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Status of Double Jeopardy and Forfeiture Law in the Sixth Circuit

BY STEFAN D. CASSELLA*

INTRODUCTION

On July 13, 1995, the Sixth Circuit Court of Appeals vacated the criminal conviction of Guy Jerome Ursery on the ground that the conviction and the earlier civil forfeiture of Ursery's property subjected him to multiple punishments for the same offense in separate proceedings in violation of the Double Jeopardy Clause of the Fifth Amendment.¹ The decision followed the Ninth Circuit's ruling in United States v. $405,089.23,² in which the court ordered the return of drug proceeds to a convicted felon on the ground that a civil forfeiture that follows a criminal conviction for the same offense violates the Double Jeopardy Clause.³

Moreover, the Fifth Circuit has followed Ursery in dismissing a criminal conviction that occurred after a civil forfeiture,⁴ and the Tenth

³ The Double Jeopardy Clause states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. On January 12, 1996, the Supreme Court granted the government's petitions for certiorari in $405,089.23 and Ursery. 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996) (Nos. 95-345, 95-346). These cases will be heard in April, 1996, and a decision is expected before the end of the Court's current term in June.
⁴ United States v. Perez, 70 F.3d 345 (5th Cir. 1995).
Circuit has followed $405,089.23 in vacating a civil forfeiture that occurred after a conviction.\(^5\) These cases immediately cast doubt on the status of hundreds of criminal convictions obtained in recent years following the civil or administrative forfeiture of the defendant's property. Indeed, federal prisoners throughout the country have filed an avalanche of motions to vacate their sentences on double jeopardy grounds pursuant to 28 U.S.C. § 2255.\(^6\) Likewise, convicted defendants, invoking Federal Rule of Civil Procedure 60(b), have sought to overturn civil forfeitures that were completed after the defendant's conviction on criminal charges.\(^7\) Ursery, $405,089.23, and their progeny have also prompted defendants in pending cases to move to dismiss their indictments on double jeopardy grounds because of an earlier civil forfeiture, or to move to dismiss a pending forfeiture because of an earlier conviction. Several courts have allowed defendants whose forfeiture-based double jeopardy laws were rejected by the district court to make an interlocutory appeal, thus delaying the start of the criminal trial.\(^8\)

This flood of double jeopardy litigation has produced a rapidly changing body of law. This Article reviews the status of Sixth Circuit law

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\(^5\) United States v. S. Titan Court, 75 F.3d 1470 (10th Cir. 1996).

\(^6\) 28 U.S.C. § 2255 (1994) provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

\(^7\) The provisions of FED. R. CIV. P. 60(b) that have been cited most often are paragraphs (5) and (6) which provide as follows:

\(5\) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

\(6\) any other reason justifying relief from the operation of the judgment.


\(^8\) See United States v. German, 76 F.3d 315 (10th Cir. 1996); United States v. Perez, 70 F.3d 345 (5th Cir. 1995); United States v. Washington, 69 F.3d 401 (9th Cir. 1995); United States v. Chick, 61 F.3d 682 (9th Cir.), petition for cert. filed, 64 U.S.L.W. 3417 (U.S. Nov. 29, 1995).
on double jeopardy and forfeiture and outlines the issues likely to arise when § 2255 and Rule 60(b) motions are filed in closed cases, and motions to dismiss indictments and civil complaints are filed in pending cases.\textsuperscript{9} It also discusses some of the ways double jeopardy problems may be avoided in future cases,\textsuperscript{10} and it concludes with a discussion of the possible outcomes of the Supreme Court's review of \textit{Ursery} and $405,089.23.\textsuperscript{11}

\section*{I. RESPONDING TO DOUBLE JEOPARDY CHALLENGES}

To prevail on a motion to vacate or a motion to dismiss on double jeopardy grounds, a criminal defendant or civil claimant must establish the five elements of a double jeopardy violation. The party claiming double jeopardy must show that there were (1) two punishments, (2) imposed in separate proceedings, (3) for the same offense, (4) by the same sovereign, (5) against the same defendant.\textsuperscript{12} In addition, because the Double Jeopardy Clause protects only against the imposition of, or the attempt to impose, a second punishment, the defendant must show that the alleged subsequent punishment that he is seeking to vacate or avoid occurred or would occur second in time.\textsuperscript{13} The following sections discuss the status of the law in the Sixth Circuit on these six points.

\subsection*{A. Punishment}

Whether forfeiture constitutes punishment for double jeopardy purposes depends primarily on the relationship of the property to the underlying offense. Is the property the proceeds of a crime? Property used to facilitate its commission? Contraband? The corpus delicti\textsuperscript{14} of the offense?

\textsuperscript{9} See infra notes 12-137 and accompanying text.
\textsuperscript{10} See infra notes 138-57 and accompanying text.
\textsuperscript{11} See infra notes 158-62 and accompanying text.
\textsuperscript{13} Id. at 1165.
\textsuperscript{14} The corpus delicti is “[t]he body (material substance) upon which a crime has been committed.” BLACK'S LAW DICTIONARY 344 (6th ed. 1990).
Most of the controversy concerns "facilitating property," or property that makes the underlying criminal offense easier to commit or harder to detect. In 

Ursery, the Sixth Circuit held that the forfeiture of real property used to facilitate a drug offense under 21 U.S.C. §§ 881(a)(7) constituted punishment within the meaning of the Double Jeopardy Clause. The court stated broadly that, in light of the Supreme Court's decision in Austin v. United States, "any civil forfeiture under 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes." Given this categorical approach, it is likely that the Sixth Circuit would view the forfeiture of other kinds of facilitating property, such as vehicles forfeited under 21 U.S.C. § 881(a)(4), as "punishment" for double jeopardy purposes.

Other courts decline to apply Austin's categorical approach to double jeopardy cases. In those courts, the test of whether a forfeiture constitutes "punishment" is the fact-based "rational relationship" test set forth by the United States Supreme Court in United States v. Halper. Under this case-by-case approach, a given forfeiture may or may not be considered punishment for double jeopardy purposes, depending on the relationship of the property to the underlying crime. For example, the Second Circuit has held that a civil sanction constitutes punishment for double jeopardy purposes only if it is overwhelmingly disproportionate to the harm caused by the defendant's act. As a result, in some courts, even the forfeiture

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15 See, e.g., United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990) (defining facilitating property).
16 The property in question was the land on which marijuana was grown. United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995), cert. granted 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996) (Nos. 95-345, 95-346).
17 Id.
19 Ursery, 59 F.3d at 573 (emphasis added).
20 See United States v. Perez, 70 F.3d 345, 349 (5th Cir. 1995) (applying Ursery's approach to 21 U.S.C. § 881(a)(4) cases and finding that they are always punishment); United States v. 9844 S. Titan Court, 75 F.3d 1470 (10th Cir. 1996) (applying categorical approach to both proceeds and facilitating property).
22 United States v. Morgan, 51 F.3d 1105, 1115 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995). See also United States v. Clementi, 70 F.3d 997, 999 (8th Cir. 1995) (applying the Halper rational relationship test to contraband); United States
of facilitating property may be considered "remedial" or "non-punitive" in some circumstances.\textsuperscript{23}

The courts that take the case-by-case approach have the better argument. \textit{Austin} itself recognizes that just because the Eighth Amendment applies to all forfeitures it does not follow that all forfeitures constitute punishment for Eighth Amendment purposes. Similarly, the Double Jeopardy Clause may apply to all forfeitures categorically, but not all forfeitures constitute punishment for double jeopardy purposes.\textsuperscript{24} Courts should have to review the facts of each case under the \textit{Halper} standard to determine if the civil sanction is rationally related to the underlying crime. Only where the forfeitures fail to satisfy the rational relationship test should it constitute punishment for double jeopardy purposes.

\textsuperscript{23} \textit{See} United States v. 100 Chadwick Drive, 913 F. Supp. 430 (W.D.N.C. 1995) (holding the \textit{Halper} analysis survives \textit{Austin}; civil sanction is punishment only where it is solely deterrent or retributive and not partially remedial in purpose); Garcia v. United States, Nos. C-95-2782 DLI, CR-90-0168 DLI, 1996 WL 69803 (M.D. Cal. Jan. 18, 1996) (forfeiture of used car so disproportionate, in negative sense, to the magnitude of the area that it cannot be considered punishment); (United States v. Erinkitola, 901 F. Supp. 80, 84-85 (N.D.N.Y. 1995) (forfeiture of car driven to scene of drug offense is "remedial" because it removes instrumentality of the crime from circulation); United States v. Ramos-Oseguera, 900 F. Supp. 1258, 1263 (N.D. Cal. 1995) (forfeiture of telephone used to commit drug offense is the "trivial opposite of the excessive sanction" and thus cannot be punishment); \textit{No. 14-I}, 899 F. Supp. at 1420-21 (forfeiture of facilitating property may be remedial under \textit{Halper}, so case-by-case analysis is required).\textsuperscript{24}

\textit{E.g.}, United States v. 100 Chadwick Drive, 913 F. Supp. 430 (W.D.N.C. 1995).
Ursery's adoption of the categorical approach appears to foreclose the reliance on the rational relationship test in Sixth Circuit facilitation cases. However, the Court of Appeals left the door open with its subsequent decision in United States v. Salina, in which it held the forfeiture of drug proceeds to be remedial, rather than punitive in nature, because such actions are "inherently proportional to the damages caused by the illegal activity." The court then proceeded to distinguish facilitation cases which involved vehicles and real property from proceeds cases because the forfeitures in facilitation cases "bear no relation to the underlying offense." But not all facilitation cases fit that description; many times facilitating property is forfeited because its use was essential to the commission of the underlying offense and the forfeiture thus serves the remedial purpose of making the crime impossible to commit in the future. Thus, the Sixth Circuit might yet apply the fact-based Halper test if faced with a purely remedial situation such as the forfeiture of a leasehold interest under 21 U.S.C. § 881(a)(7) to shut down a crack house.

In any event, Salinas makes it clear that the categorical approach applies only to the forfeiture of facilitating property, while the Halper test still applies to other types of forfeiture. Thus, not only is the forfeiture of proceeds not considered "punishment" for double jeopardy purposes in the Sixth Circuit, but other forfeitures, such as the forfeiture of

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25 65 F.3d 551 (6th Cir. 1995).
26 Id. at 554. The court further noted that "one never acquires a property right to proceeds." Id.
27 Id. at 553 (citing Tilley, 18 F.3d at 300).
28 Id.
29 Id. See also Smith v. United States, 76 F.3d 879 (7th Cir. 1996) ("There is . . . no reason to conclude that the forfeiture of property or money exchanged for contraband . . . is anything but remedial."); United States v. $184,505.01, 72 F.3d 1160, 1168-69 (3d Cir. 1995) (finding that forfeiture of proceeds is not punishment); United States v. Clementi, 70 F.3d 997, 999 (8th Cir. 1995) (holding that forfeiture of proceeds is "rationally related to the damages of that activity"); United States v. Tilley, 18 F.3d 295, 300 (5th Cir.) (finding that forfeiture of proceeds is not punitive, so double jeopardy not implicated), cert. denied, 115 S. Ct. 574 (1994). Cf. United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994) (deciding that forfeiture of proceeds from racketeering is not punishment and does not trigger Eighth Amendment analysis); SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994) (holding that an order requiring a convicted defendant to give up profits of illegal securities trading did not constitute additional punishment barred by double jeopardy). But see United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994) (finding that forfeiture of
“exchange money” in a drug case, or contraband, or the corpus delicti of a money laundering case, may also be considered remedial if they satisfy the rational relationship test in a given instance.

Finally, the Supreme Court's recent decision in *Witte v. United States*, suggests that forfeiture may not be considered "punishment" for double jeopardy purposes if, considered in conjunction with the criminal penalty imposed for the same offense, the cumulative punishment is no greater than the punishment which would have been imposed in a single proceeding. In *Witte*, the Court noted that in imposing a sentence for an offense that was previously used to enhance the penalty for an earlier offense, the court could mitigate the punishment by taking the earlier

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31 Clementi, 70 F.3d at 1000 ("Because it simply cannot be punishment to take from a criminal that which the law forbids him to possess, the forfeiture of firearms under 18 U.S.C. § 924(d) is not punishment" for double jeopardy purposes.).

32 See United States v. Twenty One Thousand Two Hundred Eighty Two Dollars, 47 F.3d 972, 973 (8th Cir. 1995) (finding that forfeiture of property being laundered in violation of 18 U.S.C. § 1956 is not punitive and not subject to Excessive Fines Clause of Eighth Amendment if property consisted of criminal proceeds); United States v. $145,139.00, 18 F.3d 73, 75 (2d Cir.) (finding that forfeiture of corpus delicti — undeclared funds in 31 U.S.C. § 5316 (1994) case — does not trigger double jeopardy), cert. denied, 115 S. Ct. 72 (1994); Ragin v. United States, 893 F. Supp. 570, 579 (W.D.N.C. 1995) (holding that, under proportionality review forfeiture of shopping center used to launder drug proceeds was remedial for double jeopardy purposes); Crowder v. United States, 874 F. Supp. 700, 704 (M.D.N.C. 1994) (finding that proportionality analysis would be more appropriate than a categorical approach, but deciding the case on other grounds), aff'd, 69 F.3d 534 (4th Cir. 1995); United States v. Haywood, 864 F. Supp. 502, 508-09 (W.D.N.C. 1994) (finding that proportionality is the proper test). But see United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 490-91 (2d Cir. 1995) (questioning whether property that has some legitimate purpose can ever be considered an instrumentality of the crime for the purpose of finding a forfeiture to be purely remedial); United States v. $69,292.00, 62 F.3d 1161, 1164-65 (9th Cir. 1995) (holding that forfeiture of undeclared currency under 31 U.S.C. § 5317 (1994) is punishment).

sentencing enhancement into account and, thus, avoid any double jeopardy violation. Similarly, in forfeiture cases, courts have held that there is no double jeopardy violation if the court mitigates the punishment imposed in a related criminal case to take the earlier forfeiture into account.

B. Same Proceeding

There is no double jeopardy violation as long as multiple punishments are imposed in the same proceeding. In United States v. $405,089.23, the Ninth Circuit held that civil forfeiture cases and criminal prosecutions constitute one proceeding "only if they were brought in the same indictment and tried at the same time." The Tenth Circuit agrees with the Ninth Circuit, but the Second, Eighth, and Eleventh Circuits rejected this approach as one that elevates form over substance. These courts recognized that civil and criminal cases are always docketed separately in the federal system, even when related to the same offense. Consequently, these courts held that civil and criminal cases which are contemporaneously pending constitute the "same proceeding" for double jeopardy purposes because there is no likelihood that the government

34 Id. at 2209. The Court noted that a sentence within the statutory range constituted punishment only for the charged offense. Id. at 2208.

35 See, e.g., United States v. Singleton, 897 F. Supp. 1268, 1271-72 (N.D. Cal. 1995) (deciding that civil forfeiture does not constitute punishment for double jeopardy purposes if the cumulative value of the civil forfeiture and the fine imposed in a parallel criminal case does not exceed the maximum statutory criminal fine, and the defendant agrees to the forfeiture as part of his criminal plea); United States v. Amiel, 889 F. Supp. 615, 620 (E.D.N.Y. 1995) (stating that there was no double punishment where court refrained from imposing fines and restitution in criminal case following forfeiture in civil case).

36 United States v. Halper, 490 U.S. 435, 450 (1989). The Court observed that "[i]n a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." Id.

37 United States v. $405,089.23, 33 F.3d 1210, 1216 (9th Cir. 1994), modified, 56 F.3d 41 (1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996) (Nos. 95-345, 95-346). The court was concerned that the government would gain an advantage from trying the civil and criminal cases separately. Id. at 1217.

38 United States v. 9844 S. Titan Court, 75 F.3d 1470 (10th Cir. 1996).
instituted one proceeding only because of dissatisfaction with the penalty imposed in an earlier case and, therefore, the separate civil and criminal proceedings were not an attempt to enhance the defendant's punishment.\footnote{United States v. Smith, No. 95-1568, 1996 WL 34552, at *3-4 (8th Cir. Jan. 31, 1996); United States v. 18755 North Bay Rd., 13 F.3d 1493, 1499 (11th Cir. 1994); United States v. Millan, 2 F.3d 17, 20-21 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994); see also United States v. Doyer, 907 F. Supp. 1519, 1524 (M.D. Fla. 1995) ("Where civil and criminal actions are pursued contemporaneously, there is no concern, as expressed in Halper, that the government might act abusively by seeking a second punishment when it is dissatisfied with the punishment levied in the first action."); Amiel, 889 F. Supp. at 622-23 (following Millan even though the indictment was filed after entry of a forfeiture judgment by default because there was no indication that the government filed the indictment because it was dissatisfied with the default judgment); United States v. $130,052.00, No. CIV. A 94-D-1654-N, 1995 WL 810351, at *9 (M.D. Ala. 1995).}

In Ursery, the Sixth Circuit found a middle ground. Instead of adopting either categorical approach, the court held that the question of whether two cases — one civil and the other criminal — constitute the "same proceeding" for double jeopardy purposes requires a fact-based inquiry.\footnote{United States v. Ursery, 59 F.3d 568, 574-75 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996) (Nos. 95-345, 95-346).} Under this approach, a court must determine whether the government instituted and managed the two cases in such a manner that the cases could truly be considered a "single, coordinated proceeding."\footnote{Id. at 575.} The Court of Appeals did not specify what "indicia of coordination" were required to establish that two cases constituted the same proceeding.\footnote{Id. In the particular case, the court stated that there was no communication between government attorneys, the proceedings were instituted four months apart, and the proceedings were presided over by different judges and resolved by different judgments. \textit{Id.}} Other courts, however, have relied on factors such as the dates on which the respective cases were instituted, the degree to which the government attorneys handling the two cases coordinated their actions with each other, and whether the government made it clear to the defendant from the outset of both cases that it was proceeding both civilly and criminally in order to seek the full range of sanctions available for the offense.\footnote{\textit{United States v. 321 S.E.} 9th Court, No. 88-6171-CIV-PAINE, 1995 WL 789019 (S.D. Fla. Dec. 20, 1995) (civil and criminal cases were part
There is one situation where it should be absolutely clear that a civil forfeiture and a criminal prosecution constitute a single and coordinated proceeding — cases where the defendant, as part of his guilty plea in a criminal case, agrees not to contest a related civil forfeiture. In that situation, the defendant by his own action permits the court to merge the civil and criminal cases so that the defendant’s interest in his property is effectively extinguished at the very instant that jeopardy attaches in the criminal case with the acceptance of the guilty plea by the court. The case law on this issue, however, is sparse, and it may be simpler to of the same proceeding because the property was seized incident to defendant’s arrest, and the two actions were brought simultaneously); Rivera v. United States, No. 92 Civ. 6100 (DNE), 1995 WL 437691, at *6 (S.D.N.Y. July 24, 1995) (stating that administrative forfeiture and criminal prosecution were part of a single, coordinated proceeding where property was seized at defendant’s arrest and the DEA immediately commenced administrative forfeiture proceedings); United States v. Levine, 905 F. Supp. 1025, 1032 (M.D. Fla. 1995) (finding that a forfeiture in California and prosecution in Florida were a single proceeding because the indictment was filed while the civil case was pending; delay between entry of forfeiture judgment and completion of prosecution cannot matter where defendant caused the delay by becoming a fugitive); United States v. All Shares of Stock of R.S. Cars, Inc., No. 92-5334 (D.N.J. May 31, 1995) (following Millan and disagreeing with $405,089.23); Amiel, 889 F. Supp. at 622-23 (following Millan, despite filing of indictment after entry of forfeiture judgment by default, because there was no indication that the government filed indictment because it was dissatisfied with the default judgment); United States v. 18900 S.W. 50th St., No. 93-30301/LAC (N.D. Fla. Sept. 19, 1994) (finding that a civil case filed after indictment but before sentencing is part of single prosecution).

44 United States v. Singleton, 897 F. Supp. 1268, 1271-72 (N.D. Cal. 1995) (distinguishing $405,089.23 where defendant agrees to civil forfeiture as part of guilty plea; civil and criminal cases constitute single proceeding in that instance); United States v. Domitrovich, Nos. CS-94-481-FVS, CR-93-295-FVS (E.D. Wash. May 10, 1995) (discussing but not deciding whether jeopardy attaches in civil forfeiture case when the defendant agrees not to contest the forfeiture as part of his guilty plea in a criminal case; holding that in any event, civil and criminal jeopardy in such case would be simultaneous, so criminal sentence would not be barred on account of prior jeopardy). But see Oakes v. United States, 872 F. Supp. 817, 820-25 (E.D. Wash. 1994) (holding that civil forfeiture and criminal prosecution are separate proceedings and rejecting waiver of double jeopardy even where defendant pleads guilty and agrees not to oppose civil
view a defendant’s agreement to the civil forfeiture as a waiver of his double jeopardy rights rather than as a merger of the two cases into a single proceeding.\(^\text{45}\)

#### C. Same Offense

There is no double jeopardy problem if the civil forfeiture and the criminal prosecution are based on separate offenses. At the very least, this means that there is no double jeopardy violation if the two cases are based on different conduct.

So, if the defendant is convicted of growing marijuana on one parcel of land, a second parcel on which marijuana was also grown can be forfeited civilly without violating double jeopardy.\(^\text{46}\) Similarly, if the defendant is prosecuted for possession of drugs with intent to distribute, he may be required to forfeit, in a separate civil proceeding, the proceeds of earlier drug offenses for which he was not prosecuted, even if the arrest on the criminal offense and the seizure of the money occurred at the same time.\(^\text{47}\) While there are no Sixth Circuit cases discussing this point in the forfeiture context, it is consistently followed by other courts.

In addition, there is no double jeopardy violation if a defendant is separately punished for two offenses arising out of the same conduct, as long as each offense requires an element of proof that the other does

\(^{45}\) United States v. Cordoba, 71 F.3d 1543 (10th Cir. 1995) (defendant’s agreement to civil forfeiture as part of guilty plea constitutes waiver of double jeopardy).

\(^{46}\) United States v. Stanwood, 872 F. Supp. 791, 794-95 (D. Or. 1994) (holding that forfeiture of one parcel on which marijuana was grown does not bar prosecution for growing marijuana on a second parcel).

\(^{47}\) United States v. Rhodes, 62 F.3d 1449, 1452 (D.C. Cir. 1995); United States v. 9844 S. Titan Court, 75 F.3d 1470 (10th Cir. 1996); United States v. Smith, 75 F.3d 382 (8th Cir. 1996) (stating that forfeiture of facilitating real property and prosecution for drug offenses that occurred at another location apparently involved different conduct); United States v. Leaniz, No. CR-2-90-18, 1995 WL 143127, at *5-6 (S.D. Ohio Mar. 31, 1995); United States v. Sung Jin Kim, Nos. 95-00407 ACK, CR No. 91-1505 ACK (D. Haw. Aug. 11, 1995). See also United States v. $87,118.00, No. 93-C-3127, 1995 WL 491502, at *1 (N.D. Ill. Aug. 11, 1995) (holding that because the government refrained from introducing, in the civil forfeiture case, any evidence of the criminal offense of which claimant was convicted, the civil case could not constitute second jeopardy for the same offense).
not. The government has argued that the "same elements" test requires a finding that civil forfeitures and criminal prosecutions are based on separate offenses in virtually all cases because the civil case requires proof that property was involved in or derived from the offense, which the criminal offense does not, and the criminal offense requires proof that the defendant committed the offense with a particular mental intent, which the civil forfeiture does not. While some courts have adopted this argument, the Sixth Circuit rejected it in Ursery, holding that "forfeiture and conviction are punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense." The court continued, stating that "the


50 See, e.g., United States v. Perez, 902 F. Supp. 1318, 1322 (D. Colo. 1995) (holding that administrative forfeiture and criminal prosecution involve different elements); United States v. Falkowski, 900 F. Supp. 1207, 1214-15 (D. Alaska 1995) (holding that since civil forfeiture requires the use of property and the criminal claim requires mens rea, "the civil claim and the criminal offense each have an element not shared by the other"); United States v. Campbell, Civ. No. 94-M-2905, Criminal Action No. 91-CR-388 (D. Colo. Jun. 21, 1995) (holding that § 881 forfeitures did not bar conspiracy prosecution because in the civil case the focus was on the property, not the owner, and the government was not even required to prove that the owner was involved in the crime); United States v. Thibault, 897 F. Supp. 495, 498 (D. Colo. 1995) (stating that civil forfeiture requires proof that property was used to commit an offense, and does not require proof that the owner was involved; the criminal case does not require the use of property but requires mens rea); Leaniz, No. CR-2-90-18, 1995 WL 143127, at *6 ("The elements for conspiracy are completely different from the elements required for forfeiture."); see also United States v. Chick, 61 F.3d 682, 687-88 (9th Cir.) (suggesting that requirement of proof of defendant's participation in the offense distinguishes criminal prosecution from civil forfeiture for double jeopardy purposes), petition for cert. filed, 64 U.S.L.W. 3417 (U.S. Nov. 29, 1995) (No. 95-858).

government cannot confiscate Ursery’s residence without a showing that he was manufacturing marijuana. The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action.\textsuperscript{52}

This is not a correct statement of the law because under 21 U.S.C. § 881(a)(7), the government can forfeit real property used to grow marijuana whether the owner was involved in the criminal offense or not.\textsuperscript{53} In Ursery’s case, his property would have been equally forfeitable if a third person had grown the marijuana with Ursery’s knowledge and consent.\textsuperscript{54} Moreover, even if the criminal offense was properly considered a lesser included aspect of the forfeiture offense, double jeopardy would not necessarily bar the imposition of separate punishments. In numerous instances, the courts have recognized multi-layered offenses such as racketeering,\textsuperscript{55} continuing criminal enterprises,\textsuperscript{56} and money laundering\textsuperscript{57} as separate offenses from their predicates for double jeopardy purposes even though proof of the over-arching offense necessarily requires proof of all elements of a predicate offense.\textsuperscript{58} So, 

\textit{Accord} United States v. 9844 S. Titan Court, 75 F.3d 1470 (10th Cir. 1996).

\textsuperscript{52} Id. at 574.


\textsuperscript{54} Austin v. United States, 113 S. Ct. 2801, 2808-10 (1993) (noting that civil forfeiture historically punished the owner for knowingly or negligently allowing his property to be used to facilitate a criminal offense).


\textsuperscript{58} See, e.g., Garrett v. United States, 471 U.S. 773 (1985) (rejecting a double jeopardy challenge to a 21 U.S.C. § 848 conviction following earlier prosecution for predicate drug offense where Congress intended to create separate offenses and did not intend a choice between them); United States v. Brown, 31 F.3d 484, 496 n.20 (7th Cir. 1994) (holding that separate prosecutions for money laundering and predicate offense do not violate double jeopardy even though the test in Blockburger v. United States, 284 U.S. 299 (1932), was not satisfied because Congress clearly contemplated different types of conduct in enacting the two provisions); United States v. O’Connor, 953 F.2d 338, 344 (7th Cir.) (allowing separate prosecutions for violations of 18 U.S.C. § 1962(c) and predicate offenses), cert. denied, 504 U.S. 924 (1992); United States v. El-Difrawi, 898 F. Supp. 3, 9 (D.D.C. 1995) (citing Garrett for the proposition that forfeiture for the money laundering offense does not preclude prosecution for the
even if the Sixth Circuit were correct in its characterization of civil forfeiture as a multi-layered offense for which the criminal violation serves as a predicate, the structure of the statutes and their legislative history evidence Congressional intent to authorize separate proceedings and cumulative sanctions.\(^5\)

In any event, while the Sixth Circuit has stated its position on this issue in *Ursery*, that holding applies only to the broad application of the *Blockburger/Dixon* "same elements" test to civil forfeitures and criminal prosecutions generally. It does not necessarily preclude the government's establishing that the civil forfeiture and criminal prosecution, while premised on the same conduct, nevertheless were based on separate statutes with separate elements.

For example, it appears to be universally recognized that a civil forfeiture based on a substantive drug offense will not bar a subsequent criminal prosecution for a drug conspiracy, or vice versa, because conspiracies and substantive offenses are separate offenses for double jeopardy purposes.\(^6\) Similarly, a forfeiture based on the money launder-

\(^5\) See 21 U.S.C. § 881(i) (1994) (permitting a civil forfeiture case to be stayed pending the completion of a related prosecution); id. § 881(j) (stating venue for a civil forfeiture action lies in the district in which a related criminal prosecution is pending); id. § 847 ("Any penalty imposed for violation of [the Controlled Substances Act] shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law." (emphasis added)).

Double Jeopardy and Forfeiture will not bar a criminal prosecution for the underlying predicate offense because money laundering and its predicates are separate offenses for double jeopardy purposes. The Third Circuit recently held that forfeiture of drug proceeds under § 881(a)(6) and a criminal conviction for possession of heroin with intent to distribute are separate offenses because the former requires that proceeds be derived from a sale or exchange, which the latter does not, and the latter requires proof of possession by the defendant, which the former does not.

The government is often unable to take advantage of this rule; however, where the documents supporting the civil forfeiture were worded so broadly that it is impossible to determine what offense was the basis for the forfeiture, or whether that offense was different from the offenses set forth in a related criminal indictment. But one court has held that there is no double jeopardy violation as long as the forfeiture

1995).


63 United States v. Sherrett, 877 F. Supp. 519, 527 (D. Or. 1995). The court noted that the forfeiture pleadings were broad enough to include conspiracy allegations, precluding criminal prosecution on that charge. Id. The court said that "[i]t is immaterial that the government could have constructed its forfeiture cases in a manner that omitted the allegations of conspiracy. It did not do so." Id.
can be limited to an offense for which the claimant was not punished criminally.\textsuperscript{64}

\textbf{D. Separate Sovereign}

The Double Jeopardy Clause is violated only if two punishments for the same offense are imposed by the same sovereign. If one punishment is imposed by a state and another by the federal government, no double jeopardy violation occurs.

There is no Sixth Circuit decision on this point in the civil forfeiture context, but courts throughout the country, including the Second, Eighth, and Ninth Circuits, have uniformly held that a state civil forfeiture action does not bar a later federal criminal prosecution, nor does a state prosecution bar a later federal civil forfeiture.\textsuperscript{65} Moreover, double jeopardy is not implicated where there has been a prosecution for the same offense by a foreign government and the United States then commences a civil forfeiture.\textsuperscript{66}

Defendants frequently challenge the application of the dual sovereignty rule in those cases in which the federal civil forfeiture follows a state prosecution and is handled by state prosecutors specially designated as Assistant United States Attorneys for the purpose of handling the particular case. In such cases, the federal government generally has “adopted” the forfeiture and intends to return up to eighty percent of the forfeited funds to the state under the equitable sharing provisions of the drug and money laundering statutes.\textsuperscript{67} No court has yet declined to apply

\textsuperscript{64} United States v. Sardone, No. CR 93-0597-GT (S.D. Cal. June 19, 1995) (holding that since the administrative forfeiture could have been based on drug conspiracy alone, it did not bar subsequent prosecution on substantive offenses).


\textsuperscript{66} United States v. Real Property Located at Incline Village, 47 F.3d 1511, 1522 (9th Cir. 1995) (refusing to allow claimant to fight civil forfeiture on basis of Swiss prosecution because Switzerland is a separate sovereign), \textit{cert. granted}, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996) (No. 95-173).

\textsuperscript{67} Under 18 U.S.C. § 981(e)(2) (1994), the property may be transferred to the
the dual sovereignty rule in that situation, but in *United States v. All Assets of G.P.S. Automotive Corp.*, 68 the Second Circuit remanded such a case to the district court to determine whether the federal government was allowing itself to be used as a "tool" of the State, such that the federal case was really a state action barred by the earlier State prosecution. 69 A similar challenge in the Sixth Circuit should be expected.

E. Same Defendant

Because double jeopardy is a personal right, a person may assert a double jeopardy objection only if he was personally subjected to punishment for the same offense in a prior proceeding. If the defendant was not a party to the prior proceeding, or the punishment imposed in that proceeding was levied against another person, there can be no violation of the Double Jeopardy Clause when additional punishment is imposed.

Obviously, this means that a defendant in a criminal case cannot successfully object to the criminal prosecution on the ground that his wife's property was forfeited in an earlier civil proceeding. 70 Nor can a wife assert state by "the Attorney General, the Secretary of the Treasury, or the Postal Service as the case may be... on such terms and conditions as he may determine."

Under 21 U.S.C. § 881(e)(3)(A) (1994), the property transferred must "[have] a value that bears a reasonable relationship to the degree of direct participation of the State..." Under Justice Department policy guidelines, if a case is wholly a product of a states investigation but is "adopted" for the purpose of forfeiture by federal authorities, the federal government will retain 20% of the forfeited assets to cover the cost of the federal action and will return the balance to the state. See DEP'T OF JUSTICE GUIDE TO EQUITABLE SHARING (Department of Justice).

68 66 F.3d 483 (2d Cir. 1995).


double jeopardy in a civil forfeiture case based on her husband's earlier conviction for the offense on which the forfeiture was based.  

Most important, courts throughout the country are virtually unanimous in holding that a defendant cannot raise a successful double jeopardy challenge to a criminal prosecution or conviction on the ground that an earlier civil forfeiture represented prior jeopardy, if the defendant never filed a claim in the forfeiture case and accordingly never became a party to that proceeding. The leading case on this point is United States v. Torres72 in which the Seventh Circuit held that an uncontested administrative forfeiture did not constitute prior jeopardy. 73 The Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits and numerous district courts have followed the Torres holding. 74 Moreover, some courts have extended Torres to uncontested judicial forfeiture actions. 75

Ramos-Oseguera, 900 F. Supp. 1258, 1263-64 (N.D. Cal. 1995) (defendant not punished by forfeiture of property he claimed was his uncle's).

71 See United States v. Lots 18 and 19, No. 94-10077-CIV-HIGHSMITH (S.D. Fla. Mar. 22, 1995) (holding that when criminal defendant transferred forfeited property to his ex-wife, she lacked standing to assert a double jeopardy claim); see also United States v. $69,292.00, 62 F.3d 1161, 1163 (9th Cir. 1995) (stating that convicted defendant cannot assert double jeopardy bar to subsequent civil forfeiture without demonstrating that he, not his brother, was the owner of the subject property).

72 28 F.3d 1463 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994).

73 Id. at 1465.


75 See United States v. $184,505.01, 72 F.3d 1160, 1167-68 (3d Cir. 1995)
The theme of Torres and its progeny is that a defendant cannot assert that a civil forfeiture constitutes “punishment” for double jeopardy purposes if, by not contesting the forfeiture, the defendant never became a party to the proceeding and thus was never at risk of having his guilt or innocence adjudicated. Furthermore, because the defendant was not a party to the forfeiture proceeding, his claim of ownership was never adjudicated or established.

It does not matter what reason the defendant offers for not filing a claim in the forfeiture proceeding. In particular, the failure to file a claim is not excused because the defendant feared that his Fifth Amendment self-incrimination rights would be jeopardized, or because the defen-

(holding that a party who never contests a judicial forfeiture is not “in jeopardy”); United States v. Penny, 60 F.3d 1257, 1262 (7th Cir. 1995) (holding that a defendant who does not make a claim to the forfeited property cannot invoke double jeopardy protection); United States v. Amiel, 995 F.2d 367, 371-72 (2d Cir. 1993) (noting that if default judgment in civil forfeiture became a final and valid decision there would be no prior punishment because defendants would have no claim to the property); United States v. Cartagena, No. Crim. 93-225-02, 1995 WL 678208, at *2 (E.D. Pa. Nov. 15, 1995) (holding that where no claim to the property was filed with the court, any punishment from forfeiture “exists only in the abstract”); United States v. Unger, 898 F. Supp. 740, 742-43 (D. Or. 1995) (holding that defendant was not punished in uncontested judicial forfeiture even though he filed claim and cost bond in administrative proceeding); United States v. Smith, Cr. No. 90-40017 (S.D. Ill. May 16, 1995) (finding that defendant could not raise double jeopardy claim where he did not file a claim to the property in judicial forfeiture); United States v. Chaney, 882 F. Supp. 829, 830 (E.D. Wis. 1995) (citing Torres for the proposition that where defendant fails to file a claim to forfeited property there is no double jeopardy); United States v. Martin, Nos. 95-C-609, 90-CR-452, 1995 WL 124126, at *5 (N.D. Ill. Mar. 20, 1995) (“Jeopardy does not attach to people who are not parties to the forfeiture action.”); United States v. Sherrett, 877 F. Supp. 519, 524 (D. Or. 1995) (holding double jeopardy not implicated by filing of civil judicial forfeiture if defendant never files a claim). But see United States v. Brophil, 899 F. Supp. 1257, 1260-66 (D. Vt. 1995) (questioning the correctness of, and rejecting, Torres).

76 Torres, 28 F.3d at 1465.
77 Id. at 1465-66.
78 See United States v. Clementi, 70 F.3d 997, 1000 n.4 (8th Cir. 1995) (holding that assertion of ownership would not constitute Fifth Amendment waiver because criminal statute only pertains to use of property, not ownership); Cretacci, 62 F.3d at 311 (holding that failure to file claim in civil case cannot be excused on Fifth Amendment grounds because assertion of a property interest
dant’s ownership of the forfeited property was evident from public title records or other circumstances. Nor can a defendant excuse his failure to file a claim by asserting that the government failed to provide him with adequate notice of the forfeiture and thus violated the Due Process Clause. In the latter event, the court may vacate the forfeiture and

in a civil case cannot be used against the defendant in the criminal case); Barber, 906 F. Supp. at 427 (following Cretacci); Ringor, 887 F. Supp. at 1380-82 (holding that where defendant failed to file claim in forfeiture she cannot later claim the failure was to avoid self-incrimination); Smith, Cr. No. 90-40017, at 6 (holding that merely filing a claim does not invoke self-incrimination); United States v. Inocencio, CR 94-954-TUC WDB (D. Ariz. Jan. 4), aff’d, 67 F.3d 309 (9th Cir. 1995).

See United States v. Idowu, 74 F.3d 387 (2d Cir. 1996) (it is irrelevant that the seizing agency knew defendant was the owner of the property); United States v. James, No. 95-3135, 1996 WL 89550 (3d Cir. Mar. 4, 1996) (it is irrelevant that defendant was the titled owner of the forfeited vehicle; because he never became a party to the forfeiture proceeding, jeopardy did not attach); United States v. Plunk, 68 F.3d 482 (9th Cir. 1995) (finding no adjudication of ownership even though forfeiture documents indicate property was seized from defendant); United States v. Washington, 69 F.3d 401, 403-04 (9th Cir. 1995) (no jeopardy when defendant fails to contest administrative forfeiture even where property was seized from defendant’s physical possession); United States v. Rural Route 9, 900 F. Supp. 1032, 1036 (C.D. Ill. 1995) (finding defendant’s ownership of the property irrelevant if defendant did not contest ownership of the property). Ringor, 887 F. Supp. at 1377

But see Gainer v. United States, 904 F. Supp. 1234, 1237-38 (D. Kan. 1995) (finding that uncontroverted forfeiture of truck constitutes punishment where truck was titled in defendant’s name).

See United States v. Arreola-Ramos, 60 F.3d 188, 191 (5th Cir. 1995)
require the government to initiate a new forfeiture proceeding,81 but the former uncontested proceeding cannot constitute prior jeopardy.

Courts have also strictly construed the pleading requirements in these cases. If a claim is filed out of time, it is the same as if no claim was filed at all.82 The same is true for claims that are defective for other reasons.83 Similarly, if a defendant files and then withdraws a claim, or files a claim but then does not pursue it, the forfeiture is considered uncontested for double jeopardy purposes.84 One court has suggested


82 See United States v. Ruth, 65 F.3d 599, 604 (7th Cir. 1995) (holding that a defendant was not subject to double jeopardy when the defendant's letter was too late to make him a party to a forfeiture), petition for cert. filed (U.S. Jan. 19, 1996) (No. 95-7546); United States v. Perez, 902 F. Supp. 1318, 1322 (D. Colo. 1995) (holding defendant not at risk of double jeopardy in a forfeiture proceeding where the defendant filed his statement of intent to contest the forfeiture too late to make him a party to the forfeiture proceeding); United States v. Idowu, 74 F.3d 387 (2d Cir. 1996) (claim filed without cost bond is defective); United States v. Castro, No. 95-50480, 1996 WL 89091 (9th Cir. Mar. 5, 1996) (defendant who filed claim without cost bond abandoned the property and cannot assert prior jeopardy); Jones v. United States, 900 F. Supp. 238, 240 (E.D. Mo. 1995) (stating that double jeopardy is not implicated where request to proceed in forma pauperis denied); United States v. Muth, 896 F. Supp. 196, 198 (D. Or. 1995) ("[A] defendant who fails to file and pursue a timely, sufficient claim is in the same position as someone who failed to file a claim at all.").

83 United States v. Idowu, 74 F.3d 387 (2d Cir. 1996) (claim filed without cost bond is defective); Castro, No. 95-50480, 1996 WL 89091 (9th Cir. Mar. 5, 1996) (defendant who filed claim without cost bond abandoned the property and did not assert prior jeopardy).

that this rule would prevent a defendant from asserting "prior jeopardy" where the defendant filed a claim in a civil forfeiture and then "confessed judgment" in an attempt to create a double jeopardy bar to a subsequent prosecution.\textsuperscript{85}

Finally, there is some confusion in the courts as to whether the denial of a petition for remission or mitigation of forfeiture, which a defendant may file in lieu of formally contesting the forfeiture in a judicial forum, can constitute "punishment" for double jeopardy purposes. Most courts have held a remission petition to be a request for leniency or an executive pardon and hence the denial of such a petition cannot constitute "punishment."\textsuperscript{86} But dicta in two Ninth Circuit opinions suggests that the issue is not yet settled.\textsuperscript{87}

\begin{itemize}
\item \textit{See}, e.g., United States v. German, 76 F.3d 315 (10th Cir. 1996); United States v. Ruth, 65 F.3d 599, 604 n.2 (7th Cir. 1995) (filing remission petition "does not serve to contest the forfeiture, but rather is a request for an executive pardon"), \textit{petition for cert. filed} (U.S. Jan. 19, 1996) (No. 95-7546); United States v. Wong, 62 F.3d 1212, 1214 (9th Cir. 1995) (denying remission petition does not cause jeopardy to attach under customs procedure into which remission petitions are considered prior to institution of forfeiture proceedings); United States v. Villarreal-Lara, 913 F. Supp. 501 (1995) (following \textit{Ruth}); United States v. Unger, 898 F. Supp. 740, 743 (D. Or. 1995) (filing remission petition is "an informal request for mercy" which "is not the equivalent of a claim;" therefore jeopardy does not attach in an administrative proceeding involving only a remission petition); Juncaj v. United States, 894 F. Supp. 318, 320 (E.D. Mich. 1995) (holding double jeopardy does not attach when a remission of forfeited property is denied); Orallo v. United States, 887 F. Supp. 1367, 1371 (D. Haw. 1995) (denying remission petition in otherwise uncontested administrative forfeiture is not prior jeopardy).
\item \textit{See United States v. Sanchez-Cobarruvias}, 65 F.3d 781, 784 (9th Cir. 1995) (noting that defendant "made some showing of opposing the civil forfeiture" by filing a remission petition in the administrative proceeding, but holding that jeopardy did not attach because no declaration of forfeiture was ever entered), \textit{cert. denied}, 64 U.S.L.W. 3485 (U.S. Jan. 16, 1996) (No. 95-7099); United States v. Crettacci, 62 F.3d 307, 310-11 (9th Cir. 1995) (suggesting that administrative forfeiture does not constitute punishment only if the defendant "utterly renounces" his interest in the property).
\end{itemize}
Curiously, in the months following Ursery, the Sixth Circuit has not addressed these issues. In two unpublished opinions, different panels followed Torres and held that an uncontested administrative forfeiture did not constitute prior jeopardy. But in its only published decision on this issue, the court expressly left the matter unresolved. Nevertheless, with virtual unanimity regarding the double jeopardy effect of uncontested civil forfeitures in other courts, it is likely that the Sixth Circuit will eventually follow suit.

F. Timing

Even if a defendant shows that he has been subjected to multiple punishments for the same offense in separate proceedings by the same sovereign, he is entitled only to have one of the two sanctions vacated. Which sanction is vacated depends on the timing of the two proceedings.

Because there cannot be "double jeopardy without a former jeopardy," a double jeopardy violation occurs only when the government imposes or attempts to impose the second punishment. It is well established that a prior punishment in a criminal case will bar the

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91 See supra note 74 and accompanying text.

government from attempting to impose a second punishment for the same
offense in a later civil or criminal case. Under Ursery, the same is true
if the earlier punishment was a civil sanction. It appears to be equally
accepted that if two punishments have already been imposed, a court
must vacate the one that was imposed second in time.\textsuperscript{93} In the context
of civil forfeitures and criminal prosecutions, however, establishing the
sequence of the two sanctions for double jeopardy purposes has proven
extraordinarily perplexing.

Initially, the government argued that resolution of this "timing" issue
depended upon whether the case was governed by the protection against
successive prosecutions or protection against multiple punishments.\textsuperscript{94}
Under the successive prosecutions analysis, the court determines which
prosecution came first and which came second by determining when
jeopardy "attached" in each case. In other words, because the successive
prosecutions prong of the Double Jeopardy Clause protects against the
government's twice subjecting a person to the rigors of a criminal
prosecution, and because whichever prosecution begins second is also the
one that will be barred, it is relevant to determine when each prosecution
began. The rules in this context are well defined: jeopardy attaches when
the court accepts a guilty plea, when a jury is empaneled, or in the case
of a bench trial, when the first witness is sworn.\textsuperscript{95}

\textsuperscript{93} Most courts assume that it makes no difference whether the civil or
criminal case occurred first; in either case, the latter punishment is barred. See
United States v. Arreola-Ramos, 60 F.3d 188, 192 n.18 (5th Cir. 1995); see also
United States v. Pierce, 60 F.3d 886, 890 (1st Cir.) ("The Double Jeopardy
Clause is a shield against the oppression inherent in a duplicative, punitive
proceeding; it is not a tool by which a defendant can avoid the consequences of
the proceeding in which jeopardy first attached."), petition for cert. filed (U.S.
Oct. 19, 1995) (No. 95-6474). But in his brief for the United States in the
Supreme Court in Ursery, the Solicitor General argues that the bar against
multiple punishments applies only when the criminal punishment occurs first. See
Brief for United States, at 32-33, United States v. Ursery (Nos. 95-345, 95-346,
1996 WL 84595).

\textsuperscript{94} See North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (defining the
separate prongs of the double jeopardy analysis), overruled on other grounds by

\textsuperscript{95} Crist v. Bretz, 437 U.S. 28, 38 (1978); Serfass v. United States, 420 U.S.
377, 388 (1975); United States v. Smith, 912 F.2d 322, 324 (9th Cir. 1990);
United States v. Cruz, 709 F.2d 111, 115 (1st Cir. 1983).
A civil forfeiture, however, is not a "prosecution."\(^{96}\) It is not a proceeding in which the procedural protections that attend a criminal case come into play.\(^ {97}\) Thus, the successive prosecutions analysis does not apply when double jeopardy claims involving civil forfeitures are raised. As most courts now recognize, the courts must resolve double jeopardy claims in the forfeiture context under the multiple punishments analysis.\(^ {98}\)

But does it make sense to ask when jeopardy "attaches" when applying the multiple punishments analysis? Logically, it should not matter which proceeding started before the other; the constitutional proscription, in this instance, is supposed to be against the imposition of a second punishment, not against the institution of a second proceeding. Thus, if anything, one might think that the relevant question ought to be "which punishment was imposed first and which was imposed second?"

\(^ {96}\) United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984); see also United States v. Clementi, 70 F.3d 997, 999-1000 (8th Cir. 1995) (holding that civil forfeiture does not implicate the successive prosecutions strand of the double jeopardy clause); United States v. Morgan, 51 F.3d 1105, 1113 (2d Cir.) (stating that because a civil case cannot result in either a conviction or an acquittal, the protection against successive prosecutions does not apply; defendant must show he is being subjected to multiple punishments for the same offense), cert. denied, 116 S. Ct. 171 (1995).

\(^ {97}\) See United States v. $292,888.04, 54 F.3d 564, 569 (9th Cir. 1995) (holding that the Sixth Amendment right to counsel does not apply to civil forfeiture where imprisonment is not authorized by forfeiture statute invoked by the government).

With one exception, however, the courts have declined to analyze the timing issue in terms of imposition — apparently because it produces absurd results. 99

Take, for example, the case of the intervening civil forfeiture. A defendant pleads guilty to a criminal offense, but his sentencing is deferred for several months. In the intervening period, his property is forfeited in a civil case without his raising any double jeopardy objection. Should the defendant then be able to object to being sentenced in the criminal case because the punishment in that case would be imposed second in time? Relying on Ninth Circuit precedents, 100 many defendants have argued exactly that. They assert that under the multiple punishments analysis, punishment is imposed in a criminal case only when the defendant begins serving his sentence. 101 Thus, they argue, a defendant may not be sentenced in a criminal case if the sentencing date falls after the entry of judgment in a related civil forfeiture, even if the forfeiture did not occur until after the defendant pled guilty. 102

In resolving the timing issue, the lower courts have avoided this absurdity by ignoring the distinction between successive prosecutions and multiple punishments in favor of a common sense approach. For example, in United States v. Pierce, 103 the First Circuit held that it made no sense to allow a defendant to endure what was arguably an unconstitutional second proceeding in the hopes that it would "both conclude first and lead to a more lenient punishment than that eventually imposed in trial." 104 Thus, the court held that the successive prosecutions analysis would apply to timing issues. 105 In United States v. Idowu, 106 the Second Circuit reached the same result for the same reasons, but it held that it was the multiple punishments analysis that compelled this result.


101 Von Moos, 660 F.2d at 749.

102 Ford, 632 F.2d at 1380.

103 60 F.3d 886 (1st Cir.), petition for cert. filed (U.S. Oct. 19, 1995) (No. 95-6474).

104 Id. at 890.

105 Id. at 889-90.

106 74 F.3d 387 (2d Cir. 1996).
In the Second Circuit’s view, the constitutional protection is against the imposition of “successive punishments,” not “multiple punishments.” Thus, what matters is not when the respective punishments were actually imposed, but when the government instituted the proceeding that led to the imposition of each punishment.

This hybrid analysis follows from the Supreme Court’s decision in Witte v. United States. In Witte, the defendant objected to a criminal prosecution on multiple punishment grounds. When his objection was overruled, the government argued that an interlocutory appeal should not be permitted because no violation of the multiple punishments prong of the Double Jeopardy Clause could occur until the defendant was actually sentenced for the second time. The Supreme Court, however, permitted the defendant to make an interlocutory appeal, noting that for timing purposes, the multiple punishments prong should be construed to protect against both the imposition of a second punishment as well as any attempt to impose a second punishment.

If the protection against the imposition of multiple punishments is understood as a bar against the attempt to impose a second punishment, the approach to resolving the timing issue in multiple punishments cases becomes almost identical to the approach used in successive prosecutions cases. In both instances, the relevant question is whether, at the time one case reaches a critical stage (the stage at which jeopardy is said to “attach”), another proceeding has already reached that critical stage. So, what is relevant for timing purposes in multiple punishments cases is whether, at the time the government attempts to impose one punishment,

107 Id. at *4-5.
109 Id. at 2204-05.
110 Id. at 2204. See United States v. Perez, 70 F.3d 345 (5th Cir. 1995) (allowing interlocutory appeal from denial of motion to dismiss indictment on double jeopardy grounds where claim was based on prior civil forfeiture); United States v. Washington, 69 F.3d 401, 403 (9th Cir. 1995) (rejecting the argument that an interlocutory appeal is inappropriate until the subsequent punishment is actually imposed); United States v. Chick, 61 F.3d 682, 684-86 (9th Cir.) (“[W]here judgment has been entered in a civil forfeiture proceeding, and a defendant moves to dismiss a subsequent criminal prosecution on double jeopardy grounds, we find the pretrial order denying the motion to dismiss appealable under the collateral order exception to the final judgment rule . . .”), petition for cert. filed, 64 U.S.L.W. 3417 (U.S. Nov. 29, 1995) (No. 95-858).
it has already attempted to impose another punishment for the same offense.

Not surprisingly, in developing this hybrid rule, courts have borrowed extensively from the timing rules in successive prosecutions cases. Thus, for purposes of the timing analysis in multiple punishment cases, the critical event in a criminal case—i.e., the point at which the government attempts to impose punishment—occurs when the court accepts a guilty plea, a jury is empaneled, or the first witness is sworn. In civil cases, of course, there is nothing analogous to the entry of a guilty plea. So, the event marking the government’s attempt to impose punishment occurs when the civil case is submitted to an adjudicative hearing, or if there is none, when an order or declaration of forfeiture is entered against the property. This logically follows because the earlier stages of a


112 See United States v. McDermott, 64 F.3d 1448, 1454-55 (10th Cir.) (holding jeopardy cannot attach in a civil proceeding until it reaches an adjudicative hearing, unless claimant settles the case, incurring punishment before the hearing takes place), cert. denied, 116 S. Ct. 930 (1995); United States v. Garcia, Nos. C-95-2782, CR-90-0168, 1996 WL 69803 (N.D. Cal. Jan. 18, 1996); United States v. Barber, 906 F. Supp. 424, 427-28 (E.D. Mich. 1995) (stating that in a civil case, if there is a jury trial, jeopardy attaches when the jury is sworn; if there is a bench trial, it is when the court begins to hear evidence; if there is a settlement, it is when the court enters judgment); United States v. Aguilar, Nos. 95-C-934, 90-CR-209-3, 1995 WL 214382, at *3 (N.D. Ill. Apr. 4, 1995) (deciding that jeopardy attaches on date of forfeiture hearing); United States v. Martin, Nos. 95-C-609, 90-CR-452, 1995 WL 124126, at *4 (N.D. Ill. Mar. 20) (attaching jeopardy in a forfeiture proceeding at the time evidence is first presented to the trier of fact), aff’d, 52 F.3d 328 (7th Cir. 1995); United States v. Lenz, Cr. No. 93-1286-R (S.D. Cal. Jan. 9, 1995) (finding that jeopardy did not attach in a civil forfeiture case dismissed on the government’s motion because (1) the case had not yet been submitted to the trier of fact, and (2) no punishment had yet been imposed).

113 See United States v. Clementi, 70 F.3d 997, 1000 (8th Cir. 1995) (holding that a stay of the civil forfeiture case prevented jeopardy from attaching); United States v. Sanchez-Cobarruvias, 65 F.3d 781, 784 (9th Cir. 1995) (finding no double jeopardy violation because the agency never entered a final disposition
civil case — such as the seizure of the property, the filing of a complaint, and the initiation of discovery — are all analogous to stages in a criminal case that occur before the defendant is placed in jeopardy. It is the entry order in earlier administrative forfeiture), *cert. denied*, 64 U.S.L.W. 3485 (U.S. Jan. 16, 1996) (No. 95-7099); United States v. Park, 947 F.2d 130, 133-36 (5th Cir. 1991) (holding seizure of unreported cash did not constitute prior jeopardy barning criminal prosecution on CMIR charge where administrative forfeiture was stayed pending outcome of criminal case), *vacated in part*, 951 F.3d 634 (5th Cir. 1992); United States v. Thompson, 911 F.2d 451, Nos. CR 91-60122-HO, CV 95-6055-HO, 1995 WL 787896, at *2 (D. Or. Dec. 6, 1995) (attaching jeopardy in civil cases when judgment is entered, not when defendant agrees to forfeiture as part of a criminal guilty plea); United States v. Blumberg, 903 F. Supp. 33, 35 (D. Or. 1995) (noting that it is not inconsistent for jeopardy to attach in a criminal case when a plea is entered, and in a civil case when judgment is entered, because there is no equivalent to a guilty plea in a civil case); United States v. Lane, 891 F. Supp. 8, 11-12 (D. Me. 1995) (rejecting argument that jeopardy attaches when government seizes defendant's property); United States v. Messino, 876 F. Supp. 980, 982 (N.D. Ill. 1995) (attempting to confess judgment in civil case has no jeopardy effect until court accepts confession and enters forfeiture order); United States v. Stanwood, 872 F. Supp. 791, 793-94 (D. Or. 1994) (convicting a defendant was the “first” punishment because entry of the guilty plea preceded the forfeiture judgment); see also United States v. Mayle, 64 F.3d 660, Nos. 95-5793, 93-5794, 94-5591, 1995 WL 478145, at *2-3 (4th Cir. Aug. 14, 1995) (reversing prior civil forfeiture on appeal does not constitute prior jeopardy barring criminal prosecution). But see United States v. Kearns, 61 F.3d 1422, 1428 (9th Cir. 1995) (attaching jeopardy under United States v. Barton, 46 F.3d 51 (9th Cir. 1995), in a civil case at the earliest date on which an answer is filed); *Barton*, 46 F.3d at 52 (filing an answer is the earliest point at which jeopardy can attach in a civil forfeiture case); United States v. Domitrovich, Nos. CS-94-481-FVS, CR-93-295-FVS (E.D. Wash. May 10, 1995) (discussing but not deciding whether jeopardy attaches in a civil forfeiture case when the defendant agrees not to contest the forfeiture as part of his guilty plea in a criminal case; holding that in any event, civil and criminal jeopardy in such case would be simultaneous, so criminal sentence would not be barred on account of prior jeopardy); United States v. Thorpe, No. CR 94-108-S-EJL (D. Idaho Apr. 26, 1995) (attaching jeopardy in civil case when deadline for filing a claim passes); see also United States v. Falkowski, 900 F. Supp. 1207, 1210 (D. Alaska 1995) (discussing that, in civil case, either jeopardy never attached because defendant did not file an answer, or it attached when default judgment was entered).
of a judgment in a civil case that divests the defendant of his interest in his property.

For example, in United States v. Stanwood,114 a defendant who pled guilty before any civil sanction was imposed could not object to being sentenced in the criminal case on account of an intervening civil forfeiture because at the time the government commenced the criminal action — i.e., when it attempted to impose the criminal punishment — it had not yet attempted to punish the defendant in any related case.115 If anything, the defendant in such a case could object only to the civil forfeiture, because that action represented the government's second attempt to impose punishment.

This hybrid analysis, however, only applies to the timing issue. If, notwithstanding the empaneling of a jury or the taking of evidence, there is no conviction in the criminal case, there is no punishment, and thus no bar to the civil forfeiture.116 Similarly, in civil cases, an adjudicative hearing that does not result in a forfeiture judgment against the defendant cannot constitute jeopardy in any event because there is no punishment. In other words, while the timing rules may constitute a hybrid between

115 Id. at 793-94. See Harrison v. United States, 67 F.3d 307 (9th Cir. 1995) (entering guilty plea before entering stipulation of forfeiture does not implicate double jeopardy); United States v. Roberts, 67 F.3d 310 (9th Cir. 1995) (holding double jeopardy not implicated where guilty plea preceded settlement agreement in forfeiture case); United States v. Pierce, 60 F.3d 886, 889 (1st Cir.) (attaching jeopardy in criminal case when jury is sworn, not when punishment is imposed, because successive prosecutions analysis applies), petition for cert. filed (U.S. Oct. 19, 1995) (No. 95-6474); United States v. Faber, 57 F.3d 873, 874-75 (9th Cir. 1995) (entering guilty plea in a criminal case before civil forfeiture is not prior jeopardy); United States v. Whitby, 896 F. Supp. 898, 901-02 (W.D. Wis. 1995) (holding that jeopardy does not attach to a criminal prosecution when the guilty plea is accepted before a civil forfeiture default judgment is accepted by a court); Gehring v. United States, No. CR-90-0265-WFN (E.D. Wash. May 10, 1995) (rejecting argument that criminal punishment is imposed when incarceration begins, and that civil punishment is imposed when defendant agrees to forfeiture at time of criminal guilty plea); Dean v. United States, No. CR-92-0239-WFN (E.D. Wash. May 10, 1995) (holding that punishment is exacted in civil forfeiture at time stipulation of decree of forfeiture is filed); United States v. Groceman, 882 F. Supp. 976, 978 (E.D. Wash. 1995) (sentencing after guilty pleas is first punishment where no civil forfeiture is pending at that time).
the multiple punishments and successive prosecutions analysis, the multiple punishments analysis still governs whether a constitutional violation occurs. The bar is against the attempt to impose a successive punishment, not a bar against successive prosecution.

In general, a criminal prosecution cannot be barred as “second jeopardy” where an earlier civil forfeiture did not result, or has not yet resulted, in any judgment of forfeiture. That applies to administrative forfeiture cases in which property has been seized and the period for filing a claim has passed, but the seizing agency has not yet entered a declaration of forfeiture.\(^\text{117}\) It also applies to civil judicial cases where a complaint was filed and the defendant responded with a claim and answer, but the court has not entered a final judgment.\(^\text{118}\)

**G. Procedural Issues**

As mentioned earlier, defendants have tried to take advantage of the developing double jeopardy law regarding forfeitures, not only to block pending prosecutions, but also to vacate their criminal convictions and to obtain the return of their forfeited property in cases that have been concluded for some time. Notwithstanding a few celebrated cases to the contrary, the courts are generally unsympathetic to these challenges, and have rejected them not only on the merits as discussed above, but on a variety of procedural grounds as well.\(^\text{119}\) The decisions are not always consistent, but the common theme is that the courts are reluctant to allow convicted defendants to use an unanticipated change in the law as a “Get Out of Jail Free Card.”

Defendants may seek collateral relief from convictions or sentences by filing a § 2255 motion\(^\text{120}\) if the defendant can show flaws in the conviction or sentence that are “jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice.”\(^\text{121}\) Several courts, including the courts of appeal in the Third and Tenth Circuits, hold that a defendant may not raise a double jeopardy challenge for the first time on direct appeal.\(^\text{122}\) Others hold that a defendant is barred

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\(^{117}\) United States v. Sanchez-Cobarruvias, 65 F.3d 781, 784 (9th Cir. 1995).

\(^{118}\) United States v. Clementi, 70 F.3d 997, 1000 (8th Cir. 1995).

\(^{119}\) See infra notes 122-37.


\(^{122}\) United States v. Edwards, 69 F.3d 419, 441 (10th Cir. 1995), petition for
from challenging his conviction on double jeopardy grounds in a § 2255 motion if he could have made the challenge on direct appeal or in an earlier § 2255 motion but failed to do so. The latter cases arose in situations where the defendant argued that $405,089.23 or Ursery applied retroactively. In response, the courts held that if indeed those cases simply stated the law as it had been since the Supreme Court’s decision in United States v. Halper, then the defendant had no excuse for not raising the double jeopardy issue sooner.

Where courts have allowed § 2255 motions, they have insisted that the motion be filed in the district of conviction, not the district where the defendant happens to be incarcerated. This prevents defendants...
convicted in another circuit but incarcerated in the Sixth Circuit from
taking advantage of the favorable case law in that jurisdiction.

Also, courts have held that § 2255 motions only apply to criminal
sentences of incarceration. A court has no jurisdiction under § 2255 to
return property seized under a civil forfeiture statute.\(^{127}\) The proper
procedural vehicle for overturning a civil forfeiture judgment on double
jeopardy grounds is Federal Rule of Civil Procedure 60(b).\(^{128}\) As has
been true of § 2255 challenges, however, the courts have strictly
construed Rule 60(b) and have been reluctant to use it to vacate
forfeitures in long-closed cases.

For example, in response to claims that $405,089.23 and \textit{Ursery}
apply retroactively, some courts hold that if the double jeopardy cases
do not state a new rule, then the Rule 60(b) challenge should have been
raised earlier.\(^{129}\) Alternatively, other courts hold that a change in the
law is not a basis for relief under Rule 60(b).\(^{130}\) Most recently, one

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(holding that § 2255 is not the proper vehicle for seeking return of forfeited
property); United States v. Gallardo, No. CR-S-90-002969-PMP (LRL), 1995
443929, at *6 (N.D. Ill. July 24, 1995) (holding that § 2255 does not authorize
collar attacks on civil forfeitures to scare the release of forfeiture property);
Dawkins v. United States, 883 F. Supp. 83, 85 (E.D. Va.) (determining that
forfeitures are civil, not criminal, actions which involve an individuals’ liberty
and § 2255 does not authorize return of forfeited property), aff’d, 67 F.3d 297
(4th Cir. 1995).

\(^{128}\) See United States v. 400 Wrenco Loop Rd., Civ. No. 88-3117-N-HLR (D.
Idaho Apr. 18, 1995) (granting FED. R. CIV. P. 60(b) motion for relief from civil
forfeiture judgment where forfeiture followed criminal conviction).

\(^{129}\) See, e.g., United States v. 88843 Ross Lane, 907 F. Supp. 336, 337-38 (D.
Or. 1995) (filing motion four years after civil judgment is not timely if
$405,089.23 does not create a new rule); United States v. One 1956 Mercedes
(stating that if $405,089.23 is not a new rule, then claimant should have been
aware of it at the time he settled the civil forfeiture case); United States v. 12310
after civil forfeiture judgment is “inexcusably tardy”).

\(^{130}\) See United States v. 3947 Loche Ave., 164 F.R.D. 496 (D. Cal. 1995)
(rejecting challenges under Rule 60(b)(5) and (6)); \textit{One 1956 Mercedes Benz
Gull Wing}, Civil No. 89-1617-R (CM) at 5 (FED. R. CIV. P. 60(b)(5)); United
court held that now that $405,089.23 was a year old, any new Rule 60(b) motion would be denied as not having been filed within one year of the event rendering the judgment void.\(^\text{131}\)

As these cases indicate, the courts have generally been willing to apply $405,089.23 and Ursery retroactively, if only to then hold that the post-conviction or post-judgment challenge is not timely filed. But other courts have held that the double jeopardy cases constitute a "new rule" and therefore do not apply to closed cases at all.\(^\text{132}\)


\(^{132}\) See Dawson v. United States, No. 95-2362, 1996 WL 75839 (7th Cir. 1996) (proposition that civil forfeiture could constitute jeopardy was not established as the time of defendant's conviction; therefore, it is a "new rule" that does not apply retroactively under Teague v. Lane, 489 U.S. 288, reh'g denied, Teague v. Lane, 490 U.S. 1031 (1989)); Ferguson v. United States, 911, F. Supp. 424 (C.D. Cal. 1995) (to the extent that Austin requires a finding that civil forfeiture constitutes jeopardy, it created a new rule by overturning 89 Firearms; therefore, under Teague v. Lane, defendant cannot rely on Austin or its progeny in seeking § 2255 review of pre-1993 convictions); Garcia v. United States, Nos. C-95-2782, CR-90-0168, 1996 WL 69803 (N.D. Cal. Jan. 18, 1996) ($405,089.23 was not dictated by precedent at the time of defendant's pre-Austin conviction). United States v. Falkowski, 900 F. Supp. 1207, 1212 n.4 (D. Alaska 1995) ("If the interplay between civil forfeiture, criminal prosecution and the double jeopardy clause is so 'novel' that Falkowski is excused from raising the issue, then it would appear to be too novel to receive retroactive application."); 12310 Short Circle, 162 F.R.D. at 138-39 (holding $405,089.23 does not apply retroactively to closed civil cases where motion to vacate is made under Fed. R. Civ. P. 60(b)); United States v. Knight, No. CR 94-816 H (S.D. Cal. Mar. 20), aff'd on other grounds, 67 F.3d 309, No. 96-50145, 1995 WL 576893 (9th Cir. Sept. 29, 1995). But see Smith v. United States, 76 F.3d 879 (7th Cir. 1996) (retroactivity does not apply to double jeopardy claim based on Halper); Oakes v. United States, 872 F. Supp. 817, 826-27 (E.D. Wash.) (holding on double jeopardy to civil forfeiture is not a "new rule"); United States v. Stanwood, 872 F. Supp. 791, 797-98 (D. Or. 1994) (holding application of double jeopardy to civil forfeiture not a new rule, but application of old rule to facts at issue); United States v. McCaslin, 863 F. Supp. 1299, 1305-06 (W.D. Wash. 1994) (holding application of double jeopardy to civil forfeiture not a new rule, but
Finally, courts have recently held that the defendant waived any double jeopardy objection he might have raised when he did not assert it at the time he entered a guilty plea or agreed to the settlement of a civil case. The guilty plea cases are particularly interesting. In *United States v. Broce*, the Supreme Court held that a defendant who entered a guilty plea without raising any double jeopardy defenses waived the double jeopardy defense, even if he was not aware of the defense at the time the plea was entered. Initially, when double jeopardy objections were raised in the forfeiture context, courts were unwilling to apply *Broce* to find a waiver. Most often, they cited cases holding that *Broce* did not apply where the double jeopardy violation was apparent on the face of the record in the criminal case in which the defendant entered his guilty plea.

In *United States v. Falkowski*, however, the district court recognized that a double jeopardy violation in the forfeiture context is rarely, if ever, apparent on the face of the record in the criminal case because a hearing and examination of the record in the related civil case is generally

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135 See United States v. Wong, 62 F.3d 1212 (9th Cir. 1995) (holding that entry of guilty plea does not constitute double jeopardy waiver under *Broce* where court could resolve double jeopardy claims without an evidentiary hearing); *Oakes*, 872 F. Supp. at 825-26 (holding that there was no double jeopardy waiver, despite guilty plea, because Fifth Amendment violation was apparent on the face of the indictment); *Stanwood*, 872 F. Supp. at 796-97 (stating no waiver despite guilty plea, because no evidentiary hearing would be required); see also United States v. Ursery, 59 F.3d 568, 571 (6th Cir. 1995) (excusing failure to raise double jeopardy at pre-trial because *Austin* had been decided only two days before), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996) (Nos. 95-343, 95-346).

required to determine if the forfeiture and the prosecution were for the same offense under the *Blockburger* test.\textsuperscript{137}

II. AVOIDING DOUBLE JEOPARDY PROBLEMS IN FUTURE CASES

Double jeopardy can always be avoided if it is possible to pursue forfeiture as part of the criminal case,\textsuperscript{138} but criminal forfeiture, for a variety of reasons, is not always a viable option. In particular, criminal forfeiture is not possible where there is no criminal forfeiture statute, where the defendant is a fugitive, where the property in question belongs to a third party, or where the property was derived from, or used to commit, an offense other than the specific act for which the defendant is being prosecuted.\textsuperscript{139} Criminal forfeiture is also problematic in cases where the property does belong to the defendant but the government may not be able to prove it, and a third party — possibly acting in collusion with the defendant — files a claim to recover it.\textsuperscript{140} Finally, criminal forfeiture is problematic when a third party, who is not an innocent owner, shares a legal interest in the defendant’s property.\textsuperscript{141}

For all of these reasons, civil forfeiture will continue to be an important tool of law enforcement. Thus, prosecutors will have to

\textsuperscript{137} Id. at 1212-14; see also United States v. Singleton, 897 F. Supp. 1268, 1273 (N.D. Cal. 1995) (agreeing to civil forfeiture as part of criminal guilty plea constitutes waiver of any double jeopardy claim in the criminal case).


\textsuperscript{139} See United States v. Riley, Nos. 95-2694, 95-2781, 95-2778, 1996 WL 102124 (8th Cir. Mar. 11, 1996) (only the defendant’s interest in property may be forfeited in a criminal case); United States v. Jimerson, 5 F.3d 1453 (11th Cir. 1993) (government cannot forfeit defendant’s wife’s interest in criminal case); United States v. Rhodes, 62 F.3d 1449 (D.C. Cir. 1995) (noting that forfeiture had to be done civilly because property was derived from an offense other than that charged in the indictment).

\textsuperscript{140} United States v. Henry, 850 F. Supp. 681 (M.D. Tenn. 1994) (defendant’s wife had standing to contest forfeiture of marital residence in criminal case), aff’d, United States v. Henry, 64 F.3d 664 (6th Cir. 1995).

\textsuperscript{141} See United States v. Riley, 1996 WL 102124 (8th Cir. 1996) (only the defendant’s interest in property may be forfeited in a criminal case); United States v. Jimerson, 5 F.3d 1453 (11th Cir. 1993) (government cannot forfeit defendant’s wife’s interest in a criminal case); United States v. Rhodes, 62 F.3d 1449 (D.C. Cir. 1995) (notice that forfeiture had to be done civilly because property was derived from an offense other than that charged in the indictment).
continue to deal with double jeopardy issues even if they use criminal forfeiture whenever it is available. The following suggests some ways in which double jeopardy may be avoided in such cases.

A. Administrative Forfeitures

When a federal law enforcement agency seizes property for forfeiture under one of the civil forfeiture statutes, the agency is obligated under the customs laws to commence an administrative forfeiture action. The initiation of a civil forfeiture action, of course, does not by itself constitute jeopardy. It is only the culmination of the action with the entry of a declaration of forfeiture that could conceivably bar a subsequent criminal prosecution. Therefore, it is entirely proper for federal agencies to initiate administrative forfeiture actions after the seizure of property under a forfeiture statute. And where there is no conceivable conflict with a subsequent criminal case — i.e., where the property owner will not be prosecuted — there is no reason why the forfeiture can not be completed.

There is also no reason not to complete the forfeiture in those circuits where the court of appeals has followed United States v. Torres and held that an uncontested forfeiture does not constitute jeopardy. All administrative forfeitures are, by definition, uncontested. Thus, an administrative forfeiture in a circuit following Torres will never constitute jeopardy. As noted, of course, the Sixth Circuit has not yet addressed the Torres issue in a published opinion. Therefore, in the Sixth Circuit federal agencies may choose to suspend the entry of a final declaration of forfeiture in administrative cases even if no claim is filed until the Court of Appeals resolves this issue.

Again, there is no reason to suspend the administrative forfeiture where the property owner is not the person likely to be prosecuted. Moreover, there is no reason to suspend the forfeiture if it is based on conduct, or on an offense, other than that which will be the basis for the

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143 See United States v. Sanchez-Cobarruvias, 65 F.3d 781, 784 (9th Cir. 1995) (holding that there is no jeopardy until there is some “finality” to the forfeiture proceeding), cert. denied, 116 S. Ct. 797 (1996); supra notes 87 & 113 and accompanying text.
144 See supra note 74 and accompanying text.
145 See supra note 90 and accompanying text.
criminal case. By following the decisions applying the Blockburger test,\textsuperscript{146} for example, seizing agencies and prosecutors can frequently avoid any possible conflict between an administrative forfeiture and a criminal prosecution.

Finally, there is no reason to suspend an administrative forfeiture if the property constitutes the proceeds of a criminal offense. As mentioned, the Sixth Circuit has held that the forfeiture of proceeds is purely remedial in nature and therefore does not constitute punishment for double jeopardy purposes.\textsuperscript{147}

\textbf{B. When the Defendant Files a Claim}

There will be times, of course, when the defendant does contest a civil or administrative forfeiture, and there is no way not to base the forfeiture on the offense for which the defendant may be prosecuted. In that case, the government must take steps to ensure that the civil case does not jeopardize the prosecution of the criminal case.

The obvious solution in most cases will be to incorporate the forfeiture into the criminal indictment. As mentioned, that is not always possible. Even where it is possible, it is frequently the case that the indictment will not be ready for presentation to a grand jury for many months. In that case, the government has no choice but to initiate a civil forfeiture action within a reasonable time.\textsuperscript{148}

If the civil complaint can be based on offenses other than the one on which the defendant will be prosecuted, or if it relates only to the forfeiture of proceeds, there will be no double jeopardy problem. If, however, the offenses are identical, the government should file the complaint but move for a stay. The law is sparse with respect to whether the avoidance of double jeopardy violations is sufficient grounds for a stay. One court has entered a stay on that basis,\textsuperscript{149} but others have refused.\textsuperscript{150}

\textsuperscript{146} See supra notes 60-62 and accompanying text.
\textsuperscript{147} United States v. Salinas, 65 F.3d 551, 554 (6th Cir. 1995).
\textsuperscript{148} 19 U.S.C. § 1604 (1994) (requiring the Attorney General to “cause the proper proceedings to be commenced and prosecuted, without delay” once a case has been referred by the seizing agency).
\textsuperscript{149} United States v. Four Aircraft, A94-401 CV (JKS) (D. Alaska Nov. 16, 1994).
\textsuperscript{150} See, e.g., United States v. All Funds, Monies, Securities, Mutual Fund Shares, and Stocks Held in Fidelity Investments, 162 F.R.D. 4 (D. Mass. 1995)
If the case is not stayed, there is a danger that the defendant will seek to "confess judgment" in the civil case in order to manufacture a double jeopardy violation. However, an offer to confess judgment will not alone constitute prior jeopardy; jeopardy does not attach until the court accepts the defendant's default and enters an order of forfeiture. Therefore, at any point prior to the entry of the forfeiture judgment, the government always has the option of dismissing the civil action and avoiding any double jeopardy concern.

But the courts should not countenance such a transparent attempt by a criminal defendant to blackmail the government into releasing forfeitable property to avoid jeopardizing a criminal case. As a federal district court in Illinois observed, it does not seem to make sense to allow a defendant to create a double jeopardy violation by filing a claim and then confessing that his claim has no basis. Logically, there should be no difference between a civil case in which a judgment is entered by default because the defendant never filed a claim or filed a claim but failed to pursue it, and one where a claim was filed but the defendant subsequently confessed judgment. If there is no double jeopardy bar created by the former, there should be no bar created by the confession of judgment.

Finally, under Ursery, a prosecutor in the Sixth Circuit could argue that contemporaneously pending civil and criminal matters constitute a single proceeding for double jeopardy purposes. The factors that would most likely be used by the court to determine whether the parallel proceedings were in fact a single, coordinated prosecution, are listed above. In short, a court should recognize parallel civil and criminal cases as a single, coordinated proceeding if the government's intention to pursue the full range of available civil and criminal sanctions against the defendant has been made known from the outset of the case — i.e. from the time of arrest and/or seizure of the property, and the civil and

\[\text{(lifting stay of civil case where there is no danger claimant will use discovery to gain advantage in the criminal case, and government can avoid double jeopardy by pursuing criminal forfeiture and holding property with restraining order); United States v. 167 Woodland Rd., No. 94-10851-RWZ, 1994 WL 707129 (D. Mass. Dec. 2, 1994) (holding that court cannot stay civil case where claimant consents to forfeiture leaving no case or controversy).}\]


\[152\] Id. at 982 n.1.

\[153\] See supra note 84 and accompanying text.

\[154\] See supra notes 36-44 and accompanying text.
criminal investigations have in fact been coordinated within the seizing agency and the United States Attorney's Office.

C. Where There is No Criminal Forfeiture Statute

In a surprising number of instances, Congress has authorized civil, but not criminal, forfeiture of property. In fact, outside of the drug and money laundering arena, most forfeiture statutes are civil only.155 Among the most commonly used forfeiture statutes in this category are 8 U.S.C. § 1324 (alien smuggling); 18 U.S.C. § 1955 (gambling), 18 U.S.C. § 545 (smuggling), 18 U.S.C. § 924 (firearms), 26 U.S.C. § 5861(d) (firearms) and 49 U.S.C. § 782 (aircraft and vessels used to transport contraband). In such cases, the government has no choice but to file a civil forfeiture action, even if a criminal indictment is ready to go and the offense underlying the forfeiture is the same as the offense set forth in the indictment.156

In this instance, the single proceeding rule in the Sixth Circuit offers a way out. If the government demonstrates that it coordinated the civil and criminal cases in every way from their inception, and the only reason they were not consolidated was the absence of a criminal forfeiture provision, a court should apply the Ursery test in a manner that permits the prosecution of parallel proceedings.

Alternatively, the government could attempt to join the civil and criminal cases by moving to consolidate them into one unified but bifurcated proceeding. Such a consolidated case would present procedural challenges, but they are not insurmountable. Moreover, the defendant's objection to the consolidation should be construed as a waiver of the double jeopardy violation that the government was attempting to avoid.157

None of these alternatives is certain to avoid double jeopardy problems. Only a decision by the Supreme Court overturning $405,089.23 and Ursery could do that. But at least these steps can minimize the risk

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155 See 28 U.S.C. § 2461 (1994) (when Congress fails to specify whether a forfeiture statute is civil or criminal, it is to be considered civil).
to the government's ability to impose true punishment for the criminal violation.

III. SUPREME COURT REVIEW OF $405,089.23 AND URSERY

The Supreme Court will review $405,089.23 and Ursery before the end of its October 1995 term. At that time, the Court will have an opportunity to clarify all of the issues that have troubled the lower courts.

First, if the Court accepts the premise that civil forfeiture can implicate double jeopardy in some instances, it should make clear whether Halper's "rational relationship" test or Austin's categorical approach determines whether a forfeiture constitutes punishment for double jeopardy purposes. In Halper, the court said that a civil sanction would be considered punishment for double jeopardy purposes only in the "rare case" where there was no rational relationship between the penalty imposed and the crime committed. But the application of Austin's categorical rule to double jeopardy cases has converted "Halper's rule of reason for the 'rare' case into a per se rule for the routine case" that threatens thousands of criminal prosecutions. If the Austin Court meant to overturn Halper, it should have stated so; if it meant Austin's categorical rule to apply only to Eighth Amendment cases, it should have stated that.

Similarly, if the Court is going to apply double jeopardy law to civil forfeitures, it should clarify what it meant in Halper when it held that there would be no double jeopardy violation if the civil and criminal sanctions were imposed in the same proceeding. The Court is well aware that in the federal system civil and criminal matters are not literally combined in one complaint or indictment. Thus, the Court must have contemplated some means by which the civil sanctions Congress has authorized for criminal offenses can be imposed in a parallel proceeding that does not bar the imposition of a criminal penalty for the same offense. Congress surely assumed that such a procedure was constitutionally acceptable when it repeatedly over the past 200 years enacted civil forfeiture statutes as sanctions for criminal offenses. Indeed, in many instances, Congress explicitly provided rules governing parallel proceed-

158 See supra note 3.
It is now up to the Court to make clear exactly what the Constitution requires in applying those rules.

The Court could go much further, however, and eliminate the double jeopardy problem for most, if not all, civil forfeiture cases. The Court should hold that under the Blockburger/Dixon rule, civil forfeitures and criminal prosecutions generally involve separate offenses because each proceeding requires proof of an element that the other does not. To do this, the Court needs to recognize that a civil forfeiture, as an in rem proceeding, does not require proof that the property owner played any role in the commission of the crime giving rise to the forfeiture, while a criminal prosecution obviously requires proof that the defendant committed the offense with the mens rea required by the applicable statute. At the same time, an in rem forfeiture requires proof that specific property was involved in, or derived from, a criminal offense. With only a few exceptions, such as cases making possession of contraband a crime, criminal offenses do not require proof that any particular property was involved in the offense.

Finally, the Court could eliminate the problem entirely by reconsidering Halper itself. Justice Scalia has questioned whether there really is a “multiple punishments” prong of the Double Jeopardy Clause and has suggested that double jeopardy cases be analyzed solely under the successive prosecution approach. In his view, Halper was really an Eighth Amendment Excessive Fines case which, if decided today, would be analyzed under Austin, and not as a double jeopardy case. If adopted, that view would make all of these issues moot, because as noted, a civil forfeiture is never a prosecution. Some forfeitures would have to be mitigated to avoid violating the Excessive Fines Clause, but no forfeiture would bar the criminal prosecution of the perpetrator of the underlying offense.

**CONCLUSION**

For two hundred years it was unquestioned that civil forfeiture did not implicate the Double Jeopardy Clause. The current confusion is the law is due entirely to the interpretation being given to language in Austin v. United States that the Supreme Court may never have intended to

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161 See supra note 59.
apply in the double jeopardy context. It is up to the Court to resolve the issues raised by *Austin* as soon as possible. In the meantime, while the law is developing very rapidly, courts, prosecutors, and private litigants will continue to struggle with the application of double jeopardy principles to a statutory structure and judicial process to which they were never meant to apply.