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COMPLYING WITH *NUNEZ*: THE NECESSARY PROCEDURE FOR OBTAINING FORFEITURE OF PROPERTY AND AVOIDING DOUBLE JEOPARDY AFTER *STATE V. ESPARZA*

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I. INTRODUCTION

In May 2000, the New Mexico Supreme Court delivered its opinion in *State v. Nunez*,[1] holding that civil forfeiture under the New Mexico Controlled Substances Act[2] was considered punishment for the purpose of New Mexico's double jeopardy clause.[3] As such, *Nunez* required criminal prosecutions and civil forfeiture actions to proceed in a "single, bifurcated proceeding."[4] While *Nunez* was considered by many to be a radical and unwarranted departure from federal jurisprudence,[5] more important to New Mexico practitioners was the procedural uncertainty left in its aftermath.[6] *State v. Esparza*[7] marks the first case in which the New Mexico appellate courts have attempted to determine precisely what procedure is mandated by the *Nunez* opinion.[8] This Note examines the impact that recent case law and legislation

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1. 2000-NMSC-013, 2 P.3d 264.

2. NMSA 1978, §§ 30-31-1 to 30-31-41 (1997).

3. N.M. CONST. art. II, § 15; *Nunez*, 2000-NMSC-013, ¶ 94, 2 P.3d at 288; *infra* notes 36–55 and accompanying text.

4. *Nunez*, 2000-NMSC-013, ¶ 104, 2 P.3d at 290.

5. *See Nunez*, 2000-NMSC-013, ¶¶ 128–72, 2 P.3d at 294–309 (Serna, J., dissenting) (declaring the majority opinion to be a "radical departure from federal jurisprudence"); Laurel A. Carrier, *Criminal Procedure–Civil Forfeiture and Double Jeopardy:* State v. Nunez, 31 N.M. L. REV. 401, 401 (2001) (characterizing the *Nunez* decision as "unique" and stating that it made New Mexico the "[f]irst state to deviate from federal jurisprudence regarding double jeopardy with respect to civil forfeiture under the Fifth Amendment"); Janice Greger Shipon, *Double Jeopardy–No Legislative Deference: Civil Forfeiture of Drug Related Property Constitutes Double Jeopardy Under the New Mexico Constitution*, 32 RUTGERS L.J. 1358, 1358 (2001) (calling *Nunez* a "controversial decision" and a "drastic departure from federal double jeopardy analysis").

6. *See Nunez*, 2000-NMSC-013, ¶ 105, 2 P.3d at 290 ("We are not unmindful that a single proceeding may pose some logistical or procedural complexities."); *infra* note 99; *see also* Carrier, *supra* note 5, at 418–20 (contemplating the variety of procedural questions that *Nunez* produced).

7. 2003-NMCA-075, 70 P.3d 762.

8. Prior to *Esparza*, the New Mexico Supreme Court revisited the issue of civil forfeiture and double jeopardy in *City of Albuquerque ex rel. Albuquerque Police Department v. One 1984 White Chevy*, 2002-NMSC-014, 46 P.3d 94. However, in *White Chevy*, the court declined to apply *Nunez*, stating that the *Nunez* decision was limited in its application to the Controlled Substances Act. *Id.* ¶ 9, 46 P.3d at 97. Despite this holding, the court's analysis in *White Chevy* followed the reasoning of the *Nunez* court but found the required forfeiture of a person's vehicle, after the owner was caught driving the vehicle with a revoked license due to DUI charges, served a remedial purpose. *Id.* ¶ 18, 46 P.3d at 99. Thus, in *White Chevy* double jeopardy protections were not implicated.

The prosecution of civil forfeiture and criminal charges in a single, bifurcated proceeding, so as to avoid double jeopardy, has also come before the New Mexico Court of Appeals since its decision in *Esparza*. *See* State v. Brown, 2003-NMCA-110, 76 P.3d 1113; State v. Tijerino, 2004-NMCA-039, 87 P.3d 1095. In *Brown*, the court did not address whether the state complied with the constitutional requirements mandated in *Nunez*, holding that the "Defendant failed to include his forfeiture case as part of the record; without the record of the case, this court is unable to review his double jeopardy claim." *Id.* ¶ 23, 76 P.3d at 1120 (citing S. Union Gas Co. v. Taylor, 82 N.M. 670, 672, 486 P.2d 606, 608 (1971)). In *Tijerino*, the New Mexico Court of Appeals barred the City of Albuquerque from pursuing a criminal prosecution after a stipulated order of dismissal of the forfeiture proceeding, resulting in the loss of the Defendant's Ford vehicle, when the two proceedings were not pursued simultaneously. *Id.* ¶¶ 8–13, 87 P.3d at 1097–98. Yet, since the stipulated judgment was entered on August 21, 2001, and the criminal charges were not filed until October 1, 2001, the court of appeals did not address the specific procedure mandated by *Nunez* as the City failed to pursue the charges in a single bifurcated proceeding. *Id.* ¶ 17, 87 P.3d at 1099.

has had on the specific procedures for pursuing civil forfeiture in conjunction with a criminal prosecution. Additionally, this Note suggests that criminal forfeiture is an alternative to civil forfeiture that the New Mexico Supreme Court and New Mexico Legislature may have overlooked.

II. BACKGROUND

Forfeiture actions are "statutorily created sanction[s]"[9] that are intended to keep people who commit crimes from acquiring a profit based upon their wrongdoing.[10] Thus, forfeiture actions are typically used to attain property that was either utilized to facilitate a crime or is considered to be proceeds of a crime.[11] Civil forfeiture actions, in contrast to criminal forfeiture, are classified under in rem jurisdiction and considered to be actions against the property itself and not the property owner.[12]

When dealing with civil forfeiture, double jeopardy may be used as a defense to the subsequent initiation of a criminal prosecution after the conclusion of the forfeiture proceeding, or vice versa.[13] Both the Fifth Amendment of the United States Constitution[14] and article II, section 15 of the New Mexico Constitution[15] protect an individual from being subjected to jeopardy twice for the same offense. The Supreme Court of the United States has interpreted the federal Double Jeopardy Clause as providing three distinct protections: (1) "a second prosecution for the

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9. *Nunez*, 2000-NMSC-013, ¶ 33, 129 N.M. at 74. While civil forfeiture was originally a part of English common law, modern forfeitures in the United States are solely statutory actions. *See* Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241 (1994) ("[I]n this country property may only be forfeited if its forfeiture is specifically authorized by statute."). Under English common law, three types of forfeiture existed. The first, called deodand, required the forfeiture of all instrumentalities involved in the death of a person. Therefore, if a person were "killed by a moving cart, the cart and its horses were [forfeited]...." *Id.* However, in 1846, England abolished this form of forfeiture. The second type, forfeiture of the estate, required the automatic forfeiture of a defendant's estate upon conviction of a felony or treason. While automatic forfeiture was initially used in colonial America, the First Congress did away with the automatic forfeiture of estate. What remained was statutory forfeiture, which serves as the basis for modern civil forfeiture laws in the United States. *Id.* Criminal forfeiture actions are also statutory in nature; however, criminal forfeiture does not possess the same historical recognition by the Supreme Court of the United States as does civil forfeiture. Forfeiture of the estate was the English common law antecedent to modern criminal forfeiture. Leach & Malcolm, *supra* at 247 n.25 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974)). After being abolished by the First Congress, criminal forfeiture was not again recognized until 1970. United States v. Bajakajian, 524 U.S. 321, 332 n.7 (1998). Since 1970, Congress has enacted criminal forfeiture statutes in a variety of different areas to provide an additional deterrence to incarceration. *See supra* Leach & Malcolm, at 249–53. For examples of criminal forfeiture statutes, see Racketeer Influenced and Corrupt Organization Activities, 18 U.S.C. §§ 1961–1968 (1970, as amended in 1992), and Crime Control Act, 21 U.S.C. § 881 (1988).

10. *Nunez*, 2000-NMSC-013, ¶¶ 33, 34, 129 N.M. at 74.

11. *See* Leach & Malcolm, *supra* note 9, at 243, 246.

12. *Compare* United States v. Ursery, 518 U.S. 267 (1996) (holding that civil forfeiture did not constitute punishment because of the in rem nature of the proceeding), *and* Leach & Malcolm, *supra* note 9, at 246–49 (stating that in rem forfeiture actions are "directed against property rather than against individuals"), *with Bajakajian*, 524 U.S. at 332 (stating that, "in personam, criminal forfeitures...have historically been treated as punitive"), *and* Douglas Kim, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 10 CAMPBELL L. REV. 527, 535 (1997) ("Criminal forfeiture is an in personam action. As such, the defendant must be convicted of or plead guilty to violations of certain federal statutes before the government gains title.").

13. *Nunez*, 2000-NMSC-013, ¶ 31, 2 P.3d at 275.

14. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb....").

15. N.M. CONST. art. II, § 15 ("[N]or shall any person be twice put in jeopardy for the same offense....").

same offense after acquittal";[16] (2) "a second prosecution for the same offense after conviction";[17] and (3) "multiple punishments for the same offense."[18] New Mexico similarly interprets the state constitution to provide the same protections.[19]

While the Double Jeopardy Clause prohibits multiple punishments for the same offense, this protection has been limited to *criminal* punishments[20] and is further limited to multiple punishments occurring in *successive* proceedings.[21] Yet, because the multiple punishment protection purportedly only applies to criminal punishment,[22] much of the debate surrounding the prosecution of criminal charges in addition to civil forfeiture actions has been centered on what constitutes punishment for the purposes of double jeopardy.[23] This definition of punishment has been limited in its scope by the "guilty property" fiction. This fiction is based upon the in rem nature of the proceeding and the notion that the proceeding is instituted against the property, and not the property owner.[24] The notion that civil forfeitures are only actions against property, or the "guilty property" fiction, is still adhered to

16. North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794, 803 (1989).

17. *Id.*

18. *Id.*

19. *See* State v. Martinez, 120 N.M. 677, 678, 905 P.2d 715, 718 (1995) (citing Swafford v. State, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991)) (The United States and New Mexico double jeopardy clauses "protect a defendant from a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and from multiple punishments for the same offense.").

20. *See* Helvering v. Mitchell, 303 U.S. 391, 398–99 (1938) ("Unless this sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause...is not applicable."). According to the Supreme Court of the United States in *Hudson v. United States*, 522 U.S. 93 (1997), "the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, 'in common parlance' be described as punishment." *Id.* at 99 (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 549 (1943)). Instead, in determining what constitutes punishment under the Double Jeopardy Clause, the Supreme Court has, in large part, deferred to congressional intent and statutory construction. *See Hudson*, 522 U.S. at 99 (indicating the inquiry for the Court is "whether the legislature, 'in establishing the penalizing mechanism, indicated...a preference of one label or the other'"); *Ursery*, 518 U.S. at 278 (requiring "clearest proof" that a "statutory scheme was so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism") (citing One Assortment of 89 Firearms v. United States, 465 U.S. 354, 365 (1984)).

21. *See* Missouri v. Hunter, 459 U.S. 359, 366 (1983). Generally, neither the United States nor the New Mexico Double Jeopardy Clause prohibits bringing multiple charges against a defendant for the same offense when the charges are brought in a single proceeding. *See* Ohio v. Johnson, 467 U.S. 493, 500 (1984) ("[T]he [Double Jeopardy] Clause does not prohibit the State from prosecuting respondent for...multiple offenses in a single prosecution."); State *ex rel.* Schwartz v. Kennedy, 120 N.M. 619, 626, 904 P.2d 1044, 1051 (1995) (establishing that the first factor in multiple punishment analysis is the determination as to whether or not the proceedings were separate; if they are not separate, then no violation of double jeopardy exists).

22. Despite the distinction made between criminal and civil mechanisms, the multiple punishment protection has been argued to protect against both criminal charges and civil forfeiture actions for the same offense when successively tried. *See, e.g.*, United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994), United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), *rev'd*, 518 U.S. 267 (1996); *Nunez* 2000-NMSC-013, 2 P.3d 264; *cf.* United States v. Halper, 490 U.S. 435 (1989) (holding that a civil penalty constituted a second punishment under double jeopardy); Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (finding a civil tax to be punishment for purposes of double jeopardy).

23. *See, e.g.*, Various Items of Personal Property v. United States, 282 U.S. 577 (1931); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); Hudson v. United States, 522 U.S. 93 (1997); *Ursery*, 518 U.S. 267. For New Mexico cases dealing with punishment and double jeopardy, see, for example, *Nunez*, 2000-NMSC-013, 2 P.3d 264, and *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 904 P.2d 1044 (1995).

24. *See infra* notes 29–33 and accompanying text.

by the Supreme Court of the United States,[25] despite widespread criticism.[26] By contending that in rem actions are against the property and that the individual is not being punished, this fiction allows for both civil forfeiture and criminal charges, based upon a single offense, to be pursued in separate proceedings without implicating the multiple punishment protection of the Double Jeopardy Clause.[27] However, federal law and the law of New Mexico have diverged on this issue.[28]

Historically, the Supreme Court of the United States has relied heavily on the "guilty property" fiction to distinguish civil forfeiture actions and civil penalties from criminal punishment.[29] In *Various Items of Personal Property v. United States*,[30] the Supreme Court relied upon the "guilty property" fiction, and the distinction between in rem and in personam jurisdiction, to determine whether civil forfeiture was punitive, and therefore a violation of the multiple punishment protection of the Double Jeopardy Clause.[31] The Court in *Various Items* held:

> A forfeiture proceeding...is in rem. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.[32]

The general distinction between in rem and in personam jurisdiction has remained a predominant part of the Supreme Court's analysis regarding civil forfeiture actions.[33] While no longer the only inquiry in determining whether civil forfeiture is punitive, this distinction evolved into the *United States v. Ward*[34] test, which

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25. *See Ursery*, 518 U.S. at 270–92.

26. *See id.* (Stevens, J., dissenting) ("We have repeatedly rejected the idea that the nature of the court's jurisdiction has any bearing on the constitutional protections that apply at a proceeding before it."); *Nunez*, 2000-NMSC-013, ¶ 82, 2 P.3d at 285 ("[I]n New Mexico, we have expressly dismissed the guilty property fiction as 'anachronistic' and not reflective of the true nature of an in rem civil forfeiture proceeding.") (citing State v. $2730.00, 111 N.M. 746, 748, 809 P.3d 1274, 1276 (1991)); *see also* Note, *Double Jeopardy Clause—In rem Civil Forfeiture*, 110 HARV. L. REV. 206, 214 (1996) (criticizing ineffectiveness of "guilty property" fiction to justify many civil forfeiture actions).

27. *See infra* Part II.A.

28. *See infra* notes 39–41 and accompanying text.

29. *See, e.g.*, Various Items of Personal Property v. United States, 282 U.S. 577 (1931); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); *see also Ursery*, 518 U.S. at 278 ("Our cases reviewing civil forfeitures under the Double Jeopardy Clause adhere to a remarkably consistent theme....In rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause.").

30. 282 U.S. 577 (1931).

31. *Id.* at 581.

32. *Id.* (citations omitted).

33. *See, e.g.*, *89 Firearms*, 465 U.S. 354; *Ursery*, 518 U.S. 267.

34. 448 U.S. 242 (1980). The *Ward* test, when applied, creates a presumption that civil forfeiture actions are remedial, instead of punitive, and makes this presumption extremely difficult to refute. The test calls for two levels of analysis. The courts first look at the construction of the statute authorizing forfeiture in order to assess whether Congress intended the forfeiture to be a civil or criminal cause of action. *Id.* 248–49 (citing Flemming v. Nestor, 363 U.S. 603, 617–21 (1960)). Under this prong of the *Ward* test, courts may look at a number of factors, including the label Congress places on the sanction, *id.* at 249 (stating that labeling some sanctions as civil and others as criminal is a clear manifestation of congressional intent to treat the action as a remedial measure), and the

currently remains the federal test.[35]

In *State v. Nunez*,[36] the New Mexico Supreme Court chose to extend the protection of the state's jeopardy clause to defendants facing criminal charges and civil forfeiture actions.[37] Thus, the court rejected the federal presumption[38] that civil forfeiture is remedial,[39] deciding instead that civil forfeiture under the New Mexico Controlled Substances Act[40] was punishment for purposes of New Mexico's constitutional protection against double jeopardy.[41] In its divergence from federal jurisprudence, the New Mexico Supreme Court relied upon *State v. Gomez*[42] and the distinctive characteristics that distinguish New Mexico and federal jurisprudence in the area of civil forfeiture.[43] In addition, the New Mexico Supreme Court noted that *United States v. Ursery* marked a "singular reversal of [the United States Supreme Court's] recent double jeopardy jurisprudence"[44] upon which New Mexico courts

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"procedural mechanisms [Congress] established for enforcing forfeiture under the statute." *See 89 Firearms*, 465 U.S. at 363 ("Congress' intent...is most clearly demonstrated by the procedural mechanisms it established...."). Procedural mechanisms appear to be the predominate factor in determining the first prong of the *Ward* test. The Court, in *89 Firearms*, included the nature of the jurisdiction in its analysis of procedural mechanisms stating, "In contrast to the in personam nature of criminal actions, actions in rem have traditionally been viewed as civil proceedings, with jurisdiction dependent upon the seizure of a physical object." *Id.* The reliance of the federal courts on the "guilty property" fiction makes in rem jurisdiction a crucial aspect of determining the penal or remedial nature of civil forfeiture.

For the second prong of the test, the courts determine if the civil forfeiture action is "'so punitive...as to negate' Congress' intention." *Id.* at 365. However, to satisfy the second prong of the test, the Supreme Court held that "'[o]nly the clearest proof' that the purpose and effect of the forfeiture are punitive will suffice." *Id.*

35. *See, e.g., 89 Firearms*, 465 U.S. at 365; *Ursery*, 518 U.S. at 288–90.

36. 2000-NMSC-013, 2 P.3d 264.

37. *Id.*

38. *See supra* note 34.

39. 2000-NMSC-013, ¶ 84, 2 P.3d at 286.

40. NMSA 1978, §§ 30-31-1 to 30-31-41 (1997).

41. 2000-NMSC-013, ¶ 94, 2 P.3d at 288; *see infra* note 138.

42. 1997-NMSC-006, 932 P.2d 1. *Gomez* provides for an interstitial approach when evaluating federal and state constitutional claims. According to interstitialism, if the right asserted is protected by the federal Constitution then the state follows federal jurisprudence. *Id.* ¶ 19, 932 P.2d at 7. However, if the right is not protected by the federal Constitution, then the state court determines if the right is protected by the state constitution. *Id.* Federal precedent is deviated from for three reasons: "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Id.*

43. *Nunez*, 2000-NMSC-013, ¶ 17, 2 P.3d at 272. The New Mexico Supreme Court noted that the State has "a time-honored precedent that has always regarded forfeiture as punitive." *Id.* New Mexico precedent is distinctive because it stands in direct contrast to the historical federal precedent regarding civil forfeiture as non-punitive. *See supra* note 29.

44. *Id.* ¶ 16, 2 P.3d at 272. The recent federal precedent to which the New Mexico Supreme Court refers, and from which *Ursery* deviates, is *United States v. Halper*, 490 U.S. 435 (1989), and *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994). Both *Halper* and *Kurth Ranch* repudiated the *Ward* test. In *Halper*, the government pursued civil penalties following criminal charges that resulted in two years imprisonment and a $5000 fine. 490 U.S. at 437. The United States subsequently filed a civil action based on the False Claims Act, 31 U.S.C. §§ 3729–3731 (1994), potentially subjecting Halper to a statutory penalty of over $130,000, even though the actual loss suffered by the government only amounted to $585. *Halper*, 490 U.S. at 438–39. The U.S. District Court for the Southern District of New York found that the statutory penalty "exceed[ed] what 'could reasonably be regarded as the equivalent of compensation for the Government's loss,'" thus constituting punishment. *Id.* at 439 (quoting Justice Frankfurter's concurrence in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)). The Supreme Court agreed. According to the Court, neither retribution nor deterrence are "legitimate nonpunitive governmental objectives." *Id.* at 448 (Kennedy, J., concurring) (quoting Bell v. Wolfish, 441 U.S. 144, 168 n.20 (1979)). Thus, "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...." *Id.*

In *Kurth Ranch*, the defendants were convicted on criminal charges, were required to forfeit $18,016.83 and a variety of farm equipment, and had a civil tax of $900,000 levied against them by the government. 511 U.S.

had already relied.[45] Thus, to adopt the presumption against double jeopardy protection found in *Ursery*[46] would require the New Mexico Supreme Court to "dismantle a significant body of law."[47]

In analyzing the multiple punishment double jeopardy claims in *Nunez*,[48] the New Mexico Supreme Court relied upon three factors set forth in *State ex. rel. Schwartz v. Kennedy*.[49] Under the *Schwartz* analysis, the court looks at "(1) whether the State subjected the defendant to separate proceedings; (2) whether the conduct...consisted of one offense or two offenses; and (3) whether the penalties in each of the proceedings may be considered 'punishment' for the purposes of the Double Jeopardy Clause."[50]

Nunez focused primarily on the third factor of the *Schwartz* analysis,[51] determining that civil forfeiture under the Controlled Substances Act was punishment for the purposes of double jeopardy.[52] In doing so, the *Nunez* court rejected the federal presumption stating, "In New Mexico, the fact that the Legislature has chosen to

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at 771–73. Again, the Supreme Court of the United States held that "[a] defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding." *Id.* at 773.

45. The primary New Mexico case that relied upon *Halper* and *Kurth Ranch*, prior to *Ursery*, was *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 904 P.2d 1044 (1995). However, *Schwartz* has since been relied upon and cited by a number of New Mexico cases. *See, e.g.*, State v. Borja-Guzman, 1996-NMCA-025, 912 P.2d 277; State v. Gonzales, 1997-NMCA-039, 940 P.2d 185; State v. Powers, 1998-NMCA-133, 967 P.2d 454.

46. Finding that the circuit courts' reliance on *Halper* in civil forfeiture cases was misguided, *Ursery* revived *Ward* as the federal test. *See* 518 U.S. at 287–88. According to the *Ursery* Court, *Halper* was *clearly* limited to civil penalties and did not extend to forfeiture actions. *Id.* In making the distinction between civil penalties and civil forfeiture actions, the Court relied upon the guilty property fiction, once again, stating:

> Since at least *Various Items*, we have distinguished civil penalties such as fines from civil forfeiture proceeding that are in rem. While a "civil action to recover...penaltie[s] [sic], is punitive in character," and much like a criminal prosecution in that "[i]t is the wrongdoer in person who is proceeded against...and punished," in an in rem forfeiture proceeding, "it is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned."

Id. at 283. Thus, the Supreme Court found that the *Ward* test, with its presumption against punishment and double jeopardy protections, *see supra* note 34, applied to civil forfeiture actions. *But see Ward*, 448 U.S. at 249. Although *Ward* has been recognized by the Court as the current test for civil forfeitures, the facts of *Ward* dealt with a civil penalty and not a civil forfeiture action. Thus, despite the "historical distinction" relied upon by the Court in *Ursery*, there is not a particularly clear differentiation between civil forfeiture and civil penalty cases. *Id.* at 249.

47. *Nunez*, 2000-NMSC-013, ¶ 17, 2 P.3d at 272.

48. *Nunez* consisted of the consolidated appeals of five separate defendants who had been subjected to both criminal charges and the civil forfeiture of their property. *Id.* ¶ 1, 2 P.3d at 269. Each of the defendants was charged with violations of the Controlled Substances Act, NMSA 1978, §§ 30-31-1 to 30-31-41 (1997). *Nunez*, ¶ 1, 2 P.3d at 269–70. The defendants challenged the State's ability to pursue criminal prosecution after acquiring the forfeiture of defendants' property. Jesus Nunez, Alex Gallegos, Edward Vasquez, and Marguerite Vasquez each suffered a default judgment in the forfeiture proceeding. *Id.* ¶¶ 3–12, 2 P.3d at 270–71. Nunez was indigent and unable to obtain counsel, and Gallegos discovered that attorneys fees would be more than the value of the forfeited property. David Chavez was able to reach a settlement with the State regarding the civil forfeiture action but also contested the subsequent criminal prosecution. *Id.* ¶¶ 7, 8, 2 P.3d at 270.

49. 120 N.M. 619, 904 P.2d 1044 (1995).

50. *Id.* at 626, 904 P.2d at 1051.

51. *Nunez*, 2000-NMSC-013, ¶¶ 55–60, 2 P.3d at 280–81. The New Mexico Supreme Court determined that the first two prongs of the *Schwartz* test had been satisfied. *Id.* In its analysis of the first prong, the court concluded it was clear that the civil forfeiture and criminal prosecution had been pursued in two separate proceedings. *Id.* ¶ 55, 2 P.3d at 280. As to the second prong, the court found that since the civil forfeiture and criminal charges were based upon a violation of a single statutory provision and required the same evidence for each charge only one offense existed. *Id.* ¶¶ 56, 57, 2 P.3d at 280–81 (applying Blockburger v. United States, 284 U.S. 299, 304 (1932)).

52. 2000-NMSC-013, ¶ 104, 2 P.3d at 290.

label a proceeding 'civil' or 'criminal' is not dispositive of the true nature of that proceeding."[53] The *Nunez* court also rejected the Supreme Court's reliance on the "guilty property" fiction:

> [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 that property, 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.[54]

The court further stated, "Once it is accepted that the purpose of in rem forfeiture is to target, not the property by itself, but a person's interest in that property, it is self-evident that the forfeiture is punishment."[55]

To remedy the constitutional problem presented by the combination of civil forfeiture and criminal actions, the New Mexico Supreme Court required both civil forfeiture and criminal actions be brought together in a "single, bifurcated proceeding."[56] Generally, neither New Mexico nor the federal double jeopardy clause prohibits bringing multiple charges against a defendant for the same offense when the charges are united in a single proceeding.[57] It is only when a defendant is punished for an offense and is later punished again for the same offense that double jeopardy protections against multiple punishments are implicated. Thus, according to the court in *Nunez*, a single proceeding is necessary to "eliminate the potential for double-jeopardy violations."[58]

Soon after the New Mexico Supreme Court rendered its decision in *Nunez*, the state legislature codified the basic requirements the court had established.[59] The Forfeiture Act[60] addressed many of the issues that presented various problems or concerns in *Nunez*.[61] Most importantly, the statute codified the requirement that the forfeiture and criminal charge be brought in a single, bifurcated proceeding and that jurisdiction over the forfeiture proceeding would lie in the same venue as the criminal prosecution.[62] Additionally, the statute provided for representation by a

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53. *Id.* ¶ 46, 2 P.3d at 278.
54. *Id.* ¶ 84, 2 P.3d at 286.
55. *Id.* ¶ 83, 2 P.3d at 286.
56. *Id.* ¶ 104, 2 P.3d at 290.
57. *See supra* note 21.
58. *Nunez*, 2000-NMSC-013, ¶ 104, 2 P.3d at 290 (citing Luis Garcia-Rivera, *Dodging Double Jeopardy: Combined Civil and Criminal Trials*, 26 STETSON L. REV. 373, 375–76 (1996) ("[T]he only feasible way to avoid double jeopardy is to bring both civil and criminal suits in one combined proceeding.")).
59. *See* Forfeiture Act, NMSA 1978, §§ 31-27-1 to 31-27-8 (2002); STATE OF N.M., SENATE FINANCE COMM., FISCAL IMPACT REPORT ON FORFEITURE ACT, S. 45-5, at 1 (2002) ("The [Forfeiture Act] codifies the bifurcated proceeding set forth in *State v. Nunez*."). However, the legislation passed in 2002 was not the New Mexico Legislature's first attempt to address the concerns associated with civil forfeiture. A 1996 proposed forfeiture act included a requirement, similar to that of *Nunez*, mandating that civil forfeiture and criminal charges be presented to the same jury in a single, bifurcated proceeding. However, that provision was struck by the Senate Judiciary Committee, and the entire act was later vetoed by the governor. *See Nunez*, 2000-NMSC-013, ¶ 2, P.3d at 313–14 n.31.
60. NMSA 1978, §§ 31-27-1 to 31-27-8 (2002).
61. *See Nunez*, 2000-NMSC-013, ¶ 104, 2 P.3d at 290 (finding that bringing civil forfeiture and criminal charges together in a single, bifurcated proceeding "will also remedy some of the other factors that bring into question the fairness of modern forfeiture. Most notably, the indigent defendant will have available the assistance of counsel in the forfeiture proceeding....").
62. NMSA 1978, § 31-27-6(C) (2002).

public defender in civil forfeiture proceedings if a public defender had first been made available to the defendant in the criminal prosecution.[63] The Forfeiture Act also altered the burden of proof to one of "clear and convincing evidence"[64] and required the State to show not only that the property is subject to forfeiture[65] but also that the criminal charge resulted in a conviction and the value of the forfeited property is not excessive when compared to the offense.[66] It is in light of these requirements, established in *Nunez* and codified by the Forfeiture Act, that *Esparza* was decided.

III. STATEMENT OF THE CASE

State v. Esparza is three cases that were consolidated for the purpose of appeal.[67] Each defendant was charged with violating the New Mexico Controlled Substances Act.[68] The State, pursuant to the Act, filed both criminal charges and civil forfeiture actions against each defendant.[69] On appeal, each defendant argued that double jeopardy precluded the State from pursuing both the criminal charge and civil forfeiture claim unless the two actions were pursued simultaneously. The court of appeals consolidated these cases to allow for a single determination regarding what circumstances would bar the state from pursuing both actions according to *Nunez*.[70] The New Mexico Court of Appeals held that the procedures employed by the State were sufficient to meet the constitutional requirements established in *Nunez*[71] and found that no New Mexico constitutional double jeopardy violations existed with regard to the defendants.[72]

A. *State v. Esparza*

Defendant Esparza was charged with trafficking in a controlled substance after Hobbs police seized 230 grams of cocaine, in addition to $33,123.[73] The State filed a criminal information against Esparza that contained both the criminal charge and a complaint for civil forfeiture of the seized currency.[74] Esparza pled no contest to the drug trafficking charge.[75] However, when the court indicated that the State would proceed with the civil forfeiture claim, Esparza objected on double jeopardy

63. NMSA 1978, § 31-27-6(C)(3) (2002); *see also Nunez*, 2000-NMSC-013, ¶ 104, 2 P.3d at 290 ("[T]he indigent defendant will have available the assistance of counsel in the forfeiture proceeding because both the property and the criminal actions will take place in a single trial.").

64. NMSA 1978, § 31-27-6(E) (2002).

65. The phrase "subject to forfeiture" typically refers to property that is connected to illegal activity, usually requiring that the property be an instrumentality or proceed of a crime.

66. NMSA 1978, § 31-27-6(E)(3) (2002). Specifically, the Forfeiture Act requires that the value of the forfeited property not "unreasonably exceed: (a) the pecuniary gain derived or sought to be derived from the crime; (b) the pecuniary loss caused or sought to be caused by the crime; or (c) the value of the convicted owner's interest in the property." *Id.*

67. 2003-NMCA-075, ¶ 1, 70 P.3d at 764.

68. NMSA 1978, §§ 30-31-1 to 30-31-41 (1997); *Esparza*, 2003-NMCA-075, ¶ 1, 70 P.3d at 764.

69. *Esparza*, 2003-NMCA-075, ¶ 1, 70 P.3d at 764.

70. *Id.*

71. *Id.* ¶¶ 24–34, 70 P.3d at 768–70; *see supra* Part II.B.

72. *Esparza*, 2003-NMCA-075, ¶ 1, 70 P.3d at 764.

73. *Id.* ¶ 3, 70 P.3d at 764.

74. *Id.* ¶ 3, 70 P.3d at 764–65.

75. *Id.* ¶ 3, 70 P.3d at 765.

grounds arguing that the acceptance of the plea barred the State from seeking forfeiture.[76] The district court concluded that the State had brought the criminal charge and forfeiture action in a "'single, bifurcated proceeding' as required by *Nunez*";[77] consequently, the civil action proceeded and Esparza was ordered to forfeit the seized currency.[78]

B. State v. Booth

Defendant Booth was charged and indicted with possession of marijuana and intent to distribute.[79] The State filed a motion for forfeiture of Booth's vehicle three days after the indictment.[80] The forfeiture action was filed under the same cause number as the criminal charge and assigned to the same judge as the criminal prosecution.[81] A default judgment was later entered in favor of the State on the forfeiture charge.[82] Following the default judgment, Booth made a motion to dismiss the criminal charge on double jeopardy grounds arguing that the forfeiture judgment precluded the State from subsequently proceeding with the criminal charge.[83] The district court denied the motion, suggesting instead that Booth move to have the default judgment set aside.[84] Booth declined to challenge the default judgment for forfeiture, choosing instead to preserve his double jeopardy claim for appeal.[85] Booth pled guilty to the criminal charge against him and was convicted.[86]

C. State v. Reed

The State charged Defendant Reed with possession of marijuana and intent to distribute,[87] and a month later the Department of Public Safety (DPS) filed a complaint requesting forfeiture of Reed's vehicle and $2955.94 seized during his arrest.[88] The forfeiture claim was filed in the district court for Santa Fe County,[89] and the criminal information was filed later the same month in the district court for Chaves County by the local district attorney.[90] The special assistant attorney general for DPS filed a motion to consolidate the civil forfeiture claim and the criminal charge in order to comply with the procedural requirements established in *Nunez*. The Santa Fe County district court granted the motion and the forfeiture claim was redirected to Chaves County.[91]

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76. *Id.*
77. *Id.* ¶ 4, 70 P.3d at 765 (quoting *Nunez*, 2000-NMSC-013, ¶ 104, 2 P.3d at 290).
78. *Id.*
79. *Id.* ¶ 6, 70 P.3d at 765.
80. *Id.*
81. *Id.*
82. *Id.* ¶ 7, 70 P.3d at 765.
83. *Id.* ¶ 8, 70 P.3d at 765.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* ¶ 10, 70 P.3d at 766.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*

Reed's trial was scheduled for July 17, 2001.[92] The special assistant attorney general for DPS did not appear on the day of trial due to a failure to receive notification.[93] Reed offered to enter a plea of guilty if the court would dismiss the civil forfeiture claim on DPS's failure to prosecute.[94] The trial court dismissed the forfeiture claim over the objections of the district attorney, and Reed pled guilty to the criminal charge.[95] DPS immediately appealed the ruling, arguing a failure to receive notice and an opportunity to be heard.[96] DPS also argued that the dismissal should not be affirmed on double jeopardy grounds.[97]

IV. RATIONALE & ANALYSIS

Nunez provided the *Esparza* court with little guidance as to the correct procedural mechanisms necessary to comport with the New Mexico constitutional protection against double jeopardy. The basic holding in *Nunez* provided that civil forfeiture and criminal charges, arising from the same offense, must be pursued in a "single, bifurcated proceeding."[98] While *Nunez* noted the procedural quagmire that this may create,[99] the New Mexico Supreme Court did not specify how prosecutors were to proceed or exactly what procedure the courts were to require. As a result, the New Mexico Court of Appeals in *Esparza* attempted to define a "single, bifurcated proceeding," while looking to the policies underlying double jeopardy in order to determine if the State of New Mexico complied with *Nunez* in its prosecution of defendants Reed, Booth, and Esparza.

A. Single Proceedings

While *Nunez* failed to explicitly define a single proceeding,[100] the opinion did illustrate what procedures would be considered insufficient.[101] *Nunez* cited *State ex*

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92. *Id.* ¶ 11, 70 P.3d at 766.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* ¶ 12, 70 P.3d at 766.
97. *Id.* DPS preemptively raised the double jeopardy claim prior to Defendant Reed. *Id.* Perhaps the reason DPS raised the double jeopardy issue was because New Mexico allows for a double jeopardy claim to be raised, even on appeal, without preservation and does not allow entrance of a guilty plea to waive the right to appeal double jeopardy claims. *Nunez*, 2000-NMCA-013, ¶¶ 97–98, 115, 2 P.3d at 289, 292 (referring to NMSA 1978, § 30-1-10 (1963)). Hence, the double jeopardy issue remained a viable claim that Defendant Reed could have raised at any time.
98. *Id.* ¶ 104, 2 P.3d at 290.
99. *Id.* ¶ 105, 2 P.3d at 290 ("We are not unmindful that a single proceeding may pose some logistical or procedural complexities.") (citing Luis Garcia-Rivera, *Dodging Double Jeopardy: Combined Civil and Criminal Trials*, 26 STETSON L. REV. 373, 398–404 (1996)). The Garcia-Rivera article notes many differences between criminal charges and civil forfeiture actions that may create procedural difficulties including: assignment of "different docket numbers"; "different discovery and procedural rules"; and "different standards of proof." Garcia-Rivera, *supra*, at 399.
100. *Nunez* does cite Garcia-Rivera, *supra* note 99, at 398, which defines a single proceeding as "one action in which all claims are brought before the same trier of fact." However, this article was cited by *Nunez* to illustrate the complexities of combining civil forfeiture actions and criminal prosecutions and not for its definition of a single proceeding. *But see* Stephen H. McClain, *Running the Gauntlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets Under 21 U.S.C. § 881(A)(4), (6) and (7)*, 70 NOTRE DAME L. REV. 941, 963–65 (1995) (arguing that "civil and criminal proceedings are always separate proceedings [because] [t]hey are simply different in nature").
101. 2000-NMSC-013, ¶ 55, 2 P.3d at 280 (rejecting "single, coordinated prosecutions"); *see infra* notes 105–106 and accompanying text.

rel. Schwartz v. Kennedy[102] as an example of *separate* proceedings.[103] According to *Schwartz*, a civil and criminal action, when "tried at different times before different fact finders, and...resolved by separate judgments" are merely "parallel actions" and are considered separate for double jeopardy purposes.[104] The New Mexico Supreme Court explicitly rejected such parallel actions in *Nunez*, holding that any attempt to "[c]ontrive an identity between...two proceedings such as that set forth in *United States v. Millan*, in which the court asserted that the two actions were both part of a 'single, coordinated prosecution,'" would not constitute a single proceeding for purposes of the New Mexico double jeopardy clause.[105] Under *Millan*, a "single, coordinated proceeding" was determined to exist when (1) "warrants for the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit"; (2) "the civil complaint incorporated the criminal indictment"; and (3) the defendants were aware of both the civil and criminal proceedings against them.[106] Unlike the requirements in *Nunez*, *Millan* did not necessitate that both actions be initiated or proceed together in order to avoid double jeopardy implications.[107]

Following the supreme court's lead, the New Mexico Court of Appeals distinguished *Esparza* from *Millan*,[108] determining that, unlike *Millan*, the civil forfeiture and criminal actions had been brought under the same case number and before the same trier of fact.[109] While the *Esparza* court agreed with Defendant Booth's contention that "the mere act of assign[ing]...a docket number is insufficient, of itself, to demonstrate that the penalties were sought in a single, bifurcated proceeding,"[110] the court found that the procedure was adequate because both charges were filed under the same case number, heard by the same judge, and initiated prior to jeopardy attaching.[111]

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102. 120 N.M. 619, 904 P.2d 1044 (1995).

103. *Nunez*, 2000-NMSC-013, ¶¶ 46–54, 2 P.3d at 279–80.

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

105. 2000-NMSC-013, ¶ 55, 2 P.3d at 280 (citation omitted).

106. 2 F.3d 17, 20 (2d Cir. 1993).

107. *Id.* *Millan*'s "single, coordinated proceeding" has received a great deal of criticism, including criticism by federal courts. *See* United States v. $405,089.23, 33 F.3d 1210, 1216 (9th Cir. 1994) ("[T]he position adopted by the Second Circuit [in *Millan*] contradicts...common sense."), *rev'd on other grounds*, *Ursery*, 518 U.S. 267 (1996).

108. *Esparza*, 2003-NMCA-075, ¶¶ 31–33, 70 P.3d at 769–70. The *Esparza* court distinguished the procedure used in the cases against defendants Reed, Booth, and Esparza from the procedure followed in *Millan* to illustrate that the procedure used in the *Esparza* cases was not considered insufficient under *Nunez*. *See supra* notes 100–107 and accompanying text. The court distinguished *Esparza* from *Millan* based upon several factors including the shorter lapse in time between the filing of the criminal prosecution and civil action in *Esparza*, the fact that both proceedings were before the same judge, and because the State made a good faith attempt to comply with the procedural requirements. *Esparza*, 2003-NMCA-075, ¶¶ 31–33, 70 P.3d at 769–70.

109. 2003-NMCA-075, ¶¶ 24–30, 70 P.3d at 768–69.

110. *Id.* ¶ 27, 70 P.3d at 769; Brief-in-Chief for Appellant Booth at 9, *Esparza* (No. 23,118) (citing Village of Deming v. Marquez, 74 N.M. 747, 749, 398 P.2d 266, 267 (1965) (holding that the clerk assigning a criminal case a civil docket number did not change the nature of the case or the court from treating the case as a criminal matter)).

111. *Esparza*, 2003-NMCA-075, ¶ 27, 70 P.3d at 769. The *Esparza* court specifically stated that acceptance of a plea does not signal the attachment of jeopardy, as would the entry of a sentence in a criminal prosecution or a default judgment in a civil forfeiture action. *Id.* ¶¶ 16–17, 70 P.3d at 767. *Nunez* addressed the attachment of jeopardy in both civil and criminal proceedings:

> In a criminal trial, jeopardy attaches at the moment the trier of fact is empowered to make any determination regarding the defendant's innocence or guilt. In a nonjury trial, this means that

The defendants also argued that the timing of each judgment was critical, and that to conclude either the civil forfeiture or criminal prosecution prior to the other proceeding violated the requirements of *Nunez*.[112] According to Defendant Esparza, "The proper procedure envisioned by the [c]ourt in *Nunez* would dictate the [c]ourt to refrain from any acceptance of a plea if the issue of the forfeiture is at question and until it is resolved in order to avoid the clearly stated and defined issues of jeopardy."[113] The basis for this argument is that upon the acceptance of a plea or, in Booth's case, the entrance of a default judgment, jeopardy attaches thereby barring any subsequent proceedings.[114]

Yet, *Esparza* held that, while timing was crucial, it was not the timing of each judgment that was determinative, but the timing involved in the initiation of the two claims.[115] Proper initiation, according to the court, requires that both the civil forfeiture and criminal charge be brought together, or consolidated, prior to the attachment of jeopardy.[116] Once the proceedings are jointly initiated, "[a] decision by a district court to dispose of either the forfeiture claim or the criminal charges prior to the resolution of the entire case will not foreclose the imposition of the remaining penalty."[117] Thus, *Esparza* concluded that *Nunez* only requires the "proper initiation of the dual penalty proceeding,"[118] and, once properly initiated in

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> jeopardy attaches when the court begins to hear at least some evidence on behalf of the state. In a jury trial, jeopardy attaches at the point when a jury is impaneled and sworn to try the case. In the case of a guilty plea or plea of nolo contendere, jeopardy attaches at the time the court accepts the defendant's plea....[J]eopardy attaches in a civil forfeiture proceeding at the time the court enters its final judgment, either at the conclusion of a trial or upon entering a default judgment.

Nunez, 2003-NMSC-013, ¶ 28, 2 P.3d at 274–75 (citations omitted). *But see* State v. Angel, 2002-NMSC-025, 51 P.3d 1155. *Angel* found that the determination made in *Nunez* regarding the attachment of jeopardy in criminal cases was unnecessary. *Id.* ¶ 10, 51 P.3d at 1158. Instead, *Angel* held that "[j]eopardy attaches when the court enters a judgment and imposes a sentence on the guilty plea, not when the plea was accepted." *Id.*

112. Defendants Esparza and Booth argued that the acceptance of a plea or the entrance of a default judgment causes jeopardy to attach, consequently barring any future proceedings. *See* Brief-in-Chief for Appellant Esparza at 7–9, *Esparza* (No. 22,744); Brief-in-Chief for Appellant Booth at 5–10, *Esparza* (No. 23,118). The procedure advocated by both defendants would require that the court time the civil forfeiture and criminal prosecution so that the proceedings conclude simultaneously in a single judgment. *See id.*

Defendant Reed argued that consolidation subsequent to the filing of the criminal prosecution and civil forfeiture claim violated *Nunez*, advocating that the two claims must be "*brought* only in a single bifurcated proceeding." Appellee Reed's Answer Brief at 2, *Esparza*, 2003-NMCA-075 (22,582) (quoting *Nunez*, 2000-NMSC-013, ¶ 104, 2 P.3d at 290) (emphasis added).

113. Brief-in-Chief for Appellant Esparza at 9, *Esparza* (No. 22,744). Similarly, Defendant Booth argued that the criminal charges and forfeiture actions be resolved in "one trial at which all issues of fact are decided and [resulting in] one judgment in which all punishments are given." Brief-in-Chief for Appellant Booth at 8, *Esparza* (No. 23,118); *see also supra* notes 111–112.

114. *Supra* notes 111–112.

115. *Esparza*, 2003-NMCA-075, ¶ 20, 70 P.3d at 767 ("*Nunez* appears to mandate only proper initiation of the dual penalty proceeding, meaning that the criminal charges and the forfeiture proceeding must be merged or consolidated prior to the occurrence of any event that signals the attachment of jeopardy.").

116. *Id.*; *see supra* notes 111–112. Defendant Reed argued that the civil forfeiture and criminal prosecution against him were improperly initiated. However, because the civil forfeiture and the criminal prosecution were consolidated prior to the attachment of jeopardy, the *Esparza* court rejected Reed's argument. 2003-NMCA-075, ¶ 37, 70 P.3d at 770.

117. *Esparza*, 2003-NMCA-075, ¶ 20, 70 P.3d at 767. The court of appeals supported this determination with language taken from *Nunez* stating, "if the civil forfeiture is pursued first, resulting in either a trial or a default judgment, the double-jeopardy defense would arise upon the *subsequent initiation* of a criminal proceeding." 2000-NMSC-013, ¶ 31, 2 P.3d at 275 (emphasis added).

118. *Esparza*, 2003-NMCA-075, ¶ 20, 70 P.3d at 767.

a single proceeding, *Nunez* does not prohibit the prosecution of multiple charges but only the subsequent prosecution of a criminal charge or civil forfeiture action.[119]

The *Esparza* court could have also relied upon the Forfeiture Act[120] to support this conclusion. Under the Act, a criminal conviction is required as an element of proof in establishing that forfeiture is necessary.[121] The statute defines a criminal conviction as existing when "a person has been found guilty of a crime in the trial court whether by plea of guilty or nolo contendere or otherwise."[122] Additionally, both *Nunez* and the Forfeiture Act require that the criminal prosecution and civil forfeiture action be bifurcated and tried separately.[123] By requiring a finding of guilt, either by a plea or verdict, in a bifurcated proceeding,[124] the legislature requires that the criminal proceeding conclude individually, and prior to, the civil forfeiture action.[125] Thus, Defendant Esparza's suggested procedure, requiring the court to refrain from accepting a plea until the forfeiture issue is decided, cannot be accommodated in light of the legislative requirements.[126]

B. Bifurcation

In addition to the requirement of a single proceeding, both *Nunez* and the Forfeiture Act require that the criminal prosecution and the civil forfeiture action be bifurcated and proceed separately.[127] This requirement to bifurcate provided the *Esparza* court with another ground upon which to reject the defendants' timing argument.[128] Specifically, the *Esparza* court found that requiring both the civil forfeiture action and the criminal charge to be tried and concluded simultaneously would fail to comport with the policies underlying bifurcation.[129]

The court noted that requiring the claims to proceed simultaneously would "impermissibly interfere with the inherent ability of district judges to manage their

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119. *Id.* (citing *Nunez*, 2000-NMSC-013, ¶ 31, 2 P.3d at 275).

120. NMSA 1978, §§ 31-27-1 to 31-27-8 (2002).

121. NMSA 1978, § 31-27-6(E)(2) (2002).

122. NMSA 1978, § 31-27-3(A) (2002).

123. *See* NMSA 1978, § 31-27-6(C) (2002); *Nunez*, 2000-NMSC-013, ¶¶ 104–05, 2 P.3d at 290; *see also infra* Part IV.B.

124. *See infra* Part IV.B.

125. The requirement established in *Nunez*, and codified by the Forfeiture Act, that the civil and criminal claims be bifurcated and thus tried separately will not allow for the criminal and civil charges to be concluded simultaneously when paired with the conviction requirement. *See* NMSA 1978, § 31-27-6(C) (2002); *Nunez*, 2000-NMSC-013, ¶¶ 104–05, 2 P.3d at 290.

126. Even if the requirements of the Forfeiture Act could be met by a finding of guilt by judge or jury, without the entrance of a judgment, the trial court could not refrain from the acceptance of a plea, as Defendant Esparza argues. *See* Brief-in-Chief for Appellant Esparza at 7–9, *Esparaza* (No. 22,744). If guilt is not determined based upon findings by the judge or jury, then there must at least be the acceptance of a plea to meet the "conviction" requirement of the Forfeiture Act. *See* NMSA 1978, § 31-27-6(E)(2) (2002).

127. *See supra* note 125; *see also* BLACK'S LAW DICTIONARY 1510 (7th ed. 1999) (defining a bifurcated trial as "[a] trial that is divided into two stages, such as for guilt and punishment or for liability and damages.—Also termed *two-stage trial*.").

128. Defendants' timing argument is discussed in the preceding section. *See supra* notes 112–119 and accompanying text.

129. 2003-NMCA-075, ¶ 21, 70 P.3d at 767–68. According to *Esparza*, the purpose of bifurcation is "the expeditious and economical resolution of cases that involve disparate procedural or substantive issues." *Id.* The court found that requiring the criminal prosecution and civil forfeiture action to proceed simultaneously would not further the policy of preserving judicial resources. *Id.* ¶ 21, 70 P.3d at 768.

dockets."[130] After the requirements set forth in *Nunez*, however, this argument is no longer persuasive. The mandate by *Nunez* of a "single, bifurcated proceeding" and the additional requirements codified by the Forfeiture Act[131] eliminate the discretion trial court judges would otherwise possess to determine how civil forfeiture and criminal proceedings, arising from the same offense, will proceed through the courts. *Nunez* specifically prohibits civil forfeiture and criminal prosecutions arising from the same offense from being brought in separate proceedings, and, yet, by requiring bifurcation, *Nunez* also prohibits the claims from being tried at the same time.[132] In noting that requiring both actions to proceed simultaneously would improperly hinder trial court judges from controlling their own dockets, the *Esparza* court failed to acknowledge that the requirements of *Nunez* and the Forfeiture Act already result in severe limitations upon the discretion of trial court judges.

There are, however, policy reasons associated with bifurcation that provide a stronger foundation for the court's argument. One purpose of bifurcation mentioned by the court of appeals was the ability of the trial court to preserve judicial resources by trying specific issues separately.[133] Bifurcation, when at the discretion of a trial judge,[134] is considered appropriate if the "resolution of [a] particular issue may expedite or end the litigation."[135] Thus, bifurcation is often used when one issue may be dispositive of the case as a whole.[136] One example of bifurcation is the separation of liability and damages in civil actions. Being dispositive, the liability portion of the trial is pursued first, because if no liability is found, a trial on damages becomes unnecessary.[137] Under the New Mexico Forfeiture Act, a criminal conviction is necessary to acquire the forfeiture of property seized for a violation of the Controlled Substances Act.[138] Thus, since a criminal conviction is required as an

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130. *Id.* ¶ 21, 70 P.3d at 768 (citing State v. Ahasteen, 1998-NMCA-158, ¶ 28, 968 P.2d 328).

131. Specifically, the Forfeiture Act requires that (1) the criminal prosecutions and civil forfeiture actions be before the same trier of fact, (2) the claims are bifurcated, and (3) the criminal prosecution proceed prior to the civil forfeiture action. NMSA 1978, § 31-28-6(B)–(E) (2002); *see supra* notes 59–66 and accompanying text.

132. *See Nunez*, 2000-NMSC-013, ¶ 104, 2 P.3d at 290.

133. *Esparza*, 2003-NMCA-075, ¶ 21, 70 P.3d at 768 (citing Bolton v. Bd. of County Comm'rs, 119 N.M. 355, 361, 890 P.2d 808, 814 (N.M. Ct. App. 1994)).

134. Bifurcation is typically a matter of discretion for the trial court judge. *See Bolton*, 119 N.M. at 361, 890 P.2d at 814 ("The decision...to bifurcate the trial...is entrusted to the sound discretion of the [trial] court.") (citing McCrary v. Bill McCarty Constr. Co., 92 N.M. 552, 554, 591 P.2d 683, 685 (N.M. Ct. App. 1979)). However, in New Mexico, the requirement to bifurcate civil forfeiture claims and criminal charges is mandated by *Nunez* and the Forfeiture Act. NMSA 1978, § 31-27-6(C) (2002); *Nunez*, 2000-NMSC-013, ¶¶ 104–05, 2 P.3d at 290.

135. *Bolton*, 119 N.M. at 361, 890 P.2d at 814 (citing Mendenhall v. Vandeventer, 61 N.M. 277, 279, 299 P.2d 457, 458 (1956)).

136. "[I]f one issue at trial may be dispositive, the [judge] has authority to bifurcate the trial and first litigate the possibly dispositive issue." Yadon v. Quinoco Petroleum, Inc., 114 N.M. 808, 812, 845 P.2d 1262, 1266 (1992). For examples of bifurcation used to promote judicial economy by resolving dispositive issues first, see *Martinez v. Kerr-McGee Corp.*, 120 N.M. 118, 898 P.2d 1256 (1995) (separating liability portion of trial from damages), and *Ratzlaff v. Seven Bar Flying Service, Inc.*, 98 N.M. 159, 162, 646 P.2d 586, 589 (1982) (bifurcating trial into two phases: (1) determining validity of a release alleviating employer from all future responsibility and (2) evaluating worker's compensation claim).

137. *See, e.g.*, *Kerr-McGee*, 120 N.M. 118, 898 P.2d 1256.

138. NMSA 1978, § 31-27-6(E). While *Nunez* only deals with the New Mexico Controlled Substances Act, NMSA 1978, §§ 30-31-1 to 30-31-41 (1997), the Forfeiture Act also addresses property seized pursuant to other legislation. *See* NMSA 1978, § 31-27-1 notes (listing other statutes to which the Forfeiture Act applies including Imitation Controlled Substances Act, § 30-31A-10 (2002), and Racketeering Act § 30-42-4 (2002)). However, there is no indication that the Forfeiture Act applies to city ordinances, as seen in *City of Albuquerque ex rel. Albuquerque Police Department v. One 1984 White Chevy*, 2002-NMSC-014, 46 P.3d 94.

element of proof in the forfeiture proceeding, the criminal prosecution, being dispositive, should be tried first in order to preserve judicial resources.[139]

The New Mexico Rules of Civil Procedure provide an additional basis that *Esparza* could have relied upon to refute the defendants' argument that the bifurcated proceeding end in a single judgment.[140] While the rules of civil procedure may envision bifurcated proceedings concluding in a single judgment,[141] a single judgment in a bifurcated proceeding is not mandatory.[142] In fact, New Mexico Rule of Civil Procedure 54(B)(1) provides an exception to entering a single judgment, allowing a trial court judge to enter a judgment in a multiple claim lawsuit that does not resolve all of the existing claims.[143] Absent Rule 54(B)(1), the trier of fact is still permitted to issue multiple judgments in a single proceeding with multiple claims; however, those decisions are not considered final for the purpose of appeal.[144] Rule 54(B)(1) expressly states that these non-final orders may be revised any time prior to the entry of a final judgment.[145]

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139. Although a criminal prosecution and civil forfeiture action will be predicated on much of the same evidence, any waste of judicial resources will be minimized due to the Forfeiture Act's requirement that both parts of the proceeding be presented to the same trier of fact. *See* NMSA 1978 § 31-27-6(C) (2002).

140. When speaking of bifurcation, reliance upon the rules of civil procedure is necessary. Although bifurcation is often used in criminal cases, *see, e.g.*, State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983) (explaining that bifurcation of guilt and sentencing in a capital case is statutorily required), the rules of criminal procedure only provide for severance. *See generally* Rule 5-203(C) NMRA 2004. Within the rules of civil procedure there is a clear distinction intended between severance and bifurcation. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2387 (2d ed. 1987). Once severed, the resulting two proceedings are considered completely independent of one another, while bifurcation is considered to still be one proceeding with two stages or trials. *Id.*

141. *See* Rule 1-042 NMRA 2004; FED. R. CIV. P. 42(b); Wright, *supra* note 140 (stating, "Separate trials [under FRCP 42(b)] usually result in one judgment"). New Mexico Rule 1-042(b) and Federal Rule of Civil Procedure 42(b) are essentially the same in terms of content; hence, reliance upon Federal Rule 42(b) is warranted. Compare Rule 1-042(b) NMRA 2004, stating:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving the right of trial by jury given to any party as a constitutional right.

with FED. R. CIV. P. 42(b), stating:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

142. *See* Rule 1-054(B)(1) NMRA 2004.

> [W]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the judgment adjudicating all the claims.

Id.

143. *Id.*; *see, e.g.*, *Kerr-McGee*, 93 N.M. 9, 595 P.2d 1204 (finding that it was within the trial court's discretion to enter a final judgment in a worker's compensation case regarding an injury occurring in 1977 but leaving for further consideration a claim regarding a 1971 injury).

144. *See* Rule 1-054(B)(1) NMRA 2004.

145. *Id.*

Based upon the New Mexico Rules of Civil Procedure,[146] the court of appeals could have refuted the defendants' contention that the bifurcated proceeding must end in a single judgment on two grounds. First, while a bifurcated proceeding *may* end in a single judgment, the rules of civil procedure include other ways in which a bifurcated proceeding may conclude.[147] Although the defendants argue that *Nunez* requires a bifurcated proceeding ending in a single judgment, nothing in *Nunez* or the rules governing bifurcation mandate such a procedure.[148]

Second, there is also good reason to advocate that each claim, the criminal prosecution and the civil forfeiture, conclude in independent final judgments. Rule 54(B)(1) allows for the revision of any non-final order until the time at which a final judgment is made.[149] However, the Forfeiture Act requires a "conviction" in the criminal prosecution in order to obtain the civil forfeiture of defendant's property.[150] Assuming that the criminal prosecution is first, if the decision in the criminal proceeding were revised, this could bear directly on the outcome of, or even the need for, a civil forfeiture hearing. Thus, to refrain from entering a final judgment in the criminal proceeding could result in a waste of judicial resources and possibly subject defendants to potentially unnecessary legal fees.[151]

C. Policies Underlying Double Jeopardy

Finally, the *Esparza* court held that, while the procedure implemented by the State in its prosecution of defendants Reed, Booth, and Esparza was not perfect, it was sufficient to avoid the state constitutional implications associated with double jeopardy.[152] While *Nunez* found that trying civil forfeiture and criminal prosecutions separately was a violation of double jeopardy,[153] the New Mexico Supreme Court did not expressly state what underlying policy aspects of double jeopardy were being violated. Hence, the *Esparza* court inferred that *Nunez* was concerned primarily with defendants' lack of proper notice, or expectation of finality, and the fact that defendants were being subjected to multiple trials—common policies underlying double jeopardy.[154]

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146. *See supra* notes 141–145 and accompanying text.

147. *See supra* notes 143–145 and accompanying text.

148. The *Esparza* court rejected the defendants' argument for a single judgment on the grounds that it would violate the policies underlying bifurcation; however, the court did not specify those policies. 2003-NMCA-075, ¶ 21, 70 P.3d at 767–68. The argument made above is just one that would be encompassed by the court's general determination.

149. *See supra* notes 143–145 and accompanying text.

150. *See* Forfeiture Act, NMSA 1978, § 31-27-6(E)(2) (2002); *supra* text accompanying notes 66 and 121–122.

151. This argument assumes that the defendant would be paying for legal counsel. Under the Forfeiture Act, indigent defendants that receive state-paid counsel in the criminal proceeding may also receive a public defender in the civil forfeiture proceeding. NMSA 1978, § 31-27-6(C)(3) (2002). Although indigent defendants may not be subjected to the extra cost, the State would still bear the burden of potentially unnecessary legal fees.

152. 2003-NMCA-075, ¶¶ 28, 34, 10 P.3d at 769, 770.

153. 2000-NMSC-013, ¶ 117, 2 P.3d at 293.

154. *Esparza* relied upon the policies commonly understood to "underl[ie] the prohibition against double jeopardy" to determine if the State had complied with the requirements of *Nunez*. 2003-NMCA-075, ¶ 26, 70 P.3d at 769. The policy concerns regarding double jeopardy upon which *Esparza* relied, including finality and the "expense, embarrassment and ordeal of repeated trials," are largely undisputed. *Id.* ¶ 26, 70 P.3d at 769; *see* United States v. Scott, 437 U.S. 82, 87 (1978) ("The origin and history of the Double Jeopardy Clause are hardly a matter

With regard to finality, the *Esparza* court determined that *Nunez* was concerned with defendants being subjected to either a civil forfeiture or criminal prosecution, after which the defendant had the understanding that the punishment stemming from their offense was complete, when it was not.[155] The requirement of a single, bifurcated proceeding serves to protect defendants from the surprise of a second proceeding in the future. By requiring that criminal charges and civil forfeiture be jointly sought, the New Mexico Supreme Court ensured that defendants were on notice to all charges and penalties pending against them, including related forfeiture claims derived from a single offense.

According to *Esparza*, the *Nunez* court also intended to protect defendants from being "subjected to the 'expense, embarrassment and ordeal of repeated trials.'"[156] Prior to *Nunez*, prosecutors were able to take advantage of the lower burden of proof and more lenient evidentiary rules found in civil forfeiture proceedings.[157] Prosecutors could try the criminal charge first and, if unable to get a conviction or plea, try again using a civil forfeiture proceeding with a much lower burden.[158] *Nunez*, and the subsequent Forfeiture Act, attempted to remedy this situation by requiring a higher burden of proof in civil forfeiture cases,[159] shifting from preponderance to clear and convincing evidence,[160] in addition to requiring a criminal conviction as an element of proof in obtaining forfeiture.[161]

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of dispute."). *Scott* described the generally recognized purpose of the prohibition against double jeopardy, by quoting *Green v. United States*:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

355 U.S. 184, 187–88 (1957); *see also* State v. Lujan, 103 N.M. 667, 671–72, 712 P.2d 13, 17–18 (1986) ("The purpose of the double jeopardy prohibition in both the state and federal constitutions is to prevent the government from harassing citizens by subjecting them to multiple suits until a conviction is reached, or from repeatedly subjecting citizens to the expense, embarrassment and ordeal of repeated trials.").

155. *See Esparza*, 2003-NMCA-075, ¶ 26, 70 P.3d at 768.

156. *Id.* ¶ 26, 70 P.3d at 769 (citing State v. Lujan, 103 N.M. 667, 671, 712 P.2d 13, 17 (N.M. Ct. App. 1985)).

157. *Nunez*, 2000-NMSC-013, ¶¶ 108–11, 2 P.3d at 291–92. The *Nunez* court expressed concern with the ease at which prosecutors could obtain the forfeiture of personal property. Specifically, the court noted that forfeiture proceedings begin with a "virtual presumption that the confiscation was proper." *Id.* ¶ 109, 2 P.3d at 291. In addition to the State having a much lower burden of proof, that burden could be met with evidence typically inadmissible in a criminal case. *Id.* The New Mexico Supreme Court also expressed concerns regarding other aspects of the civil nature of forfeiture proceedings, indicating that there are significantly less safeguards found in civil forfeiture proceedings including those "protections that are indispensable in a criminal setting—such as...the right to counsel, presumption of innocence, [and] the right to confront one's accusers." *Id. See generally* Leach & Malcolm, *supra* note 9 (criticizing civil forfeiture and discussing the advantages of criminal forfeiture).

158. *See* United States v. Halper, 490 U.S. 435, 451 n.10 (1989) ("[W]hen the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.").

159. *Nunez*, 2000-NMSC-013, ¶¶ 106–10, 2 P.3d at 290–291 (holding that the State will bear a burden of clear and convincing evidence in place of the typically lower burden of "either probable cause or preponderance of the evidence").

160. NMSA 1978, § 31-27-6(E) (2002); *Nunez*, 2000-NMSC-013, ¶ 110, 2 P.3d at 291.

161. NMSA 1978, § 31-27-6(E) (2002); *Nunez*, 2000-NMSC-013, ¶ 110, 2 P.3d at 291.

The *Esparza* court found that these basic double jeopardy protections were safeguarded through the procedures followed by the State. Each defendant was afforded notice of all of the charges and penalties levied against them, including related civil forfeiture claims, and each defendant was only subjected to a single proceeding and not the cost or inconvenience of multiple trials.[162] However, it was not solely upon the avoidance of double jeopardy implications that the *Esparza* decision rested. Without creating a "good faith" exception per se,[163] *Esparza* suggested that the intent of prosecutors to comply with the *Nunez* requirements would be taken into consideration by the court.[164] The *Esparza* court held that, because prosecutors made a good faith effort to comply with *Nunez*, "[t]he State should [not] be denied its right to a full and fair opportunity to convict those who have violated the law."[165] Thus, the New Mexico Court of Appeals found that no double jeopardy violations existed.

V. IMPLICATIONS

In the aftermath of *Nunez* there was concern regarding the procedural uncertainty that remained.[166] While *Esparza* addressed some of these uncertainties, it did not provide an exact procedure for prosecutors to follow. Hence, the ambiguity that was created by *Nunez* still persists, to some degree, in *Esparza*. Yet, much of the procedural uncertainty that remains is not only warranted, but beneficial. *Esparza*'s failure to provide an exact procedure for prosecutors to follow ensures a sufficient amount of flexibility for prosecutors to cope with a variety of procedural situations.[167]

The *Esparza* court's reliance on the intent of prosecutors to comply with *Nunez*[168] also serves the same purpose by providing procedural flexibility. While there may be some disagreement with the use of a good faith exception when dealing with constitutional protections,[169] *Esparza*'s reliance on the intent of prosecutors only

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162. *Esparza*, 2003-NMCA-075, ¶¶ 26, 28, 70 P.3d at 768–69.

163. *Cf.* United States v. Leon, 468 U.S. 897, 919 (1984). *Leon* established the good faith exception to the exclusionary rule holding:

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

Id. The good faith exception in *Leon* allows for what would otherwise be an infringement of constitutional protections, because law enforcement had a reasonable belief that they had complied with the requirements of a lawful search and seizure. *Id.* at 919–20. In contrast, *Esparza* requires compliance with the constitutional protections of double jeopardy, only factoring in the intent of prosecutors to comply with *Nunez* when procedural nuances are involved. 2003-NMCA-075, ¶¶ 33, 34, 70 P.3d at 770. The assertion that *Esparza* is not extending a good faith exception, per se, to the *Nunez* requirements seems clear when viewed in light of the New Mexico Supreme Court's refusal to adopt *United States v. Leon* and apply a good faith exception to the exclusionary rule in *State v. Gutierrez*. 116 N.M. 431, 447, 863 P.2d 1052, 1066–68 (1993).

164. *See Esparza*, 2003-NMCA-075, ¶¶ 33, 34, 70 P.3d at 770.

165. *Esparza*, 2003-NMCA-075, ¶ 34, 70 P.3d at 770.

166. *See* Carrier *supra* note 5, at 418–20.

167. While *Esparza* has provided prosecutors a certain amount of flexibility, the courts will still review the procedure to make sure the prohibition against double jeopardy remains intact.

168. *Esparza*, 2003-NMCA-075, ¶¶ 33, 34, 70 P.3d at 770.

169. While the *Esparza* decision has not been criticized for its use of intent, other cases have. *See, e.g.*, United States v. McCaslin, 863 F. Supp. 1299, 1305 (W.D. Wash. 1994), *aff'd by* 959 F.2d 786 (9th Cir. 1992) (holding

reinforces the position that the courts will not restrict the State's ability to prosecute due to procedural nuances.[170] There is no indication that the *Esparza* court meant for the State's intent, alone, to be sufficient to protect against double jeopardy; instead, the court only relied on intent *after* it had ensured that the basic protections associated with double jeopardy had been satisfied.[171] With regard to *Nunez* and *Esparza*, it appears that the intention of the courts was to produce a system in which prosecutors are encouraged to establish procedures that incorporate the ideals and protections of double jeopardy, rather than placing the burden on the courts to create a specific procedure to which prosecutors should adhere.[172] Based upon the procedures followed in the prosecution of Esparza, Reed, and Booth, it appears that *Nunez* was successful in accomplishing this goal.

Procedurally, *Esparza* established that, in order to comply with *Nunez*, civil forfeiture and criminal charges must be pursued in a single proceeding,[173] requiring that both claims be initiated together or consolidated prior to the attachment of jeopardy[174] and be heard by the same trier of fact. [175] If properly initiated, the civil forfeiture and criminal charges may proceed and conclude independently. Beyond the general requirements established in *Nunez* and *Esparza*, the process of trying criminal prosecutions and civil forfeitures in a single, bifurcated proceeding would be more efficient if the criminal prosecution, required as an element of forfeiture,[176] was *required* to proceed prior to the civil forfeiture action.[177] However, both case law[178] and legislation[179] could have easily provided further protection and a clearer procedural process by requiring criminal forfeiture in the place of civil forfeiture.

Nunez and the Forfeiture Act altered the face of civil forfeiture in New Mexico in many ways. Most importantly, *Nunez* found that civil forfeiture under the New

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that "a prosecutor's state of mind cannot determine whether a defendant has been placed twice in jeopardy"). The *McCaslin* court expressly refuted any reliance on the intent of prosecutors when determining if civil forfeiture and criminal charges had been pursued in a single proceeding. *Cf.* United States v. Leon, 468 U.S. 897 (1984) (Brennan & Marshall, JJ., dissenting). In *United States v. Leon*, Justices Brennan and Marshall disagreed with the majority's decision to provide a good faith exception to the exclusionary rule, excluding evidence obtained through an illegal search, stating, "Although the self-restraint and care exhibited by the officers in this case is commendable, that alone can never be a sufficient protection for constitutional liberties." *Id.* at 948 (Brennan & Marshall, JJ., dissenting). However, both *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994), and *Millan*, 2 F.3d at 20–21, found no double jeopardy violations because a single, coordinated proceeding existed in which there was no indication that the prosecution acted abusively. *See McCaslin*, 863 F. Supp. at 1305 ("The government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action.").

170. *See Esparza*, 2003-NMCA-075, ¶ 34, 70 P.3d at 770.

171. *Id.*

172. *Cf. Leon*, 468 U.S. at 954 (Brennan & Marshall, JJ., dissenting). *Leon* provides a discussion of systematic deterrence regarding the Fourth Amendment protection against search and seizure. *Id.* The exclusionary rule, according to the dissent in *Leon*, was created not to deter specific police officers, but to create a system in which police officers were trained to acquire a valid warrant and were aware of the consequences for failing to do so. *Id.* In essence, the purpose of the exclusionary rule was to create a system in which the respect for Fourth Amendment ideals was incorporated into the system itself. *Id.*

173. *Esparza*, 2003-NMCA-075, ¶¶ 20, 26–28, 70 P.3d at 767–69.

174. *Id.* ¶ 20, 70 P.3d at 767.

175. *Id.*

176. Forfeiture Act, NMSA 1978, § 31-27-6(E) (2002).

177. *See supra* notes 120–126.

178. *Nunez*, 2000-NMSC-013, 2 P.3d 264; *Esparza*, 2003-NMCA-075, 70 P.3d 762.

179. Forfeiture Act, NMSA 1978, §§ 31-27-1 to 31-27-8 (2002).

Mexico Controlled Substances Act constituted punishment.[180] In light of this finding, the New Mexico Supreme Court and the New Mexico Legislature changed various aspects of civil forfeiture, resulting in a procedure that bears a stronger resemblance to criminal forfeiture.[181]

Civil forfeiture has been distinguished from criminal forfeiture on several different grounds.[182] After *Nunez* and the Forfeiture Act, however, the distinction between civil and criminal forfeiture in New Mexico is no longer clear. One significant distinction is that criminal forfeiture is perceived as in personam jurisdiction, while civil forfeiture is still often classified as a proceeding in rem.[183] Yet, the New Mexico Supreme Court, in *Nunez*, rejected the classification of civil forfeiture as in rem, instead finding that it was the person and not merely the property that was proceeded against.[184]

Another distinction between criminal and civil forfeiture is the burden of proof, including both the requisite level of proof necessary and the party bearing that burden.[185] Following *Nunez* and the Forfeiture Act, the State must now bear the burden in proving that forfeiture is warranted,[186] just as the State would in criminal forfeiture proceedings.[187] Prior to *Nunez*, the State was only required to show a reasonable belief that the property was used in connection with, or was the proceeds of, a crime.[188] The burden then shifted to the defendant to prove that the property should be retained, requiring the defendant to show by a preponderance of the evidence that the property was not subject to forfeiture.[189]

In addition to shifting the burden of proof, *Nunez* also elevated the burden placed on the State in obtaining civil forfeiture from probable cause to clear and convincing evidence.[190] Yet, in criminal forfeiture cases, the government's burden, determined by statute, ranges from a preponderance of the evidence to beyond a reasonable doubt.[191] Thus, the New Mexico Supreme Court created a higher burden of proof for civil forfeiture actions pursued in conjunction with criminal prosecutions than is required in some federal criminal forfeitures.[192] Furthermore, the Forfeiture Act's

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180. *Nunez*, 2000-NMSC-013, ¶ 104, 2 P.3d at 290.

181. *See generally* Kim, *supra* note 12.

182. *Id.* at 535–42 (defining criminal and civil forfeiture); *see generally* Leach & Malcolm, *supra* note 9, at 253–64 (comparing criminal and civil forfeiture).

183. Kim, *supra* note 12, at 535–39; *see supra* note 12 and accompanying text.

184. 2000-NMSC-013, ¶ 104, 2 P.3d at 290; *see supra* text accompanying notes 52–55.

185. *See* Leach & Malcolm, *supra* note 9, at 254–57.

186. NMSA 1978, §31-27-6(E) (2002); *Nunez*, 2000-NMSC-013, ¶ 110, 2 P.3d at 291.

187. *See* Leach & Malcolm, *supra* note 9, at 264.

188. *Nunez*, 2000-NMSC-013, ¶¶ 106–11, 2 P.3d at 290-92; *see also* Leach & Malcolm, *supra* note 9, at 254–57.

189. *Nunez*, 2000-NMSC-013, ¶¶ 106–11, 2 P.3d at 290–92; see *supra* note 65.

190. *Nunez*, 2000-NMSC-013, ¶ 110, 2 P.3d at 291.

191. *See* Kim, *supra* note 12, at 536–38. There has been some debate over what standard of proof the government must bear in criminal forfeiture cases. The general rule is that if the criminal forfeiture is considered part of the substantive offense, then proof beyond a reasonable doubt applies. *Id.* However, if Congress clearly intends the forfeiture to be part of the sentencing, then the burden is lowered to preponderance of the evidence. *Id.* Yet, regardless of whether the criminal forfeiture is part of the substantive offense or merely sentencing, the underlying criminal charge must still be proven beyond a reasonable doubt. *Id.*; *see also* Leach & Malcolm, *supra* note 9, at 264–65 n.102.

192. *See* Kim, *supra* note 12, at 537–38. Reliance on the burden of proof in federal criminal forfeiture statutes is necessary because New Mexico has not yet enacted any criminal forfeiture statutes of its own.

requirement that a criminal conviction be obtained as an element of forfeiture[193] is analogous to the requirement of a plea or finding of guilt necessary to obtain the criminal forfeiture of property.[194]

A transition to criminal forfeiture in New Mexico would also extend protection to defendants against default judgments in civil forfeiture cases.[195] The Forfeiture Act specifies that the respective rules of procedure[196] will apply in each proceeding, thus allowing for default judgments in civil forfeiture actions.[197] Under these circumstances, default judgments allow the State to acquire the forfeiture of property, without requiring the State to prove its case, when such forfeiture is considered to be punishment.[198] Thus, a default judgment allows the forfeiture of property merely upon a defendant's failure to appear.[199] However, by switching to criminal forfeiture, default judgments would no longer be permitted.

Nor would switching to criminal forfeiture, in place of the current civil forfeiture requirements, dramatically displace the procedure set forth in *Nunez* and the Forfeiture Act. As previously mentioned, the combined procedure of *Nunez* and the Forfeiture Act has created a civil forfeiture system that bears a strong resemblance to criminal forfeiture.[200] Hence, the burden of proof, the requirement of a conviction, and the in personam nature of the proceeding would all remain intact.

Conversely, the aspects of the process that would be changed by switching to criminal forfeiture would create a much clearer procedural process. Problems associated with the initiation or consolidation of criminal charges and forfeiture actions prior to the attachment of jeopardy[201] would be eliminated. Also, criminal forfeiture would require that any property the State wants the defendant to forfeit be included in the criminal information.[202]

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193. NMSA 1978, § 31-27-6(E)(2) (2002).

194. Leach & Malcolm, *supra* note 9, at 264–65 ("Before a judge can enter an order of criminal forfeiture, the trier of fact must first convict the defendant....").

195. Nothing in *Esparza* suggests that the court intended to prohibit default judgments. In *Esparza*, Defendant Booth was subjected to a default judgment in the civil forfeiture proceeding against him due to his failure to appear. The court did not treat the entry of a default judgment, in Booth's case, any differently from the acceptance of a plea in Defendant Esparza's case. 2003-NMCA-075, ¶ 27, 70 P.3d at 769.

196. The Forfeiture Act requires that the rules of civil procedure apply in the civil forfeiture hearing, and the rules of criminal procedure apply in the criminal prosecution. NMSA 1978, 31-27-6(C)(2) (2002).

197. NMSA 1978, § 31-27-6(C)(2) (2002).

198. *Nunez*, 2000-NMSC-013, ¶ 102, 2 P.3d at 290 ("It is absurd to claim that a person is not punished by a default forfeiture judgment."). While *Nunez* provided that a default judgment would preclude a subsequent criminal prosecution if the two actions were not part of the same proceeding, the court did not address whether or not default judgments were appropriate in civil forfeiture actions pursued in conjunction with a criminal proceeding, even though the forfeiture constitutes punishment.

199. Rule 1-055(A) NMRA 2004 ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."). In contrast, there is no provision found in the rules of criminal procedure that would allow for punishment without the benefit of an actual hearing.

200. *See supra* notes 180–194 and accompanying text.

201. *See supra* notes 112–119 and accompanying text.

202. *See* Kim, *supra* note 12, at 535–36. While the requirement to list the property to be forfeited in the criminal information would eliminate issues with the attachment of jeopardy and proper initiation under *Nunez*, it is not a considerable change from the procedure presently followed. The State followed essentially the same procedure when filing the criminal charges and civil forfeiture action against Defendant Esparza, naming both the criminal charges and the property to be forfeited in the criminal information. *Esparza*, 2003-NMCA-075, ¶ 3, 70 P.3d at 765.

Under criminal forfeiture, the key alteration would be that the rules of criminal procedure would apply to both the criminal prosecution and the forfeiture action. The application of criminal procedure to all parts of the proceeding would eliminate the need for bifurcating the forfeiture and the criminal prosecution. Yet, the requirement that there be a finding of guilt prior to the forfeiture of property could still be accommodated by a special verdict, indicating a finding of guilt and the connection of the property to the crime.[203] Additionally, the replacement of civil forfeiture with criminal forfeiture would eliminate the judicial inefficiency associated with bifurcated proceedings[204] and would return to trial court judges the discretion to determine how a case will proceed through the court.[205]

VI. CONCLUSION

State v. Esparza marked the first attempt by the New Mexico Court of Appeals to determine the procedure mandated by *Nunez* requirement of a "single, bifurcated proceeding" for civil forfeiture and criminal charges arising from the same offense.[206] While some practitioners may be disappointed that *Esparza* did not establish a specific procedure for the State to follow, the court of appeals was successful in ensuring that the safeguards against double jeopardy established in *Nunez* remained intact.[207] However, the question still remains whether *Nunez* and the Forfeiture Act should have provided additional protections by requiring criminal forfeiture in place of the civil forfeiture process established by case law and legislation. By adopting criminal forfeiture in place of civil forfeiture, New Mexico courts and the New Mexico Legislature could provide a clearer procedural process while ensuring that defendants are adequately protected against double jeopardy violations.[208]

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203. *See* Leach & Malcolm, *supra* note 9, at 264–65.

204. Under civil forfeiture, evidence pertinent to both the civil forfeiture and the criminal prosecution must be repeated in the second stage of the trial and the same trier of fact must be present for both proceedings. As a result, the jury must be held over. For a more in-depth discussion of the advantages of criminal forfeiture, see Leach & Malcolm, *supra* note 9, at 264–85.

205. *See supra* notes 130–132 and accompanying text.

206. *See supra* note 8 and accompanying text.

207. *See supra* notes 166–172 and accompanying text.

208. *See supra* notes 178–205 and accompanying text.