



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 REPLY BRIEF

ORAL ARGUMENT REQUESTED

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CITATIONS TO THE RECORD

The body of this brief exceeds the limit of 15 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 4,400 words (**4,178**). This word count was obtained using Microsoft Word 2016.

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INTRODUCTION

Defendant claims that bringing her *State v. Breit* claim, 1996-NMSC-067, 122 N.M. 655, for the first time on remand for retrial, on the very same evidence already passed upon by *both* the district court and this Court, was proper and necessary to “raise undeveloped double-jeopardy claims” to “benefit the parties and the court.” [AB 1, 16] But Defendant’s later admission that “the defense did not introduce additional evidence, but [instead] relied on the trial record” refutes any claim the record was previously undeveloped or deficient. [AB 10, 35] Defendant could have raised her claim in her direct appeal but did not. This suggests that she was not truly subject to extreme prosecutorial misconduct.

Defendant also claims that it was proper to wait and see if she even needed to bring a *Breit* claim. Defendant argues it is proper for a defendant to hold on to a claim of outrageous prosecutorial misconduct just in case the State seeks retrial or fails to offer a “favorable plea[.]” [AB 30-31] Permitting such overt gamesmanship should not be indulged by this Court and is the very reason the State seeks this Court conclude that if a defendant knows of an alleged *Breit* claim, predicated on evidence already in the record, such a claim must be brought as part of a direct appeal. The shield should not be yielded as a sword and NMSA 1978, Section 30-1-10 (1963) so unreasonably expanded.

ARGUMENT

All instances of alleged prosecutorial misconduct were contained within the original trial record. Instead of arguing that this misconduct was so outrageous as to bar retrial, Defendant only alleged evidentiary errors. *State v. Cardenas*, 2025-NMSC-020 (*Cardenas I*) Here, Defendant attempts to escape her prior appellate strategy by claiming that “some (but not all) of” the instances of alleged prosecutorial misconduct were raised in her appeal. [AB 3-9] But then she addresses the very same evidence originally placed before this Court as evidentiary error. [*Id.*] Defendant claims her delay in raising a *Breit* claim is attributable to: (1) the record being undeveloped [AB 29], and (2) her tactical decision to “wait[] to raise” a *Breit* claim until “it was clear that the State would attempt to re-try her.” [AB 30] But the record was not underdeveloped: Defendant based her *Breit* claim entirely on the record of the first trial. To the extent Defendant decided upon a wait and see approach, New Mexico precedent does not support such gamesmanship.¹ The State begins with responding to the latter argument.

¹ In Defendant’s Motion to Dismiss, Defendant asserted “the New Mexico Supreme Court . . . reversed on the basis of evidentiary error . . . this evidentiary error *was caused by* prosecutorial misconduct and there was significant additional prosecutorial misconduct.” [*Compare* AB 33, n. 3 *with* RP 401.]

I. THERE IS NO LEGAL SUPPORT FOR A “WAIT AND SEE” APPROACH AND SECTION 30-1-10 IS NO BAR.

A. “Wait and See” Rationale.

This Court has stated 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.” *State v. Ben*, 2015-NMCA-118, ¶ 8 (internal citation omitted.); *see also State v. Revels*, 2025-NMSC-021, ¶¶ 19-24. *Breit* has always provided a *narrow* exception to the general rule that retrial is not barred. *See* 1996-NMSC-067, ¶ 35. Defendant asks this Court to permit that narrow exception to be broadened so that defendants may obtain appellate reversal on narrow grounds and then escape retrial by arguing for the first time—based on no new facts—that they were subjected to extreme official misconduct.

Defendant relies on Section 30-1-10, which states that 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.” (emphasis added). But this statute does not help Defendant. This statute gave her the ability to raise her *Breit*

claim for the first time on appeal without having to demonstrate that she preserved any prosecutorial misconduct claims. She intentionally chose not to assert that claim. This decision had consequences: she forfeited her claim. A waiver is “the intentional relinquishment or abandonment of a known right,” while forfeiture is “the failure to make the timely assertion of a right.” *Walker v. United States*, 134 F.4th 437, 440 (6th Cir. 2025). The State’s proposed rule does no violence to Section 30-1-10. If a defendant truly believes they were subjected to such extreme prosecutorial misconduct as to bar retrial, they may raise that issue freely in an appeal of right. But failure to assert that claim in a timely fashion, thereafter, would require new evidence. Requiring parties to bring arguments in a timely fashion serves the “strong policy in New Mexico disfavoring piecemeal appeals.” *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 26, 113 N.M. 231. This Court’s ability to determine the narrow instances where a defendant may waive double jeopardy would not conflict with our precedent and would not conflict with a defendant raising double jeopardy in habeas or after a non-conditional plea as suggested by Defendant. [AB 17²]

Despite having addressed the governing precedent in its original brief, the

2 The Answer Brief cites *Torres v. Santistevan*, 2023-NMSC-021 [AB 17] but this case is not on point as it deals with multiple convictions not prosecutorial misconduct. See *Santistevan*, 2023-NMSC-021, ¶¶ 26-27.

State revisits each case briefly to reiterate why the State’s request in this matter would not conflict with that precedent and to respond to Defendant’s arguments. Here, the *Breit* exception to double jeopardy should not, and does not, apply.

In *Breit*, the defendant was granted a new trial by the district court upon his motion for new trial based on “extreme prosecutorial misconduct.” *Id.* 1996-NMSC-067, ¶¶ 1, 5. Following conviction after the second trial, the *Breit* defendant appealed to this Court where his trial was described as one “out of control,” where the prosecutor inflamed the jury with allegations that were irrelevant, matters that could not permissibly be presented as evidence, and exaggerated claims that no evidence could ever support, and when objections were raised, the prosecutor “expressed sarcasm and scorn toward opposing counsel and the court.” *Id.* ¶¶ 7, 41. Additionally, the prosecutor argued with witnesses, attempted to solicit irrelevant comments after admonishment from the district court, and was belligerent with opposing counsel. *Id.* ¶ 42. The prosecutor expressed “sarcasm, sneering, rolling of eyes and exaggerated expressions” to such a degree that it would have drawn an untenable number of objections. *Id.* Critically, this behavior continued not just through the original trial, but into the new trial. *Id.* ¶¶ 43-44. The moment in *Breit* Defendant points to for comparison is where the *Breit* prosecutor tells the jury in that case that “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.” [AB 43, citing *Breit*,

1996-NMSC-067, ¶¶ 32, 75] *Breit* is distinguishable.

First, the prosecutors' conduct here did not rise to the same level of egregious prosecutorial behavior found in *Breit*. As set forth by the State below, the trial prosecutors were relatively new lawyers, certainly to New Mexico, who behaved amateurishly and heedlessly at various moments of the five-day trial.³ [2 RP 443] But these missteps did not constitute the sort of misconduct contemplated by *Breit*. The attorney representing Defendant at trial, who had multiple decades of New Mexican defense trial experience, never objected as to prosecutorial misconduct. It was only near the close of the five-day trial that defense counsel was only just “beginning” to think that actions by the prosecutors may be rising to the level of prosecutorial misconduct. [03/11/22 CD 10:42:49-:43:29] The misconduct in *Breit* was clear and was raised and objected to right away. But here, Defendant did not raise prosecutorial misconduct despite, presumably, being similarly informed.

Second, with the alleged burden shifting comment, prosecutors told the jury that the State does not have to disprove any of the defense's theories. That is, in fact, a true statement of the law in this instance because the theories being referenced were never incorporated into the case or the jury instructions. Specifically, the State

³ Defendant asserts the State “does not present any serious argument that the incidents found by the district court were not misconduct.” [AB 37] This misstates the State's argument and negates the fact that the State has done so, both before the district court and on appeal. This is not the primary question before this Court.

must prove the elements of crimes set forth in the jury instructions inclusive of any defense theory incorporated into those instructions. The State does not have to disprove defense theories mentioned, but not pursued, during the context of a trial and can argue the presence or lack of evidence accordingly.

Rather than dwell on the lack of comparative facts, Defendant instead points to discrete language from *Breit* stating that the right to be protected from double jeopardy is “so fundamental, that it cannot be relinquished even if a conviction is affirmed on appeal.” [AB 18, citing *Breit*, 1996-NMSC-067, ¶ 18] Perhaps this language begs clarification as to whether defendants *can* “relinquish” or “waive” double jeopardy protection, allowing them to be retried for the same offense—e.g. in instances of mistrial or retrial. Double jeopardy protections are not absolute. To the extent *Breit* stands for the proposition that double jeopardy “cannot be relinquished[,]” the State would ask this Court for clarification.

Defendant also argues that dismissal on remand was proper under *McClagherty II*. [RP 402, citing 2008-NMSC-044] The State disagrees. In its opening brief, the State sought to distinguish *McClagherty II*, pointing to the new evidence presented to the court in *McClagherty II* as being distinguishable from the lack of new evidence here. [BIC 36-37] Defendant responded to the State’s argument by arguing that a third *McClagherty* case—*McClagherty 1.5*—refuted the State’s position because the defendant knew about the evidence the State claimed

was new. [AB 21-22, citing 2007-NMCA-041, 141 N.M. 468]

Specifically, the State had argued that in *McClagherty II*, new defense counsel learned for the first time that the prosecutor's questioning was even worse than defense originally believed because the defense learned that the witness statements the prosecutor read to the jury during the original trial did not, in fact, say what the prosecutor had told the jury. *McClagherty II*, ¶ 11. Based on the new evidence, the defendant filed *Breit* motion. *Id.* ¶¶ 3, 11.

Defendant points to *McClagherty 1.5* for the proposition that the evidence was not, in fact, new and so the State's argument should fail. [AB 21] But *McClagherty 1.5* states that while on redirect the "[d]efendant disagreed with the prosecutor's version" of the hearsay statements, but then the prosecutor objected arguing that defense counsel was eliciting a lie. *Id.*, ¶ 5. The statements themselves were never entered into evidence or otherwise made part of the record. *Id.* ¶ 6. It was not until the *Breit* hearing that the district court was presented with the statements themselves for the first time, thereby becoming newly privy to the content of the statements. Presumably, the defense did not have the statements when the defendant was being questioned originally, or defense would have made them part of the record. Familiarity with the statements was not the source of the State's argument as to the evidence being new—it was that the statements themselves were not obtained and then entered into the record until later.

The *McClagherty* cases are, therefore, distinguishable because the district court considered *Breit* was proper where there was *new* evidence entered into the record by new defense counsel as to prosecutorial misconduct which caused the prior rulings to be called into question. Here, there was no new counsel and there was no new evidence or fact.⁴

Defendant only touches briefly on *State v. Amador*, but it is also distinguishable. [See generally AB]; 2024-NMSC-006. In *Amador*, the prosecutorial misconduct was so severe that the district court sua sponte ordered a new trial. *Id.* ¶ 1. After retrial, the defendant was convicted and appealed based specifically on *Breit*. *Amador*, 2024-NMSC-006, ¶ 2. During closing arguments at the first trial, the prosecutor, among other errors repeatedly called the defendant a pedophile and randomly referenced the Catholic Church and allegations of child sexual abuse—as if to underscore the defendant as a pedophile. *Id.* ¶ 8. Even more concerning, the prosecutor told the jury that the defendant was a convicted felon when he was not.

In sum, none of the defendants in *Breit*, *McClagherty*, or *Amador* utilized a

⁴ In response to the State’s assertion that this case was distinguishable from *McClagherty* based on there being new counsel on remand in that case, unlike here, Defendant argues that there was new counsel on remand here, pointing to all entries except her own. It was appellate counsel—not new defense counsel—who, at the very least, argued the *Breit* motion to the district court. [Compare AB 22 with 2 RP 432]

“wait and see” approach to raising prosecutorial misconduct and the cases cannot be read to support such a theory. Rather, all three defendants actively pursued prosecutorial misconduct claims in their respective cases. Further, in none of these cases did a defendant convert other claims of error *into* prosecutorial misconduct. All three cases are distinguishable. [*Compare* AB 18-19 *with Breit*, 1996-NMSC-067; *McClagherty* 1.5 and II; and *Amador*]

B. NO NEW EVIDENCE.

Defendant’s second justification for waiting until remand to bring a *Breit* claim for the first time was that the record needed to be developed. [AB 1, 10, 22, 31] However nothing “new” was added. [*Id.*] Defendant’s motion to dismiss set forth specific alleged instances of prosecutorial misconduct, but the State has demonstrated how each instance was originally raised as another type of error in *Cardenas* I. [BIC 21-23, citing to RP 452] Defendant now claims that the “false assertion 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.” [AB 31]

To begin, the State’s original appellate brief, in *Cardenas* I, was an answer brief—it was *responding* to Defendant’s argument and in which she raised the error surrounding Mr. Flores. *See* Brief in Chief, at 39-40, *State v. Cardenas*, S-1-SC-39517 (N.M. Aug. 15, 2023). Defendant’s briefing in *Cardenas* I is complete with

citations *to the trial record*. The *Cardenas* I Brief in Chief stated that “[t]he State based its question on a child endangerment charge that was filed against Luis Flores” and that in a sidebar, the State told the district court that “[Flores] pled guilty to [the child endangerment] charge” after his and [Defendant’s] daughter tested positive for drugs. *Id.* at 35, 39. Defendant noted that “Defense counsel tried to argue in closing that the charge against [Flores] was dismissed[,]” but the prosecutors claimed that defense counsel was “misrepresenting things.” *Id.* at 39.

The State did not need to “admit” the alleged “mischaracterization” at trial because the question, under *Breit*, is not whether the State admits the conduct but whether the conduct rises to the level of prosecutorial misconduct. Here, all the facts and circumstances surrounding this alleged instance of misconduct were in the original trial record and were pled on appeal as evidentiary error. [**Compare AB 31 with Brief in Chief, at 39-40, *State v. Cardenas*, S-1-SC-39517**] On remand, the only difference was the State acknowledged that the case docket states what it states. To the extent this was an “admission” it certainly was not necessary to perfect a *Breit* claim, nor was it the only instance of alleged misconduct Defendant relied upon in seeking a bar to retrial.

Defendant argues that it is “useful to have a district court hearing in which the parties can present evidence on the *Breit* claim.” [**AB 29-30**] This argument fails for two reasons. First, this Court can and does resolve questions of prosecutorial

misconduct whether they were preserved or not. *See State v. Hildreth*, 2022-NMSC-012; *Lensegrav*, 2025-NMSC-016. Second, Defendant admits that she waited to bring her *Breit* argument for entirely different reasons: she “waited to raise a *Breit* claim until it was clear that the State would re-try her.” [AB 30]

While there may be instances where factual development might be necessary, this Court is equipped to send such a case back to the district court for that purpose if needed. However, as *Breit* is meant to provide reprieve for “egregious” errors the State is hard pressed to think of a situation where such additional development would be necessary. *See Egregious*, MERRIAM WEBSTER, <http://merriam-webster.com/dictionary/egregious> (last visited Feb. 9, 2026) (defining egregious as “*very noticeable . . . glaringly bad.*” (emphasis added)) Cases such as *Hildreth*, 2022-NMSC-012 and *Lensegrav*, 2025-NMSC-016, support this argument.

The State’s proposed rule would not create a “reverse preservation requirement.” [AB 32] Rather, the rule would prevent defendants from holding on to known claims only to raise them for the first time on remand for retrial if they do not get a “favorable plea” or if the State decides to proceed with retrial. The district court’s decision as to prosecutorial misconduct did not merely “overlap[] with this Court’s finding of reversible error”—Defendant was able to transmute every instance she argued to this Court as evidentiary error (as it had been preserved) into prosecutorial misconduct (which had not been preserved) and ask the district court

to convert its previous evidentiary rulings into a ruling on prosecutorial misconduct. There is no case in New Mexico which would support this strategy, and our law should not be read to support it.

II. DEFENDANT FAILED TO PRESERVE A PROSECUTORIAL MISCONDUCT CLAIM—THIS ADDS ANOTHER STEP *BEFORE* REACHING THE THREE PRONG TEST OF *BREIT*.

Defendant’s brief does not address *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482. [*See generally* AB] 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.” *Allen*, 2000-NMSC-002, ¶ 95; *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”). Ignoring the precedent does not change the metric. [AB 24-25, 36]

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. This is when this Court would review the three prongs of *Breit* de novo. [**Compare AB 24-25, 26 with Allen, 2000-NMSC-002 and Lensegrav, 2025-NMSC-016**]

Had Defendant brought her alleged claims of prosecutorial misconduct in her direct appeal, those claims would have suffered the same review as the claims of the defendants in *Hildreth* and *Lensegrav*. This Court would have begun with fundamental error. By waiting until she got back to district court, the district court began and ended with the three-prong *Breit* test. Defendant articulates her “dodge” of unfavorable review best stating “[t]here is no need for that threshold step [of fundamental error review] in this case, where [Defendant’s] convictions were already reversed.” [**AB 36**] Exactly the State’s point.

Here, had this Court been asked to review Defendant’s case for prosecutorial misconduct, it would have proceeded with a fundamental error review, where it would 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.” *Allen*, 2000-NMSC-002, ¶ 95. To arrive at this conclusion and hold that fundamental error occurred, this 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).

By utilizing her “wait and see approach” Defendant entirely skipped the review for fundamental error which would have been a necessary part of this Court’s review. The district court never had to opine on whether it believed the prosecutorial misconduct was a “significant factor” in the jury’s deliberations or not. Instead, the district was asked to review its own interlocutory evidentiary rulings from the original trial. [**Compare RP 479-93, with *Lensegrav*, 2025-NMSC-016**] As such, 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. Defendant’s gamesmanship produced a significantly more favorable standard of review.

Defendant also argues that “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.” [**AB 27**] Again, this underscores the State’s argument. There was no lower-court decision for it to review—it was revisiting its *own* prior rulings from the original trial, post-appeal. As in the early days of New Mexican jurisprudence, the district court was able to sit in appellate-like capacity over decisions it made during the trial and, here, had the ability to change its evidentiary rulings to conclusions as

to prosecutorial misconduct.

At trial, the district court passed rulings on the alleged evidentiary errors which were transmuted into prosecutorial misconduct post-appeal. The district court did not find any evidentiary error originally—but suddenly on remand determined that what it had previously seen as the proper admission of evidence, was now extreme prosecutorial misconduct. There was no new evidence. There were no new facts. It was a review of the trial record by the same court which heard the trial. It did not “take evidence” it did not “find facts,”—all of that already existed. [AB 27] But it did make conclusions of law—just very different ones than those it made at trial. [*Id.*]

To the extent this Court determines 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 district court’s order stated it “agree[d] with the descriptions of prosecutorial misconduct contained in the motion to dismiss[,]” and that *Amador*, *McClagherty* II, and *Breit* supported that the alleged misconduct here was “the type of serious misconduct that create[] a bar to retrial.” [RP 480, 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—the measure required by *Breit*’s first prong. Here, the late identification of the alleged error exacerbated the State’s inability to cure since the trial was over and the direct appeal completed.

As to the second prong of *Breit*, the district court summarily held the prosecutors were in possession of the requisite knowledge as to their conduct and, thus, acted intentionally. *Hildreth*, 2022-NMSC-012, ¶ 42. 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.” *Id.* If prosecutors—or the Court—can disagree as to the error it was not the sort of error contemplated by *Breit*’s second prong.

As to the final prong, the district court concluded “the trial prosecutors . . . 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 a case” or knowing what is meant by “nolle prosequi” 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.

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,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 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