rather at resolving the interests, claims, titles, and rights in that property."<sup>69</sup>

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60. *Nunez*, 129 N.M. at 83, 2 P.3d at 284.

61. *Id.*

62. *Id.* (quoting *State v. Ozarek*, 91 N.M. 275, 573 P.2d 209 (1978)).

63. *Id.* at 284.

64. *See id.*

65. 518 U.S. 267 (1996).

66. *See Nunez*, 129 N.M. at 83, 2 P.3d at 284.

67. *See id.*

68. *See id.*

69. *Id.* at 285.

Furthermore, the court observed that, despite the Act's innocent owner exceptions, third parties not known to the court, but who have interests in the property to be forfeited, are divested of their interests along with the defendant.<sup>70</sup>

The court also expressed its disapproval of the use of the "guilty property" fiction as a means of characterizing *in rem* jurisdiction as remedial rather than punitive in nature.<sup>71</sup> It explained that the guilty property fiction stems from the use of *in rem* jurisdiction in admiralty law where courts, often unable to obtain jurisdiction over individuals accused of committing maritime offenses, brought *in rem* actions over their vessels instead.<sup>72</sup> In *Ursery*, the Supreme Court relied heavily upon the guilty property fiction in reaching its decision that civil forfeiture does not trigger the protections of the double jeopardy clause under the Fifth Amendment. Because only persons, not property, can be punished, the *Ursery* Court surmised that forfeiture actions could not be included in the realm of punishment. However, the New Mexico Supreme Court criticized the fiction as merely theoretical and less practicable than its own view of *in rem* jurisdiction, which recognizes its impact on the individual.<sup>73</sup> It concluded that forfeiture is indeed punishment, stating,

[I]t must not be forgotten that the *in rem* action is directed, not at the property itself, but at any interest that may exist in the property itself, and that when, as the consequence of a crime, the court divests a defendant, without compensation, of any interest in property - that defendant has been punished. *In rem* was never intended, and should never be interpreted, to abrogate fundamental constitutional rights.<sup>74</sup>

### c. Deterrence

The deterrent purpose of civil forfeiture under the Act was also a factor the *Nunez* court found to be punitive.<sup>75</sup> Because the cost to the individual is, in the court's view, designed to exceed the profit from drug crimes, the deterrent purpose behind civil forfeiture is apparent. Not only are individuals charged with violating the Act deprived of the profit gained from their drug activities, but there is potential for them to lose legally acquired property such as vehicles, aircraft, or other vessels used to facilitate the crime as well.<sup>76</sup>

### d. Reimbursement

The court found no correlation between the value of the property seized under the Act and the cost to the state in the investigation and prosecution of drug related crimes, the harm to innocent victims, or the overall costs to society arising from the trafficking of illegal drugs.<sup>77</sup> Unlike a statute that might attempt to reimburse the

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70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.* at 286.

74. *Id.*

75. *Id.* at 287.

76. *See id.*, at 286-87.

77. *See id.* at 287.

state for costs associated with the prosecution based on average expenditures in prior cases, the court found that the New Mexico Controlled Substances Act does not attempt to justify forfeiture based on the expense borne by the government in prosecuting drug cases. The court noted the value of the property subject to forfeiture is not a consideration during forfeiture proceedings under the Act, and that nothing in the statute requires the value of the property or the proceeds therefrom be applied toward the government's cost in prosecuting the individual from whom the property was forfeited. The court further asserted that the notion of "rough justice" lends additional support to the punitive nature of forfeitures because it admits that the value of the sanction is not related to the expenses incurred by the government in addressing drug-related crimes.<sup>78</sup>

#### e. Commission of Crime

The court characterized the fact that forfeiture under the Act occurs only after the commission of a crime as "the most compelling argument [ ] that civil forfeiture is punitive...."<sup>79</sup> Because the government may only forfeit an individual's property under the Act upon proof that they committed a crime, the *Nunez* court agreed with the Court of Appeals' earlier assertion that the punitive nature of forfeiture provisions is demonstrated by the choice of the legislature to tie the forfeiture to criminal misconduct under the Controlled Substances Act.<sup>80</sup>

#### f. Innocent Owner Provisions

Finally, the court noted that sections 30-31-34(G)(1), (2), and (4) of the Controlled Substances Act provide innocent owner exceptions.<sup>81</sup> Again, the court agreed with the holding of the New Mexico Court of Appeals that the innocent owner provisions confirm the legislature's intent to punish only individuals associated with drug-related crimes under the Act.<sup>82</sup> Noting that no New Mexico case involving illegal drugs has affirmed forfeiture where the owner of the property was not aware of its use by others, the court concluded,

Forfeiture in New Mexico is a sanction that applies only to wrongdoers. "If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the

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78. *See id.*

79. *Id.* at 288.

80. *See id.* (referring to *Albuquerque Police Dep't v. Martinez*, 120 N.M. 408, 412-13, 902 P.2d 563, 567-68 (Ct. App. 1995)).

81. *See id.* Section 30-31-34(G)(1) reads, "no conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of the Controlled Substances Act;" section 30-31-34(G)(2) reads, "no conveyance is subject to forfeiture under this section by reason of any act or omission established for the owner to have been committed or omitted without his knowledge or consent;" section 30-31-34(G)(4) reads, "a forfeiture of a conveyance encumbered by a bona fide security interest shall be subject to the interest of a secured party if the secured party neither had knowledge of nor consented to the act or omission...."

82. *See Nunez*, 129 N.M. at 288, 2 P.3d at 288 (referring to *Albuquerque Police Dep't v. Martinez*, 120 N.M. 408, 902 P.2d 563 (1995)).

assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense."<sup>83</sup>

## V. ANALYSIS

The decision by the *Nunez* court to deviate from federal law, which does not regard civil forfeiture as "punishment" for double jeopardy purposes, was flawed for two reasons. First, the court failed to adequately explain its departure from federal double jeopardy doctrine when it reached a decision that was contrary to the United States Supreme Court's unanimous holding in *Ursery*.<sup>84</sup> Second, even if the court was justified in its departure from federal constitutional analysis, the court was incorrect in concluding that the New Mexico forfeiture provision was more punitive than remedial and, therefore, was "punishment" in the double jeopardy context.

### A. Deviation from the Federal Standard Was Not Warranted

The *Nunez* court suggested that the New Mexico Double Jeopardy Clause is "facially different" and that New Mexico case law had recently rejected the federal double jeopardy standard.<sup>85</sup> Under the interstitial approach to constitutional analysis, a state court may depart from the federal analysis for three reasons including "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."<sup>86</sup> Apparently relying on the third of these justifications, the *Nunez* court cited the "distinct characteristics of New Mexico's double-jeopardy...jurisprudence" as its reason for departing from federal analysis.<sup>87</sup> However, examination of both the New Mexico constitutional and statutory double jeopardy provisions and recent case law reveals little support for this assertion.

The Double Jeopardy Clause of the New Mexico Constitution is found in the New Mexico Bill of Rights and states,

No person shall...be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.<sup>88</sup>

In a similar vein, the Fifth Amendment of the United States Constitution states that "[n]o person shall...be subject for the same offense to be twice put in jeopardy of life or limb...."<sup>89</sup> Because *Nunez* presented the question of whether the defendant's protection against multiple punishments had been violated, the only

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83. *Id.* (quoting *Austin v. United States*, 509 U.S. 602, 617 (1993)).

84. 518 U.S. 267, 298-99 (1996). Justice Stevens dissented only to the extent that the Court upheld the forfeiture of *Ursery*'s home; however, he agreed with the Court that the forfeiture of the proceeds of the illegal acts as well as any instrumentality of the illegal activity was constitutional. Because section 30-31-34 does not allow for the forfeiture of real property, his dissent on this issue is irrelevant.

85. See *Nunez*, 129 N.M. at 87, 2 P.3d at 288.

86. *State v. Gomez*, 122 N.M. 777, 783, 932 P.2d 1, 7 (N.M. 1997).

87. *Id.* at 784, n.3.

88. N.M. CONST. art. II, § 15.

89. U.S. CONST. amend. V, cl. 2.

relevant portion of the New Mexico Constitution was that which reads, "[n]o person shall...be twice put in jeopardy for the same offense...."<sup>90</sup> Excising the remaining portion of the Article, the language of both the Fifth Amendment and Article II, § 15 is, contrary to the court's analysis, very similar.

Again, by statute, the protection against double jeopardy in New Mexico is restated and expanded upon:

No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted.<sup>91</sup>

The court seized upon the non-waiver provision in New Mexico's double jeopardy statute to assert that, because federal law expressly denies a similar interpretation of the Fifth Amendment, New Mexico double jeopardy jurisprudence is distinct.<sup>92</sup> While it is true that the Fifth Amendment does not prohibit waiver of a double jeopardy defense,<sup>93</sup> it is difficult to conceive how the non-waiver provision renders the New Mexico double jeopardy jurisprudence distinct in the context of multiple punishment. To the extent that it relied on this provision of the statute, the court failed to explain how the protection against double jeopardy in New Mexico is "facially different" from its federal counterpart with respect to the protection against multiple punishments for the same offense.

Similarly, the court did not adequately explain how New Mexico case law concerning the protection against multiple punishments had recently departed from the federal analysis.<sup>94</sup> It cited *State v. Breit*<sup>95</sup> for the proposition that New Mexico had departed from federal double jeopardy analysis; however, the double jeopardy protection addressed in *Breit* was that against multiple prosecutions in a wholly different context.<sup>96</sup> Specifically, the *Breit* court held that the New Mexico double jeopardy protection prohibits the retrial of a defendant following a mistrial that was the result of intentional prosecutorial misconduct to provoke a mistrial.<sup>97</sup> This holding was not new to New Mexico but was merely an affirmation of the earlier case, *State v. Day*,<sup>98</sup> which was decided based on the federal analysis of the same

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90. N.M. CONST. art II, § 15.

91. N.M. STAT. ANN. § 30-1-10 (1999).

92. *Nunez*, 129 N.M. 63, 73, 2 P.3d 264, 274.

93. See, e.g., *United States v. Broce*, 488 U.S. 563 (1989) (holding respondents' challenge on double jeopardy grounds foreclosed by their guilty pleas and convictions); See also, *Ricketts v. Adamson*, 483 U.S. 1 (1987) (holding murder prosecution did not violate double jeopardy because respondent breached his plea agreement).

94. See *Nunez*, 129 N.M. at 97, 2 P.3d at 298 (Serna, J., dissenting).

95. 122 N.M. 655, 930 P.2d 792 (N.M. 1996). In an initial trial, Breit was convicted of murdering a man in Alamogordo, New Mexico. Due to extreme prosecutorial misconduct, the trial court granted the defendant's motion for a new trial. When he was again convicted on retrial and sentenced to life in prison, Breit appealed on double jeopardy grounds. *Id.* at 795.

96. See *id.* at 796.

97. See *id.* at 797.

98. 94 N.M. 753, 617 P.2d 142 (N.M. 1980). Day was originally convicted of aggravated burglary and criminal sexual penetration but the New Mexico Court of Appeals granted defendant a new trial due to confusion

issue two years earlier. Thus, it was only because the United States Supreme Court had subsequently retreated from its own holding in the case relied upon by the *Day* court that the court in *Breit* was in disagreement with the federal analysis.

Furthermore, contrary to the *Nunez* court's assertions that the New Mexico double jeopardy clause is "of a different nature"<sup>99</sup> compared to the Fifth Amendment, the New Mexico Supreme Court has consistently held that the State and Federal Constitutions' double jeopardy provisions are, indeed, the same.<sup>100</sup> As recently as 1995, in *Schwartz v. Kennedy*, the court expressly held that the provisions were comparable. Specifically, the court in *Schwartz* stated, "[d]ue to the similarity of the Federal and State Double Jeopardy Clauses, this Court consistently has construed and interpreted the state clause as providing the same protections offered by the federal clause."<sup>101</sup> The court further held that in examining whether one's protection against multiple punishments has been violated, the analysis is *indistinguishable* from that employed under the Fifth Amendment.<sup>102</sup> In *Schwartz*, the court seemed to foreclose the possibility that the protection against multiple punishments was broader under New Mexico jurisprudence than under the Fifth Amendment, stating, "[w]e reserve the question... whether the New Mexico Double Jeopardy Clause, under circumstances *other than the multiple punishment doctrine*, provides greater protection than the federal clause."<sup>103</sup>

The similarity between the New Mexico Double Jeopardy Clause and that of the Fifth Amendment, in addition to the absence of case law holding that the protection against multiple punishment in New Mexico is different from the federal analysis, and the court's own assertion that New Mexico's multiple punishment doctrine does not provide more protection than the Fifth Amendment, does not support the *Nunez* court's decision to depart from the federal doctrine. The court's reasons for rejecting federal analysis in this case seem insufficient to warrant a departure from the Supreme Court's holding in *Ursery*.

### *B. Civil Forfeiture Is Not "Punishment" under the Schwartz Standard*

In its application of the balancing test to determine whether civil forfeiture is "punishment," the court minimized the remedial qualities of civil forfeiture and placed significant emphasis on what it viewed as "decidedly punitive" aspects of the

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regarding his insanity defense, which violated his right to due process. When Day was again convicted of the same offenses in the second trial, he appealed on grounds of prosecutorial misconduct, and his conviction was again reversed. The issue in *Day* was whether double jeopardy barred retrial of the defendant following the reversal of his conviction based on prosecutorial misconduct. *Id.* at 143-44.

99. *Nunez*, 129 N.M. at 73, 2 P.3d at 274.

100. See *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223, 1227 n.3 (1991) ("[W]e find no suggestion in the briefs of counsel nor in the reported New Mexico case law that the New Mexico double jeopardy clause, in the multiple punishment context, provides further protection than that afforded by the federal clause as interpreted by relevant federal case law."); *State v. Day*, 94 N.M. 753, 756, 617 P.2d 142, 145 (N.M. 1980) ("The double jeopardy clause in Article II, Section 15 of the New Mexico Constitution is subject to the same construction and interpretation as its counterpart in the Fifth Amendment to the United States Constitution."); *State v. Rogers*, 90 N.M. 604, 605, 566 P.2d 1142, 1143-44 (1977) ("There is little to distinguish the language of our constitutional prohibition against double jeopardy from that found in the federal constitution.").

101. *Schwartz v. Kennedy*, 120 N.M. 619, 625, 904 P.2d 1044, 1050 (1995).

102. *Id.*

103. *Id.* (emphasis added).

statute. Had it given greater consideration to the remedial purposes underlying the forfeiture of illegal proceeds and instrumentalities of drug crime, it may not have as easily concluded that civil forfeiture under the Act was "punishment" for the purpose of New Mexico's protection against multiple punishments. For example, through civil forfeiture, the costs incurred by the government in drug enforcement are defrayed while the instrumentalities of drug crime are removed from the community. The court's abandonment of the "guilty property" fiction did not undermine these remedial purposes. Moreover, the secondary deterrent effect and the innocent owner exception provided by the statute are not sufficient to render the forfeiture provision more punitive than remedial in nature.

### 1. Civil Forfeiture Reimburses Government

The forfeiture statute serves the remedial purpose of reimbursing the government for at least a portion of its expenditures in the area of illegal drug enforcement. Section 30-31-35(E) of the Act<sup>104</sup> provides for the reimbursement of the government by allowing forfeited property to be used by law enforcement agencies in the enforcement of the Act, or the proceeds from forfeited property to be placed in the general fund of the state, county, or municipality that apprehended the defendant and carried the cost of detecting, apprehending, and prosecuting the defendant.<sup>105</sup> For example, money seized from drug offenders funds the Narcotics Squad of the Albuquerque Police Department by providing undercover vehicles and surveillance equipment.<sup>106</sup> In its assessment of the possibility that seizure and forfeiture of property under the New Mexico Controlled Substances Act reimburses the government for the cost of its efforts to detect, prosecute, and incarcerate drug traffickers, the court noted that "[t]here is no claim that forfeiture reimburses the government dollar for dollar, even if a specific dollar amount could be determined."<sup>107</sup> The fact that a dollar amount cannot be determined does not seem sufficient to dismiss the notion that forfeiture proceedings do indeed reimburse the state and local governments for the high cost of drug detection and prosecution.<sup>108</sup> In fact, in many cases, including the *Nunez* case, it seems unlikely that the government will recover through forfeiture its entire cost in prosecuting the case. Although it is possible that in some cases the government may recover property with a value exceeding the actual cost in apprehending a particular drug offender, it

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104. N.M. STAT. ANN. § 30-31-35(E)(1997) provides, "When property is forfeited under the Controlled Substance Act, the law enforcement agency seizing it shall: (1) sell that which is not required to be destroyed by law. The proceeds shall revert to the general fund of the state, county or municipality as the case may be; (2) take custody of the property for use by law enforcement agencies in the enforcement of the Controlled Substances Act or remove it for disposition in accordance with law; provided that where a motor vehicle has been seized by a municipal police department or a county sheriff's department with [within] its respective jurisdictional boundaries, such department shall institute forfeiture proceedings; or (3) in case of property seized by the state police, forward property, the proceeds from the sale of which are not required to revert to the general fund, to the state police, bureau of narcotics for disposition; provided that motor vehicles seized by the state police may be loaned to the governor's organized crime prevention commission for use in undercover work, the entire cost of operating such vehicles to be borne by the governor's organized crime prevention commission."

105. *See id.*

106. Jeff Jones, *Drug Dealer Property Ruling May Sap APD Coffers*, ALBUQUERQUE J., Feb. 22, 2000, at A1.

107. *Nunez*, 129 N.M. at 81, 2 P.3d at 282.

108. N.M. STAT. ANN. § 30-31-35(E).

seems that this would be an extraordinary occurrence because the statute does not provide for the forfeiture of real property, even if obtained with drug proceeds.<sup>109</sup> Thus, civil forfeiture in New Mexico is limited to less valuable personal property such as vehicles used to transport illegal drugs as well as the fruits of the illegal conduct: profits to which the defendant has no legal right.<sup>110</sup>

In addition, the lack of individual restitution does not support the proposition that forfeiture is punitive, as drug offenses are commonly understood as "victimless" crimes. Rather than cast doubt upon the remedial nature of the statute, the court only underscored the benefit to the community when "forfeited property or the proceeds of their sale revert to the general fund or are used by law enforcement agencies."<sup>111</sup>

## 2. Civil Forfeiture Removes Harmful Instrumentalities from the Community

Perhaps the most troublesome portion of the court's opinion was its view that the removal of instrumentalities of drug crime was not a substantial remedial purpose of civil forfeiture in New Mexico.<sup>112</sup> It is generally accepted that the adverse effect of drug trafficking on the surrounding community and society as a whole is great.<sup>113</sup> Given the significant harm to society brought about by drug trafficking, the purpose underlying the forfeiture of property used to facilitate drug crimes serves a clearly remedial purpose. Without these instrumentalities, the commission of drug trafficking is less likely to occur and the harm to society is lessened. Though forfeiture of the vehicles used in drug trafficking may also have an adverse effect on the owner, under the *Schwartz* test, the inquiry is whether the *purpose* behind the sanction is punitive, and the effect on the defendant is irrelevant.<sup>114</sup>

The court's failure to acknowledge the significance of vehicles and other instrumentalities in drug trafficking was unsound, particularly under the facts of this case. Though not mentioned in the facts by the court, the vehicle seized and later forfeited from Nunez had been specifically altered for the purpose of transporting illegal substances undetected.<sup>115</sup> The marijuana found in Nunez' vehicle was located in a hidden compartment within the gas tank of the car.<sup>116</sup> Just as the revocation of drivers licenses under the Informed Consent Act in *Schwartz* was deemed remedial because it was consistent with the legislative goal of providing the public with safe roadways, by forfeiting Nunez' vehicle, the government removed a harmful instrumentality, in this case a vehicle with the primary function of transporting illegal drugs, from commerce, a legitimate and important legislative goal underlying

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109. See *Nunez*, 129 N.M. at 102, 2 P.3d at 303. (Serna, J., dissenting)

110. It is interesting to note that although the court maintains that "forfeiture [of proceeds] deprives the owner of nothing to which he or she is entitled," under the facts of this case, its holding effectively protected such proceeds. *Id.* at 82, 2 P.3d at 283.

111. *Id.* at 82, 2 P.3d at 283.

112. *Id.* at 81, 2 P.3d at 282.

113. See generally 2000 OFF. NAT'L DRUG CONTROL POL'Y ANN. REP. 7 (citing higher healthcare costs, dangerous neighborhoods, and overcrowded criminal justice systems as costs to society associated with illegal drugs); See also, Michael Tonry and James Q. Wilson, DRUGS AND CRIME 9-57 (1990) (discussing inner-city deterioration resulting from illicit drug use and sales).

114. *Nunez* at 78, 2 P.3d at 279; *Schwartz v. Kennedy*, 120 N.M. 619, 631, 904 P.2d 1044, 1056 (1995).

115. See Brief for Appellant at 2, *State v. Nunez*, 129 N.M. 63, 2 P.3d 264 (N.M. 2000) (No. 23,796).

116. See *id.*



forfeiture pursuant to the Act. The removal of the instrumentalities of drug crime seems, alone, to be sufficient to overcome any punitive aspects of the sanction.

### 3. *In Rem* Nature of Civil Forfeiture Is Not Punitive

The New Mexico Supreme Court criticized the United States Supreme Court's opinion in *Ursery* for its reliance on the fact that civil forfeitures are *in rem* proceedings, or proceedings against things rather than persons, as support for its holding that such forfeitures are not punitive under the Federal Constitution.<sup>117</sup> The fact that the interests of a defendant in property that was illegally used or obtained are dissolved through forfeiture does not necessarily mean, as the court suggested, that the purpose behind the forfeiture was to "punish" the defendant. Furthermore, where the owner of the property is not a wrongdoer, the property is returned to that owner pursuant to the innocent owner provision of the statute, so long as they had no knowledge of and did not consent to the illegal use of the property by another.<sup>118</sup> The innocent owner provision, contrary to the court's opinion, does not suggest that the statute is punitive because it seeks to forfeit property only from wrongdoers. Vehicles and other instrumentalities are forfeited not because they are inherently dangerous, but because they are dangerous in the hands of an individual who uses them to commit drug crimes or those of a third-party owner who allows others to use their property to carry-out crimes.

In a similar fashion, the court's dismissal of the concept of "guilty property" was unnecessary in reaching its decision. The court characterized *in rem* jurisdiction as "rooted in the hoary annals of admiralty law" when courts often could not obtain jurisdiction over those who committed maritime offenses, but could obtain *in rem* jurisdiction over the wrongdoer's ocean vessels."<sup>119</sup> However, a closer examination of the history of the concept of guilty property reveals that the practice of proceeding against property as the wrongdoer has roots far beyond admiralty law, and the purpose of such proceedings was not to "punish" the property in order to punish the wrongdoer but rather to independently punish the property for its own wrongdoing.<sup>120</sup>

Like the New Mexico Supreme Court, many critics of civil forfeiture have characterized it as grounded in a "legal fiction" that inanimate objects could be guilty of crimes.<sup>121</sup> Perhaps the New Mexico Supreme Court was correct in its assertion that principles of *in rem* and guilty property that originally underlay forfeiture statutes are outdated. The idea that only people, not property, can be

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117. *Nunez* at 83, 2 P.3d at 284.

118. See N.M. STAT. ANN. § 30-31-34(G)(2) (1999).

119. *Nunez* at 84, 2 P.3d at 285.

120. For a more in-depth discussion on the history of proceedings against property, see Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 YALE J.L. & HUMAN. 1, 20 (1999).

121. See generally Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 44 (1994) (discussing the history of deodand proceedings against inanimate objects); Marc S. Roy, Comment, *United States Federal Forfeiture Law: Current Status and Implications of Expansion*, 69 MISS. L.J. 373, 377 (1999) (describing concept of *in rem* forfeiture as a "classic embodiment of a legal fiction[ ]" and noting, "what is really on trial in a forfeiture action is the right of the owner of an object to his continued rights of ownership....").

punished and, therefore, actions against property cannot be punishment does seem “anachronistic.” However, the fact that civil forfeiture is, for all practical purposes, directed at the individual with an interest in property, does not render forfeiture decidedly punitive. In fact, the court’s lengthy discussion of *in rem* proceedings as well as its dismissal of the guilty property fiction was unnecessary and of no consequence to the ultimate issue the court sought to resolve: “whether the sanction of forfeiture was intended to be a form of punishment.”<sup>122</sup>

#### 4. Deterrent Effect of Civil Forfeiture Is Not Punitive

The court cited the general deterrent effect that criminal law typically seeks to achieve in support of its contention that civil forfeiture statutes are punitive, noting, “[i]t is universally acknowledged that our forfeiture statutes are meant to deter those who contemplate trafficking in controlled substances.”<sup>123</sup> The court explained that the cost of forfeiture is designed to exceed any profit from crime. While this may be applicable to forfeiture statutes in general, due to the comparatively limited scope of the New Mexico civil forfeiture provision, this argument does not seem to apply in New Mexico. In fact, in one of the cases consolidated under *Nunez*, the State did not forfeit the entire proceeds originally seized by the police and it declined to forfeit the defendant’s vehicle.<sup>124</sup> This does not seem consistent with an underlying purpose of deterrence. If the central purpose of the forfeiture statute was to deter individuals from drug trafficking, it seems that the legislature would have chosen to include real property in the scope of the statute. Instead, however, the legislature chose to limit the scope of civil forfeiture to illegal contraband and cash profits, neither of which an individual has a right to possess, and vehicles used to transport illegal contraband. Of course, the forfeiture of vehicles and other vessels may serve as a deterrent to those contemplating drug trafficking, but merely because the provision has this deterrent effect does not render it punitive.

Under a multiple punishment analysis, the fact that a civil sanction serves a deterrent purpose does not render the provision “punishment” for double jeopardy purposes. The court in *Schwartz* recognized this, stating, “a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.”<sup>125</sup> Not only can the civil forfeiture provision be fairly characterized as remedial, but, even with the minimal deterrent effect, it cannot be characterized as *only* a deterrent or retributive sanction.

#### 5. Innocent Owner Exception Does Not Reveal a Punitive Purpose

That the civil forfeiture provision under the Act provides innocent owner provisions does not seem to support the allegedly punitive nature of the sanction. Here, the court’s logic was confusing. According to the court, because innocent

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122. *Nunez*, 129 N.M. at 77, 2 P.3d at 278.

123. *Id.* at 286.

124. *See id.* at 270.

125. *Schwartz v. Kennedy*, 120 N.M. 619, 629, 904 P.2d 1044, 1054. (quoting *United States v. Halper*, 490 U.S. 435, 449 (1989) (emphasis added)).

owners avoid forfeiture of their property so long as they did not have knowledge of and did not consent to the illegal use of their property, the purpose of the provision is to "punish" the wrongdoer. On the other hand, the fact that innocent owners do not forfeit their property equally supports the remedial goal of removing such property only from individuals for whom it serves to facilitate drug offenses. This is supported by the legislature's inclusion of the words "knowledge" and "consent" under section 30-31-34(G)(2).<sup>126</sup> In the case of the truly innocent owner the targeted property will not be forfeited, however, where a third-party owner fails to show they did not know of or consent to the illegal use of the property, such property remains subject to civil forfeiture. This only bears out the legislature's remedial goal of removing property that is used to facilitate drug crime by removing it from the possession of the defendant, or from a third party who allows the defendant to use it in carrying-out drug crimes. The innocent owner exceptions hardly support the notion that the sole purpose underlying the statute is to punish those who involve themselves in illegal drug activities. Rather than underscore an allegedly punitive purpose, the legislature's decision to include innocent owner provisions is more consistent with a conscious decision to limit the statute to serve only remedial purposes.

## VI. IMPLICATIONS

The *Nunez* decision requires that forfeiture complaints and criminal charges pursuant to the New Mexico Controlled Substances Act be brought in one, bifurcated proceeding in order to avoid violating the protection against double jeopardy.<sup>127</sup> The implications of this decision are far-reaching in several respects. For individuals accused of violating the Act, the holding provides certainty that only one proceeding will be initiated against them. In the event that the State pursues only criminal charges against the defendant, a later proceeding to forfeit the defendant's property will be barred and, likewise, where only a complaint for forfeiture is brought, the defendant may not be subject to criminal charges arising out of the same events.<sup>128</sup> Moreover, where defendants face both criminal charges and a forfeiture complaint, it appears that those defendants who are represented by a public defender will now have the additional benefit of representation by their attorney to defend against forfeiture of their property because both actions will take place in one trial.<sup>129</sup>

The impact on the state is less beneficial. State prosecutors, law enforcement agencies, public defenders, and other defense lawyers, along with the courts, will have to muddle through a host of procedural issues associated with the creation of this new hybrid proceeding that encompasses both criminal and civil matters.<sup>130</sup> For example, the *Nunez* court did not address whether a criminal judge would sit for both the criminal and civil portions of the proceeding, or whether a judge or jury

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126. See Statute cited *supra* note 81.

127. *Id.* at 290.

128. See *id.*

129. See *id.*

130. For additional discussion of these issues, see Bruce Daniels, *Drug Trial May Test 1999 Ruling*, ALBUQUERQUE J., Aug. 7, 2000, at A1.

would decide the civil forfeiture portion of the proceeding.<sup>131</sup> If the jury only hears that portion of the trial concerning criminal charges under the act, while the judge makes a decision regarding the civil forfeiture portion of the trial, what will happen if the jury is unable to decide on the issue of criminal liability? Will the judge have to withhold his/her decision on the forfeiture until a new trial on the criminal charges is complete? This is just one of the many issues that have arisen as a result of the *Nunez* decision.

Perhaps one of the most immediate concerns of prosecutors, responsible for pursuing criminal charges under the Act, and law enforcement agencies, responsible for bringing forfeiture proceedings against seized property, is how to coordinate their efforts in order to avoid the double jeopardy implications of *Nunez*. Pursuant to the Act, a complaint for civil forfeiture must be brought within thirty days of the date the property at issue was seized.<sup>132</sup> However, prosecutors are frequently not able to prepare an adequate criminal case in such a short amount of time, particularly where multiple defendants are involved.<sup>133</sup> Thus, it is common for the law enforcement agency to file the forfeiture complaint and receive a default judgment due to the defendant's failure to respond. Presently, because jeopardy would attach for such judgments, the forfeiting agency has begun to move the court to have the default judgment set aside. The state then moves to have the forfeiture proceeding consolidated with the criminal trial at a later date.<sup>134</sup> This and other types of creative procedural moves by the government will likely continue in order to resolve the tension between the narrow time frames in which a civil complaint must be brought and the need for adequate time to prepare for a criminal trial. Without these moves, district attorneys and law enforcement agencies will have to choose between hastily preparing for a trial in which criminal and civil charges will be presented, or refraining from bringing either forfeiture proceedings or criminal charges altogether.

Unfortunately, many other issues have not yet been resolved, such as whether the case will be transferred to a civil judge in the event that the state chooses to waive prosecution and whether the heightened burden of proof required by the *Nunez* Majority Opinion will apply where civil forfeiture is sought from individuals not charged with criminal offenses under the Act. Additional concerns arise regarding the role of the public defender, who now appears to be obligated to defend criminal

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131. City of Albuquerque's Motion for Rehearing Pursuant to Rule 14-401 of the New Mexico Rules of Appellate Procedure at 3, *State v. Nunez*, 129 N.M. 63, 2 P.3d 264 (2000) (No. 23,796).

Although at the writing of this Note no case has gone to trial involving a *Nunez* bifurcated trial, it appears to have been resolved that such a proceeding will be assigned to a criminal judge, who will hear and make a decision concerning civil forfeiture under the Act, and a jury will hear the evidence regarding criminal charges. Telephone Interview with Mark Drebing, Assistant District Attorney, Second Judicial District Attorney's Office (Nov. 1, 2000). Because there does not appear to be a right to a jury trial in the civil forfeiture proceeding, once the jury has retired to deliberate regarding the criminal charges, the judge will hear any additional evidence concerning the forfeiture, such as the claims of innocent third-party owners, or claims of lien holders on the property at issue. *Id.* The judge would then make a decision on the issue of forfeiture and announce this decision at the same time the jury announces their verdict on the criminal charges. *Id.*

132. See N.M. STAT ANN. § 30-31-35(C).

133. Bruce Daniels, *Judges, Attorneys Grapple with Forfeiture Ruling*, ALBUQUERQUE J., Jan. 11, 2000, at A1.

134. Telephone Interview with Mark Drebing, Assistant District Attorney, Second Judicial District Attorney's Office (Nov. 1, 2000).

defendants in civil matters,<sup>135</sup> contrary to New Mexico law.<sup>136</sup> Finally, *Nunez* leaves open the possibility that other statutes with forfeiture provisions, such as Albuquerque's DWI forfeiture program, are now subject to attack on double jeopardy grounds.<sup>137</sup>

### CONCLUSION

In *Nunez*, the Supreme Court of New Mexico held that civil forfeiture under the New Mexico Controlled Substances Act was "punishment" for double jeopardy purposes in New Mexico. Based on this holding, the State may no longer bring criminal prosecution and civil forfeiture under the Act based on the same offense in separate proceedings.

In order to avoid conflict with the protection against double jeopardy, the government must, when it seeks to pursue criminal charges and civil forfeiture, bring both actions in a single bifurcated proceeding. The *Nunez* decision sets the state apart from federal jurisprudence in this area as well as that of every other state that has addressed the issue. In addition, the *Nunez* decision presents many procedural challenges for New Mexico's district attorneys and law enforcement agencies, who must now carefully coordinate their efforts to bring criminal charges and actions for civil forfeiture in a single proceeding in which the rules of civil and criminal procedure will govern. The challenges presented by the *Nunez* decision are only beginning to surface and the New Mexico courts' resolution of many of these issues remains to be seen.

LAUREL A. CARRIER

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135. *See id.*

136. N.M. STAT. ANN. § 31-15-10 (B) (2000) (providing that the district public defender will represent any individual otherwise unable to afford an attorney and who is charged with any *crime* carrying a possible sentence of imprisonment).

137. City of Albuquerque's Motion for Rehearing Pursuant to Rule 14-401 of the New Mexico Rules of Appellate Procedure at 6, *Nunez*, (No. 23, 796).