IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

HENRY HILDRETH, JR.,

No. S-1-SC-37558
Ct. App. No. A-1-CA-36833

Defendant-Petitioner.

DEFENDANT-PETITIONER'S BRIEF IN CHIEF

On Certiorari to the New Mexico Court of Appeals

Oral argument is requested.

BENNETT J. BAUR
Chief Public Defender

Caitlin C.M. Smith
Associate Appellate Defender
Law Offices of the Public Defender
1422 Paseo de Peralta, Bldg. 1
Santa Fe, NM 87501
(505) 395-2830

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

Other State Cases

Constitutional Provisions

Statutes

Rules and Jury Instructions

Other Authorities

STATEMENT REGARDING RECORD CITATIONS

The district court proceedings in this case were audio-recorded using For The Record software. FTR CDs were reviewed using The Record Player and are cited by date and timestamp in the form **[mm/dd/yy CD hour:minute:second]**. Citations to the Record Proper are in the form **[RP page number]**.

CERTIFICATION OF COMPLIANCE

The body of this brief exceeds the limit of 35 pages set forth in Rule 12-318(F)(2) NMRA. Undersigned counsel certifies that this brief is written in Times New Roman, a proportionally spaced font, and that the body of the brief contains fewer than 11,000 words (specifically, 9,346). This word count was obtained using Microsoft Word 2016.

NATURE OF THE CASE

Henry Hildreth's attorney, Steven Seeger, did not participate in Mr. Hildreth's trial. Believing that he could not be constitutionally effective, Mr. Seeger instead went on strike. He did not participate in jury selection, deliver an opening statement about the case, cross-examine the State's witnesses, present evidence for the defense, or make a closing argument.

The trial court judge, the Honorable Robert Aragon, knew that Mr. Hildreth did not have a participating defense attorney. Nevertheless, Judge Aragon proceeded with trial, denying all of Mr. Seeger's motions for a continuance or a mistrial. Mr. Hildreth was convicted, remanded, and given the maximum sentence.

On appeal, the State conceded that Mr. Hildreth was denied the assistance of counsel and Mr. Hildreth's conviction should be vacated. The Court of Appeals agreed and reversed the conviction. However, it rejected Mr. Hildreth's argument that he should not be retried.

The sole issue before this Court is whether retrial under these circumstances would constitute double jeopardy. Because he was constructively denied the assistance of counsel, and Judge Aragon proceeded with trial despite the near-certainty that the verdict would be overturned on appeal, Mr. Hildreth asks this Court to hold that retrial would violate the New Mexico Constitution.

SUMMARY OF FACTS AND PROCEEDINGS

I. Pretrial Motions

On Friday, March 10, 2017, Steven Seeger filed a motion to continue Henry Hildreth's trial, which was scheduled for the next Tuesday, March 14. **[RP 71-72]** This was the first trial setting. **[*See* RP 52-54 (notice of trial issued three days after arraignment)]** Mr. Seeger explained in his motion that the prosecution had made late disclosures, including a late witness list and a disc that he had received on Thursday, the day before he filed the motion. **[*See* RP 72]** Mr. Seeger needed additional time to call witnesses and file his own witness list.[1] **[RP 71-72]** He also said that he had experienced difficulty communicating with the district attorney's office; three different prosecutors had worked on Mr. Hildreth's case, and the last two had not been familiar enough with the case to discuss it with Mr. Seeger. **[RP 71-72]**

That morning, the parties appeared before Judge Aragon. **[3/10/17 CD 9:49:26-9:54:58]** At the beginning of the hearing, before any substantive argument, Judge Aragon told Mr. Seeger that he would be denying the motion to continue. **[*Id.* 9:50:34-38]** Mr. Seeger told Judge Aragon that he would not be prepared for trial on Tuesday and would not participate. **[*Id.* 9:50:38-9:51:18]**

---

[1] The record does not include the identities of the potential defense witnesses, but in a later hearing, Mr. Seeger mentioned a potential eyewitness whom the State had not called to testify. **[3/14/17 CD 9:06:53-9:07:08]**

Judge Aragon responded that the trial date had been set for months and suggested that the parties should "[s]ee if you can work it out," presumably meaning work out a plea deal. **[*Id.* 9:50:47-58]**. In response to Mr. Seeger's assertion that he would not be ready for trial and would not participate, Judge Aragon said, "If that is true, then he would have excellent grounds for appeal on incompetency of counsel." **[*Id.* 9:51:06-13]** He expressed his confidence that Mr. Seeger was "an extremely competent and diligent attorney" and that there had been plenty of notice. **[*Id.* 9:53:22-42]**

Mr. Seeger said that he was "not going to do a C-minus job on the trial," and Judge Aragon responded, "Well, then, I guess you'll have to do an F-minus job and just sit there. I don't know, I can't tell you how to run your business, Mr. Seeger." **[*Id.* 9:53:51-9:54:03]** Judge Aragon denied the motion and suggested that Mr. Seeger raise any discovery issues in motions in limine. **[*Id.* 9:54:19-34]**

On Monday, Mr. Seeger filed a motion for sanctions based on the discovery violations. **[RP 79-80]** He asked the court to prohibit the prosecution from calling any witnesses who were not timely disclosed, although he also noted that the court could grant a continuance as a sanction for violations of the discovery rules. **[RP 80]** The prosecutor filed a response in which she admitted that she disclosed a disc on Thursday; she said the disc "was not previously within the control of the State." **[RP 82]**

On Tuesday, the day of trial, Mr. Seeger renewed his motion to continue and argued both the motion to continue and the motion for sanctions. **[3/14/17 CD 9:04:07-24]** He said that he had been unable to review the late-disclosed disc and did not know what was on it. **[*Id.* 9:07:22-30]** Mr. Seeger explained that he was the managing attorney for the Gallup public defender's office, and one of his contract attorneys had just died after a sudden heart attack. **[*Id.* 9:07:30-49]** Mr. Seeger had spent the weekend attending the attorney's viewing and reassigning his cases, and he had not had time to review the disc. **[*Id.* 9:07:49-9:08:16]** Mr. Seeger expressed concern that the disc might include witness statements or exculpatory material. **[*Id.* 9:15:23-9:16:13]**

The prosecutor again admitted that she had turned over the disc late but maintained that it had not been in the control of the State. **[*Id.* 9:10:37-53]** Judge Aragon asked if the prosecutor intended to use the disc, and she said, "It's nothing that the State would have presented today." **[*Id.* 9:11:09-14]**

Judge Aragon denied Mr. Seeger's motions, saying that "if [the defense] felt they were being deprived of information, they should have filed a motion long before this." **[*Id.* 9:16:56-9:17:10]** Judge Aragon told the prosecutor that "this business of disclosure is getting very serious with the Supreme Court" and advised her to "do what you're supposed to do," but imposed no sanctions. **[*Id.* 9:17:45-54]**

Jury selection began, and Mr. Seeger began his protest in earnest. When Mr. Seeger was given an opportunity to address the potential jurors, he said to them, "It is with a heavy heart that I announce the following: I advised Judge Aragon and the staff that I was not prepared to go to trial." **[*Id.* 9:49:04-15]** Halfway through his sentence, Judge Aragon started speaking over him to cut him off. **[*Id.* 9:49:04-15]** Judge Aragon told Mr. Seeger his comment was improper, and he ordered the panel to ignore Mr. Seeger's statement. **[*Id.* 9:49:04-41]** Specifically, Judge Aragon told the venire:

> You are to ignore anything Mr. Seeger said to you a moment ago. It has absolutely nothing to do with the purpose of this trial, which is to determine whether the defendant is guilty or not guilty. That is an order from the court. You are not to lend any credence to what was just said, or, nor the emotion with which it was presented to you.

[*Id.* 9:49:19-41]

Mr. Seeger said nothing further to the prospective jurors and asked them no questions. **[*See id.* 9:49:41-9:50:08, 10:08:25-10:13:42]** After the venire was excused, Judge Aragon and the prosecutor began to discuss challenges for cause. **[*See generally id.* 10:00:44-10:08:03]** After they discussed each juror, Judge Aragon asked Mr. Seeger for his position; each time, Mr. Seeger answered, "No comment." **[*Id.* 10:01:43-46, 10:02:26-29, 10:03:05-14]** After the third "No comment," Judge Aragon began anticipating Mr. Seeger's response—"No comment, Mr. Seeger?" **[*Id.* 10:04:13-17, 10:05:08-11, 10:05:32-40]**

The prosecutor concluded her challenges for cause, and Judge Aragon moved on to Mr. Seeger:

Judge Aragon:	Mr. Seeger, do you have any challenges for cause?
Mr. Seeger:	No comment.
Judge Aragon:	All right. For the record, I'm going to note that Mr. Seeger on Friday announced his intention not to participate in this trial. I'm going to assume that "no comment" is a rhetorical affirmation of that intention. Is that correct, Mr. Seeger?
Mr. Seeger:	Correct.

[*Id.* 10:06:48-10:07:06] Mr. Seeger made no challenges for cause.

Judge Aragon moved on to peremptory challenges and said, "The state will go first, and Mr. Seeger has already announced his intention not to represent his client in this proceeding. I will, however, mention his name as we proceed." **[*Id.* 10:14:02-16]** He went down the list of prospective jurors. Judge Aragon would read each name, the prosecutor would strike or accept the juror, and Judge Aragon would say that Mr. Seeger had waived his opportunity to strike the juror. **[*Id.* 10:14:16-10:15:52]** Mr. Seeger exercised no peremptory strikes. **[*See id.* 10:15:52-10:16:00]**

After the prosecutor had exhausted her strikes, the parties and the prospective jurors returned to the courtroom, where the names of the jurors were

announced. **[*Id.* 10:29:08-10:33:54]** Judge Aragon asked the bailiff to swear in the jury. **[*Id.* 10:33:54-59]**

II. The Trial and Aftermath

After the jury was sworn, Mr. Seeger moved for a mistrial on the grounds that Mr. Hildreth had been denied effective assistance of counsel. **[3/14/17 CD 10:48:07-14]** "He has not been denied effective assistance of counsel," said Judge Aragon. "He has been . . . *refused* any assistance of counsel. There's a world of difference there." **[*Id.* 10:48:14-24]** Judge Aragon asked Mr. Seeger to confirm "that you intend to follow through on your declaration . . . that you are not going to defend this man?" **[*Id.* 10:48:24-37]** Mr. Seeger said, "Correct. I am not going to participate because I cannot provide effective assistance of counsel." **[*Id.* 10:48:37-43]** Judge Aragon proceeded with trial.

The prosecution made an opening statement. **[*Id.* 10:59:22-11:00:47]** Judge Aragon asked Mr. Seeger if he wanted to make an opening statement, telling him that "the weight of your heart at the moment is of no consequence whatsoever to the duty the jury is intended to perform today." **[*Id.* 11:00:47-11:01:19]** Mr. Seeger stood and began to speak to the jury about the Sixth Amendment right to counsel, and he and Judge Aragon had the following exchange in open court:

> Mr. Seeger (to jury): This country prides itself on being a country that follows the rule of law. And we have a number of principles that are involved in that. And our founding fathers in 1789 adopted a

	constitution and certain amendments. The Sixth Amendment says that my client has the right to an attorney. That has been defined as effective assistance of counsel.
Judge Aragon:	Mr. Seeger, that is improper opening statement. I will not allow you to proceed.
Mr. Seeger:	I have nothing further then.
Judge Aragon (to jury):	You are to ignore the civics lesson that was presumptuously offered by Mr. Seeger.

[*Id.* 11:01:26-11:02:13]

The prosecution called two of its three witnesses. **[*Id.* 11:02:16-11:23:18, 11:23:25-11:42:19]** Mr. Seeger made no objections during their testimony and conducted no cross-examination. **[*See generally id.*]**

After the lunch break, Mr. Seeger renewed his motion for a mistrial or a continuance. **[*Id.* 1:40:30-1:41:56]** Mr. Seeger had looked at the disc that had been disclosed late by the State, and it contained recorded statements from three witnesses, including the two who had testified that morning, and from Mr. Hildreth himself. **[*Id.*]** Mr. Seeger explained that he had not yet had a chance to listen to the interviews or to have them transcribed for use in cross-examination, and he expressed concern that they might contain exculpatory information or prior inconsistent statements. **[*Id.* 1:41:17-51]**

Upon questioning by Judge Aragon, the prosecutor admitted that the disc had been in the possession of a police officer before she disclosed it to Mr. Seeger.

[*Id.* 1:42:26-45] She also confirmed Mr. Seeger's description of the contents of the disc. **[*Id.* 1:43:03-30]** The prosecutor offered no explanation for why she had previously said that the disc was not in the control of the State, nor why she had not previously told the court that the disc contained witness statements. **[*See id.* 1:41:56-1:43:30]**

Judge Aragon asked Mr. Seeger why he had not reviewed the disc between Thursday and the date of trial. Mr. Seeger explained in detail why he had not: he had been in court, then at the viewing of his recently deceased friend and colleague, then reviewing and reassigning the attorney's cases, some of which had court settings that week. **[*Id.* 1:43:48-1:45:25]** Judge Aragon did not respond directly to Mr. Seeger's explanation, but denied the motion, saying only that there had been no showing of prejudice. **[*Id.* 1:45:36-1:46:04]**

The prosecution called one additional witness. **[*Id.* 1:47:12-2:01:14]** Mr. Seeger objected once, successfully, to the introduction of evidence that had never been disclosed. **[*Id.* 1:57:40-1:58:20]** Other than that, Mr. Seeger made no objections, and again, he conducted no cross-examination. **[*Id.* 1:47:12-2:01:14]**

After the State rested its case, Mr. Seeger did not move for a directed verdict. **[*Id.* 2:02:30-51]** He stated that he had hoped to call four or five witnesses, but he had neither disclosed nor subpoenaed them. **[*Id.* 2:02:51-2:03:41]** Judge

Aragon told the jury that there would be no defense evidence and released them for the day. **[*Id.* 2:05:07-2:07:38]**

After the jury departed, the parties held a conference on jury instructions. Mr. Seeger proposed no jury instructions and made no substantive objections. **[*See id.* 2:37:47-2:38:18, 2:39:32-48]** As Judge Aragon and the prosecutor discussed the proposed instructions, Mr. Seeger occasionally offered suggestions about the step-down instruction and the order of the instructions. **[*See generally id.* 3:04:05-3:12:16, 4:28:55-4:42:34; *see also* 3/15/17 CD 9:16:20-40 (offering spelling correction)]**

The next morning, Mr. Seeger renewed his motion for a mistrial on the basis of ineffective assistance of counsel. **[3/15/17 CD 9:16:43-9:17:15]** Judge Aragon again denied the motion. **[*Id.* 9:17:15-47]**

The prosecution gave a closing argument, during which Mr. Seeger objected once and received a curative instruction. **[*Id.* 9:44:25-9:45:31]** Judge Aragon asked Mr. Seeger if he wanted to give a closing argument. Mr. Seeger responded, "Your honor, as stated before, I think given the circumstances, I could not provide effective assistance of counsel." **[*Id.* 9:48:31-49]** Judge Aragon cut him off, saying, "That is not evidence, Mr. Seeger. If you don't intend to argue the evidence, please return to your seat." **[*Id.*]**

The jury acquitted Mr. Hildreth of unlawful taking of a motor vehicle but convicted him of aggravated battery on a household member with great bodily harm. **[RP 136-37]** *See* NMSA 1978, § 30-16D-1 (2009); NMSA 1978, § 30-3-16(C) (2008).[2] Judge Aragon ordered Mr. Hildreth taken into custody, where he stayed for eighty days pending sentencing. **[*See* RP 135 (remand order), 180 (log of sentencing 6/2/17)]** At sentencing, Judge Aragon sentenced Mr. Hildreth to the maximum term of three years in prison, followed by two years of parole. **[RP 190-92, 218-220]** *See* Section 30-3-16(C); NMSA 1978, § 31-18-15(A)(11) (2016).[3]

III. The Appeal

Mr. Hildreth appealed his conviction to the New Mexico Court of Appeals, raising several issues. *See generally State v. Hildreth*, 2019-NMCA-047, 448 P.3d 585. First, Mr. Hildreth argued that he had been constructively denied the assistance of counsel. *Id.* ¶ 1. Second, he argued that Judge Aragon's failure to protect his right to counsel and willful disregard of a likely reversal on appeal should bar retrial under Article II, Section 15 of the New Mexico Constitution. *See id.* Finally, he argued that Judge Aragon abused his discretion by denying Mr.

---

[2] Section 30-3-16 was subsequently amended effective July 1, 2018. *See* N.M. Laws 2018, ch. 30, § 2. All references in this brief are to the 2008 version of the statute.

[3] Section 31-18-15 has also subsequently been amended. *See* N.M. Laws 2019, ch. 211, § 7 (effective July 1, 2019). This brief cites the statute in effect at the time, although the relevant subsection has not changed.

Seeger's motions for a continuance or a mistrial, and that the final judgment against him improperly included a dismissed charge. *See id.*

The State of New Mexico conceded that Mr. Hildreth was denied his constitutional right to counsel and that his conviction should be vacated. *Id.* ¶¶ 1, 12. The Court of Appeals agreed and reversed Mr. Hildreth's conviction. *Id.* ¶¶ 13-14. However, the Court of Appeals rejected Mr. Hildreth's argument that the New Mexico Constitution barred retrial. *Id.* ¶¶ 20-21. The Court remanded for retrial and did not decide the remaining issues. *Id.* ¶ 1.

Mr. Hildreth appealed the retrial issue, and this Court granted certiorari.

ARGUMENT

I. Improper judicial conduct bars retrial under the federal *Kennedy* rule and should also do so under New Mexico's *Breit* standard.

Both the federal and New Mexico constitutions protect a defendant from being put in jeopardy twice for the same offense. U.S. Const. amend. V; N.M. Const. art. II, § 15. However, the two double jeopardy clauses provide different levels of protection against retrial in cases of official misconduct. When a defendant moves for a mistrial based on misconduct by the government, the double jeopardy clause of the United States Constitution bars retrial "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). As discussed below,

the *Kennedy* rule applies both to prosecutorial misconduct and to comparable conduct by other officials, including judges.

Several states apply the *Kennedy* rule to their state constitutions,[4] but New Mexico does not. Instead, Article II, Section 15 of the New Mexico Constitution provides stronger protection against double jeopardy. *State v. Breit*, 1996-NMSC-067, ¶ 3, 122 N.M. 655, 930 P.2d 792. Because the federal rule applies to judges as well as prosecutors, and New Mexico's protections are stronger than those of the federal constitution, Mr. Hildreth asks this Court to recognize that the *Breit* rule also applies to improper judicial conduct.

A. The Kennedy *rule and its predecessors apply to judicial misconduct.*

Although *Kennedy* itself dealt with prosecutorial misconduct, 456 U.S. at 669, the United States Supreme Court had previously recognized that judicial misconduct could bar retrial of a defendant. *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (stating that certain "bad-faith conduct by judge or prosecutor" prohibits retrial under the federal constitution (quoting *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion))). *See also Gori v. United States*, 367 U.S. 364, 369 (1961) (suggesting possibility that double jeopardy might bar retrial in cases where "a judge exercises his authority to help the prosecution, at a trial in

---

[4] *See, e.g., State v. Michael J.*, 875 A.2d 510, 534-35 (Conn. 2005); *State v. DeMarco*, 511 A.2d 421, 424-25 (N.J. Super. Ct. App. Div. 1986); *Robinson v. Commonwealth*, 439 S.E.2d 622, 625-26 (Va. Ct. App. 1994).

which its case is going badly, by affording it another, more favorable opportunity to convict the accused"); *United States v. Tateo*, 377 U.S. 463, 468 n.3 (1964) (suggesting that retrial might be barred "[i]f there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused"). A concurrence in *Kennedy* addressed the issue directly, stating that the rule barring retrial "also encompasses comparable judicial misconduct." *Kennedy*, 456 U.S. at 683 n.12 (Stevens, J., concurring in the judgment). This rule has also been recognized in secondary sources. *See, e.g.*, Wayne R. LaFave et al., *The "Goaded" Mistrial Motion*, 6 Crim. Proc. § 25.2(b) (4th ed. 2017) ("A judge's intent to goad a defendant into calling for a mistrial will bar retrial as well.").

Kennedy applies only in the narrow circumstance of government conduct that deliberately provokes a mistrial, so in jurisdictions that apply the *Kennedy* rule, judicial misconduct would only bar retrial if a judge goaded a defendant into moving for a mistrial. This would be very unusual, not least because a judge who wanted to make life difficult for a defendant would have other tools at her disposal (such as ruling against defense motions and allowing damaging testimony). But it has happened, and *Kennedy* has been applied to conduct by judges. *See Butler v. State*, 95 A.3d 21, 39-40 (Del. 2014) (holding that trial judge goaded defense

counsel into requesting a mistrial, and therefore double jeopardy clause barred retrial).

Additionally, before *Kennedy*, other state courts had barred retrial based on improper conduct by judges and other government actors. In *Crim v. State*, 294 N.E.2d 822 (Ind. Ct. App. 1973), an Indiana court held that double jeopardy protections barred retrial where the prosecutor and trial judge forced a defendant into trial without a lawyer. In its opinion, the court referred repeatedly to the actions of both the judge and the prosecutor, and it quoted a long exchange between the judge and the defendant. *See id.* at 823-26 (transcript), 828 ("this effort of the Prosecuting Attorney, sanctioned by the trial court, had serious legal consequences"), 830 ("the prosecutor and trial judge insisted that the [defendant] proceed . . . without counsel"; "'manifest necessity' cannot be created by errors on the part of the prosecutor or judge but must arise from some source outside their control"). The *Crim* Court focused not on the particular governmental actor whose conduct caused the constitutional violation, but rather on the violation of the defendant's fundamental rights. *See id.* at 830. The situation in which the judge and prosecutor placed the defendant, the court concluded, "amounted to jeopardy by coercion." *Id. See also State v. Rathbun*, 600 P.2d 392, 398 (Or. 1979) (en banc) (barring retrial because of misconduct by bailiff and holding that his conduct was "so abhorrent to the sense of justice that . . . the same sanction is required to

effectuate the constitutional command as in the case where the prosecutor or the judge intends to provoke a mistrial").[5]

B. Logically, the* Breit *rule should apply to improper judicial conduct.

In 1996, this Court rejected *Kennedy*'s narrow "goading" standard as insufficiently protective of double-jeopardy interests. *Breit*, 1996-NMSC-067, ¶ 3. The *Breit* Court was concerned that the *Kennedy* rule prohibited retrial only in cases where the official misconduct was intended to provoke a mistrial, rather than to accomplish other ends: to harass the defendant, to ensure a conviction through unfair means, or otherwise to "prejudice the defendant to the point of the denial of a fair trial." *Id.* ¶¶ 20-21 (quoting *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992)). For purposes of the New Mexico Constitution, this Court adopted the three-part *Breit* test:

> Retrial is barred under Article II, Section 15, of the New Mexico Constitution, when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.

Breit, 1996-NMSC-067, ¶ 32.

---

[5] These cases refer to retrial after a mistrial, but "the double-jeopardy analysis is identical, whether the defendant requests a mistrial, a new trial, or, on appeal, a reversal." *Breit*, 1996-NMSC-067, ¶ 15.

On its face, *Breit* applies to "improper official conduct" and is not limited to prosecutors. The New Mexico courts have never previously addressed its application to officials who are not prosecutors. The Court of Appeals in this case declined to address whether *Breit* applied to judges and appeared to assume that it did not. *See Hildreth*, 2019-NMCA-047, ¶ 18 ("Although Defendant acknowledges that our appellate courts have applied *Breit* only in cases of prosecutorial misconduct, he nonetheless urges this Court to extend *Breit* to the judge's actions in this matter."), ¶ 20 (holding that "[e]ven if we were to extend *Breit* to instances of judicial misconduct," Judge Aragon's conduct was not inappropriate).

There is no reason why *Breit* should not apply to improper judicial conduct. The double jeopardy principles at issue in *Breit* are equally implicated in cases of judicial and prosecutorial misconduct. *See Breit*, 1996-NMSC-067, ¶¶ 9, 20-23 (describing the interests protected by the double jeopardy clause and the inadequacy of the *Kennedy* rule). During a criminal trial, both the prosecutor and the judge wield control over the direction of trial and therefore power over the defendant. The State decides whether to "[put] the defendant through the embarrassment, expense, and ordeal of criminal proceedings." *Id.* ¶ 23 (quoting *Kennedy*, 456 U.S. at 689 (Stevens, J., concurring in the judgment)). The judge decides whether the charges are appropriate for trial and how much leeway the

State will have in proving its case, as well as whether and when to grant a continuance or a mistrial.

One of the judge's responsibilities in the courtroom is to protect the rights of the defendant, including the right to counsel. *See Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) ("The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court . . . . This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."); *State v. Grogan*, 2007-NMSC-039, ¶ 10, 142 N.M. 107, 163 P.3d 494 ("[In] cases of obvious ineffective assistance of counsel, the trial judge has the duty to maintain the integrity of the court, and thus inquire into the representation."). When the judge abdicates this responsibility, the defendant faces the ordeal of successive prosecutions and improper convictions just as surely as he would in the case of prosecutorial misconduct.

"Raising the bar of double jeopardy should be an exceedingly uncommon remedy." *Breit*, 1996-NMSC-067, ¶ 35. Only in extremely rare cases will improper judicial conduct meet the criteria described in *Breit*. But in those rare cases, our courts should apply the same double jeopardy analysis that they would apply to misconduct by a prosecutor.

II. Judge Aragon's conduct meets every prong of the *Breit* test, and therefore retrial would constitute double jeopardy.

Breit sets out a three-pronged test for when retrial after official misconduct would constitute double jeopardy. The New Mexico Constitution bars retrial when 1) "improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a . . . motion for a new trial," 2) "the official knows that the conduct is improper and prejudicial," and 3) "the official . . . acts in willful disregard of the resulting . . . reversal." *Breit*, 1996-NMSC-067, ¶ 32. Judge Aragon's conduct at Mr. Hildreth's trial met all three prongs of the test.

A. Judge Aragon's conduct was improper, and the resulting prejudice to Mr. Hildreth could not be cured by any means short of a new trial.

The first prong of the *Breit* test is met here. Judge Aragon's conduct was improper in two ways: First and most importantly, Judge Aragon allowed Mr. Hildreth to be tried and convicted without a participating defense attorney. Secondarily, Judge Aragon violated his duty to appear impartial in front of the jury. As both parties and the Court of Appeals below agreed, the first problem was so prejudicial to Mr. Hildreth that it required reversal and a new trial. *See Hildreth*, 2019-NMCA-047, ¶ 12.

1. It was improper for Judge Aragon to proceed with trial knowing that Mr. Hildreth had no meaningful representation of counsel.

Mr. Hildreth had a right to counsel in his trial. *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. Officially, he was represented by Mr. Seeger, but as Mr. Seeger himself argued many times, that representation did not fulfill Mr. Hildreth's constitutional right to counsel. **[3/14/17 CD 10:48:07-48, 11:21:03-38, 11:41:01-39, 1:59:01-14, 2:37:47-2:38:07; 3/15/17 CD 9:16:40-9:17:15, 9:48:31-49]** "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). "[T]he right to counsel is the right to the *effective* assistance of counsel." *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)) (emphasis added). Mr. Seeger did not "subject the prosecution's case to meaningful adversarial testing," nor did he cross-examine witnesses; the result was a constructive denial of Mr. Hildreth's right to counsel. *See Grogan*, 2007-NMSC-039, ¶ 12 (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)) (describing circumstances in which prejudice from deprivation of counsel is presumed); *accord Hildreth*, 2019-NMCA-047, ¶ 14.

"[I]n cases of obvious ineffective assistance of counsel, the trial judge has the duty to maintain the integrity of the court, and thus inquire into the representation." *Grogan*, 2007-NMSC-039, ¶ 10. As soon as it became apparent to Judge Aragon that Mr. Seeger was not going to represent Mr. Hildreth at trial,

Judge Aragon had an obligation to step in and protect Mr. Hildreth's right to counsel. He did not do so.

As the Court of Appeals recognized, Judge Aragon could have addressed Mr. Seeger's non-participation in a variety of ways. *See Hildreth*, 2019-NMCA-047, ¶ 16 (offering guidance to judges). Judge Aragon could have granted the continuance requested by the defense, accompanied by whatever commentary he thought was required. For example, he could have admonished Mr. Seeger for failing to call his witnesses earlier, warned Mr. Seeger that he needed to be prepared at the next setting, and explained that any additional motions for continuance would be disfavored.

Judge Aragon could also have imposed more severe sanctions. He could have ordered Mr. Seeger to participate in the case, and then, if Mr. Seeger refused, he could have held Mr. Seeger in contempt. Judges have the power to punish contempt by "reprimand, arrest, fine or imprisonment." NMSA 1978, § 34-1-2 (1851). Courts that have addressed the situation of non-participating defense attorneys have specifically suggested holding the attorney in contempt. *See Hildreth*, 2019-NMCA-047, ¶ 16; *Martin v. Rose*, 744 F.2d 1245, 1252 (6th Cir. 1984) ("[T]he court's contempt power or the disciplinary mechanism of the bar may be appropriately invoked."); *People v. McKenzie*, 668 P.2d 769, 776 (Cal. 1983) ("[I]n some situations, the court may order defense counsel to participate in

the trial and threaten to impose the sanction of contempt if he refuses to do so."), *abrogated on other grounds by People v. Crayton*, 48 P.3d 1136 (Cal. 2002); *State v. Brooks*, 452 So.2d 149, 157 (La. 1984) ("The trial judge could have ordered defense counsel to represent the defendant immediately and actively under penalty of contempt.").

If he had held Mr. Seeger in contempt, Judge Aragon could then have removed Mr. Seeger and ordered substitute counsel. *See Sanders v. Rosenberg*, 1997-NMSC-002, ¶¶ 8-9, 122 N.M. 692, 930 P.2d 1144 (discussing New Mexico precedents on disqualifying attorneys). *See also McKenzie*, 668 P.2d at 777 ("If counsel persists in his refusal to participate despite the threat of contempt, the court may hold him in contempt, and in any event should relieve him of his duties in the case."); *Brooks*, 452 So.2d at 157 (similar). Judge Aragon could even have addressed Mr. Hildreth directly to see whether he understood what Mr. Seeger was doing and whether he wanted a new attorney. *See, e.g.*, *United States v. Lespier*, 558 F.2d 624, 630 (1st Cir. 1977) (suggesting this approach when the court thinks defendants may be manipulating the court); *McKenzie*, 668 P.2d at 777.

Instead of taking any of these approaches, Judge Aragon pushed forward with trial as though nothing were wrong. Mr. Hildreth went through his entire trial without meaningful representation by counsel. As a result, Mr. Hildreth was

convicted and incarcerated in violation of the Sixth Amendment and Article II, Section 14.

This constructive denial of the right to counsel created a structural problem that could not be fixed without a mistrial or a new trial. *See Cronic*, 466 U.S. at 659 (presuming prejudice in cases of denial of counsel or total "fail[ure] to subject the prosecution's case to meaningful adversarial testing"); *Grogan*, 2007-NMSC-039, ¶ 12 (same). Mr. Hildreth and the State agreed below that his conviction must be reversed. *Hildreth*, 2019-NMCA-047, ¶ 12. The Court of Appeals correctly held that "[Mr.] Seeger's conduct rose to the level of a constructive denial of counsel." *Id.* ¶ 14. The Court noted that Judge Aragon chose to go forward with trial "in circumstances where some form of guilty verdict was not only a near certainty, but had no realistic chance of being upheld on appeal," and that this choice "all but ensur[ed] a violation of the defendant's constitutional rights." *Id.* ¶ 16.

The Court of Appeals' conclusion echoed that of the California Supreme Court more than thirty years ago. In 1983, that court considered a similar case and concluded:

> By allowing this defendant to proceed to trial without the assistance of counsel when he had not affirmatively waived his right to such assistance, the court abrogated both its duty to protect the rights of the accused and its duty to ensure a fair determination of the issues on their merits. Furthermore, the court's action, rather than promoting, actually hindered the orderly administration of justice. By permitting such a proceeding to go forward, the judge virtually assured an appeal, a

> reversal and a future retrial, thereby placing an unnecessary additional strain on an already over-burdened judicial system.

McKenzie, 668 P.2d at 776.

This clear violation of Mr. Hildreth's constitutional rights establishes the prejudice element of *Breit*'s first prong: the "improper official conduct [was] so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial." *Breit*, 1996-NMSC-067, ¶ 32. There was no serious argument in this case that Mr. Hildreth's conviction under these circumstances was valid. Once trial began, there was no way to cure the violation of the right to counsel other than a mistrial or a new trial.

2. It was improper for Judge Aragon to implicitly and explicitly criticize Mr. Seeger in front of the jury.

Judge Aragon also engaged in a second form of improper conduct. During Mr. Hildreth's trial, the jury witnessed the tense, fraught interactions between Judge Aragon and Mr. Seeger. Over and over, the jurors saw Mr. Seeger decline to ask questions. The jurors saw Mr. Seeger attempt to address them, sometimes saying he was unprepared, and they saw Judge Aragon interrupt and talk over him. **[*See* 3/14/17 CD 9:49:04-41, 11:01:26-11:02:13; 3/15/17 CD 9:48:31-49]**

"During the course of a trial a judge should not make any unnecessary comments or take any unnecessary action which might prejudice the rights of either of the parties." *State v. Caputo*, 1980-NMCA-032, ¶ 10, 94 N.M. 190, 608

P.2d 166. Several times during the trial, Judge Aragon made statements that suggested his displeasure with Mr. Seeger. During voir dire, after Mr. Seeger attempted to tell the jury venire that he was unprepared for trial, Judge Aragon stopped him. **[3/14/17 CD 9:49:04-19]** Rather than simply telling the panel to disregard Mr. Seeger's comments, Judge Aragon gave a longer statement, concluding with an admonition "not to lend any credence to what was just said . . . nor the emotion with which it was presented to you." **[*Id.* 9:49:19-41]** At other points in the trial, when Mr. Seeger refused to ask questions, Judge Aragon unnecessarily declared for the record, in front of the jury, that "Mr. Seeger waives his right to ask any cross-examination questions" or "Mr. Seeger declines to ask any cross-examination questions." **[*Id.* 1:59:01-23, 11:41:01-39]** In all of these situations, Judge Aragon said more than was necessary, and his additional commentary further drew the jury's attention to his dispute with Mr. Seeger.

Judge Aragon was most clearly critical of Mr. Seeger in his comments during opening statements. Before he was cut off at voir dire, Mr. Seeger had told the jury that it was with a "heavy heart" that he had told the court he was unprepared for trial. [**3/14/17 CD 9:49:04-15]** Before Mr. Seeger attempted to give an opening statement, Judge Aragon referred back to that statement, telling him in front of the jury that "the weight of [his] heart" was of no concern to the jury. **[*Id.* 11:01:09-19]** After Mr. Seeger began to speak about the importance of the right to

counsel, Judge Aragon stopped him and told the jury "to ignore the civics lesson that was presumptuously offered by Mr. Seeger." **[*Id.* 11:02:08-13]**

Beyond generally communicating his own frustration with Mr. Seeger, Judge Aragon's remarks were categorically improper. A judge may not denigrate defense counsel to the jury by calling his actions "presumptuous." *See State v. Henderson*, 1998-NMSC-018, ¶¶ 10-12, 15, 125 N.M. 434, 963 P.2d 511 (reversing conviction due to judge's improper behavior and comments, including insulting defense counsel in the presence of the jury). The fact that Judge Aragon was frustrated with Mr. Seeger does not excuse his comments; as a judge, Judge Aragon had a duty to remain above the fray. *See* Rule 21-100 NMRA ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.").

Based on these comments and the overall atmosphere in the courtroom, the jury would have noticed the tension between Mr. Seeger and Judge Aragon and wondered what was going on.[6] "Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice." Rule 21-203 NMRA (committee commentary).

---

[6] Mr. Hildreth's pretrial proceedings and trial were captured on audio CD. To undersigned counsel's ear, the tension in the courtroom is palpable in the recordings. The Court of Appeals disagreed. *See Hildreth*, 2019-NMCA-047, ¶ 20. Undersigned counsel encourages this Court to listen for itself to the recordings of the pretrial conference on March 10 and the trial on March 14-15.

Jurors would have perceived that Judge Aragon was upset or angry with the defense, but not with the prosecution. By criticizing Mr. Seeger in front of the jury, Judge Aragon implicitly invited the jurors to think of him negatively as well. *See State v. Paiz*, 1999-NMCA-104, ¶ 17, 127 N.M. 776, 987 P.2d 1163 ("[N]o one in the courtroom commands the jury's respect as does the judge who makes all the decisions in a criminal trial except guilt or innocence.").

In isolation, Judge Aragon's attitude toward the defense would not bar retrial. But it is part of his improper conduct at Mr. Hildreth's trial, and the *Breit* inquiry looks at misconduct as a whole. *See Breit*, 1996-NMSC-067, ¶ 45 (holding that "most of these infractions would be unlikely to raise the bar to retrial," but "[t]he cumulative effect was to deny the defendant a fair trial").

3. The Court of Appeals' holding that Judge Aragon acted properly was erroneous.

The Court of Appeals rejected Mr. Hildreth's argument that Judge Aragon's conduct was improper. The Court of Appeals stated that it "listened to the entire audio recording of the trial, and there was no instance in which [Judge Aragon's] tone of voice sounded inappropriate or improper." *Hildreth*, 2019-NMCA-047, ¶ 20. The Court also held that Judge Aragon "attempted to mitigate [Mr.] Seeger's inaction in the eyes of the jury . . . by reminding them that the State had the burden of proof" and generally "made every attempt to have [Mr.] Seeger participate and defend his client, all to no avail." *Id.*

The Court of Appeals appears to have blamed Mr. Seeger for failing to defend Mr. Hildreth and concluded that because Judge Aragon "kept his commentary on [Mr.] Seeger's actions to a minimum," *id.*, Judge Aragon's conduct was not improper. But this case is not a contest about whether Mr. Seeger or Judge Aragon was more blameworthy. Mr. Seeger and Judge Aragon had asymmetric options available to them. Mr. Seeger had no ability to stop the trial, and he believed that without a continuance, he could not provide effective assistance of counsel to Mr. Hildreth whether he participated in trial or not. **[*See* 3/14/17 CD 10:48:07-48]** Rather than cooperate and provide a "C-minus" defense, Mr. Seeger sat out the trial to call attention to its unfairness. This Court may believe, as the Court of Appeals apparently did, *see id.* ¶ 16, that Mr. Seeger acted improperly, but that is independent from the question of how Judge Aragon acted.

Unlike Mr. Seeger, Judge Aragon had the ability to stop the trial. However, he did not exercise it. Instead, in violation of the Sixth Amendment and Article II, Section 14, he conducted a criminal trial in which the defense attorney refused to participate. By making unnecessary and improper comments in front of the jury, he compounded his error.

Even if this Court agrees with the Court of Appeals that Judge Aragon's behavior during trial was appropriate or excusable, *see Hildreth*, 2019-NMCA-047, ¶ 20, it does not cure Judge Aragon's decision to go forward with trial in the

first place. It *cannot* be proper for a judge to conduct a trial in which he knows there is no participating defense attorney. *See Grogan*, 2007-NMSC-039, ¶ 10. No amount of politeness could compensate for the fact that Mr. Hildreth had no meaningful representation at trial. Similarly, it does not matter whether Judge Aragon gave Mr. Seeger opportunities to participate, as the Court of Appeals held. *Hildreth*, 2019-NMCA-047, ¶ 20. The right to counsel belonged to Mr. Hildreth, not Mr. Seeger. "Whatever may have been the court's right to discipline counsel[,] . . . the client cannot be penalized, by the loss of his constitutional right to legal representation at his trial . . . ." *Brooks*, 452 So.2d at 156 (quoting *City of Baton Rouge v. Dees*, 363 So.2d 530, 532 (La. 1978)).

As soon as Judge Aragon realized that Mr. Hildreth had no participating defense attorney, he had an obligation to stop the trial. By failing to do so, he engaged in improper conduct that could not be fixed without a mistrial or new trial.

B. Judge Aragon knew that his conduct was improper and prejudicial.

The second prong of the *Breit* test asks whether "the official knows that the conduct is improper and prejudicial." *Breit*, 1996-NMSC-067, ¶ 32. Mr. Seeger repeatedly told Judge Aragon that he was not participating in trial and moved for a mistrial on that basis. **[3/14/17 CD 9:04:56-9:05:16, 10:06:48-10:07:06, 10:48:07-14; 3/15/17 CD 9:16:43-9:17:15]** Judge Aragon acknowledged throughout the trial that Mr. Seeger was not participating. **[*See* 3/14/17 CD**

9:04:56-9:05:16, 10:06:48-10:07:08, 10:14:02-16, 10:48:07-50] Judge Aragon was surely aware of the constitutional right to counsel and of his responsibility under *Grogan*, 2007-NMSC-039, ¶ 10, and *Zerbst*, 304 U.S. at 465, to protect that right. *See also White v. Ragen*, 324 U.S. 760, 764 (1945) ("[I]t is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel.").

It is reasonable to assume that judges know they may not conduct a trial in which a criminal defendant is unrepresented. *See State v. McClaugherty*, 2008-NMSC-044, ¶ 49, 144 N.M. 483, 188 P.3d 123 ("[T]here must be a point at which lawyers are conclusively presumed to know what is proper and what is not." (quoting *Pool v. Superior Court*, 677 P.2d 261, 270 (Ariz. 1984) (in banc))). "Under minimal legal, ethical, and professional standards," *Breit*, 1996-NMSC-067, ¶ 48, this Court can conclude that Judge Aragon knew his conduct was improper and prejudicial.

Judge Aragon may have felt that he was doing the right thing in trying to keep the case on schedule and avoid a delay or a mistrial (notwithstanding the fact that this was a first trial setting). However, "standards of justice should outweigh" these logistical concerns. *Id.* ¶ 47. "[J]udges above all others in our society must honor the fundamental principle that a desirable end cannot justify means that violate the law." *Concha v. Sanchez*, 2011-NMSC-031, ¶ 42, 150 N.M. 268, 258

P.3d 1060. And as the Court of Appeals observed, trying a case without a participating defense attorney "hinders, rather than promotes judicial economy by wasting scarce court resources while all but ensuring a violation of the defendant's constitutional rights." *Hildreth*, 2019-NMCA-047, ¶ 16. *See also McKenzie*, 668 P.2d at 776.

Furthermore, Judge Aragon's belief "regarding his . . . own conduct is irrelevant in this analysis." *McClaugherty*, 2008-NMSC-044, ¶ 27. The *Breit* standard is an objective test based on "conduct as it manifests at the trial, not the motivation for that conduct." *McClaugherty*, 2008-NMSC-044, ¶ 27. "Defendants should be protected from reprosecution once a prosecutor's actions, *regardless of motive or intent,* rise to such an extreme that a new trial is the only recourse." *Id.* ¶ 26 (quoting *Breit*, 1996-NMSC-067, ¶ 22). As discussed in Part I above, this standard should apply equally to the actions of a judge.

C. Judge Aragon acted in willful disregard of the inevitable reversal on appeal.

The third prong of the *Breit* test is satisfied if "the official . . . acts in willful disregard of the resulting . . . reversal." *Breit*, 1996-NMSC-067, ¶ 32. Judge Aragon was aware that Mr. Seeger was not participating in the case; he openly (and sometimes flippantly) discussed the situation with Mr. Seeger. When Mr. Seeger told Judge Aragon that he was not comfortable doing "a C-minus job on the trial," Judge Aragon said, "Well, then, I guess you'll have to do an F-minus job

and just sit there." **[3/10/17 CD 9:53:51-9:54:03]** During trial, when Mr. Seeger raised a motion, Judge Aragon told him, "I don't need to hear any more about your protestations of unpreparedness, Mr. Seeger. You're on record with that." **[3/14/17 CD 1:40:21-30]** Judge Aragon acknowledged Mr. Seeger's nonparticipation many times during the trial. **[*See id.* 9:04:56-9:05:16, 10:06:48-10:07:08, 10:14:02-16, 10:48:07-50]**

Given the obvious violation of Mr. Hildreth's constitutional right to counsel, his conviction "had no realistic chance of being upheld on appeal." *Hildreth*, 2019-NMCA-047, ¶ 16. Judge Aragon realized this. When Mr. Seeger first said that he was not prepared for trial and would not participate, Judge Aragon replied, "If that is true, then [Mr. Hildreth] would have excellent grounds for appeal on incompetency of counsel." **[3/10/17 CD 9:50:38-9:51:13]**

Mr. Seeger announced his intention not to participate before trial and did not participate in jury selection. **[*Id.* 9:50:34-9:51:18, 9:53:51-9:54:07; 3/14/17 CD 9:04:56-9:05:16, 9:49:04-19, 10:00:44-10:19:40]** At that point, his intentions were clear, and jeopardy had not yet attached. *See Martinez v. Illinois*, 572 U.S. 833, 839 (2014) (jeopardy attaches when a jury is sworn). Judge Aragon could have reset the trial (and admonished or sanctioned Mr. Seeger, if he chose) without prejudice to Mr. Hildreth. That choice would have protected Mr. Hildreth's right to counsel and avoided any question of double jeopardy. Instead, Judge Aragon

ordered the jury sworn in, allowing jeopardy to attach. This choice to allow the jury to be sworn, despite knowing that there are likely to be problems at trial, is significant in other double jeopardy contexts. *See Downum v. United States*, 372 U.S. 734, 737 (1963) ("The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance." (quoting trial court)); *Martinez*, 572 U.S. at 843 (holding retrial was barred where "the State participated in the selection of jurors and did not ask for dismissal before the jury was sworn"); *State v. Gutierrez*, 2014-NMSC-031, ¶ 29, 333 P.3d 247 (holding that "the prosecution took a calculated risk" by allowing jury to be sworn before key witness arrived).

After the trial began, Mr. Seeger moved for a mistrial three times, and at any one of those points, Judge Aragon could have granted the motion and stopped the trial. **[3/14/17 CD 10:48:07-14, 1:42:51-56; 3/15/17 CD 9:16:43-9:17:15]** That he continued with trial further indicates the willful disregard that *Breit* describes: Judge Aragon was determined to finish the trial, regardless of whether the resulting conviction would be reversed on appeal.

Judge Aragon's actions after the verdict contribute to the picture of willful disregard. Mr. Hildreth, who had no previous criminal history, had been released on bond for nearly nine months before trial, with no violations of his conditions of release. **[*See* RP 47 (bond posted 6/23/16); RP 51, 58, 73 (logs of all pretrial**

hearings); 6/2/17 CD 11:25:53-58 (statement that Mr. Hildreth had no criminal history)] After the jury convicted Mr. Hildreth, Judge Aragon ordered Mr. Hildreth into custody pending sentencing, over Mr. Seeger's objection. **[3/15/17 CD 10:57:36-11:02:01]** Judge Aragon set the case on the "normal track for sentencing," **[*Id.* 11:01:23-58]** and Mr. Hildreth remained in custody for eighty days before being sentenced. **[*See* RP 135 (detention order dated 3/15/17), 180 (log of sentencing hearing on 6/2/17)]**

During this time, with the benefit of hindsight, Judge Aragon could have thought about his role in the trial. *See Breit*, 1996-NMSC-067, ¶ 86 (judge's reflections on her role in "a trial out of control"). Given that Mr. Hildreth had been convicted in a trial where he was essentially unrepresented, Judge Aragon could have taken steps to mitigate the prejudice of this constitutional violation to Mr. Hildreth. For example, Judge Aragon might have invited the parties to move for a new trial, or he could have released Mr. Hildreth on bond while motions, sentencing, or appeals were pending. Instead, Judge Aragon waited for the sentencing hearing, then sentenced Mr. Hildreth to the maximum term of three years in custody. **[RP 190]** *See* §§ 30-3-16(C), 31-18-15(A)(11).[7] As of this filing, Mr. Hildreth has served more than two and a half years of his sentence.

[7] This pattern has continued since sentencing—Judge Aragon has consistently denied Mr. Hildreth's motions for bond. Before briefing began in his appeal, Mr. Hildreth filed an unsuccessful motion for appeal bond. *See* Motion for Bond

Judge Aragon's actions do not suggest that he was deterred from improper conduct by the threat of reversal, nor that he tried to limit the damage that Mr. Hildreth suffered. On the contrary, despite knowing that reversal was likely as a result of his failure to safeguard Mr. Hildreth's right to counsel, Judge Aragon consistently chose to punish Mr. Hildreth to the greatest extent that he could. A second trial will not cure this harm to Mr. Hildreth. "[U]nlike the State's interest in a lawful conviction, which could be vindicated upon appeal after a second trial, if the accused is acquitted at a second trial . . . he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *McClaugherty*, 2008-NMSC-044, ¶ 69. *See also Crim*, 294 N.E.2d at 830 (holding that retrial

---

Pending Appeal, *State v. Hildreth*, No. D-1113-CR-2016-00167 (11th Jud. Dist. Ct. Sept. 15, 2017). After the State conceded in the Court of Appeals that Mr. Hildreth's conviction should be reversed, Mr. Hildreth renewed his motion for appeal bond, and additionally filed a motion asking Judge Aragon to recuse himself. *See* Renewed Motion for Appeal Bond, No. D-1113-CR-2016-00167 (Oct. 16, 2018); Unopposed Motion to Recuse, No. D-1113-CR-2016-00167 (Dec. 13, 2018). Judge Aragon granted neither motion. Order, No. D-1113-CR-2016-00167 (Nov. 8, 2018); Court's Notice on Motion to Recuse, No. D-1113-CR-2016-00167 (Jan. 7, 2019).

After the Court of Appeals reversed his conviction, while the petition for certiorari on the *Breit* issue was pending, Mr. Hildreth renewed his motions. Renewed Motion to Recuse, No. D-1113-CR-2016-00167 (Aug. 6, 2019); Third Motion for Appeal Bond, No. D-1113-CR-2016-00167 (Aug. 6, 2019). Nearly two months later, Judge Aragon issued an order refusing to consider either motion, effectively denying them. Court's Second Notice on Motions to Recuse and Appeal Bond, No. D-1113-CR-2016-00167 (Oct. 3, 2019).

would constitute double jeopardy where "the prosecutor and trial judge insisted that the [defendant] proceed in a jury trial in a felony case without counsel").

The Court of Appeals held that Judge Aragon attempted to have Mr. Seeger participate in trial and therefore did not act in willful disregard of a likely reversal. *Hildreth*, 2019-NMCA-047, ¶ 20. There are three problems with this reasoning. First, as mentioned above, the right to counsel belonged to Mr. Hildreth, not Mr. Seeger. Second, Judge Aragon did not have to accept Mr. Seeger's refusal to participate. He could have ordered Mr. Seeger to participate under threat of contempt; he did not do so. *See* discussion *supra* p. 21. Finally, Judge Aragon's attempts to have Mr. Seeger participate are beside the point. Judge Aragon may have preferred to have Mr. Seeger participate, but when Mr. Seeger refused, Judge Aragon moved forward with trial anyway, disregarding the likelihood of reversal.

The Court of Appeals' own reasoning compels the conclusion that Judge Aragon's conduct met every prong of the *Breit* test. The Court of Appeals correctly determined that Judge Aragon "forc[ed] [Mr. Hildreth] to go to trial with an attorney who refuse[d] to participate . . . all but ensuring a violation of the defendant's constitutional rights," *Hildreth*, 2019-NMCA-047, ¶ 16; that Mr. Hildreth was constructively denied the assistance of counsel, requiring reversal, *id.* ¶¶ 14-15; and that Judge Aragon "deci[ded] to proceed with . . . trial in circumstances where some form of guilty verdict was not only a near certainty, but

had no realistic chance of being upheld on appeal." *Id.* ¶ 16 (emphasis added) (citing *Grogan*, 2007-NMSC-039, ¶ 10). Proceeding with a trial that will all-but-certainly violate the Constitution and be reversed on appeal constitutes acting in willful disregard of reversal, and it violates the standard set out in *Breit*, 1996-NMSC-067, ¶ 32.

CONCLUSION

Judge Robert Aragon knew that Henry Hildreth had no meaningful representation at trial. Judge Aragon also presumably knew that the Sixth Amendment and Article II, Section 14 protect a defendant's right to counsel, and that deprivation of counsel is grounds for reversal. Nevertheless, Judge Aragon proceeded with a transparently unconstitutional trial, convicting Mr. Hildreth without the protections of an attorney and imposing the maximum sentence.

Having endured this experience once, and having served nearly all of the sentence for a third-degree felony, Mr. Hildreth should not be subject to jeopardy again. He respectfully asks this Court to hold that retrial under these circumstances would constitute double jeopardy in violation of Article II, Section 15. He additionally requests oral argument to assist in resolving the constitutional issue in this case.

Respectfully submitted,

Bennett J. Baur
Chief Public Defender

_/s/ *Caitlin Smith*_____
Caitlin C.M. Smith
Associate Appellate Defender
1422 Paseo de Peralta, Bldg. 1
Santa Fe, New Mexico 87501
(505) 395-2830

CERTIFICATE OF DELIVERY

I hereby certify that on October 21, 2019, a copy of this pleading was uploaded to Odyssey File & Serve for service on Emily Tyson-Jorgenson in the Office of the Attorney General.

_/s/ *Caitlin Smith*_____
Law Offices of the Public Defender