Opinion 08-04

OPINION OF: GARY K. KING Attorney General

July 28, 2008

BY: Andrew S. Montgomery, Assistant Attorney General

TO: The Honorable Floyd D. Haake, Fifth Judicial District Attorney, 102 North Canal Street, Suite 200, Carlsbad, NM 88220-5750

QUESTIONS:

1. May a district attorney pursue a civil damages action pursuant to NMSA 1978, Section 17-2-26 against a person who has already been convicted and sentenced in a criminal prosecution based on the same underlying conduct?

2. May a district attorney use funds appropriated pursuant to NMSA 1978, Section 36-1-8(B) to pay litigation expenses incurred in a civil damages action?

CONCLUSIONS:

1. Yes. A district attorney has the authority and duty to prosecute civil as well as criminal cases in which the state is a party and which arise in his or her district under the game and fish laws. Double jeopardy prohibitions do not inhibit the district attorney from bringing a civil action for damages pursuant to NMSA 1978, Section 17-2-26 against a person previously convicted and sentenced for a criminal offense arising out of the same conduct in violation of the game and fish laws, because the damages authorized by Section 17-2-26 are remedial rather than punitive and serve to compensate the state for the loss of unique public resources.

2. Yes. Civil litigation expenses, like most other expenses incurred by a district attorney, are paid from state funds appropriated in accordance with a budget approved by the Department of Finance and Administration.

FACTS:

The Department of Game and Fish has requested the District Attorney for the Fifth Judicial District to commence a civil action for damages against a person charged with illegally taking a trophy animal. The defendant in the prospective civil action has already pleaded guilty and has been fined for one or more criminal offenses based on the same taking of a trophy animal.

ANALYSIS:

1. Civil Damages Action Based on Same Conduct Underlying a Criminal Prosecution

A. Statutory Overview

The New Mexico Constitution provides that each district attorney "shall perform such duties … as may be prescribed by law." N.M. Const. art. VI, § 24. Among the duties that the legislature has prescribed for district attorneys is that each shall "prosecute and defend for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested." NMSA 1978, § 36-1-18(A)(1) (1909, as amended through 2001). Beyond this general duty, the legislature has more specifically provided in Chapter 17, the game and fish statutes, that each district attorney shall prosecute criminal and civil actions arising under those particular statutes:

> It shall be the duty of each of the district attorneys in this state to prosecute and defend for the state in all courts of the county or counties in their respective districts, all causes, criminal and civil, arising under the provisions of this chapter, in which the state may be a party or interested or concerned.

NMSA 1978, § 17-2-27 (1912).

Among the causes arising under Chapter 17 is a civil action in the name of the state to recover damages for the unlawful taking of a game animal:

> The director of the department of game and fish, or any other officer charged with enforcement of the laws relating to game and fish if so directed by the director, may bring a civil action in the name of the state against any person unlawfully wounding or killing, or unlawfully in possession of, any game quadruped, bird or fish, or part thereof and recover judgment for the following minimum sums as damages for the taking, killing or injuring [of enumerated game animals] ….

NMSA 1978, § 17-2-26(A) (1912, as amended through 2006); *see also id.* § 17-2-26(D) (confirming that judgment shall not be for less than the statutory minimum sums).

Over and above the statutory minimum damages set for the unlawful taking of game animals, Section 17-2-26 directs the State Game Commission to establish sums of damages for the taking of designated trophy animals. *Id*. § 17-2-26(B). Regulations promulgated under Section 17-2-26 assign dollar values to enumerated trophy animals, varying by criteria such as size and number of antler points, which are used to determine civil damages liability. *See* 19.30.11.1 - 19.30.11.10 NMAC. The regulations provide that in case of a dispute regarding the value of a trophy animal, an expert scorer at Safari Club International will score the animal and provide documented findings to the Department of Game and Fish and the defendant. *See* 19.30.11.7(B) NMAC.

Section 17-2-26(C) states explicitly that the damages it authorizes are intended to be compensatory and over and beyond any criminal fines:

> Damages recovered pursuant to this section are intended to compensate the state for the loss of unique public resources and shall not be limited or reduced by the extent of fines assessed pursuant to any criminal statute. The department of game and fish shall not award or issue a license, permit or certificate to a debtor owing damages pursuant to this section until the judgment has been paid in full to the department.

All moneys collected or received under state laws for the protection and propagation of game and fish "shall be paid over to the state treasurer to the credit of the game protection fund, unless otherwise provided by law, and the fund, including all earned income therefrom, shall not be transferred to another fund." NMSA 1978, § 17-1-14(A) (1921, as amended through 2005). Section 17-2-26(D) provides that an "action for damages may be joined with an action for possession, and recovery may be had for the possession as well as the damages."

Statutory provisions apart from Section 17-2-26 impose various criminal penalties for violations of game and fish laws or regulations. In particular, Section 17-2-10 authorizes misdemeanor sentences of imprisonment and fines varying in amount depending on the nature of the violation and the species of game animal involved. *See* NMSA 1978, § 17-2-10 (1931, as amended through 1999). Other provisions authorize forfeiture of firearms, bows and arrows, and motor vehicles used as instrumentalities to commit certain violations of the game and fish laws. *See* NMSA 1978, § 17-2-20.1 (1979, as amended through 2002).

By virtue of Sections 36-1-18 and 17-2-27, a district attorney has the duty, and thus the authority, to prosecute a civil action pursuant to Section 17-2-26 when the Director of the Department of Game and Fish so directs. A district attorney may pursue such an action absent some constitutional restraint on his or her authority.

B. Double Jeopardy Prohibitions

The question arises as to whether a district attorney's authority to bring a civil damages action is limited by reason of the defendant's constitutional right to be free from double jeopardy. Such a limitation, if any, arises because the defendant has already been convicted and sentenced in a criminal prosecution based on the same underlying conduct of illegally taking a trophy animal.

No substantial question arises under the Double Jeopardy Clause in the United States Constitution, which provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This constitutional limitation "protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (1997). When the legislature establishes a remedy or sanction that it intends to be *civil* in nature, no double jeopardy

problem arises absent "the clearest proof" that the statutory scheme is so punitive in form and effect as to transform the purportedly civil remedy into a criminal penalty. *Hudson*, 522 U.S. at 99-100 (citations and internal quotation marks omitted); *United States v. Ursery*, 518 U.S. 267, 277-78, 288-90 (1996) (citations and internal quotation marks omitted).

The damages remedy that the New Mexico legislature has authorized in Section 17-2-26 is expressly to be sought in a "civil action," and expressly to be recovered by a "civil judgment." NMSA 1978, §§ 17-2-26(A), (B). The legislature's intention is expressly "to compensate the state." *Id.* § 17-2-26(C). There is virtually no indication, much less "the clearest proof," that the civil damages remedy is so punitive in form and effect as to transform it into a criminal punishment. *See Hudson*, 522 U.S. at 99-100; *Ursery*, 518 U.S. at 290. There is little doubt, then, that for purposes of the federal Double Jeopardy Clause a damages award under Section 17-2-26 is not a criminal punishment and does not put the defendant in double jeopardy.

One might ordinarily expect the result to be the same under the Double Jeopardy Clause of the New Mexico Constitution, which, in language substantially similar to that of its federal counterpart, provides, "[N]or shall any person be twice put in jeopardy for the same offense." N.M. Const. art. II, § 15; *see State v. Rogers*, 90 N.M. 604, 605-06, 566 P.2d 1142, 1143-44 (1977) ("There is little to distinguish the language of our constitutional prohibition against double jeopardy from that found in the federal constitution. ... Since the two provisions are so similar in nature, we are of the opinion that they should be construed and interpreted in the same manner.").[1]

The matter is complicated, however, by the New Mexico Supreme Court's decision seven years ago in *State v. Nuñez*, 2000-NMSC-013, ¶ 16, 129 N.M. 63, 2 P.3d 264, which explicitly "reject[s] federal doctrine regarding the double-jeopardy implications of civil forfeiture as it is applied under the Controlled Substances Act [NMSA 1978, §§ 30-31-1 to -41 (1972, as amended through 1997)]." *Nuñez* holds that the New Mexico Double Jeopardy Clause, as well as the statutory prohibition against double jeopardy in NMSA 1978, Section 30-1-10 (1963), forbid the state from bringing both criminal charges and civil forfeiture demands under the Controlled Substances Act where the multiple claims are based on the same conduct but pursued in separate proceedings. *See* 2000-NMSC-013, ¶¶ 1, 117.

Under *Nuñez*, the preferred "multiple punishment analysis" for purposes of the New Mexico Double Jeopardy Clause is three-pronged, as follows:

> "Multiple punishment analysis ... entails three factors: (1) whether the State subjected the defendant to separate proceedings; (2) whether the conduct precipitating the separate proceedings 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."

2000-NMSC-013, ¶ 36 (quoting *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 626, 904 P.2d 1044, 1051 (1995)). The New Mexico Supreme Court distinguished its analysis in *Nuñez* – under which "there is no deference to legislative intent" that a penalty be civil rather than criminal – from the United States Supreme Court's analysis in *Ursery* – under which the legislature's intent is conclusive absent "the clearest proof" that a civil penalty is so punitive in form and effect as to render it criminal. *Id.*¶¶ 39-40, 45.

In regard to the third prong of the analysis, the New Mexico Supreme Court announced in *Nuñez* that "determining whether a sanction is remedial or punitive for double-jeopardy purposes requires a balancing of all the purposes behind the sanction." 2000-NMSC-013, ¶ 64. Two subsequent New Mexico decisions have fleshed out this general directive.

In the first decision, the New Mexico Supreme Court ruled that New Mexico's double jeopardy prohibitions did not preclude the City of Albuquerque from commencing civil forfeiture actions pursuant to a city ordinance after completion of separate criminal proceedings, based on the same act of driving while intoxicated. *See City of Albuquerque v. One (1) 1984 White Chevy Ut.*, 2002-NMSC-014, ¶¶ 2, 9, 132 N.M. 187, 46 P.3d 94. The double jeopardy question in *White Chevy* reduced to "whether forfeiture of the motor vehicles should be considered remedial or punitive." *Id.* ¶ 9. The Court instructed that this question should be answered in two steps. *First*, a court should "'evaluat[e] the government's *purpose* in enacting the legislation, rather than evaluating the effect of the sanction on the defendant.'" *Id.* ¶ 11 (quoting *Schwartz*, 120 N.M. at 631, 904 P.2d at 1056) (emphasis added). *Second*, a court should "determine whether the sanction established by the legislation was sufficiently punitive in its *effect* that, on balance, the punitive effects outweigh the remedial effect." *Id.* (emphasis added). The Court cited with approval the United States Supreme Court's *Hudson* decision for its articulation of "the test" for determining whether on balance the effects of a statute are punitive or remedial. *Id.* (citing *Hudson*, 522 U.S. at 99-100). That test posits seven "useful guideposts" (sometimes referred to as the *Mendoza-Martinez* factors) for determining whether the effects of a sanction are so punitive as to outweigh its remedial purpose and effects:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Hudson, 522 U.S. at 99-100 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). The New Mexico Supreme Court in *White Chevy* concluded that (1) the clear purpose of the Albuquerque ordinance is to authorize forfeiture of motor vehicles

as a remedial measure aimed at protecting the public, and (2) the ordinance serves that remedial purpose without being punitive in its effects. *See* 2002-NMSC-014, ¶¶ 12-19.

The second decision, issued by the New Mexico Court of Appeals, undertook a similar analysis. *See State v. Kirby*, 2003-NMCA-074, 133 N.M. 782, 70 P.3d 772, *cert. quashed*, 133 N.M. 771, 70 P.3d 761 (2003). In *Kirby*, the Court of Appeals held that the New Mexico Double Jeopardy Clause does not preclude the state from pursuing, in separate proceedings, criminal charges as well as a $75,000 civil penalty under the New Mexico Securities Act, NMSA 1978, §§ 58-13B-1 to -57 (1986, as amended through 1999), based on the same conduct. *See* 2003-NMCA-074, ¶ 3. In a thorough opinion, the Court of Appeals recapitulated the New Mexico Supreme Court's test for double jeopardy under the State Constitution and Section 30-1-10, as enunciated in *White Chevy*, *Nuñez*, and *Schwartz*. *See id.* ¶¶ 15-19. As in *White Chevy*, there was no question that the defendant was subjected to separate proceedings in which the criminal charges and civil penalty were pursued, and there was likewise no question that the same conduct precipitated both proceedings and formed the basis for the relief sought in each. *See id.* ¶ 21. Thus, the double jeopardy inquiry again reduced to a single question, *viz*., "whether the $75,000 civil penalty is remedial or punitive." *Id*. ¶ 22. The Court of Appeals employed *White Chevy*'s two-step analysis for determining whether a sanction is remedial or punitive, including the *Mendoza-Martinez* factors as part of the analysis. *See id.* ¶¶ 22-39. The Court concluded that the legislature intended the civil penalty in Section 58-13B-37(B) of the Securities Act to be part of an overall remedial regulatory and administrative scheme with the aim of protecting the public, and that the penalty "was not sufficiently punitive in its effect that, on balance, the punitive effect outweighed its remedial effect." *Kirby*, 2003-NMCA-074, ¶¶ 26, 39.

C. Application of Double Jeopardy Precedents

The analysis begins here, as it did in *Nuñez*, with the three-pronged "multiple punishment analysis." *See Nuñez*, 2000-NMSC-013, ¶ 36. As in *White Chevy* and *Kirby*, the first two prongs of the analysis are not in controversy. As to the first prong, the defendant in the prospective civil action under Section 17-2-26 has already been charged, convicted, and sentenced in a prior criminal proceeding, and any claim for damages will therefore be pursued in a subsequent, separate proceeding. As to the second prong, it is assumed that the conduct on which the criminal conviction was based – the illegal taking of a trophy animal – will identically form the basis of the civil damages claim. Thus, the analysis hinges on the third prong, which considers whether the civil damages remedy under Section 17-2-26 should be considered "punishment" for double jeopardy purposes, or whether instead it should be considered remedial. *Nuñez*, 2000-NMSC-013, ¶ 36; *see also White Chevy*, 2002-NMSC-014, ¶ 9.

In determining whether civil damages under Section 17-2-26 are remedial or punitive, the first consideration is the legislature's purpose in enacting the statute. *See White Chevy*, 2002-NMSC-014, ¶ 11. This inquiry looks to the legislature's intent rather than any "subjective effect" the statute might have on the defendant. *Id*. The legislature's purpose in enacting Section 17-2-26 is explicitly remedial. This is true not merely

because the legislature entitled the statute "Civil liability" and provided for a remedy in a "civil action" recoverable by a "civil judgment." NMSA 1978, §§ 17-2-26(A), (B). *Nuñez* teaches that labels such as these are not dispositive, *see* 2000-NMSC-013, ¶¶ 39, 46, 48, although the words that the legislature uses are certainly not entirely without meaning. *See, e.g., Kirby*, 2003-NMCA-074, ¶ 38 (commenting that "it should not go unnoticed that the Legislature chose to label the penalty a civil penalty"). More important than the adjective "civil," however, is the noun "damages." Whereas *Nuñez*, *White Chevy*, and *Kirby* all are concerned with whether "sanctions" of forfeiture or monetary penalties are remedial or punitive, Section 17-2-26 does not contemplate any sanction at all; rather, it provides for the intrinsically remedial award of damages. Moreover, if the legislature's intent were in doubt, Section 17-2-26(C) declares that intent unequivocally: "Damages recoverable pursuant to this section are intended *to compensate the state* for the loss of unique public resources...." (Emphasis added.) Finally, over and above the compensatory function of the damages award itself, the statute further evinces a remedial purpose by authorizing a claim for possession, akin to the compensatory remedy of replevin, in conjunction with a claim for damages. *See id.* § 17-2-26(D).

While the remedial purpose of Section 17-2-26 is clear, *White Chevy* next requires an evaluation of the statute's effects to determine whether, despite its remedial purpose, the statute has punitive effects that outweigh its remedial effects. *See* 2002-NMSC-014, ¶ 11. The statute's effects are evaluated by way of the seven *Mendoza-Martinez* factors. *See Kirby*, 2003-NMCA-074, ¶ 28.

First, the civil damages remedy authorized by Section 17-2-26 is not a sanction imposing an "affirmative disability or restraint" because it does not carry the "stigma" of a criminal conviction. *Kirby*, 2003-NMCA-074, ¶ 30 (quoting *Hudson*, 522 U.S. at 104, for proposition that "a monetary fine, coupled with an indefinite ban on working in the banking industry, did not constitute an 'affirmative disability or restraint' because the sanctions did not 'approach[] the infamous punishment of imprisonment'") (citation and internal quotation marks omitted). As already noted, an award of civil damages is not a sanction at all; much less does it affirmatively disable, restrain, or stigmatize the defendant.

Second, by no stretch of the legal imagination have civil damages "historically been regarded as punishment." *Kirby*, 2003-NMCA-074, ¶ 28. To the contrary, "'monetary assessments,'" even those in the form of penalties as opposed to damages, "'are traditionally a form of civil remedy.'" *Id*. ¶ 31 (quoting *United States v. Ward*, 448 U.S. 242, 256 (1980) (Blackmun, J., concurring)). The United States Supreme Court's decision in *Ward* is closely analogous, although it deals with monetary penalties rather than damages, because the government there used the penalties to remediate environmental harms. *See Ward*, 448 U.S. at 246. Damages under Section 17-2-26 similarly conform to the traditional concept of a civil remedy because they serve to compensate the state for the loss of unique public resources. *See* NMSA 1978, § 17-2-26(C).

Third, the damages remedy is not conditioned on a finding of scienter or criminal intent. *See Kirby*, 2003-NMCA-074, ¶ 32. To the contrary, criminal intent is not an element of the "unlawful" taking of game animals, on which Section 17-2-26 predicates a damages award. *See State v. Barber*, 91 N.M. 764, 767, 581 P.2d 27, 30 (Ct. App. 1978). The absence of a criminal intent requirement is consistent with the regulatory and administrative nature of the game and fish laws, which are aimed at regulated lawful activity. *See State v. Gonzalez*, 2005-NMCA-031, ¶ 14, 137 N.M. 107, 107 P.3d 547 (noting that strict liability crimes are recognized under statutes in the nature of regulatory measures concerned with conduct posing a serious threat to public health or safety); *see also Schwartz*, 120 N.M. at 631, 904 P.2d at 1056 (finding that sanction of license revocation does not implicate double jeopardy because it "reasonably serves regulatory goals adopted in the public interest"); *Kirby*, 2003-NMCA-074, ¶ 23 (finding overall remedial purpose in the "extensive regulatory and administrative provisions" of the Securities Act, which are aimed at protecting investors); *cf. Nuñez*, 2000-NMSC-013, ¶ 52 (finding that provisions of the Controlled Substances Act "do not concern a regulated lawful activity, but rather an illegal criminal activity").

Fourth, it is unclear that the civil damages remedy has any retributive or deterrent effects at all, but, insofar as it does have such effects, they are incidental to its primarily remedial purpose. *See Kirby*, 2003-NMCA-074, ¶¶ 33-34 (determining that deterrent and punitive effects of civil penalty were incidental to and did not override the penalty's primarily remedial purpose); *see also Schwartz*, 120 N.M. at 633, 904 P.2d at 1058 (noting that "the fact that the regulatory scheme has some incidental deterrent effect does not render the sanction punishment for purposes of double jeopardy analysis"); *accord Hudson*, 522 U.S. at 105 (instructing that "the mere presence of this purpose [of deterrence] is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals") (citation and internal quotation marks omitted).

Fifth, it is true that damages may be awarded based on the same conduct for which the defendant was criminally charged. Indeed, that much is merely a reiteration of the second prong of *Nuñez*'s "multiple punishment analysis," without which the third prong and its effects test would not even come into play. *See* 2000-NMSC-013, ¶ 36. The fact, however, that the damages claim and the criminal conviction are based on the same conduct is "'insufficient to render the [damages] ... criminally punitive ... particularly in the double jeopardy context.'" *Kirby*, 2003-NMCA-074, ¶ 35 (quoting *Hudson*, 522 U.S. at 105).

Sixth, the civil damages remedy is rationally connected to a remedial purpose alternative to any punitive purpose or effect. *See Kirby*, 2003-NMCA-074, ¶ 36. To reiterate, the stated purpose of the damages remedy is "to compensate the state for the loss of unique public resources." NMSA 1978, § 17-2-26(C). As with the civil penalty at issue in *Kirby*, the legislature has "added substance to the remedial purposes" of Section 17-2-26 by earmarking the proceeds of civil damages judgments for the Game Protection Fund. *Kirby*, 2003-NMCA-074, ¶ 36; NMSA 1978, § 17-1-14(A) (providing that all moneys collected under state laws for the protection and propagation of game and fish are to be credited to the Game Protection Fund).

Seventh, on the basis of the information presently available to us, there is no indication that the damages recoverable under Section 17-2-26 are excessive in relation to the statute's remedial purpose. *See Kirby*, 2003-NMCA-074, ¶ 37. The statute sets minimum sums of damages on account of the illegal taking of game animals. *See* NMSA 1978, § 17-2-26(A); *see also id.* § 17-2-26(D). It entrusts to the State Game Commission the promulgation of sums of damages recoverable for the illegal taking of trophy animals. *See id*. § 17-2-26(B). The scoring system developed by the State Game Commission sets potential damages liability at between $150 and $10,000 in most cases, and over $10,000 in exceptional cases. *See* 19.30.11.8, 19.30.11.10 NMAC. While these sums are higher than the statutory minimum sums for non-trophy animals, a trophy animal is by definition more highly prized. It may be that, by reason of their uniqueness, trophy animals are not readily susceptible of market valuation. The objective criteria established by the State Game Commission appear, however, to yield reasonable, perhaps modest, estimates of the loss to the state occasioned by poaching or other illegal taking of these "unique public resources." *See* NMSA 1978, §§ 17-2-26(B), (C); 19.30.11.10 NMAC.

Overall, there is very little about a civil damages remedy that can be likened to punishment. It may be that a defendant's civil damages liability will arise out of the same conduct that has been punished criminally. But it is not redundant for the state to seek to punish the unlawful act criminally and to recoup the resulting losses to the state through a civil damages remedy. Because the former is punishment but the latter is not, there is no double jeopardy bar to pursuing both. "'[A] legislature "may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Double Jeopardy Clause.'" *White Chevy*, 2002-NMSC-014, ¶ 7 (quoting *Schwartz*, 120 N.M. at 628, 904 P.2d at 1053 (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938))). A district attorney may therefore pursue a civil damages action pursuant to Section 17-2-26 although the defendant has previously been convicted and fined for the same illegal act.

2. District Attorney's Payment of Civil Litigation Expenses Using Funds Appropriated Pursuant to NMSA 1978, Section 36-1-8(B)

A district attorney's authority to pay litigation expenses incurred in a civil damages action is straightforward. By statute, those expenses, like most other expenses of the Office of the District Attorney, are payable out of state funds:

> All salaries and expenses of the offices of the district attorneys, except the expenses of maintenance and upkeep of quarters occupied by the district attorneys and their staffs, shall be paid from funds appropriated to the district attorneys in the respective judicial districts upon warrants drawn by the secretary of finance and administration in accordance with budgets approved by the state budget division of the department of finance and administration.

NMSA 1978, § 36-1-8(B) (1913, as amended through 2001). As Section 36-1-8(B) suggests, separate provision is made for building maintenance and upkeep expenses,

which are the responsibility of the relevant board of county commissioners. *See* NMSA 1978, § 36-1-8.1 (1980). Litigation expenses, however, plainly are not building maintenance and upkeep expenses, but are within the general category of "salaries and expenses of the offices of the district attorneys." NMSA 1978, § 36-1-8(B). As such, they may be paid from appropriated funds in accordance with a budget approved by the State Budget Division of the Department of Finance and Administration. *Id*.

GARY K. KING
Attorney General

ANDREW S. MONTGOMERY
Assistant Attorney General

[1] In fact, recent pronouncements of the New Mexico Supreme Court and at least one individual Justice arguably reflect the view that the New Mexico's double-jeopardy jurisprudence needs to be aligned more closely, not less so, with the United States Supreme Court's interpretations of the federal Double Jeopardy Clause. *See State v. Frazier*, 2007-NMSC-032, ¶¶ 12-15, 142 N.M. 120, 164 P.3d 1 (applying federal Double Jeopardy Clause and recognizing that legislative intent is the polestar guiding the determination of whether multiple punishments are imposed for the same offense); *id*. ¶¶ 42, 47 n.2 (Chávez, C.J., specially concurring) (opining that "more is required to bring our double-jeopardy jurisprudence in line with the United States Constitution," and that "'it is embarrassing to assert that the single term "same offence" ... has two different meanings'") (quoting *United States v. Dixon*, 509 U.S. 688, 704 (1993)).