



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

CRISTAL CARDENAS,

No. S-1-SC-41142

Defendant-Appellee.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
DOÑA ANA COUNTY,
HON. JUDGE CONRAD F. PEREA PRESIDING

DEFENDANT-APPELLEE'S ANSWER BRIEF

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NOTE ON RECORD CITATIONS

The district court proceedings in this case were audio-recorded using For The Record software. FTR CDs were reviewed using The Record Player and are cited by date and timestamp in the form **[mm/dd/yy CD hour:minute:second]**. The record proper is cited as **[volume RP page]**. The State’s brief-in-chief is cited as **[BIC page]**.

This brief uses “(cleaned up)” to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017); *see, e.g., Brownback v. King*, 592 U.S. 209, 215 (2021).

CERTIFICATION OF COMPLIANCE

The body of this brief exceeds the limit of 35 pages set forth in Rule 12-318(F)(2) NMRA. Undersigned counsel certifies that this brief is written in Times New Roman, a proportionally spaced font, and that the body of the brief contains fewer than 11,000 words (specifically, 10,805). This word count was obtained using Microsoft Word in Microsoft Office 365.

NATURE OF THE CASE

The prosecutors at Cristal Cardenas's trial repeatedly engaged in improper conduct. Among other things, the prosecutors misled the district court about the factual basis for impeachment evidence, made false statements in front of the jury, and made closing arguments that were inflammatory and shifted the burden of proof to the defense. Ms. Cardenas was convicted and appealed to this Court, which reversed her convictions on evidentiary grounds.

On remand to the district court, Ms. Cardenas moved to dismiss the charges against her with prejudice, arguing that because of the prosecutors' egregious misconduct, retrial would constitute double jeopardy under the New Mexico Constitution. The State did not dispute Ms. Cardenas's descriptions of the trial prosecutors' conduct, nor did it introduce any evidence to explain or mitigate it. The district court granted the motion to dismiss.

On appeal, the State now asserts that because Ms. Cardenas did not seek dismissal with prejudice on appeal, she was barred from doing so on remand. The State proposes, in effect, a reverse preservation requirement for defendants, who would have to raise undeveloped double-jeopardy claims on appeal or else forfeit them. Ms. Cardenas asks this Court to reject the State's arguments, which have no basis in current law, and affirm the dismissal with prejudice.

SUMMARY OF FACTS AND PROCEEDINGS

Ms. Cardenas was convicted of one count each of first-degree murder, conspiracy to commit first-degree murder, and criminal solicitation of first-degree murder. **[2 RP 362-63]** She appealed directly to this Court, raising a variety of issues, including an omnibus cumulative error claim that included a violation of Rule 11-404(B) NMRA, improper vouching by one witness for another, and the prosecutors’ mischaracterization of evidence. Defendant-Appellant’s Brief-in-Chief at 31-44, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023). In March 2025, this Court reversed “based on a single evidentiary ruling,” namely that under Rule 11-404(A) and (B), the district court should not have allowed prosecutors to question Ms. Cardenas about her baby’s positive methamphetamine test. *State v. Cardenas*, 2025-NMSC-020, ¶¶ 2, 29-40, 572 P.3d 958. This Court remanded for a new trial. *Id.* ¶ 73.

The district court filed a notice of jury trial for September 2025. **[2 RP 394]** Ms. Cardenas continued to be held in custody, first in prison and then in the county jail. **[See 2 RP 424; 2 RP 429]** While incarcerated and awaiting retrial, Ms. Cardenas moved to dismiss the charges with prejudice. **[2 RP 401-20]** She argued that under *State v. Breit*, 1996-NMSC-067, ¶ 32, 122 N.M. 655, 930 P.2d 792, the trial prosecutors’ misconduct was so egregious that retrial would constitute double jeopardy under Article II, Section 15 of the New Mexico Constitution.

I. The misconduct described in the *Breit* motion

Ms. Cardenas's motion laid out detailed allegations of prosecutorial misconduct from her trial, some (but not all) of which were related to the evidentiary error that this Court addressed on appeal. **[See 2 RP 403-13]** During Ms. Cardenas's testimony, on cross-examination, prosecutors asked her, "So why is it that your child tested positive for meth when y'all got arrested?" **[2 RP 403-04 ¶¶ 9-11; 3/10/22 CD 2:58:26-2:59:11]** *See Cardenas*, 2025-NMSC-020, ¶ 16. As this Court found, the child's drug test was not admissible under any rule of evidence. *See id.* ¶ 28.

On remand, Ms. Cardenas alleged that the prosecutors clearly had the drug-test evidence in mind before the cross-examination, but never disclosed the evidence or gave any notice to the district court or the defense that they planned to ask about it. The result was that the prosecutors ambushed the defense and the district court with the evidence, asking a prejudicial question that the jury could not un-hear. **[2 RP 404-05 ¶¶ 12-13]**

Ms. Cardenas also alleged that the prosecutors had misled the district court about the factual basis for the question. **[2 RP 405 ¶ 14]** At bench conference, the prosecutors told both the district court and defense counsel that Luis Flores, who was the child's father and Ms. Cardenas's co-defendant, "pled guilty to this charge, Judge, of they endangered [the child]. She was found with meth, he pled guilty. He

was actually also tested positive for meth, Your Honor.” **[3/10/22 CD 3:01:43-3:02:21]** *See Cardenas*, 2025-NMSC-020, ¶ 17. This was false; Mr. Flores’s child endangerment charge was dismissed two years before Ms. Cardenas’s trial. *See Nolle Prosequi, State v. Flores*, D-307-CR-2018-638 (3d Jud. Dist. Ct. Mar. 17, 2020). The trial prosecutors never acknowledged this or brought it to the court’s attention. **[See 2 RP 406 ¶ 16a]** Ms. Cardenas later cited the nolle prosequi in Mr. Flores’s case on appeal, and in the State’s answer brief, appellate counsel for the State conceded that the prosecutors had misrepresented the case. *See Cardenas*, 2025-NMSC-020, ¶ 44; Defendant-Appellant’s Brief-in-Chief at 39, *Cardenas*, S-1-SC-39517 (Aug. 15, 2023); Plaintiff-Appellee’s Answer Brief at 38, *id.* (Oct. 16, 2023).

In the *Breit* motion in the district court, Ms. Cardenas explained that the prosecutors had made false statements in front of the jury as well. One set of false statements was, again, about Mr. Flores’s child endangerment case. During closing argument, defense counsel said that the case had been dismissed. A prosecutor interrupted and said, “Your Honor, objection, that case was not dismissed,” and said that defense counsel was “misrepresenting things.” The other prosecutor said three times that there was no evidence in the record of a dismissal. **[3/11/22 CD 10:39:35-10:40:41]** None of this was correct: Ms. Cardenas had testified that she thought the case was dismissed, so defense counsel was arguing from the evidence

presented, and in fact defense counsel was correct about the dismissal, and the prosecutors were wrong. **[2 RP 406-07 ¶ 17a]** *See Cardenas*, 2025-NMSC-020, ¶ 44.

There were other false statements as well. Ms. Cardenas alleged that in opening statement, one of the prosecutors misstated what the evidence would show: he said that police “didn’t find any fingerprints” and suggested that tire tracks at the crime scene matched the dimensions of Ms. Cardenas’s Chevrolet. **[See 3/8/22 CD 9:43:53-9:44:50]** In fact, according to testimony at trial, police did find fingerprints on shell casings at the scene, and Mr. Flores was eliminated as the source of the prints, undermining the State’s theory that Mr. Flores was the shooter. **[See 3/10/22 CD 10:51:31-10:52:12, 10:56:40-10:59:43]** The prosecutors never introduced evidence that the tire tracks at the crime scene matched Ms. Cardenas’s Chevrolet; the case agent testified only that nothing “conclusive” was determined from comparing the tracks to her vehicles. **[Id. 10:31:51-59, 10:49:32-10:50:07; 2 RP 407 ¶ 17b]**

Ms. Cardenas alleged that the prosecutors misstated a witness’s testimony in front of the jury. **[2 RP 407-08 ¶ 17c]** During trial, there was a question about whether Anna Rodriguez, who was Ms. Cardenas’s friend and a cousin of one of the victims, had taken the photographs of the victims’ house that were found on a phone in Ms. Cardenas’s car. Ms. Rodriguez testified that she had taken

photographs of the house, but she did not remember taking those particular photos, and she did not recall ever taking photos from the back of the house. **[See 3/9/22 CD 8:51:13-55, 8:52:43-53]** The prosecutors later said that Ms. Rodriguez “sat here and told us that she did not” take the photos. When defense counsel objected, the prosecutor said, in front of the jury, that Ms. Rodriguez “said she had taken one of [the photos], but not the other two.” **[3/10/22 CD 3:23:17-3:24:42]** This had no basis in the record.

Ms. Cardenas asserted that the prosecutors used this mischaracterization of Ms. Rodriguez’s testimony to improperly ask her if Ms. Rodriguez was lying. **[2 RP 412 ¶ 26]** During Ms. Cardenas’s testimony, prosecutors asked her who took the photos. Ms. Cardenas testified that she believed Ms. Rodriguez took them. “Even though she sat here and told us that she did not?” asked a prosecutor. **[3/10/22 CD 3:23:17-3:24:05]**

Ms. Cardenas described statements by the prosecutors that disparaged defense counsel in front of the jury. **[2 RP 409 ¶ 21]** When the prosecutors objected to defense counsel’s factually correct statement that the child endangerment charges against Mr. Flores had been dismissed, they said he was “misrepresenting things.” **[3/11/22 CD 10:39:35-10:40:41]** During the State’s own closing argument, one of the prosecutors told the jury that defense counsel was

trying “[t]o leave a false impression on you That’s all this case is about.

That’s all the defense is about.” **[Id. 9:34:46-9:35:15]**

Ms. Cardenas also described a series of statements by the prosecutors that shifted the evidentiary burden to the defense (some of which additionally continued to denigrate defense counsel). **[2 RP 410-11 ¶ 23]** The prosecutors suggested in closing that the jury should prioritize “justice” for the victims, even if the evidence was lacking. The prosecutor admitted that there was no DNA or fingerprint evidence tying Mr. Flores or Ms. Cardenas to the crime, but argued, “Are we going to grab Ms. Cardenas, rub that bullet on her and make sure that the DNA is in there? Does that mean, ‘Oh, yep, we’re out of luck. These people don’t get justice’? [Is] that what it means? No, [that’s not] what it means.” **[3/11/22 CD 9:14:01-40]** In rebuttal closing, the prosecutor again addressed the lack of physical evidence: “[W]hat if the phone . . . wasn’t even recovered, or they got rid of it? What if the shoe that Luis wore to kill this person [was] gotten rid of? What if the clothes, the gloves that he was wearing [were] gotten rid of? How are we going to find those? Right? Doesn’t that create an unreasonable expectation?” **[Id. 11:10:37-11:12:35]**

During closing argument, the prosecutor brought up defense counsel’s questions to a State’s witness: “Do you guys remember? He didn’t even ask a single question about that March 24th to [the witness]. Not a single question. Why?

. . . We wouldn't want to open up a can of worms with that type of question. Not a single question asked. Do you remember all that, ladies and gentlemen?" *[Id.*

9:37:30-9:38:18]

Addressing the defense's theory that the murders might have been a drug hit, the prosecutor also argued, "Since the first day of trial . . . have you heard of that word, cartel? Not a single word about that. Why? Because it's made up, total made up to get you confused. It's completely made up. There is absolute no evidence of it. Zero. . . . Not a single piece of evidence. Nothing shows that, nothing, because it's made up." *[Id. 9:01:23-9:03:03]*

During the defense closing, defense counsel responded, "I'm not saying it was a cartel hit. I don't have to prove it was. Really, the government has to disprove that it was." In front of the jury, the prosecutor objected: "This is not the State's burden. We don't have to disprove any of the defense's theory." *[Id.*

9:52:43-9:53:17]

Finally, Ms. Cardenas argued that the prosecutors encouraged the jury to make emotional decisions and disregard the jury instructions. **[2 RP 412-13 ¶ 28]** In addition to the comment during closing about making sure the victims "get justice," **[3/11/22 CD 9:14:01-40]** a prosecutor argued in closing that the defense was "finding the small rabbit holes and trying to lead you through there, so you forget about the two dead people who [were] lying on their floor at home at night,

brutally killed, gunned down by them, and because of their greed.” **[Id. 9:43:18-37]**

At the conclusion of the State’s initial closing argument, the prosecutor discouraged the jury from considering the charges independently and told the jurors that if they acquitted on murder, they should acquit on all charges: “What would be the right, just verdict? If you only believe that, ‘Okay, maybe they just hired [their co-defendant] and somebody else had come in and killed these people, so we are just going to convict them of that only one thing. We’re not going to convict [her] of murders and all that.’ Do us a favor. Do everybody a favor. Sign that not guilty verdict form on all counts and go home, okay? But ask yourself if that is the just verdict of this case.” **[Id. 9:49:45-9:50:33]**

II. The State's response and the district court order

The State, now represented by different counsel, filed a response to Ms. Cardenas's motion to dismiss. **[2 RP 396 (entry of appearance), 433-47 (response)]** The response did not disagree with the factual allegations of misconduct in Ms. Cardenas's motion. The State admitted that the trial prosecutors "behaved, at best, unprofessionally, [and] at worst, amateurishly and heedlessly." **[2 RP 443]** The State also acknowledged "the muddled burden-shifting statements proffered during the State's closing arguments." **[2 RP 445]** The State argued, however, that the conduct did not rise to the level of *Breit* error. **[See generally 2 RP 433-47]** The State did not attach any exhibits to its response.

Ms. Cardenas filed a reply, and the State subsequently filed a short surreponse. **[2 RP 449-54, 462-66]** Once again, the State did not challenge the facts in Ms. Cardenas's motion, nor did the State attach exhibits to its filing.

The district court held a hearing on the motion to dismiss. **[7/3/25 CD 9:06:10-9:32:25]** At the hearing, defense counsel laid out the argument for dismissal under *Breit*, 1996-NMSC-067. **[Id. 9:09:05-9:15:15; see also id. 9:20:14-9:23:10]** The defense did not introduce additional evidence, but relied on the trial record discussed in the motion to dismiss. **[See generally id.]**

The State argued that Ms. Cardenas had already been granted relief at the Supreme Court. **[Id. 9:15:31-9:16:54, 9:18:02-14]** The State argued that the trial

prosecutors did not have “ulterior motives that would substantiate extraordinary relief,” and their misconduct could be explained by “inexperienced prosecutors having to assume the responsibility of cases that are beyond their experience.” **[Id. 9:16:54-9:17:54; see also id. 9:23:54-9:24:21]** The State responded to the prosecutors’ disparagement of defense counsel in front of the jury by calling it “an unfortunate practice that is substantial in many trials,” but argued that denigrating defense counsel and shifting the burden of proof did not rise to the level of *Breit* error. The State asked the district court to “balance . . . the interest of the public versus the defendant,” because this was a murder case. **[Id. 9:17:14-9:20:08]** The State did not call any witnesses or present any evidence to explain or mitigate the prosecutors’ conduct.

The district court did not make a ruling at the hearing. **[Id. 9:30:10-9:32:25]** A week later, the court filed a fifteen-page order granting the motion to dismiss. **[2 RP 479-93]** The court made detailed findings on all three prongs of the test from *Breit*, 1996-NMSC-067, ¶ 32: “Retrial is barred under Article II, Section 15, of the New Mexico Constitution, when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.”

On the first prong, conduct that is so unfairly prejudicial it cannot be cured by means short of a new trial, the district court “agree[d] with the descriptions of the prosecutorial misconduct contained in the motion to dismiss.” The court noted that “[t]he State has not argued that these incidents did not occur or that they did not constitute misconduct.” **[2 RP 480 ¶ 3]** The court made findings about each incident. With regard to the question about the child’s drug test, the court found that “[i]t is clear from the record that the prosecutors knew about the drug-test evidence before cross-examination and were planning to use it,” but did not disclose the evidence or notify the opposing party or the court. **[2 RP 481 ¶ 4b]** The court found that prosecutors “misled this Court and defense counsel about the factual basis for the question” and “never informed this Court that the charges had been dismissed, despite their duty of candor to this Court.” **[2 RP 481 ¶¶ 4c-4d]**

The court found that the prosecutors made false statements to the jury, misstated in opening what the evidence would show, and improperly asked Ms. Cardenas whether another witness was mistaken or lying. The court found that in closing argument, the prosecutors denigrated defense counsel, shifted the evidentiary burden away from the State, made inappropriate appeals to the jury’s emotions, and encouraged the jury to disregard the instruction to consider each charge separately. **[2 RP 482-86 ¶¶ 4e-4p]**

The district court concluded,

The misconduct described above could not be cured by means short of a mistrial, motion for new trial, or reversal. This Court notes that the Supreme Court has already held that reversal was required because of evidentiary error. *That evidentiary error was the direct result of the prosecutors' misrepresentations to this Court.* However, even in the absence of the Supreme Court's ruling, this Court would find that this prong was met due to the quantity and severity of prosecutorial misconduct.

[2 RP 486 ¶ 5 (emphasis added)] The district court rejected the State's argument that this was not the type of misconduct that constituted *Breit* error, comparing the prosecutors' conduct to the misconduct that barred retrial in *Breit*, 1996-NMSC-067; *State v. McClaugherty (McClaugherty II)*, 2008-NMSC-044, 144 N.M. 483, 188 P.3d 1234; and *State v. Amador*, 2024-NMSC-006, 546 P.3d 1277. **[2 RP 486-87 ¶ 6]**

With regard to the second prong, whether the official knows that the conduct is improper, the district court noted that although the State had argued that the trial prosecutors were inexperienced, "the State did not introduce evidence about the prosecutors' level of experience." Additionally, "even an inexperienced prosecutor can be presumed to know the rules that the prosecutors violated in this case." **[2 RP 487 ¶ 10]** The district court concluded that "[a]ny attorney would know that misrepresenting dropped charges as a conviction constitutes misconduct," and "any attorney should know better than to mislead the district court, state facts not in evidence, shift the burden of proof, or disparage opposing counsel." The court also

concluded that Rule 11-404 was “a basic rule that attorneys can be expected to know.” **[2 RP 487-88 ¶¶ 11-13]**

For the third *Breit* prong, which addresses whether the official acted in willful disregard of the risk of mistrial, the district court concluded that the trial prosecutors in Ms. Cardenas’s case, like the prosecutors in *Breit*, “were willing to accept the risk of mistrial or reversal.” The court again compared their conduct to the conduct at issue in *Breit*, *McClougherty II*, and *Amador*. **[2 RP 489-90 ¶ 19]** The court wrote that it was “particularly troubled by the prosecutors’ repeated misrepresentations that Mr. Flores had pleaded guilty to child endangerment.” “At best, it appears that the prosecutors did not look up the resolution of the case either before cross-examining Ms. Cardenas, after she testified that the case was dismissed, or before or after the prosecutors objected to defense counsel’s statements in closing argument that it had been dismissed.” **[2 RP 490-91 ¶ 5]**

The court concluded, “These are not the actions of prosecutors who are trying to avoid causing a mistrial. Instead, they indicate willful disregard for the likelihood of mistrial or reversal on appeal. The trial prosecutors had to know that their actions carried the potential consequence of mistrial or reversal.” **[2 RP 491 ¶ 6]** The district court dismissed the charges with prejudice and ordered Ms. Cardenas released. **[2 RP 492]**

The State moved to reconsider. **[2 RP 494-508]** In its motion for reconsideration, the State argued for the first time that it was improper for Ms. Cardenas to raise a *Breit* claim that she had not first raised on appeal. **[See 2 RP 495]** The motion accused Ms. Cardenas of “[using] a bait and switch tactic” to get “a second bite of the proverbial apple.” **[2 RP 494, 501]** Ms. Cardenas did not respond to the motion to reconsider. The district court denied it summarily, and the State appealed. **[3 RP 510-11]**

ARGUMENT

I. It was appropriate for Ms. Cardenas to move to dismiss the charges after remand, when she was facing retrial.

The State asks this Court to hold that a defendant may not win reversal on appeal and then move to dismiss the charges on *Breit* grounds on remand. [BIC 25, 28] This has no basis in current law; the State cites no authority that even suggests that litigating a *Breit* motion on remand is improper. On the contrary, under New Mexico law, a double jeopardy claim cannot be waived, and this Court has found *Breit* error in a variety of procedural postures, including when the claim was litigated on remand after a successful appeal. Litigating the claim on remand does not disadvantage the State, and it allows both parties to develop a factual record in the district court, which benefits the parties and the courts.

The State's argument raises a question of how this Court should interpret the double jeopardy anti-waiver statute, NMSA 1978, Section 30-1-10 (1963). This Court reviews questions of statutory interpretation de novo. *State v. Gutierrez*, 2023-NMSC-002, ¶ 22, 523 P.3d 560.

A. A double jeopardy claim cannot be waived, and New Mexico law supports bringing it after remand from a successful appeal.

1. A defendant may raise a Breit claim at any stage of a prosecution.

“The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment.” Section 30-1-10. For example, a defendant may bring a double jeopardy claim in habeas, even if it was never raised at trial or on appeal; a defendant may also raise a double jeopardy claim after a non-conditional plea. *See Torres v. Santistevan*, 2023-NMSC-021, ¶ 26, 536 P.3d 465. A claim that official misconduct bars retrial under Article II, Section 15 is a double jeopardy claim. *State v. Lensegrav*, 2025-NMSC-016, ¶ 36, 572 P.3d 924.

This Court applied the anti-waiver statute in *Breit*, 1996-NMSC-067. The defendant in *Breit* was tried and convicted of murder, but he moved for a new trial “on the basis of impermissible comments on the defendant’s right to counsel,” and his motion was granted. *Id.* ¶¶ 1, 5, 83. After winning the motion for new trial, he moved to dismiss the charges on double-jeopardy grounds based on prosecutorial misconduct. *Id.* ¶ 6. The district court granted that motion as well. *Id.*; *see id.* ¶¶ 37, 52-89. The State appealed the dismissal of the charges, the Court of Appeals reversed, and this Court denied the defendant’s petition for certiorari. *Id.* ¶ 6.

The defendant was re-tried and convicted, and he appealed to this Court, once again raising the double jeopardy claim. *See id.* ¶¶ 7, 9. The State argued that

under the law-of-the-case doctrine, the defendant could not re-raise the issue, which had been decided against him on the State’s appeal. *Id.* ¶ 10.

This Court disagreed with the State and reached the double jeopardy issue, citing the anti-waiver statute. “The right to be protected from double jeopardy is so fundamental, that it cannot be relinquished even if a conviction is affirmed on appeal.” *Id.* ¶ 11. It did not matter either that the issue had previously been litigated or that the defendant had initially moved for a new trial rather than a mistrial or bar on retrial. “Breit’s right to be protected from double jeopardy is not compromised because he originally asked for a new trial, and now, on appeal, asks that we reverse his conviction. The defense of double jeopardy may not be relinquished.” *Id.* ¶ 15 (citing § 30-1-10).

Under *Breit* and Section 30-1-10, a defendant may bring a *Breit* claim at any time. Accordingly, the five cases in which this Court found *Breit* error came to this Court in a variety of procedural postures:

- The defendant was convicted. The district court granted a motion for a new trial and then a motion to bar retrial. The State appealed that ruling, and the Court of Appeals reversed. The defendant was re-tried and convicted, then appealed. *Breit*, 1996-NMSC-067, ¶¶ 4-7.
- The defendant was convicted. He appealed and won reversal on evidentiary grounds. On remand, he filed a *Breit* motion. The district court granted it. The State moved for rehearing, and the district court granted rehearing and denied the *Breit* motion. The defendant appealed the denial of the motion. *McClagherty II*, 2008-NMSC-044, ¶¶ 1-5.

- The defendant was convicted. The defendant appealed and raised a *Breit* issue that had not previously been raised in the district court. *State v. Hildreth*, 2022-NMSC-012, ¶¶ 1, 15, 506 P.3d 354; *Lensegrav*, 2025-NMSC-016, ¶¶ 1, 27.
- The defendant was convicted. The district court ordered a new trial but denied the defendant's *Breit* motion. The defendant was re-tried and convicted, then appealed. *Amador*, 2024-NMSC-006, ¶¶ 1-3.

This Court's cases illustrate that defendants may raise *Breit* claims after a first trial, a reversal on appeal, or a second trial. They may raise a *Breit* claim for the first time on appeal, or they may raise it in the district court either after a trial or after an appeal. *See also, e.g., Commonwealth v. Martorano*, 741 A.2d 1221, 1221-22 (Pa. 1999) (affirming dismissal of charges based on prosecutorial misconduct after defendants won reversal on appeal, then moved to dismiss on remand).

2. *The procedure here was appropriate under McClagherty II.*

The procedural posture in Ms. Cardenas's case is almost identical to the posture that was before this Court in *McClagherty II*, 2008-NMSC-044. At the *McClagherty* murder trial, during the defendant's testimony, the prosecutor asked him about statements that the prosecutor claimed to have from the defendant's sister and roommate. The sister and roommate did not testify, and their statements were never introduced into evidence. *State v. McClagherty (McClagherty I)*, 2003-NMSC-006, ¶¶ 11-14, 133 N.M. 459, 64 P.3d 486. The defendant appealed his conviction, arguing that the questions constituted inadmissible hearsay, violations of the confrontation clause, and prosecutorial misconduct. *Id.* ¶ 16. This Court reversed on hearsay grounds and did not reach the other arguments. *Id.* The defendant did not raise a *Breit* claim. *Id.* ¶ 16 n.3.

On remand to the district court, the defendant "promptly moved to bar retrial for prosecutorial misconduct under [*Breit*]." *State v. McClagherty (McClagherty I.5)*, 2007-NMCA-041, ¶ 1, 141 N.M. 468, 157 P.3d 33, *reversed by McClagherty II*, 2008-NMSC-044. The defense introduced the police statements from the roommate and sister, which did not support the prosecutor's questions at trial; it appeared "the prosecutor had 'grossly misrepresented' the content of the statements to the district court during trial." *McClagherty I.5*, 2007-NMCA-041, ¶¶ 9-10. The district court eventually denied the defense's motion. *See id.* ¶ 2. The

Court of Appeals affirmed the denial of the *Breit* motion, *id.* ¶ 53, but this Court reversed, holding that retrial was barred. *McClagherty II*, 2008-NMSC-044, ¶ 72. Neither this Court nor the Court of Appeals raised any concern about the fact that the defendant had raised his *Breit* claim for the first time on remand from his reversal on appeal.

The State admits that the procedural history of *McClagherty* “may sound like what happened here,” but argues that it was different, because in *McClagherty*, defense counsel moved to dismiss after the appeal based on new evidence. In this case, however, “there was no new counsel and there was no new evidence or fact.” **[BIC 36-37]** There are three problems with this argument.

First, the evidence that the prosecutor mischaracterized the police statements was known to the defense during the trial. The State cites *McClagherty II*, 2008-NMSC-044, ¶ 11, which says that on remand, “Defendant’s new defense counsel received and reviewed the police statements” and determined that they did not match the prosecutor’s description of them during trial. **[BIC 36]** But *McClagherty I.5*, which the brief-in-chief does not cite, makes it clear that the defense was familiar with the statements during trial: “During re-direct examination, Defendant disagreed with the prosecutor’s version of those statements and testified that he had read the women’s statements and that they contained references to his denying any shooting.” *McClagherty I.5*, 2007-

NMCA-041, ¶ 5. Even though the statements were not entered into evidence, *id.* ¶ 6, they were known to the defense.

Second, there is no indication in *McClagherty I.5* or *McClagherty II* that either court thought the defendant's right to raise the *Breit* issue hinged on the discovery of new evidence. Neither court mentioned any concern about the defendant's choice to file a *Breit* motion on remand or suggested that it might have been improper under different circumstances.

Third, even *if* the discovery of new evidence or entry of new defense counsel had made a difference in *McClagherty*, those circumstances are present in this case as well. Ms. Cardenas's *Breit* motion hinges in part on the prosecutors' mischaracterization of the dismissed charges against Mr. Flores as a conviction. That mischaracterization first came to light on appeal; it was not established in the trial record. Additionally, new defense counsel entered for Ms. Cardenas on appeal and on remand. [*See* 2 RP 365, 386]

B. Developing the Article II, Section 15 claim in the district court did not give Ms. Cardenas a more favorable standard of review.

The State argues that if Ms. Cardenas had raised her *Breit* claim on direct appeal from her convictions, this Court would have reviewed the claim for fundamental error, and that by raising the claim in the district court, Ms. Cardenas instead received more favorable de novo review. **[BIC 25-28]** As discussed below, neither part of this proposition is true. Had Ms. Cardenas raised her *Breit* claim on direct appeal, it would have been reviewed de novo. Furthermore, there was no “standard of review” in the district court, because the district court was developing the *Breit* claim for the first time. There was no advantage to Ms. Cardenas (or disadvantage to the State) from raising the claim in the district court.

1. Breit claims raised for the first time on direct appeal from a conviction are reviewed de novo.

A *Breit* double jeopardy claim is reviewed de novo. *Hildreth*, 2022-NMSC-012, ¶ 19. It does not matter whether the defendant preserved objections to the official misconduct below or whether the objections used the phrase “prosecutorial misconduct.” In *Breit*, the defense objected to some but not all of the prosecutor’s misconduct. *Breit*, 1996-NMSC-067, ¶¶ 42, 68. This Court appeared to apply de novo review; the opinion does not mention plain or fundamental error, nor does it distinguish between the preserved and unpreserved errors. *See generally id.*

In *Hildreth*, defense counsel objected repeatedly to the district court’s failure to grant a continuance or a mistrial, to discovery violations by the State, and to violations of the defendant’s right to counsel. *Hildreth*, 2022-NMSC-012, ¶¶ 4-14. It does not appear, however, that *Breit* or the phrase “judicial misconduct” were ever mentioned in the district court. *See id.* This Court applied de novo review to the defendant’s *Breit* judicial misconduct claim. *Id.* ¶ 19. Based on *Breit* and *Hildreth*, if Ms. Cardenas had raised a *Breit* claim for the first time in her direct appeal of her convictions, this Court would have applied de novo review.

The State’s argument that this Court would have reviewed a *Breit* claim on direct appeal for fundamental error relies on *Lensegrav*, 2025-NMSC-016. **[BIC 25]** But the State misreads *Lensegrav*, which does not apply fundamental-error review in its *Breit* analysis.

In *Lensegrav*, the defendant appealed her convictions and raised a *Breit* claim that had not previously been raised in the district court. *See generally id.* ¶¶ 2-26 (describing procedural history). This Court considered two questions: first, the threshold question of whether to vacate the convictions, and second, whether to bar retrial on *Breit* grounds. The Court answered both questions in the affirmative. *See id.* ¶ 44 (“Defendant did not receive the fair trial to which she was entitled, and we, therefore, vacate her convictions. Because of the outrageous prosecutorial misconduct that pervaded this trial, double jeopardy bars reprosecution.”).

For the first question, this Court considered whether unpreserved prosecutorial misconduct at trial constituted fundamental error that required reversal. *See id.* ¶¶ 27-35. The Court concluded that reversal was required, and therefore it moved on to the *Breit* claim. *See id.* ¶¶ 35-37.

In the second question, the *Breit* analysis, this Court did *not* apply fundamental-error review. It concluded that “for the reasons set forth in our discussion of fundamental error, the record leaves no doubt that [the prosecutor’s] misconduct satisfies the first prong of *Breit*,” but this Court did not suggest that a finding of fundamental error was required to meet the *Breit* test. *See id.* ¶ 38. Requiring a showing of fundamental error would have been contrary to *Breit* itself, which emphasized that the analysis does not depend on the procedural posture in which the motion is raised: “[T]he double-jeopardy analysis is identical, whether

the defendant requests a mistrial, a new trial, or, on appeal, a reversal.” *Breit*, 1996-NMSC-067, ¶ 15. *Breit* analysis does not incorporate procedural hurdles like the fundamental-error standard or the standard for requesting a new trial. *See, e.g., State v. Volpato*, 1985-NMSC-017, ¶ 7, 102 N.M. 383, 696 P.2d 471 (listing criteria for a motion for new trial based on newly-discovered evidence).

The fundamental-error review that the State identifies in *Lensegrav* was not part of the *Breit* double-jeopardy analysis. It was this Court’s initial review to see if reversal was required, before it reached the *Breit* question. Fundamental-error review would not have been necessary in Ms. Cardenas’s case, since this Court reversed her convictions on other grounds, *see Cardenas*, 2025-NMSC-020, ¶ 2, and the *Breit* analysis itself would have been de novo. *Hildreth*, 2022-NMSC-012, ¶ 19.

2. A trial court considering a Breit motion does not apply an appellate standard of review.

The State argues that in the district court, Ms. Cardenas's *Breit* claim received de novo review. **[BIC 26]** But when the district court heard the *Breit* claim, it was not acting in an appellate capacity; there was no lower-court decision for it to review. Instead, the district court heard the motion and developed the record for the first time. It took evidence, found facts, and made conclusions of law. Fact-finding "is one of the responsibilities given to trial courts rather than appellate courts." *In re R.W.*, 1989-NMCA-008, ¶ 7, 108 N.M. 332, 772 P.2d 366. The *Breit* litigation was not a post-trial review of Ms. Cardenas's first trial so much as a pre-trial motion to dismiss before her *second* trial.

Breit indicates that when the district court considers a motion to bar retrial, the district court does not act in an appellate role. This Court's opinion in *Breit* includes the original memorandum opinion from the *Breit* district court barring retrial. *Breit*, 1996-NMSC-067, ¶¶ 52-89. Like the order of dismissal in this case, it contains the district court's findings and legal conclusions, and it does not mention a standard of review or otherwise suggest that the court was acting in an appellate capacity. *See id.*

In Ms. Cardenas's case, the record for the *Breit* motion was similar to the record from the appeal of her convictions, because she was able to make a showing of *Breit* error based on the audio from her trial and a citation to Mr. Flores's case.

But in *Breit* proceedings, the parties are not limited to the record from trial or appeal. See *McClagherty 1.5*, 2007-NMCA-041, ¶¶ 13-21 (describing evidence presented in *Breit* proceedings, including testimony from the trial prosecutor, former defense counsel, and counsel for a witness, as well as documentary evidence). The State could have introduced evidence, although it chose not to.

It is worth noting that it is extremely rare for a trial court to bar retrial on *Breit* grounds. In the 30 years since *Breit* was decided, Westlaw shows a total of four government appeals from the grant of a *Breit* motion. See *State v. Pacheco*, 1998-NMCA-164, 126 N.M. 278, 968 P.2d 789; *State v. Gonzales*, 2002-NMCA-071, 132 N.M. 420, 49 P.3d 681; *City of Las Cruces v. Apodaca*, 2022-NMCA-046, 516 P.3d 242; *State v. Ruffin*, A-1-CA-40079, 2022 WL 17095043 (N.M. Ct. App. Nov. 21, 2022) (non-precedential).¹ There is no reason to think that a defendant gains any strategic advantage from waiting until after appeal to bring a *Breit* motion in district court.

¹ In three of the four cases, the district court's bar on retrial was reversed on appeal. See *Pacheco*, 1998-NMCA-164, ¶ 16; *Gonzales*, 2002-NMCA-071, ¶ 1; *Ruffin*, A-1-CA-40079, mem. op. ¶ 1. In the fourth case, which was an appeal from municipal court, the city did not seek review of the *Breit* merits, and the Court of Appeals rejected the city's procedural arguments and affirmed. *Apodaca*, 2022-NMCA-046, ¶¶ 1-2.

C. In most cases, it is preferable to develop a Breit claim in the district court before raising it on appeal.

A defendant may raise a *Breit* claim on direct appeal without first developing it in the district court. *See generally Hildreth*, 2022-NMSC-012 (not mentioning any district-court *Breit* proceedings); *Lensegrav*, 2025-NMSC-016 (same). In some cases, no factual development in the district court is necessary, because there is no conceivable explanation that would excuse or mitigate the misconduct in the trial record. For example, in *Lensegrav*, the prosecutor accused the defendant of using witchcraft to control her co-defendant. 2025-NMSC-016, ¶¶ 11-26, 29-34, 39. In *Hildreth*, the judge refused to grant a continuance or mistrial despite discovery violations and a defense attorney who refused to participate in trial. 2022-NMSC-012, ¶¶ 3-14, 33-37. There was no evidence that could have taken those situations outside the bounds of *Breit*.

But in most cases, it is useful to have a district court hearing in which the parties can present evidence on the *Breit* claim. In *Breit*, *McClagherty*, and *Amador*, the *Breit* motions were developed in the district courts. *See Breit*, 1996-NMSC-067, ¶¶ 52-89; *McClagherty II*, 2008-NMSC-044, ¶¶ 18, 29-38; *Amador*, 2024-NMSC-006, ¶¶ 14-15. In all three cases, this Court cited and relied on the district courts' findings and the facts developed below, even though it disagreed with the district courts' legal conclusions in *McClagherty* and *Amador*. *See Breit*,

1996-NMSC-067, ¶¶ 37-48; *McClagherty II*, 2008-NMSC-044, ¶¶ 28, 40-70; *Amador*, 2024-NMSC-006, ¶ 30.

The evidence presented at a *Breit* hearing can either confirm or dispel the appearance of misconduct. This opportunity to present evidence benefits the State by allowing prosecutors to provide additional context for their behavior. Even though the *Breit* standard is objective, *see McClagherty II*, 2008-NMSC-044, ¶ 27, a prosecutor may be able to introduce evidence that he behaved reasonably and did not act in willful disregard of a mistrial. Requiring a defendant to raise a *Breit* claim on direct appeal, as the State advocates, would prevent the parties from developing this kind of record.

Additionally, as a practical matter, a defendant does not always know at the time of the appeal whether it will be necessary to bring a *Breit* claim. If a defendant's convictions are reversed on appeal, the State must decide whether to re-try the case. Sometimes the appeal exposes problems with the State's case, and the State may drop charges, reduce them, or offer a favorable plea bargain. Defendants are in a responsive posture; they may get a satisfactory resolution just from a reversal, and there may be no need to litigate a *Breit* question.

Ms. Cardenas's case illustrates the reasons why litigating a *Breit* motion after appeal can be preferable. She waited to raise a *Breit* claim until it was clear that the State would attempt to re-try her. At the time she filed her motion to

dismiss, she remained incarcerated, and her trial date had been set. [**See 2 RP 394, 424, 429**]

Factual development was helpful in her case. One of the major pieces of misconduct in Ms. Cardenas’s case—the false assertions that Mr. Flores was convicted of child abuse—was never litigated at trial, because the State did not admit the mischaracterization until its appellate brief. If Ms. Cardenas had raised the mischaracterization as the basis of a *Breit* claim on direct appeal, without an opportunity for the State to present evidence, this Court might have wondered if it was an innocent mistake. *See Cardenas*, 2025-NMSC-020, ¶ 85 (Thomson, C.J., dissenting) (writing that there was “no reason to believe the State was deliberately misleading the court and jury, but rather it appears that the State was confused”). The fact that the State *did* have an opportunity to present evidence below, and it chose to present nothing, allowed the district court to infer that the prosecutors acted in willful disregard for the likelihood of mistrial or reversal. [**See 2 RP 490-91 ¶¶ 5-6**]

D. The State’s proposed rule has no basis in any case or statute, and there is no need for it, because the procedures in this case were fair to the State.

The State asks this Court to hold, for the first time, “that known instances of alleged prosecutorial misconduct must be brought in a defendant’s original appeal (absent ineffective assistance of counsel or other such equitable relief) or the claims of prosecutorial misconduct are abandoned.” **[BIC 28]** The State’s proposed rule would impose a sort of reverse-preservation requirement, in which a defendant would be prohibited from developing claims in the district court that had not been raised on appeal. This idea has no basis in any case or statute, and as described above, it would be contrary to Section 30-1-10, *Breit*, and *McClagherty II*.

The State cites a few sources of authority, none of which would justify the rule the State asks for. The State cites the “policy disfavoring piecemeal appeals,” citing *State v. Muise*, 1985-NMCA-090, ¶ 19, 103 N.M. 382, 707 P.2d 1192, and Article VI, Section 2’s right to “one appeal.”² **[BIC 19]** But Ms. Cardenas did not bring multiple or piecemeal appeals. She appealed her convictions to this Court, and when her convictions were reversed and the State attempted to re-try her, she moved to dismiss the charges on double jeopardy grounds. It is not improper for a

² *Muise* says that “piecemeal prosecutions” are disfavored and says nothing about appeals or defense motions. *Muise*, 1985-NMCA-090, ¶ 19. There are other cases that discuss a policy disfavoring piecemeal appeals, largely in the context of discussing whether there is a final, appealable order in a case. See, e.g., *Principal Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 12, 116 N.M. 412, 863 P.2d 447; *Valdez v. Erickson*, 2023-NMCA-085, ¶ 5, 538 P.3d 486.

defendant to defend herself by filing pretrial motions. (And this appeal is the State's, not Ms. Cardenas's.)

The State also cites the law-of-the-case doctrine, citing *Breit*, 1996-NMSC-067. **[BIC 19-20]** This makes no sense. In *Breit*, this Court rejected the State's law-of-the-case argument, holding that because of the anti-waiver provision in Section 30-1-10, the defendant could raise a double jeopardy claim even though it had previously been litigated and lost. *Breit*, 1996-NMSC-067, ¶¶ 10-12. And in Ms. Cardenas's case, the district court's order of dismissal did not violate any law of the case. It was not inconsistent for the district court to find *Breit* error on grounds that overlapped with this Court's finding of reversible error.³ It is valid for one court to order reversal or a new trial and for a second court find *Breit* error on

³ The State suggests that defense counsel misled the district court on remand by implying that this Court reversed Ms. Cardenas's convictions on prosecutorial misconduct grounds. It quotes a pleading in the district court in which defense counsel wrote that "the Supreme Court has already concluded that Ms. Cardenas's trial was not fair. . . . The question for this Court is not whether Ms. Cardenas's trial was fair, but whether prosecutorial misconduct was so egregious that dismissal with prejudice is required by Article II, Section 15." **[BIC 21, 35; 2 RP 449-50 ¶ 2]**

Ms. Cardenas's motion to dismiss in the district court clearly stated that she "appealed her convictions to the New Mexico Supreme Court, which reversed on the basis of evidentiary error." **[2 RP 401 ¶ 2]** The language that the State quotes was from Ms. Cardenas's reply to the State's response to her motion. In the response, the State argued that the prosecutors' conduct "cannot be found to have deprived Ms. Cardenas of a fair trial." **[2 RP 433; see also 2 RP 440]** Defense counsel responded, reasonably, that the trial had already been held to be unfair. The defense did not mischaracterize this Court's opinion to the district court.

factually related grounds. This was the case in *Breit*, where the district court granted a new trial “on the basis of impermissible comments on the defendant’s right to counsel,” and this Court barred retrial based on the prosecutor’s conduct as a whole. *See Breit*, 1996-NMSC-067, ¶¶ 37-49, 83. Similarly, in *Hildreth*, the Court of Appeals reversed the defendant’s conviction based on a violation of his right to counsel, and this Court subsequently barred retrial based on the judge’s denial of a continuance despite obvious problems with the trial, including the absence of effective counsel. *See Hildreth*, 2022-NMSC-012, ¶¶ 15, 37.

The State also argues that allowing *Breit* motions on remand when a defendant is facing retrial “would frustrate” Rule 5-614 NMRA, the rule about motions for new trials. **[BIC 20]** This situation has nothing to do with Rule 5-614, which provides a mechanism to overturn a conviction. Ms. Cardenas’s *Breit* motion was not an attack on her convictions, which had already been reversed. The State’s argument is not founded in any source of law.

Furthermore, the procedure in this case was fair to the State. On remand, the State chose to prosecute Ms. Cardenas a second time, which meant that Ms. Cardenas was entitled to raise defenses, including the defense of double jeopardy. Her *Breit* motion was factually detailed and clear about the relief it sought, so the

State had notice of the allegations and the stakes.⁴ [**See 2 RP 401-20**] The State filed both a written response to the motion and, when Ms. Cardenas filed a reply, a surresponse. [**2 RP 433-47, 449-54, 462-66**] The State attended a hearing on the motion and presented argument; it chose not to call witnesses or introduce exhibits.

The State may have been surprised to lose the *Breit* motion, but that does not mean that the process was unfair. *See McClagherty 1.5*, 2007-NMCA-041, ¶ 52 (expressing concern about the State’s assertion “that it did not call [the prosecutor] at the first hearing because it did not believe the court would rule in favor of Defendant”) (cleaned up). The unfairness in this case, as the district court found below, was that prosecutors at Ms. Cardenas’s trial repeatedly and blatantly violated the law and willfully disregarded the risk of reversal.

⁴ As the State points out, Ms. Cardenas’s brief-in-chief on appeal described most of the misconduct that she eventually raised in her *Breit* motion. [**See BIC 22-23**] It should not have been a surprise that she raised a *Breit* issue on remand.

II. The district court was correct to dismiss the charges with prejudice under Article II, Section 15.

The district court found that the prosecutors’ conduct met all three of the prongs of the *Breit* test: “Retrial is barred when (1) the improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, (2) the official knows that the conduct is improper and prejudicial, and (3) the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.” *Hildreth*, 2022-NMSC-012, ¶ 21 (quoting *Breit*, 1996-NMSC-067, ¶ 32) (cleaned up). **[2 RP 492 ¶ 24]** On appeal, this Court “defer[s] to the district court when it has made findings of fact that are supported by substantial evidence and reviews de novo the district court’s application of the law to the facts.” *McClagherty II*, 2008-NMSC-044, ¶ 39.

The *Breit* analysis contains only these three steps. The State, citing *Lensegrav*, argues that the district court should first have performed a fundamental-error analysis. **[BIC 31-37]** As discussed above, the fundamental-error review in *Lensegrav* addressed the threshold question of whether reversal was required, and it was not part of the *Breit* analysis. *See Lensegrav*, 2025-NMSC-016, ¶¶ 27-35. There is no need for that threshold step in this case, where Ms. Cardenas’s convictions were already reversed. *See, e.g., Hildreth*, 2022-NMSC-

012, ¶¶ 15-19 (moving directly to *Breit* analysis where the Court of Appeals had reversed the defendant’s conviction and *Breit* was the only issue before this Court).

A. The improper prosecutorial conduct at Ms. Cardenas’s trial was so unfairly prejudicial that it could not be cured by means short of a new trial.

1. The State does not demonstrate error in the district court’s findings of misconduct.

The district court made detailed factual findings about the prosecutors’ misconduct at trial, adopting all of the allegations of misconduct raised by Ms. Cardenas. **[2 RP 480-87]** The district court also found that the State did not argue that the incidents did not occur or that they were not misconduct. **[2 RP 480 ¶ 3]** The facts were not contested, and the State admitted that the prosecutors “behaved, at best, unprofessionally, [and] at worst, amateurishly and heedlessly,” and that they shifted the burden of proof and disparaged defense counsel during closing arguments. **[2 RP 443, 445; 7/3/25 CD 9:18:14-9:20:08]**

On appeal, similarly, the State does not present any serious argument that the incidents found by the district court were not misconduct. The State asserts that the prosecutors did not shift the evidentiary burden to the defense, but it cites no authority to support its position. **[BIC 33-34]** It argues that the misconduct was taken out of context, but it does not identify any context that would explain it. **[See BIC 33, 38-39]** It also cites *State v. Sosa*, 2009-NMSC-056, ¶ 24, 147 N.M. 351, 223 P.3d 348, for the proposition that closing argument is “necessarily responsive

and extemporaneous.” **[BIC 33, 39-40]** *Sosa* does not give prosecutors blanket permission to commit misconduct during closing argument, nor does *Sosa* mean that misconduct in closing argument can never constitute *Breit* error. Misconduct in closing argument formed part of the basis for *Breit* error in both *Breit* and *Amador*. See *Breit*, 1996-NMSC-067, ¶¶ 43, 69-81; *Amador*, 2024-NMSC-006, ¶¶ 8, 10, 25, 32-33.

The State asserts that the district court “summarily adopted Defendant’s assertions and failed to decide first whether each of the purported instances of conduct was error.” **[BIC 24; see also BIC 33]** This is contrary to the record. The district court did not act “summarily”; it agreed with Ms. Cardenas’s allegations of prosecutorial misconduct after the State did not contest them in its pleadings or at the hearing. The district court’s order includes its conclusions about why each instance of misconduct was improper—for example, the district court identifies a violation of the prosecutors’ duty of candor, an improper question they asked on cross-examination, and several instances of burden-shifting and inappropriate appeals to the jury’s emotions. **[See 2 RP 480-87]**

The district court also directly tied the prosecutors’ behavior to the first prong of the *Breit* test. It found that the prosecutors’ misconduct “could not be cured by means short of a mistrial, motion for new trial, or reversal.” **[2 RP 486 ¶ 5]** The court found that the evidentiary error on which this Court reversed Ms.

Cardenas’s convictions “was the direct result of the prosecutors’ misrepresentations to this Court.” **[2 RP 486 ¶ 5]** The State asserts that this finding “misstated the conclusion of this Court.” **[BIC 24]** But the district court was not interpreting this Court’s opinion; it was making its own finding that without the prosecutors’ misrepresentations, the district court would not have admitted the evidence that ultimately required reversal. This factual finding is entitled to deference on appeal, not least because it was made by the same district court that made the evidentiary ruling in question. *See McClaugherty II*, 2008-NMSC-044, ¶ 39.

The district court also found that regardless of this Court’s reversal on appeal, it “would find that [the first *Breit*] prong was met due to the quantity and severity of prosecutorial misconduct.” The court went on to compare the misconduct it found to the misconduct that barred retrial in *Amador*, *McClaugherty II*, and *Breit*. **[2 RP 486-87 ¶¶ 5-6]**

The State asserts that the district court failed to support its findings with legal analysis or citations. **[BIC 24, 33-34]** On appeal, however, “[t]here is a presumption of correctness in the district court’s rulings,” and “it is [the appellant’s] burden on appeal to demonstrate any claimed error below.” *State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (cleaned up). The

State does not identify any case or statute that contradicts the district court's findings or suggests they were erroneous.

2. The conduct met the first Breit prong.

The misconduct at Ms. Cardenas's trial was serious and pervasive, and, as the district court found, it was similar to the conduct in previous *Breit* cases. [**See 2 RP 486-87 ¶ 6**] Because the State asserts on appeal that “none of the instances could amount to prosecutorial misconduct,” [**BIC 34**] it is worth reviewing the law governing the prosecutors' conduct.

The prosecutors misrepresented a dismissed charge to the district court as a conviction. [**2 RP 481 ¶ 4c**] In *Amador*, 2024-NMSC-006, ¶ 7, a prosecutor similarly misrepresented the basis for impeachment evidence at trial: the prosecutor told the district court that he planned to impeach the defendant with a prior conviction, but the “prior conviction” turned out to be a conditional discharge, which is not a prior conviction for impeachment purposes. *Id.* ¶¶ 11, 29. This Court suggested that this misrepresentation alone might have been enough to bar retrial (although this Court ultimately relied on a combination of the misrepresentation and other misconduct). *See id.* ¶¶ 31-33.

The misrepresentation here was even more serious than that in *Amador*. In *Amador*, when defense counsel said that the prior case was “either a conditional discharge or a deferred,” the prosecutor promptly admitted that it was a conditional

discharge. *Id.* ¶ 11. In this case, even after Ms. Cardenas testified that she believed the charge against Mr. Flores had been dismissed, the prosecutors insisted that the charge was not dismissed and never acknowledged their misrepresentations. [**See 3/10/22 CD 4:05:26-4:06:43; 3/11/22 CD 10:39:35-10:40:41; 2 RP 481 ¶ 4d**]

Additionally, in *Amador*, it made at least some sense that the prosecutor was confused, since conditional discharges are treated like convictions for some purposes. *See* NMSA 1978, § 31-18-17 (2003) (imposing habitual offender enhancement if defendant has a prior conditional discharge). Here, the child endangerment charge against Mr. Flores was dismissed, so there was no ambiguity about the absence of a conviction.

The prosecutors made false statements to the jury during testimony and closing arguments. [**2 RP 482-83 ¶¶ 4e, 4g**] “It is misconduct for a prosecutor to make prejudicial statements not supported by evidence.” *State v. Duffy*, 1998-NMSC-014, ¶ 56, 126 N.M. 132, 967 P.2d 807, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. “[A] prosecutor has a duty not to misstate the facts.” *State v. Garvin*, 2005-NMCA-107, ¶ 29, 138 N.M. 164, 117 P.3d 970. In *McClaugherty*, the prosecutor’s misrepresentation of facts in front of the jury was part of the misconduct that led this Court to bar retrial. *See McClaugherty II*, 2008-NMSC-044, ¶¶ 9, 11, 29-31.

The prosecutors misstated in opening statement what the evidence would show. **[2 RP 482 ¶ 4f]** Referring in opening statement to evidence that would not be elicited at trial was part of the misconduct that barred retrial in *Breit*, 1996-NMSC-067, ¶ 57, and *Lensegrav*, 2025-NMSC-016, ¶¶ 14-15, 30-34, 38.

The prosecutors asked Ms. Cardenas whether another witness was lying. The question was based on a misstatement of the witness's testimony. **[2 RP 483 ¶¶ 4g-4h]** There is “a strict prohibition against asking the defendant if another witness is mistaken or lying.” *McClagherty II*, 2008-NMSC-044, ¶ 64. “[S]uch behavior is categorically improper.” *Id.* Asking the defendant if others were lying, based on a mischaracterization of the underlying evidence, was the behavior that barred retrial in *McClagherty II*. *See id.* ¶¶ 9-11, 29-36, 41, 64. The bar on retrial in *Breit* was also based in part on asking the defendant if he was “calling [other witnesses] liars.” *Breit*, 1996-NMSC-067, ¶ 64.

The prosecutors made closing arguments that shifted the evidentiary burden to the defense. **[2 RP 484-85 ¶¶ 4j-4n]** The State always has the burden to prove guilt beyond a reasonable doubt, and “a defendant need only cast doubt on the proof of the elements of the crime and bears no burden of proof.” *State v. Stalter*, 2023-NMCA-054, ¶ 19, 534 P.3d 989 (cleaned up). One of the prosecutor's burden-shifting statements was an objection that disproving that the murder was a cartel hit was “not the State's burden. We don't have to disprove any of the

defense’s theory.” [2 RP 485 ¶ 4m (quoting 3/11/22 CD 9:52:43-9:53:17)] This was similar to a statement by the prosecutor in *Breit*, 1996-NMSC-067, ¶¶ 32, 75: “It is not up to the State to show self-defense. That is a legal theory concocted by the defendant and his lawyers to sell to you.” Burden-shifting was also part of the conduct that barred retrial in *Amador*, 2024-NMSC-006, ¶¶ 10, 12, 32.

The prosecutors also denigrated defense counsel and made improper appeals to the jurors’ emotions. [2 RP 483-86 ¶¶ 4i-4p] “Prosecutorial commentary that urges a jury to convict for reasons other than the evidence defies the law and undermines the integrity of a verdict.” *State v. Cooper*, 2000-NMCA-041, ¶ 15, 129 N.M. 172, 3 P.3d 149. In *Amador*, 2024-NMSC-006, ¶ 32, this Court barred retrial in part because of the prosecutor’s inflammatory arguments, which included calling the defendant a pedophile and referring to the Catholic Church sexual abuse scandal. This Court quoted a case that said “prosecutors must stay within the four corners of the evidence and avoid irrelevant and inflammatory comments which have a tendency to prejudice the jury against the accused.” *Id.* (cleaned up).

Finally, it was improper for the prosecutor to tell the jury that if it was not going to convict Ms. Cardenas of murder, it should “[d]o everybody a favor” and “[s]ign that not guilty verdict form on all counts and go home.” [2 RP 485-86 ¶ 4p] The prosecutor’s comment violated UJI 14-6004 NMRA, which instructs jurors to consider each charge separately. It also echoed the prosecutor’s closing

argument in *Breit*, 1996-NMSC-067, ¶ 69: “If after looking at everything you honestly believe, and you can go home at night and sleep with the idea, that it’s okay for a man to walk into another man’s house and kill him while he’s sitting in his easy chair watching television . . . then that’s something that we’ll all live with, or die with, as the case may be. Because that’s what this case comes down to.” Both comments are dismissive toward the idea that the jury might reasonably acquit.

B. This Court can presume that the prosecutors knew their conduct was improper and prejudicial.

The second prong of the *Breit* test is an objective standard that does not hinge on the prosecutor's intent. *McClaugherty II*, 2008-NMSC-044, ¶ 49. "We cannot overemphasize or overstate that this is an objective standard, not a subjective one: the belief of the prosecutor regarding his or her own conduct is irrelevant in this analysis." *Id.* ¶ 27. "*Breit*'s knowledge test is satisfied by presuming knowledge on the part of the official if the rule is of the kind that every legal professional, no matter how inexperienced, is charged with knowing." *Hildreth*, 2022-NMSC-012, ¶ 42 (cleaned up).

As the district court found below, the rules that the prosecutors violated were of the kind that every legal professional is charged with knowing. **[See 2 RP 487 ¶ 10]** The State has argued both in the district court and on appeal "that the former prosecutors were inexperienced," but there is no evidence in the record to that effect. **[See BIC 42; 7/3/25 CD 9:16:54-9:17:54; 2 RP 487 ¶ 10]** *See Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 ("The mere assertions and arguments of counsel are not evidence.").

The district court was correct to find that even an inexperienced lawyer would have known the prosecutors' conduct was improper. Misrepresenting dropped charges as a conviction is obviously not allowed. *See Amador*, 2024-NMSC-006, ¶¶ 27-28. Similarly, the rules against misleading the district court,

stating facts not in evidence, shifting the burden of proof, and disparaging opposing counsel are fundamental rules governing attorney conduct. *See, e.g.*, Rule 16-303(A)(1) NMRA (“A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law”); *McClagherty II*, 2008-NMSC-044, ¶ 50 (“prohibitions against proffering evidence without an adequate legal and factual foundation [are] not a subtle point of law, and one we can presume any prosecuting attorney to know”) (cleaned up); *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”); *State v. Torres*, 2012-NMSC-016, ¶ 23, 279 P.3d 740 (“an attorney is never exempt from treating opposing counsel with respect or permitted to denigrate adversaries, especially in front of a jury”). It is reasonable to presume that any practicing attorney would know these rules. “There must be a point at which lawyers are conclusively presumed to know what is proper and what is not.” *McClagherty II*, 2008-NMSC-044, ¶ 49.

C. The prosecutors acted in willful disregard of the risk of a mistrial, retrial, or reversal.

As the district court found below, the type and quantity of prosecutorial misconduct in Ms. Cardenas’s trial was similar to that in *Breit*, *McClagherty II*, and *Amador*—all cases in which this Court held that retrial was barred. [See 2 RP 486-87, ¶ 6; 2 RP 489-90 ¶ 19] In this case, as in *Breit*, prosecutors misstated in opening statement what the evidence would show, asked the defendant to comment on the testimony of another witness, and used closing to disparage defense counsel, shift the burden of proof, and make inappropriately inflammatory arguments. [See 2 RP 482-86 ¶¶ 4e-4f, 4h-4p] See *Breit*, 1996-NMSC-067, ¶¶ 41-43, 57-60, 63-64, 69-81. As in *McClagherty II*, prosecutors used cross-examination to introduce inadmissible evidence, asked the defendant to comment on the testimony of another witness, and made false statements in front of the jury. [See 2 RP 481-83 ¶¶ 4a-4c, 4e, 4g-4h] See *McClagherty II*, 2008-NMSC-044, ¶¶ 9-11, 41-42, 60, 64. And as in *Amador*, prosecutors misrepresented a case that did *not* result in conviction as a conviction, used it to impeach the defendant’s credibility, and made closing arguments that shifted the burden of proof and inflamed the jury. [See 2 RP 481-86 ¶¶ 4a-4c, 4j-4p] See *Amador*, 2024-NMSC-006, ¶¶ 31-32.

The sheer amount of misconduct in this case supports a finding of willful disregard. “The unavoidable conclusion from such egregious misconduct is that the prosecutor was fully aware that his actions would deprive [the defendant] of [her]

right to a fair trial.” *Breit*, 1996-NMSC-067, ¶ 48. In the proceedings on remand, the State introduced no evidence that might have explained what the prosecutors were thinking when they misrepresented a dismissal as a conviction and engaged in improper closing arguments. It is hard to escape the district court’s conclusion that the prosecutors here, like the prosecutor in *Breit*, were “willing to incur . . . a mistrial, a new trial, or a reversal on appeal.” [2 RP 489 ¶¶ 18-19] *See id.*

CONCLUSION

The prosecutors' misconduct at Ms. Cardenas's trial was repeated and egregious. As the district court found, it was comparable to the misconduct in *Breit*, *McClagherty II*, and *Amador*. The misconduct here meets all three prongs of the *Breit* test.

Furthermore, there was nothing wrong with the way Ms. Cardenas raised her *Breit* claim. There is no procedural rule requiring a defendant to raise a *Breit* claim on appeal or else forfeit it—on the contrary, *Breit*, *McClagherty II*, and the anti-waiver statute protect a defendant's right to raise the claim at any time. The State had ample notice and opportunity to be heard in the district court. It lost anyway, not because the procedure was unfair, but because the trial prosecutors' behavior was appalling.

Ms. Cardenas asks this Court to affirm the district court's order of dismissal with prejudice.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that on March 29, 2026, a copy of this pleading was uploaded to Odyssey File & Serve for service on Serena Wheaton in the NMDOJ.

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Law Offices of the Public Defender