



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

No. S-1-SC-41142

CRISTAL CARDENAS,

Defendant-Appellee.

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

STATE OF NEW MEXICO'S BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

RAÚL TORREZ
Attorney General

SERENA R. WHEATON
Assistant Solicitor General
201 3rd St. NW, Ste. 300
Albuquerque, New Mexico 87102
(505) 717-3500

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

CITATIONS TO THE RECORD	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION.....	1
I. SUMMARY OF FACTS AND PROCEDURAL BACKGROUND.....	2
A. Trial.....	3
B. Original Appeal and This Court’s Opinion	8
C. Remand.....	11
ARGUMENT.....	15
II. THE DISTRICT COURT ERRED IN INVOKING <i>BREIT</i> WHERE THIS COURT REVERSED FOR EVIDENTIARY ERROR AND REMANDED FOR RETRIAL.....	15
A. Legal Standard.	15
B. Discussion.....	18
1. Flowing From Defendant’s Novel Argument On Remand, The District Court’s Resulting Analysis Is Flawed As It Never Determined Whether The Instances of Conduct Were Error Requiring Retrial Before It Reached <i>Breit</i>	18
2. The Alleged Instances of Prosecutorial Misconduct Were Never Preserved—Had Defendant’s New Claims Been Raised Before This Court, Defendant Would Have Received Fundamental Error Review	25
III. EVEN IF DEFENDANT COULD RAISE A <i>BREIT</i> CLAIM, THE DISTRICT COURT APPLIED THE INCORRECT STANDARD OF REVIEW AND MISAPPLIED THE THREE-PRONG TEST	28
A. Legal Standard	28
B. The Proper Legal Standard, If Reviewed, Was For First Fundamental Error—Thus The District Court’s Review and Order Are Flawed	31

C. Even If It Was Proper To Forgo Fundamental Error Review—The District Court Misapplied the <i>Breit</i> Three Prong Test.....	37
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CONCLUSION.....	45
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CITATIONS TO THE RECORD

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 this brief contains fewer than 11,000 words (10,706). This word count was obtained using Microsoft Word 2016.

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The record proper is cited by the abbreviation **RP** followed by the page number.

TABLE OF AUTHORITIES

Cases

<i>State v. Allen</i> , 2000-NMSC-002, 128 N.M. 482	29, 31
<i>State v. Amador</i> , 2024-NMSC-006	passim
<i>State v. Ben</i> , 2015-NMCA-118	15, 16
<i>State v. Breit</i> , 1996-NMSC-067, 122 N.M. 655	passim
<i>State v. Cardenas</i> , 2025-NMSC-020	passim
<i>State v. Chavarria</i> , 2009-NMSC-020, 146 N.M. 251	27, 28
<i>State v. Correa</i> , 2009–NMSC–051, 147 N.M. 291	27
<i>State v. Hildreth</i> , 2022-NMSC-012	39
<i>State v. Lensegrav</i> , 2025-NMSC-016	passim
<i>State v. McClaugherty</i> , 2003-NMSC-006, 133 N.M. 459	passim
<i>State v. McClaugherty</i> , 2008-NMSC-044, 144 N.M. 483	passim
<i>State v. Muise</i> , 1985-NMCA-090, 103 N.M. 382	19, 27
<i>State v. Revels</i> , 2025-NMSC-021	15, 16, 18
<i>State v. Salazar</i> , 2006-NMCA-066, 139 N.M. 603	19, 44
<i>State v. Sneed</i> , 1967-NMSC-272, 78 N.M. 615	16
<i>State v. Sosa</i> , 2009-NMSC-056, 147 N.M. 351	33, 39
<i>Washington v. Bd. of Regents of New Mexico State Univ.</i> , A-1-CA-37913, (N.M. Ct. App. Mar. 29, 2022) (nonprecedential)	26

Statutes

NMSA 1978, Section 31-1-10 (1963)	27, 28, 44
---	------------

Other Authorities

<i>Egregious</i> , MERRIAM WEBSTER, http://merriam-webster.com/dictionary/egregious (last visited Feb. 9, 2026)	25
--	----

<i>Interlocutory Order</i> , BLACK'S LAW DICTIONARY (12th ed. 2024)	26
---	----

Rules

Rule 11-404(A)(2)(a) NMRA	10
Rule 11-404(B) NMRA	9, 10, 22, 23
Rule 11-609 NMRA	43
Rule 5-614 NMRA	20

Constitutional Provisions

N.M. Const. art. II, § 15	11
N.M. Const. art. VI, § 2	19, 27

Federal Authorities

<i>United States v. Tateo</i> , 377 U.S. 463 (1964)	15
---	----

Supreme Court Filings

Answer Brief, <i>State v. Cardenas</i> , S-1-SC-39517 (N.M. Oct. 16, 2023)	2
Brief in Chief, <i>State v. Cardenas</i> , S-1-SC-39517 (N.M. Aug. 15, 2023). 1, 9, 22, 23	
Reply, <i>State v. Cardenas</i> , S-1-SC-39517 (N.M. Nov. 21, 2023)	13, 19

INTRODUCTION

When Defendant appealed her convictions for first-degree murder, conspiracy to commit first-degree murder, and solicitation to commit first-degree murder to this Court, she did not claim the prosecutors at trial engaged in extreme prosecutorial misconduct barring retrial—the most Defendant argued to this end was the prosecutors behaved inappropriately. *See State v. Cardenas*, 2025-NMSC-020 (*Cardenas* I); Brief in Chief, at 40-41, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023). After this Court concluded that the district court erred by allowing the State to ask Defendant about her six-month-old child’s having tested positive for methamphetamine, it determined that sufficient evidence supported Defendant’s conviction and remanded for a new trial.

On remand, Defendant claimed for the first time, based on no new evidence, that the prosecutors in the first trial had engaged in egregious prosecutorial misconduct sufficient to bar retrial—as opposed to the “inappropriate conduct” argued originally to this Court. Defendant candidly admitted that she did not raise this issue on appeal: “[*State v.*] *Breit* . . . wasn’t before the Supreme Court in this case—we didn’t ask for it, we asked for it here. And that’s proper.” [07/03/25 CD 09:21:13-:25, citing *Breit*, 1996-NMSC-067, 122 N.M. 655] Defendant asserted that the “relief of reversal” that this Court ordered was “insufficient[.]” [*Id.*

09:22:20-:39; 09:22:49-:54] The district court agreed with Defendant and barred the State from doing what this Court expressly mandated: retrying Defendant.

Defendant sought this Court's review in *Cardenas* I on several issues, but the case was reversed and remanded on one evidentiary error. Normally a defendant's successful appeal for trial error removes any double jeopardy bar to retrial. *Breit* created an exception when the *cause* of the remand for new trial is extreme prosecutorial misconduct. Here, a new trial was ordered not because of extreme prosecutorial misconduct, but because of an evidentiary trial error. *Breit* does not apply. When a defendant obtains a new trial following an appeal on grounds other than extreme prosecutorial misconduct, he or she may not then ask the district court to bar retrial when *all* the instances of the newly alleged prosecutorial misconduct stem from the trial and thus should have been brought for the first time on the direct appeal. The State asks the district court's order dismissing this matter be reversed and the matter reinstated for retrial.

I. SUMMARY OF FACTS AND PROCEDURAL BACKGROUND

As the facts and proceedings from the trial inform this appeal but have been fully set forth by the State in *Cardenas* I, the State here provides a shortened summary of the facts. See Answer Brief, *State v. Cardenas*, S-1-SC-39517 (N.M. Oct. 16, 2023).

A. Trial.

On March 25, 2018, Mario Cabral and his girlfriend, Vanessa Mora, were murdered at Mora's home. [03/08/22 CD 4:15:09, 04:19:02-:21:09; RP 1-7] The next morning, Mora's thirteen-year-old daughter found the dead bodies of her mother and Cabral. [03/08/22 CD 04:23:02] Prior to Cabral's relationship with Mora, Defendant and Cabral had a child together and, after separating, Cabral began having supervised custodial visits and had notified the family court he would be selling his residence. [03/09/22 CD 09:22:20-:24:46; 03/10/22 CD 01:34:13]

Thereafter, in January 2018, Defendant and her new boyfriend, Luis Flores contacted Edward Alonso to arrange for him to kill Cabral. [03/08/22 CD 01:56:30-:58:48] Alonso agreed to carry out the murders for \$10,000, payable as \$5,000 down and \$5,000 after the murder. [*Id.* 1:58:55-59:01; 02:06:32] [*Id.*] The next day, Defendant and Flores met with Alonso, in person. [*Id.* 02:06:40-:07:00] Defendant said she wanted Cabral killed within sixty days. When it took a while for Alonso to commit the murder, Defendant told Alonso that if "he wasn't able to finish the job . . . then [Flores] was gonna take care of it" and asked Alonso to get her an extra magazine for a .45 caliber gun. [*Id.* 02:24:32-:25:10] Alonso never gave them the requested magazines and was arrested for violation of his federal probation before he could murder Cabral. [*Id.* 02:23:36-:27:30] Upon arrest, Alonso used his information regarding the murder for hire to his advantage in his own sentencing

before state and federal authorities. [*Id.* 02:29:09] The former FBI agent who received and investigated Alonso's tip testified during the trial as the State's first witness. [*Id.* 10:08:28-:11:20; 10:12:12-:20:27]

The FBI followed up on the tip that Alonso gave because the FBI determined he was not giving them all the information he had, but their investigation identified that the information he was giving them, even if not all the information, was accurate information. [*Id.* 10:30:40-:56, 10:31:06-:30] The FBI determined the "story" Alonso gave FBI at their first meeting "had merit to it." [*Id.* 10:34:25-:32] Through connecting with local law enforcement, the FBI was able to determine who had taken out the hit on Cabral—his ex, Defendant. [*Id.* 10:41:19-:42:09] The agent testified that people in federal custody often try to make deals to get out of trouble. [*Id.* 10:15:12-:16:50] As a result of this the agent said:

[w]e were able to corroborate a lot of what [Alonso] was telling us. And to be honest with you, we couldn't find anything to show that he wasn't being 100% truthful. We just felt like he had more information that we weren't getting at the time.

[*Id.* 10:46:10-:38]

Four law enforcement officers testified during the trial. [03/09/22 CD 09:49:40-10:12:45, 10:19:17-11:43:47, 03:08:51-:22:06; 03/10/22 CD 08:54:43-11:27:43; 09:56:26-:57:45, 10:04:11-:12; 03/10/22 CD 10:31:33] Evidence collected from the scene of the murder included .45 caliber shell casings but not the

guns themselves. [*Id.* 10:50:55-:54:52, 02:55:53-:56:35] Those shell casings were tested for fingerprints, and no fingerprints were conclusively identified. [03/10/22 CD 10:51:31-:52:12, 10:56:40-:59:43] Law enforcement seized three vehicles and four cell phones from Defendant and in one of the three phones, they found three photos of Mora's home. [03/10/22 CD 09:03:10-:05:50, 09:18:55-:21:33, 09:22:27-:58, 10:03:40]

During direct exam, Defendant testified that she was telling the truth. [*Id.* 02:14:12-:14] She testified that when custody started to change, she was not mad, she “just wanted everything to go right for [her] daughter.” [*Id.* 01:36:45] She claimed that she did not want Cabral's house. [*Id.* 01:37:00-:38] Ultimately, she was not mad about getting no money from the house. [*Id.* 01:40:37-:40] She testified that she did not want Cabral dead. [*Id.* 01:51:24-:28] Defendant further claimed she did not know anything about guns, she did not have any guns, she had no felony convictions, she had no convictions for a crime of violence, and she had no convictions for domestic violence. [*Id.* 02:10:30-:11:30] Defendant testified she, herself, was a victim of domestic violence. [*Id.*] When asked about the phones in her possession, she could not identify whose phone was whose. [*Id.* 02:20:00-:23:40]

During cross-examination, Defendant was questioned about her two children—comparing her parenting to that of Cabral. [*Id.* 02:58:25-:34] The following exchange happened:

State: [Cabral] didn't care about [Y. Cabral] as much as you did, did he?

D: I always had [Y. Cabral] since she was born.

State: And [younger daughter]?

D: And [younger daughter].

State: Both of those girls, they are your life right?

D: Yes they are.

State: You would do anything to keep them safe.

D: What do you mean by that?

State: You would do anything to keep them safe?

. . . .

D: Like, danger-wise?

State: Danger-wise, yes.

D: Well that is what a parent would do, keep a child safe.

State: I agree. So why is it that your child tested positive for meth when y'all got arrested?

Defense immediately objected, raising several evidentiary issues. [*Id.* 02:58:30-:59:13] At a sidebar, defense stated that it had received no notice that the State planned to use this evidence and that its use was prejudicial to Defendant. [*Id.* 02:59:11-03:01:12] The State responded that Defendant had put her character at issue during direct and she, therefore, opened the door. [*Id.* 03:01:00-:27] Specifically, Defendant testified that she was a peaceful, law-abiding citizen, she did not want Cabral's home, and she just wanted her children to be safe. [*Id.* 03:01:00-:47]

The State argued Flores "pled guilty" to the child endangerment charge. [*Id.* 03:01:46-:54] The State further proffered that Defendant was misleading the jury by insinuating she is a great parent and that "if that was the truth . . . then these children

would not be testing positive for methamphetamine.” **[Id. 03:02:00-:20]** The State argued Rule 11-404 NMRA only applies in the State’s case-in-chief not “when the Defendant is going to take the stand.” **[Id. 03:03:28-:38]**

The district court decided the objection under Rule 11-404 and that it was “not looking at propensity itself.” Rather it looked at how the “door was opened.” The district court allowed the limited question. **[Id. 03:06:54-:07:06]** Defense asked the State where they had disclosure of this fact, and the State directed Defendant to a court case, by its case number, which the State argued it found after Defendant opened the door on direct and not before. **[Id. 03:07:22-:56]** Back before the jury, the State asked Defendant to confirm that her youngest daughter “tested positive for meth after [Defendant] was arrested,” and Defendant confirmed the same. **[Id. 03:14:00-:10]**

In its case-in-chief, the State asked a witness about pictures from Defendant’s phone which had been taken of Mora’s home. **[Id.]** The State asked the witness if she had taken the pictures, to which she responded “I don’t recall.” **[Id. 08:51:30-:55]** Thereafter, during the State’s cross-examination of Defendant, the State showed Defendant the pictures and asked whether Defendant was “aware that [the witness had] said that she did not take these photographs.” **[Id. 03:22:54-:23:00]** Defendant responded that the witness “did say that she took photographs.” **[Id. 03:23:02]** The State then clarified whether Defendant was “aware that [witness] said she did not

take those aerial photographs.” [*Id.* 03:23:03-:07]

In closing, the State questioned Defendant’s credibility and her memory, pointing to all the things Defendant stated she could not remember. [*Id.* 09:28:10-:15, 09:39:37-:40:19] During Defendant’s closing, the defense argued the question regarding the youngest child testing positive for meth was a “punch below the belt” and that that case had been dismissed. [*Id.* 10:39:35-:40:41] The State immediately objected, stating that the case was not dismissed and there was no evidence in the record that it had been dismissed. [*Id.*] Defendant responded that she had testified as to its dismissal. The district court sustained the State’s objection.

Ultimately a jury convicted Defendant of first-degree deliberate murder, conspiracy to commit murder, and criminal solicitation to commit murder.

B. Original Appeal and This Court’s Opinion.

Defendant appealed her convictions to this Court. In that appeal, Defendant’s arguments were: (1) the district court violated her constitutional right to a public trial; (2) cumulative errors violated her right to a fair trial including the following errors, (a) improper evidence of her child testing positive for methamphetamine was introduced, (b) improper witness testimony amounting to bolstering was permitted, and (c) there was alleged mischaracterization of evidence to the court and jury by the prosecution; (3) insufficient evidence of first-degree murder; and (4) the convictions for conspiracy and solicitation constituted a double jeopardy violation.

See Brief in Chief, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023). Defendant asserted that it was “misconduct for a prosecutor to make prejudicial statements not supported by the evidence[,]” the prosecutor asked “inappropriate questions[,]” and “improperly . . . misstate[d] a witness’s testimony” she only asked this Court to reverse her convictions because of “numerous evidentiary error” and “bar retrial” due to insufficient evidence.” *See Id.* at 39-41. But nowhere in Defendant’s original briefing did she mention legal argument as to “extreme prosecutorial misconduct” or “prosecutorial misconduct.” *See generally id.*

Following briefing and argument, this Court issued a split opinion on March 27, 2025, in which the majority stated:

[w]e reverse Defendant’s convictions based on a single evidentiary ruling. We conclude that the district court abused its discretion and committed reversible error when it allowed the State to question Defendant about her six-month-old child’s positive methamphetamine test. We reject Defendant’s sufficiency of the evidence and double jeopardy arguments and, therefore, remand for a new trial on all charges for which the jury convicted Defendant.

Cardenas, 2025-NMSC-020, ¶ 2.¹

Importantly, Defendant brought her claim as to this “single evidentiary ruling” under Rule 11-404(B) NMRA. *Cardenas*, 2025-NMSC-020, ¶ 25. But this Court, *sua sponte*, analyzed the district court’s admission of the evidence as to the

¹ The Court also determined that notetaking in the Courtroom is permissible and the district court erred to prevent such notetaking to occur. This Court did not reverse and remand on this matter despite concluding there was error. *Cardenas* I ¶¶ 64-72.

methamphetamine charge under Rule 11-404(A)(2)(a) NMRA *and* under Rule 11-404(B), concluding under each analysis the result would be the same with the resulting error being harmful to Defendant. *Cardenas*, 2025-NMSC-020, ¶¶ 27-28.

Under a Rule 11-404(B) analysis, the State is required to provide “reasonable notice of the general nature of any evidence of crimes, wrongs, or other acts that the prosecutor intends to offer at trial, so [a] defendant has a fair opportunity to review it.” *Cardenas*, 2025-NMSC-020, ¶ 30. This Court concluded that the State did not present an admissible purpose under Rule 11-404(B). *Cardenas*, 2025-NMSC-020, ¶¶ 31-33. As such, this Court concluded it was an abuse of discretion to admit the evidence of the positive methamphetamine test under Rule 11-404(B).

Additionally, this Court determined that the question was also impermissible under Rule 11-404(A)(2)(a). The State argued Defendant opened the door to evidence of the methamphetamine charge because Defendant had testified as to her character traits of being a law-abiding citizen, being peaceful, and being a good mother, which would be refuted by a positive methamphetamine test in her child. *Cardenas*, 2025-NMSC-020, ¶ 36. This Court concluded that Defendant “did not offer, or attempt to offer, proof of these character traits on direct examination.” *Id.* As such, this Court concluded it was an abuse of discretion to admit the inquiry into the positive methamphetamine test under Rule 11-404(A)(2)(a). *Cardenas*, 2025-NMSC-020, ¶ 40. Having concluded that the district court erred, this Court also then

determined the error was not harmless. *Id.* ¶¶ 41-47.

In dissent, Chief Justice Thomson stated that “[t]he majority bases its decision to order a new trial on what it calls cumulative error, a result of the trial court’s admission of one piece of testimony regarding Defendant’s infant child[.]” *Id.* ¶ 75 (Thompson, C.J., dissenting). Chief Justice Thomson disagreed that “admitting the evidence was an abuse of discretion and would [have held] that it was proper rebuttal evidence under Rule 11-404(A)(2)(a) . . . in light of Defendant’s testimony [and] even if admitting the testimony was error, it was neither cumulative nor reversible.” *Id.* Chief Justice Thomson concluded that he would affirm Defendant’s convictions. *Id.* ¶ 86.

This Court determined that the proper procedure on remand was for a new trial because there was sufficient evidence supporting each of the crimes of which Defendant had been convicted. *Id.* ¶ 74. This Court did not address any claims of prosecutorial misconduct because Defendant did not raise such a claim.

C. Remand.

Following remand on an expedited mandate, Defendant immediately filed a Motion to Dismiss. [RP 401] In that motion, argued by appellate defense counsel, Defendant sought dismissal with prejudice, arguing for the first time that retrial would constitute double jeopardy under Article II, Section 15 of the New Mexico Constitution. [*Id.*] She asserted that the evidentiary error, on which grounds this

Court reversed, was “caused by prosecutorial misconduct, and there was significant additional prosecutorial misconduct as well.” *[Id.]* Citing to the *Breit* three-prong test, Defendant asserted that all three prongs were met and so dismissal was necessary. **[RP 401-02, citing 1996-NMSC-067, ¶ 14]** The alleged instances of egregious prosecutorial misconduct raised by Defendant’s Motion were:

- During Defendant’s testimony, on cross-examination, prosecutors asked her, “So why is it that your child tested positive for meth when y’all got arrested?”;
- The prosecutors failed to disclose the methamphetamine evidence to the defense in advance, in violation of Rule 11-404(B)(3);
- The prosecutors misled the district court and the defense about the factual basis for the question about the drug test;
- After Defendant testified that she believed the charge against Flores had been dismissed, the prosecutors doubled down and insisted during closing arguments that the charge was not dismissed;
- The prosecutors made false statements during opening statements, closing arguments, and about Rodriquez having taken photographs in front of the jury;
- The prosecutors denigrated defense counsel in front of the jury;
- The prosecutors shifted the evidentiary burden to the defense;
- The prosecutors mischaracterized testimony to ask Defendant about whether another witness was lying;
- The prosecutors encouraged the jury to make emotional decisions and disregard the jury instructions.

[RP 402-15] Each of these instances of alleged misconduct occurred during the

original trial, where they were argued and ruled upon as evidentiary errors, and were thereafter brought before this Court as evidentiary errors on appeal in *Cardenas I*. See Reply, at 17, *State v. Cardenas*, S-1-SC-39517 (N.M. Nov. 21, 2023).

In the State’s response to Defendant’s Motion to Dismiss, the State argued that the trial prosecutors’ actions did not amount to egregious prosecutorial misconduct and that, as to the evidentiary error, this Court had already ordered the relief which Defendant was due—a new trial. [RP 433-47] The State asserted that this case differed from *Breit*, 1996-NMSC-067, *State v. McClaugherty* (*McClaugherty I*), 2003-NMSC-006, 133 N.M. 459, *State v. McClaugherty*, (*McClaugherty II*), 2008-NMSC-044, 144 N.M. 483, and *State v. Amador*, 2024-NMSC-006. To the extent the district court determined the State’s question as to the methamphetamine improper, it was not so wholly improper to rise to the *Breit* standard of a prosecutor who “knows” an action is a “violation[] of rules that every legal professional, no matter how inexperienced, is charged with knowing[.]” *State v. Lensegrav*, 2025-NMSC-016, ¶ 40. As support for this, the State pointed to the dissenting opinion in *Cardenas I* for the proposition that reasonable minds might differ about whether Defendant opened the door. [RP 440]; see *Breit*, 1996-NMSC-067, ¶ 33; see *Cardenas*, 2025-NMSC-020, ¶¶ 75, 79, 85 (Thomson, C.J., dissenting). In sum, the State contended that it did not act with a willful disregard for the possibility of remand and, while Defendant’s trial had flaws, the prosecutors

conduct did not rise to the level of misconduct under *Breit*. [*Id.*]

Following a reply from Defendant, [RP 449-54], a surresponse from the State, [RP 462-66], and a hearing on the Motion to Dismiss, the district court issued its ruling on July 10, 2025. [RP 479-93] Relying solely upon the same instances of alleged prosecutorial misconduct occurring during the original trial as framed by Defendant’s Motion to Dismiss, the district court dismissed Defendant’s case with prejudice. [*Id.*]

The State filed a Motion for Reconsideration, advancing the arguments contained in this Brief. [RP 494-508] The State clarified that the reason this Court had not considered *Breit* on the direct appeal was because Defendant did not bring that otherwise unpreserved claim before this Court. [RP 494-95] To the extent Defendant argued that she had preserved prosecutorial misconduct during trial, the State clarified that it was only preserved as claims of *evidentiary* error, which this Court addressed. [RP 495] The State argued that contrary to Defendant’s claim that *Breit* and *McClagherty* left little “wiggle room” for the district court to do anything but dismiss, each of those cases were legally and factually distinguishable. [*Id.*; 07/03/25 CD 09:15:00-:15:11] It also distinguished *Amador* was for its significant procedural differences. [*Id.*] The district court denied the State’s motion with the district court concluding that “it reviewed the motion and the file” and determined that “the request is not well-taken.” [RP 510] The State appealed.

ARGUMENT

II. THE DISTRICT COURT ERRED IN INVOKING *BREIT* WHERE THIS COURT REVERSED FOR EVIDENTIARY ERROR AND REMANDED FOR RETRIAL.

A. LEGAL STANDARD.

“Appellate reversal on any grounds other than evidentiary insufficiency is considered reversal for trial error and is not ‘a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective.’” *State v. Revels*, 2025-NMSC-021, ¶ 21. (internal citation omitted). Examples of these defects include “incorrect receipt or rejection of evidence . . . or prosecutorial misconduct.” *Id.* (internal citation omitted). When the judicial process is defective, “the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.” *Id.* (internal citation omitted).

This Court, citing the United States Supreme Court, has determined that “these societal interests are paramount when a conviction is reversed for trial error.” *Id.* ¶ 22 (citing *United States v. Tateo*, 377 U.S. 463, 466 (1964)). Thus, there is “no constitutional prohibition against retrial after a conviction is set aside, except where the conviction is vacated for insufficient evidence.” *State v. Ben*, 2015-NMCA-118,

¶ 8; *see also Revels*, 2025-NMSC-021, ¶ 23 (stating that in “the case in which the defendant is convicted and his conviction is set aside on appeal on a ground other than insufficiency of the evidence . . . no one doubts that society's interest in administering its laws completely overrides the defendant's interest in freedom from [the] hardships [of reprosecution]”).

This Court has stated that the “distinction between retrial after an acquittal and retrial after a conviction reversed for trial error has historically been justified on various rationales, including the legal fiction of waiver—that a defendant who successfully appeals his conviction for trial error ‘waives’ any objection to a second prosecution [and] the doctrine of continuing jeopardy—that jeopardy terminates upon an acquittal but continues through an appeal and into the subsequent retrial.” *Ben*, 2015-NMCA-118, ¶ 8 (internal citation omitted.). Normally, a defendant's appeal for trial error, motion for a mistrial, or motion for new trial removes any double jeopardy bar to retrial. *See e.g. Revels*, 2025-NMSC-021, ¶ 24 (noting that “when a reversal is based on grounds other than insufficient evidence . . . that reversal does not bar retrial . . . [and] a defendant may be retried if the conviction was set aside because of trial error.” *Id.* (internal quotation marks and citation omitted)); *see also State v. Sneed*, 1967-NMSC-272, ¶ 7, 78 N.M. 615 (“The constitutional protection against double jeopardy does not prevent a second trial for the same offense when the defendant . . . by an appeal, has invoked the action which

resulted in the second trial.”).

Breit provided a narrow exception to this general rule. 1996-NMSC-067. If a defendant moves for a bar to retrial in the face of “extreme prosecutorial misconduct,” the State may not prosecute that defendant again when: (1) “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.” *Id.* ¶ 32. This inquiry is entirely “objective...the belief of the prosecutor regarding his or her own conduct is irrelevant[.]” *McClagherty*, 2008-NMSC-044, ¶ 27.

By its terms and its reasoning, the *Breit* remedy applies only when extreme official misconduct *caused* the defendant to move for a mistrial or to seek a new trial. Prior to remand, cases where *Breit* is raised are analyzed pursuant to the *Breit* three prong test. There is no proper legal mechanism for a case to be remanded for retrial, pursuant to the general rule, and then to be converted into a *Breit* case solely using evidence available to Defendant when she brought her direct appeal. To the extent *Breit* and its progeny are protective of defendants to prevent the State from getting a second bite at the proverbial apple, this loophole in our *Breit* jurisprudence should not permit a defendant a second attempt at achieving absolution following a direct appeal ordering retrial.

B. DISCUSSION.

1. Flowing From Defendant's Novel Argument On Remand, The District Court's Resulting Analysis Is Flawed As It Never Determined Whether The Instances of Conduct Were Error Requiring Retrial Before It Reached *Breit*.

The new trial here was ordered not because of prosecutorial misconduct, but because of an ordinary trial error in a case where there was otherwise substantial evidence. *See Cardenas I*, ¶ 2 (“revers[sing] Defendant’s convictions based on a single evidentiary ruling. [This Court] conclude[d] that the district court abused its discretion and committed reversible error. . . [This Court] reject[ed] Defendant’s sufficiency of the evidence . . . arguments and, therefore, remand for a new trial on all charges for which the jury convicted Defendant”).

Because Defendant did not seek or obtain a new trial due to extreme official misconduct, the *Breit* exception to double jeopardy does not apply. Rather, the general rule permitting retrial upon reversal for trial error governs. *See e.g. Revels*, 2025-NMSC-021, ¶ 24 (“a defendant may be retried if the conviction was set aside because of trial error.” *Id.* (internal quotation marks and citation omitted)). Defendant, having achieved a successful appeal on one of her evidentiary error arguments, received the appropriate remedy—a new trial.

But following the expedited mandate, Defendant changed her argument from the prosecutors “engaged in inappropriate conduct” to the prosecutors engaged in

“egregious prosecutorial misconduct.” *Compare* Reply, at 17, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023) *with* [RP 401]. Taking what Defendant argued as evidentiary errors on appeal, Defendant then used these same instances of evidentiary error to support a new claim of “egregious” prosecutorial misconduct. Our law does not permit such tactics. *Cf. State v. Salazar*, 2006-NMCA-066, ¶ 9, 139 N.M. 603 (stating “[a]dditionally, parties cannot change their arguments on appeal . . . [noting] . . . many of the issues argued on appeal are not the issues that were presented to the trial court.”). The reverse should apply here: when a party characterizes the facts and law a particular way to prevail in one proceeding, they should not be allowed to thereafter change those characterizations.

The justification for this premise, in sum, is taken from this Court’s long-standing and well-established policy disfavoring piecemeal appeals, *see State v. Muise*, 1985-NMCA-090, ¶ 19, 103 N.M. 382 (“[J]udicial policy mandates against piecemeal prosecutions growing out of the same acts or incident.”); from constitutional principles that an aggrieved party shall have an absolute right to one appeal, *see* N.M. Const. art. VI, § 2 (providing “that an aggrieved party shall have an absolute right to one appeal.”); from law of the case doctrine, *see Breit* (explaining that the law-of-the-case doctrine may generally be invoked where “an appellate court has considered and passed upon a question of law and remanded the case for further proceedings[,]” but concluding both that the doctrine operates

differently in the double jeopardy context, and noting that “[this doctrine] is discretionary to this Court.” 1996-NMSC-067, ¶¶ 10, 12), and from the fact that a contrary rule would frustrate this Court’s rules of criminal procedure, *see* Rule 5-614 NMRA (requiring that “motion for new trial based on the ground of *newly discovered evidence* may be made only before final judgment, or within two (2) years thereafter, but if an appeal is pending the court may grant the motion only on remand of the case” and stating that “[f]ailure to make a motion for a new trial shall not constitute a waiver of any error *which has been properly brought to the attention of the court.*” *Id.* (emphasis added)).

In her Motion to Dismiss, through both new and appellate defense counsel, Defendant argued that “the New Mexico Supreme Court . . . reversed on the basis of evidentiary error . . . [and] this evidentiary error *was caused by* prosecutorial misconduct and there was significant additional prosecutorial misconduct.” [RP 401] Defendant then quoted *Breit*, stating “When a defendant’s . . . request for reversal on appeal is necessitated by prosecutorial misconduct, reprosecution may be barred[.]” [RP 402] In these two paragraphs of her motion, Defendant took the otherwise clear conclusion of this Court, reversal for evidentiary error, and transmuted it into evidentiary error now “*caused by*” prosecutorial misconduct—an allegation which was never argued on appeal before this Court despite all the evidence used to support the claim arising from Defendant’s trial. In blending what

she argued to this Court and what she perhaps later realized she might have argued to this Court, the Motion to Dismiss seems to imply that this Court considered, if it did not act upon, prosecutorial misconduct. That characterization to the district court had impact: Defendant told the district court that “the Supreme Court has already concluded that [Defendant’s] trial was not fair . . . The question for [the district court] is not whether [Defendant’s] trial was fair, but whether prosecutorial misconduct was so egregious that dismissal with prejudice is required[.]” [RP 449-50] In other words, this Court has already concluded that retrial is necessary, so the district court must only perform the *Breit* analysis. The impropriety of Defendant’s request stems from the fact that this Court did not remand, even in part, based upon prosecutorial misconduct which is the only thing that triggers the *Breit* analysis except for when it is properly sought following a *timely filed* motion for mistrial or new trial.

In Defendant’s Motion to Dismiss, Defendant succinctly summarized what she asserts are the alleged instances of prosecutorial misconduct:

- 1) **Introduction of inadmissible evidence;**
- 2) **Failure to disclose evidence in violation of Rule 11-404(B)(3);**
- 3) **Misleading the Court and the defense about the factual basis for a line of questioning;**
- 4) **Making false statements in front of the jury;**
- 5) Denigrating defense counsel in front of the jury;
- 6) Shifting the burden of proof;
- 7) Mischaracterizing testimony to ask [Defendant] if another witness was lying; and
- 8) Encouraging the jury to make emotional decisions and disregard the jury instructions.

[RP 452 (emphasis added)] The bolded sections on this list all relate to the methamphetamine question asked of Defendant during the trial. In making her assertions to the district court, Defendant never reminded or clarified to the district court that she did not preserve any of the alleged instances of misconduct during the trial as anything but evidentiary error or that she raised each of these exact instances to this Court as evidentiary error. Taking each in turn,

- 1) The “introduction of inadmissible evidence” was raised on direct appeal under “Cumulative Errors” as part of the evidentiary error analysis of mischaracterizing evidence related to “Rule 404(B) evidence” and the drug test associated with Defendant’s child testing positive for methamphetamine, *see* Brief in Chief, at 34-35, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023);
- 2) The “failure to disclose evidence in violation of Rule 11-404(B)(3)” was raised on direct appeal under “Cumulative Errors” as part of the evidentiary error analysis of failing to give notice under Rule 11-404(B), *see* Brief in Chief, at 31-34, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023);
- 3) The “misleading the Court and the defense about the factual basis for a line of questioning” was raised on direct appeal under “Cumulative Errors” as part of the evidentiary error analysis of “mischaracterizing the factual basis for the [Rule 11-] 404(B) evidence[,]” *see* Brief in Chief, at 39-40, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023);
- 4) The “making false statements in front of the jury” was also raised on direct appeal under “Cumulative Errors” as part of the evidentiary error analysis on “mischaracterizing the factual basis for the [Rule 11-] 404(B) evidence[,]” *see* Brief in Chief, at 39-40, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023);
- 5) The “denigrating defense counsel in front of the jury” was also

raised on direct appeal under “Cumulative Errors” as part of the evidentiary error analysis on “mischaracterizing the factual basis for the [Rule 11-] 404(B) evidence[,]” *see* Brief in Chief, at 39-40, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023);

6) The “shifting the burden of proof” was raised as a non-issue in Defendant’s statement of facts to the NMSC simply reiterating what the State argued to the jury, *see* Brief in Chief, at 20, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023);

and

7) The “mischaracterizing testimony to ask [Defendant] if another witness was lying” was raised on direct appeal under “Cumulative Errors” and “Testimony of Anna Rodriquez” as part of the evidentiary error analysis surrounding “misstatement by the State,” *see* Brief in Chief, at 40-41, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023).

The final instance of alleged prosecutorial error, “[e]ncouraging the jury to make emotional decisions and disregard the jury instructions[,]” while not raised on appeal as evidentiary error, was pulled from its context and was otherwise not preserved at trial. **[RP 452]** Defendant argues that at “the conclusion of the State’s closing, the prosecutor discouraged the jury from considering the charges independently[.]” **[RP 413]** However, this allegation was pulled from not the “conclusion of the State’s closing” but rather from amongst the State’s initial closing and prior to the State’s rebuttal closing and was otherwise pulled out of the context of all that the State argued to the jury. To the extent this allegation alone might have been reviewed for prosecutorial misconduct, it was not preserved and otherwise would fail to be misconduct.

In reaching its conclusion as to the first prong of the *Breit* test, the district court summarily adopted Defendant’s assertions and failed to decide first whether each of the purported instances of conduct was error. In fact the only instances of purported misconduct supported by legal analysis are those stemming from the evidentiary discussion of this Court from *Cardenas* I in discussing the methamphetamine question. [RP 480-87] Instead, the district court adopted Defendant’s argument which misstated the conclusion of this Court noting “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 [the district court].” [RP 486 (emphasis added)]

Admittedly, the district court also determined that “in absence of the Supreme Court’s ruling, [the district court] would find this prong [of *Breit*] met due to the quantity and severity of prosecutorial misconduct.” [*Id.*] But this statement exposes the legal flaw in the district court’s ruling: the new trial was not *caused* by the purportedly egregious prosecutorial misconduct, it was caused by a single evidentiary ruling about which reasonable minds disagreed. To even reach the *Breit* test—the district court first had to determine that there was prosecutorial misconduct rising to the level of error, and then whether the *Breit* prongs were met. Here the district court did not perform the correct analysis.

2. The Alleged Instances of Prosecutorial Misconduct Were Never Preserved—
Had Defendant’s New Claims Been Raised Before This Court, Defendant
Would Have Received Fundamental Error Review.

Moreover, Defendant did not object during her trial to what she now claims were “egregious” errors. *See Egregious*, MERRIAM WEBSTER, <http://merriam-webster.com/dictionary/egregious> (last visited Feb. 9, 2026) (defining egregious as “*very noticeable . . . glaringly bad.*” (emphasis added)). Despite the alleged “very noticeable” nature of the purported errors, the only time Defendant got close to making an objection as to prosecutorial misconduct was when Defendant argued during a sidebar with the district court during defense *closing*, that any conduct was only “beginning” to rise to the level of prosecutorial misconduct. **[03/11/22 CD 10:42:49-:43:29]** Defendant thereafter abandoned making a formal objection. Prosecutorial misconduct was never preserved.

The standard of review perhaps clarifies why cases remanded for retrial following a determination of evidentiary error, and absent *new* allegations of prosecutorial misconduct, should not be allowed to transmute into *Breit* cases. Had Defendant raised a prosecutorial misconduct claim as part of her direct appeal, this Court would have reviewed that claim for fundamental error. *See Lensegrav*, 2025-NMSC-016, ¶ 27 (stating “[w]ithout an objection, the district court had no opportunity to rule on any claim of prosecutorial misconduct and we must now review any such claim for fundamental error”). Only once fundamental, reversible

error has been established, would a court *then* address whether retrial was barred under *Breit. Lensegrav*, 2025-NMSC-016, ¶¶ 28, 35-36.

By waiting to raise prosecutorial misconduct for the first time on remand, Defendant achieved what she would have been barred from achieving before this Court—*full* de novo review. In particular, the district court sat in de novo review of its own interlocutory trial determinations, post-trial and appeal. All the district court’s original evidentiary rulings, upon which this Court relied in *Cardenas I*, were interlocutory rulings up until the trial was finalized. *Interlocutory Order*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining interlocutory order as “[a]n order that relates to some intermediate matter in the case; any order other than a final order.”). District courts have the authority to reconsider interlocutory orders, but this authority does not extend past the entry of final judgement into remand. *C.f. Washington v. Bd. of Regents of New Mexico State Univ.*, A-1-CA-37913, ¶ 17 (N.M. Ct. App. Mar. 29, 2022) (nonprecedential) (stating the “[d]efendant correctly notes that the district court has the authority to revisit interlocutory ruling . . . and the [district] court may revise or rescind an interlocutory order at any time before entry of a judgment that concludes the litigation[.]” *Id.* (internal quotation marks and citation omitted)). Here, when it revisited its interlocutory rulings, it disturbed the very rulings relied upon by this Court in reaching its determinations. The district court did so in absence of any new evidence or information previously unavailable and, therefore, erred.

This potential forum shopping for favorable review standards is likely one of the reasons there are two “tracks” of review for remand—general and *Breit*. Should this Court permit defendants to gamble on waiting to raise “very noticeable” or otherwise known instances of alleged prosecutorial misconduct until after remand on other errors, the rare remedy contemplated by *Breit* could become routine—especially where a defendant becomes encouraged to shift their argument from what they argued on appeal to achieve this absolution. *C.f. Muise*, 1985-NMCA-090, ¶ 19 (“[J]udicial policy mandates against piecemeal prosecutions growing out of the same acts or incident.”); N.M. Const. art. VI, § 2 (providing that an aggrieved party “shall have an absolute right to one appeal.”).

Under NMSA 1978, Section 31-1-10 (1963), “the *defense* of double jeopardy may not be waived and may be raised . . . at any stage.” (emphasis added). Defendant here is not using double jeopardy as a shield: she is using it as a sword. She sought, and received, a new trial based on a trial evidentiary error. She now seeks to escape the consequence of that decision: a new trial. Even if defendants cannot waive double jeopardy as a defense, they may certainly abandon or forfeit claims by failing to advance them on appeal. *See State v. Correa*, 2009-NMSC-051, ¶ 31, 147 N.M. 291 (explaining that issues that are not briefed on appeal are considered abandoned); *see also State v. Chavarria*, 2009-NMSC-020, ¶ 15, 146 N.M. 251 (defining “forfeiture [as] the failure to make the timely assertion of a right [and] waiver is the

intentional relinquishment or abandonment of a known right” *Id.* (internal quotation marks and citation omitted)).

The State contends 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. This nuance would not conflict with Section 31-1-10 or with *Breit* and would close the existing loophole in *Breit* jurisprudence from being exploited as a means of forum shopping and piecemeal litigation. Here, the district court erred when it failed to determine whether the alleged misconduct was, in fact, error requiring a new trial prior to reaching its de novo *Breit* analysis. The district court also erred where it agreed to review unpreserved prosecutorial misconduct claims, arising from the district court’s own interlocutory evidentiary rulings, but raised for the first time on remand where this Court reversed and remanded for evidentiary error. *C.f. Lensegrav*, 2025-NMSC-016, ¶¶ 28, 35-36. The district court’s dismissal order should be reversed for misapplication of the law, and the case reinstated for retrial.

III. EVEN IF DEFENDANT COULD RAISE A *BREIT* CLAIM, THE DISTRICT COURT APPLIED THE INCORRECT STANDARD OF REVIEW AND MISAPPLIED THE THREE-PRONG TEST.

A. Legal Standard.

Typically, “appellate review of a prosecutorial misconduct claim presents a

mixed question of law and fact. The appellate court will defer 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." *See McClagherty*, 2008-NMSC-044, ¶ 39. However, where prosecutorial misconduct was not preserved and "[w]hen the trial court had no opportunity to rule on a claim of prosecutorial misconduct because the defendant did not object in a timely manner [an appellate court] review[s] the claim on appeal for fundamental error." *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482; *see also Lensegrav*, 2025-NMSC-016, ¶ 27 (stating "[w]ithout an objection, the district court had no opportunity to rule on any claim of prosecutorial misconduct and [the claims] must now [be] review[ed] . . . for fundamental error").

Prosecutorial misconduct rises to the level of fundamental error only "when it is so egregious and ha[s] such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *Allen*, 2000-NMSC-002, ¶ 95 (internal quotation marks and citation omitted). To arrive at this conclusion and hold that fundamental error occurred, a court "must be convinced that the prosecutor's conduct created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them." *Lensegrav*, 2025-NMSC-016, ¶ 28 (emphasis added). Only if there is fundamental error requiring reversal would the Court then "address whether retrial is barred." *Id.*, ¶ 35.

Once fundamental error is established as to “extreme prosecutorial misconduct,” the State may not prosecute again when: (1) “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.” *Breit*, 1996-NMSC-067, ¶ 32. As used in this test, “willful disregard” is a “precise term, emphasizing that the prosecutor is actually aware, or is presumed to be aware, of the potential consequences of his or her actions.” *Id.* ¶ 34. This inquiry is entirely “objective...the belief of the prosecutor regarding his or her own conduct is irrelevant[.]” *McClagherty*, 2008-NMSC-044, ¶ 27.

Barring retrial is “an exceedingly uncommon remedy” available “only in cases of the most severe prosecutorial transgressions.” *Id.* ¶ 25 (quotations omitted); *Breit*, 1996-NMSC-067, ¶ 35. There can be a significant societal cost to doing so; when a court bars retrial, the State loses the ability to vindicate public rights no matter how strong the evidence of guilt or how serious the alleged crime.

The State contends that even if there was prosecutorial error during Defendant’s trial, it did not rise to the level of barring retrial. Any review for prosecutorial misconduct should have been fundamental error review first to determine if there was error and then, if error was established, a review of the *Breit*

prongs. Under the proper review standard and application of *Breit*, Defendant's Motion should have been denied.

B. The Proper Legal Standard, If Reviewed, Was For First Fundamental Error—Thus The District Court's Review and Order Are Flawed.

Prosecutorial misconduct was not preserved during the trial. The district court, prior to Defendant's direct appeal, did not have an "opportunity to rule on a claim of prosecutorial misconduct because the defendant did not object[.]" *Allen*, 2000-NMSC-002, ¶ 95. As such, the only review available to Defendant is fundamental error. Had the district court proceeded properly with a fundamental error review, it could have only concluded there was fundamental error if the conduct was "so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *Id.* To arrive at this conclusion and hold that fundamental error occurred, the district court would have had to "be convinced that the prosecutor's conduct created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them." *Lensegrav*, 2025-NMSC-016, ¶ 28 (emphasis added).

When the district court's order on the Motion to Dismiss is compared to the *Lensegrav* test, it is clear the district court did not perform the correct analysis. **[Compare RP 479-93, with *Lensegrav*, 2025-NMSC-016]** Here, the district court, at best, performed a de novo review of its own interlocutory evidentiary rulings at

trial, and then proceeded to reach the *Breit* three-pronged test. Following this review the district court concluded that “all three prongs of the *Breit* test are met . . . dismissal with prejudice [is required].” [RP 492] The district court’s order has no finding or determination as to whether it was convinced that the prosecutor’s conduct created a “reasonable probability that the error was a significant factor in the jury’s deliberations in relation to the rest of the evidence.” *Lensegrav*, 2025-NMSC-016, ¶ 28. As the district court did not perform the correct fundamental error analysis on Defendant’s unpreserved prosecutorial misconduct claims, its analysis and order are flawed and should be reversed by this Court.

Even if the district court’s order could be read to support a conclusion that it was “convinced there was a reasonable probability that the error was a significant factor in the jury’s deliberations in relation to the rest of the evidence[.]” it still did not set forth which error, if any, convinced it of such. As the errors, even in unison, would not rise to the level of passing the test established in *Lensegrav*, the district court’s order is reversible. *See id.* 2025-NMSC-016, ¶ 28 (stating in determining whether the claimed error(s) were a significant factor in the jury’s deliberations in relation to the rest of the evidence before them the court considers “(1) whether the statement invades some distinct constitutional protection; (2) whether the statement is isolated and brief, or repeated and pervasive; and (3) whether the statement is invited by defense.”).

Aside from the statements surrounding the positive methamphetamine test, the other alleged instances of conduct, even assuming they invaded a distinct constitutional protection, were isolated and/or brief or were otherwise removed from their context in Defendant’s narration of the facts. In short, the district court’s recitation of the instances of “prosecutorial misconduct,” are taken directly from Defendant’s briefing with no additional analysis, evidence, or legal support. **[Compare RP 403-13 with RP 481-86]** This built in error to the district court’s order where Defendant’s description of the alleged error in its motion was misconstrued or otherwise not predicated on cited law.

For example, Defendant argued, without legal support, that the “prosecutors shifted the evidentiary burden to the defense.” **[RP 410]** Defendant argues as an example of this “burden shift” that the prosecutor argued in closing that the absence of certain evidence did not mean “these people don’t get justice.” **[3/11/22 CD 9:14:01-:40]** Our caselaw is clear, “[c]losing argument is unique . . . [it] is necessarily responsive and extemporaneous, *not always capable of the precision that goes into prepared remarks.*” *State v. Sosa*, 2009-NMSC-056, ¶ 24, 147 N.M. 351 (emphasis added). While the prosecutor’s argument may have lacked the “precision that goes into prepared remarks” it did not operate to “shift the burden” to defense—thus it would not rise to prosecutorial misconduct.

As another example, Defendant argued that the State impermissibly identified

in its closing that despite Defendant raising cartel involvement in the murder during opening statements, defense never thereafter introduced evidence as to that assertion. There was no burden shift. The State is not required to disprove any defense theory not included in the jury instructions which form the law of the case. Defendant cites no additional law supporting her conclusion.

In fact, almost none of Defendant’s instances of “prosecutorial misconduct” are supported by legal argument as to any error—except the methamphetamine question answered by this Court—and are merely set forth in conclusory fashion as “prosecutorial misconduct” by comparison to other cases. [RP 403-415] The district court’s order, a mirror in many respects of Defendant’s motion, is also therefore bereft of legal support for its conclusions. When each instance of purported error is replaced into its context from the trial and viewed in the totality of the trial as a whole, none of the instances could amount to prosecutorial misconduct and, to the extent one or more may, none of the instances amounted to a “significant factor in the jury's deliberations in relation to the rest of the evidence before them”—except, perhaps, to the one identified by this Court as an evidentiary error. The question on the methamphetamine charge.

As to the conduct surrounding the methamphetamine test, the State’s argument that the conduct was invited by defense was not adopted by the majority, *Cardenas*, 2025-NMSC-020, ¶ 47, but the dissent agreed with the State’s contention.

Id. ¶¶ 84-85 (C.J. Thompson, dissenting). While not binding precedent, the dissent does illustrate, for purposes of *Breit*, that reasonable minds might differ as to the methamphetamine question. *Id.* ¶ 28. If reasonable minds might differ, the conduct itself would be unlikely to rise to the level of fundamental error because the conduct could not have created “a reasonable probability that the error was a significant factor in the jury’s deliberations in relation to the rest of the evidence before them.” *Lensegrav*, 2025-NMSC-020, ¶ 28 (emphasis added).

Additionally, the district court would have had to determine, under a fundamental error review, that the conduct was “so egregious and had such a persuasive and prejudicial effect on the jury’s verdict that the defendant was deprived of a fair trial.” *Id.* On this point of “fairness” the Defendant’s brief sought to mollify the district court arguing the Supreme Court had “already concluded that [Defendant’s] trial was not fair . . . The question for [the district court] is not whether [Defendant’s] trial was fair, but whether prosecutorial misconduct was so egregious that dismissal with prejudice is required[.]” [RP 449-50] Again, that characterization ignores that this Court only reversed on a single evidentiary ruling, without any discussion of prosecutorial misconduct. This Court never decided that Defendant’s trial was unfair *due to* prosecutorial misconduct. Whether the Defendant’s trial was fair as it related to prosecutorial misconduct had never been determined. The district court’s order was in error.

Finally, Defendant argued to the district court that her motion to dismiss on remand was proper under *McClagherty* II. **[RP 402, citing 2008-NMSC-044]** The State disagrees. Neither *McClagherty* case undermines the position the State takes here. See 2003-NMSC-006 (*McClagherty* I); *McClagherty*, 2008-NMSC-044 (*McClagherty* II). In *McClagherty* I, the defendant raised two issues in his direct appeal: (1) error in not granting a new trial and (2) the prosecutor questioning of a witness with hearsay evidence. 2003-NMSC-006, ¶ 3. This Court reversed on the second issue. *Id.* This Court did not reach prosecutorial misconduct as to the questioning because it was never raised by the defendant and because the Court reversed on the evidentiary question. *Id.* ¶ 16. That may sound like what happened here, but *McClagherty* II clarifies why the *McClagherty* cases are distinguishable.

In *McClagherty* II, this Court detailed that on remand, new defense counsel learned for the first time that the prosecutor's questioning was even worse than defense originally pled because defense learned that the witness statements the prosecutor read to the jury during the original trial (supporting the hearsay objection which went up on appeal in *McClagherty* I) did not, in fact, say what the prosecutor had told the jury. *McClagherty* II, ¶ 11. Based on this *new* evidence, the defendant filed a motion to dismiss. *Id.* ¶¶ 3, 11. In ruling on this motion to dismiss, the trial court was not sitting in de novo review of its rulings from the prior trial but was properly performing a *Breit* analysis on the newly discovered prosecutorial

misconduct.

McClagherty I or II are, therefore, distinguishable. In these cases, the fact that the district court reviewed the *Breit* prongs was proper because there was *new* evidence as to prosecutorial misconduct which caused the prior rulings to be called into question. The fact that the defendant did not bring his claims in his direct appeal was also distinguishable because the true nature of the prosecutorial misconduct in *McClagherty* was not revealed until remand for retrial. Here, there was no new counsel and there was no new evidence or fact. The district court erred in failing to apply fundamental error as to all of Defendant's unpreserved claims of prosecutorial misconduct before turning to *Breit*.

C. Even If It Was Proper To Forgo Fundamental Error Review—The District Court Misapplied the *Breit* Three Prong Test.

To the extent this Court determines that it was proper for the district court to begin with a *de novo Breit* analysis, the district court's order would still be erroneous. The three prongs of *Breit* are, in sum: "[1] 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] if the official knows that the conduct is improper and prejudicial, and [3] if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal." *Breit*, 1996-NMSC-067, ¶ 32.

The district court’s order stated it “agree[d] with the descriptions of prosecutorial misconduct contained in the motion to dismiss.” **[RP 480]** The first prong of *Breit* requires that “improper official conduct [be] so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial.” *Id.*, ¶ 32. After listing out the alleged misconduct, the district court concluded, purportedly based on *Amador*, *McClagherty II*, and *Breit* that these instances of alleged misconduct were “the type of serious misconduct that create[] a bar to retrial.” **[RP 486-87]**

But many of the instances of purported error, to the extent they are error, could have been cured by means short of granting a mistrial or ordering a new trial. For example, Defendant could have objected, the court could have sustained the objection and issued any necessary curative instructions. Indeed, Defendant did object—as to evidentiary error—and that is what the district court addressed. That Defendant failed to take steps to timely cure any prejudice from perceived error does not transform these evidentiary errors into egregious official misconduct with no remedy except dismissal. Further, the district court does not discuss the fact that the latent identification of these alleged errors has exacerbated its inability to cure them in any other way. As these matters were not addressed by the district court’s analysis, its conclusion as to the first prong was reached in error.

As to the second prong, and relying on the language from *State v. Hildreth*,

2022-NMSC-012, “if the official knows that the conduct is improper and prejudicial . . . *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 experienced, is charged with knowing.” [RP 487, quoting *Hildreth*, 2022-NMSC-012, ¶ 42] The district court summarily holds the prosecutors here as being in possession of this presumed knowledge. However, most of the alleged misconduct surrounded the question of the positive methamphetamine result. As discussed above, there was a split decision by this Court in *Cardenas I* on that very issue which undermines the district court’s conclusion that this was error originating in a “rule . . . that every legal professional . . . is charged with knowing.” *Hildreth*, 2022-NMSC-012, ¶ 42.

The remaining instances of alleged misconduct fair no better. There was, in fact, no burden shifting from the State to Defendant and no law supporting “burden shifting” was argued to the district court. The alleged instances of misconduct stemming from opening statement and closing argument are unsupported by law demonstrating they amounted to prosecutorial misconduct. As stated above, Defendant removes each instance of alleged conduct during opening and closing from its broader context. But the law permits broad leeway with respect to both. *See e.g. Sosa*, 2009-NMSC-056, ¶ 24 (“closing argument, and rebuttal argument in particular, *is necessarily responsive and extemporaneous, not always capable of the*

precision that goes into prepared remarks.” (emphasis added)).

As to the final prong, the district court concluded that “the trial prosecutors in this case . . . were willing to accept the risk of mistrial or reversal.” [RP 489] This conclusion is unsupported by any evidence. The district court purports to have reached this conclusion primarily because the prosecutors stated to the court that Flores had “pled guilty” to child endangerment. But prosecutors failing to “look up the resolution of the case” is not the egregious misconduct *Breit* seeks to balance. The district court again relied on *Amador*, *McClagherty II*, and *Breit* to reach its conclusion, but these cases are all distinguishable and do not support dismissal.

The defendant in *Breit* had his first conviction set aside because of extreme prosecutorial misconduct. *Id.* ¶ 5. During a “trial out of control,” the defendant had great concern about the prosecutor and following the jury’s guilty verdict the defendant filed a motion for a new trial which was granted. *Id.* ¶ 41. The defendant thereafter filed a motion to dismiss all charges on double-jeopardy grounds which was also granted by the district court, but then subject to appeal by the State. *Id.* ¶ 6. On the second appeal, this Court concluded that double jeopardy should have barred the defendant’s second trial and precluded further prosecution. *Id.* This Court’s opinion “focus[ed] on trials that are terminat[ed], nullified, or reversed at the defendant’s behest[.]” *Id.* ¶ 14. The Court stated that the “general rule is that when a defendant, on [their] motion, obtains a mistrial, reprosecution is permitted . . .

[h]owever, when a defendant's request for reversal on appeal is necessitated by prosecutorial misconduct, reprosecution may be barred." *Id.* (emphasis added).

This case is not akin to *Breit*, in which extreme prosecutorial misconduct and unprofessional behavior marred every stage of trial. Unlike the defendant in *Breit* who immediately raised prosecutorial misconduct issues in that case because they were "very noticeable," Defendant here never objected to prosecutorial misconduct and then persuaded the district court that despite having not requested a mistrial, retrial, or even raising prosecutorial misconduct in her direct appeal that she should be given yet another bite at the apple and allowed to raise it for the first time on remand for retrial, while basing her "new" claims on the very instances of evidentiary error she had argued until remand. *Breit* can be further distinguished based on the actions of the prosecutor in that case, where the prosecutor's "inappropriate conduct continued even after a new trial was granted." *Breit*, 1996-NMSC-067, ¶ 44. Here, there is no continued prosecutorial misconduct on remand. *Breit* does not require a determination of prosecutorial misconduct or dismissal.

As discussed above, this case is distinguishable from both *McClagherty* cases. In addition to what has already been discussed herein, *McClagherty II* can also be distinguished because, in that case, "the State did not point . . . to any testimony or evidence to support a factual finding that [the prosecutor] was an inexperienced lawyer, a naive practitioner, or a poor lawyer." *Id.* ¶ 47. Here, the

State pointed to the fact that the former prosecutors were inexperienced. While there are things that all lawyers are expected to know, there is no script for prosecutors to follow and inartful languaging, as occurred here, does not rise to the level of misconduct set forth under *Breit*. Crucially, there is no suggestion here, as in *McClagherty II*, that the prosecutors simply made-up purported evidence. Neither *McClagherty* case requires a determination of prosecutorial misconduct or dismissal.

The final case this Court relied upon in its Dismissal Order, *Amador*, is also distinguishable. 2024-NMSC-006. In *Amador*, the prosecutorial misconduct was so severe that the district court sua sponte motioned for a new trial. *Id.* ¶ 1. After rehearing before the district court, the defendant was convicted and appealed based specifically on *Breit*. *Amador*, 2024-NMSC-006, ¶ 2. During closing arguments at the first trial, the prosecutor referred specifically to the defendant as a pedophile and seemingly randomly referenced the Catholic Church and allegations of child sexual abuse—as if to underscore the defendant as a pedophile. *Id.* ¶ 8. The district court then cautioned the prosecutor. *Id.* But the remainder of the prosecutor’s closing contained other questionable statements. *Id.* ¶¶ 10-11. Additionally, in closing the prosecutor represented to the district court that a prior conditional discharge of defendant was a prior felony conviction—with the truth only coming to light after the jury reached a guilty verdict. *Id.* ¶¶ 11-12, 25. This Court determined that a

“basic, fundamental rule of evidence, is that impeachment of a defendant in a criminal case is governed by Rule 11-609 [NMRA].” *Amador*, 2024-NMSC-006, ¶ 27. While this Court determined that this misconduct alone may have been sufficient to conclude retrial should be barred, there were additional instances of misconduct which tipped the scale when reviewed in addition to this misconduct. *Id.* ¶ 31. The prosecutor’s actions in referring to the defendant as a pedophile five times in closing, referencing the Catholic Church, arguing that the defendant should have brought his stepdaughters to testify, and asking the jury to protect other children from the defendant all together placed the prosecutorial misconduct beyond the bar required by *Breit*. *Amador*, 2024-NMSC-006, ¶ 32.

Here, there was no move by Defendant or the district court to affect a mistrial or retrial during or following the first trial, and Defendant did not raise prosecutorial misconduct on direct appeal—declaring only on remand that the instances of evidentiary error she previously argued to both the district court and this Court were now instances of prosecutorial misconduct. *Amador* is distinguishable and does not require a determination of prosecutorial misconduct or dismissal.

In summary, none of the three cases relied upon by the district court support dismissal where: (1) Defendant did not raise prosecutorial misconduct during or following her trial, (2) Defendant did not raise prosecutorial misconduct in her direct appeal, (3) until remand, Defendant argued each instance of what she now calls

“prosecutorial misconduct” as an evidentiary error, and (4) where there is no law or precedent, including the three cases relied upon by the district court, which would support dismissal with prejudice in this case.

While the “the defense of double jeopardy may not be waived and may be raised by the accused at any stage of the criminal prosecution, either before or after judgment[,]” Section 30-1-10, this case is about a Defendant using this statute as a sword and raising *prosecutorial misconduct* tardily and in contradiction to all her arguments and legal theories until remand. Defendant knew about each alleged instance of conduct which she now styles as “egregious,” i.e. “very noticeable,” from the moment the original trial ended. Just as a criminal defendant cannot change their argument on appeal, so too should a criminal defendant be barred from arguing one legal theory to an appellate tribunal and then arguing a separate legal theory predicated on the same facts to a district court following appeal, causing a trial court to undermine the very conclusions the appellate court relied upon to reverse and remand. Cf. *Salazar*, 2006-NMCA-066, ¶ 9 (stating “[a]dditionally, parties cannot change their arguments on appeal . . . [noting] . . . many of the issues argued on appeal are not the issues that were presented to the trial court.”).

CONCLUSION

The State respectfully prays this Court reverse the district court's order of dismissal for the reasons set forth herein and to remand this matter for a new trial, as originally mandated by this Court, and that this Court do so through a formal opinion to clarify the *Breit* in light of this case.

Respectfully submitted,

RAÚL TORREZ

Attorney General

/s/ Serena R. Wheaton

SERENA R. WHEATON

Assistant Solicitor General

Counsel for Plaintiff-Appellant

201 3rd St. NW, Suite 300

Albuquerque, NM 87102

(505) 717-3500

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2026, I filed the foregoing brief electronically through the Odyssey/E-File & Serve System, which caused counsel of record to be served by electronic means.

/s/ Serena R. Wheaton

SERENA R. WHEATON