IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

HENRY HILDRETH, JR.,

Defendant-Petitioner.

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

DEFENDANT-PETITIONER'S REPLY BRIEF

On Certiorari to the New Mexico Court of Appeals

Oral argument is requested.

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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]**. The brief-in-chief is cited as **[BIC page number]** and the State's answer brief is cited as **[AB page number]**.

REPLY ARGUMENT

It is undisputed that Henry Hildreth, Jr. was convicted after a trial in which his attorney refused to participate. In his brief-in-chief, Mr. Hildreth asked this Court to bar retrial based on the district judge's improper choice to proceed with trial. In response, the answer brief argues that it was not the judge but rather Mr. Hildreth's attorney, Steven Seeger, who violated his professional duties and deprived Mr. Hildreth of his right to counsel. **[*See* AB 19, 22-24, 26, 27, 32, 34]**

But whether Mr. Seeger acted unethically by refusing to participate in trial is a question for disciplinary or contempt proceedings. **[*See* BIC 21-22; AB 23]** As Mr. Hildreth and the answer brief agree, there are mechanisms for disciplining attorneys who violate their professional responsibilities. **[*Id.*]** Furthermore, Mr. Hildreth has already won reversal of his conviction based on constructive denial of counsel. *State v. Hildreth*, 2019-NMCA-047, ¶ 14, 448 P.3d 585. What remains in his case is a standalone claim of judicial misconduct.

The legal issue before this Court is not about Mr. Seeger's refusal to participate, but rather about Judge Robert Aragon's response to that refusal. The question at the crux of this case is: Given Mr. Seeger's conduct, was Judge Aragon's conduct so improper and prejudicial that it bars retrial under *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792?

As discussed in the brief-in-chief and below, the answer is yes. A judge may not conduct a trial in which he knows the defendant has no participating attorney. Once Judge Aragon knew that Mr. Seeger was not participating, he could not continue with the trial. Because the *Breit* standard applies to improper conduct by judges, and because Judge Aragon's conduct met the criteria in *Breit*, Mr. Hildreth asks this Court to hold that retrying him would violate the New Mexico Constitution.

Mr. Hildreth responds below to some discrete arguments from the answer brief. He relies on the facts, argument, and authorities set out in his brief-in-chief for all issues not discussed below.

I. Judge Aragon had, and violated, an obligation to protect Mr. Hildreth's constitutional right to counsel.

"[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." *State v. Grogan*, 2007-NMSC-039, ¶ 10, 142 N.M. 107, 163 P.3d 494. The answer brief argues that Judge Aragon fulfilled this responsibility by asking Mr. Seeger if he was going to participate in the trial and "[giving] him the ability to defend his client." **[AB 22-23]** But merely asking Mr. Seeger this question and giving him an opportunity to participate did not fulfill Judge Aragon's duty under *Grogan*.

When a judge asks a defense attorney if he plans to participate, and the attorney confirms he does not, the judge must take further action to satisfy the requirements of *Grogan*. *Grogan* requires judges to "inquire into the attorney's actions *in order to protect the defendant's right to effective assistance* and to protect the integrity of the court." *Id.* ¶ 15 (emphasis added). This inquiry requirement serves the purpose of protecting the right to counsel under the Sixth Amendment and Article II, Section 14. Implicit in the requirement is the expectation that if the judge uncovers a constitutional violation, the judge will fix the violation rather than allowing it to continue.

Grogan was decided against a backdrop of law that requires judges to protect defendants' right to counsel. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); *Glasser v. United States*, 315 U.S. 60, 71 (1942) ("Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."), *superseded on other grounds by* Fed. R. Evid. 104; *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."). The American Bar Association echoes these requirements:

> The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.

Am. Bar Ass'n, *ABA Standards for Criminal Justice: Special Functions of the Trial Judge*, 3d ed. at 1 (2000) (Standard 6-1.1(a)), *available at* https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/trial_judge.pdf. It is settled law that a judge must not only inquire into the representation, but affirmatively safeguard a criminal defendant's right to counsel.[1]

The answer brief argues that Judge Aragon tried to protect Mr. Hildreth's right to counsel "by offering [Mr.] Seeger every opportunity to participate." **[AB 22, *see also* AB 26]** But "offering" opportunities for Mr. Seeger to participate did not help Mr. Hildreth. **[*See* BIC 29, 36]** Furthermore, by the time opening statements began, Mr. Hildreth's right to counsel had already been irreparably violated, because Mr. Seeger did not participate in jury selection, a critical stage of a trial. *See State v. Padilla*, 2002-NMSC-016, ¶ 11, 132 N.M. 247, 46 P.3d 1247.

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[1] For more on the judicial responsibility to protect a defendant's rights, even when defense counsel does not, *see* Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. Rev. L. & Soc. Change 425 (2004), and William W. Schwarzer, *Dealing with Incompetent Counsel: The Trial Judge's Role*, 93 Harv. L. Rev. 633 (1980).

The opportunities to participate that Judge Aragon subsequently gave Mr. Seeger could *not* have protected Mr. Hildreth's right to counsel, because no degree of participation would have cured the earlier violation. *See Crim v. State*, 294 N.E.2d 822, 830 (Ind. Ct. App. 1973) (barring retrial "because the prosecutor and trial judge insisted that the [defendant] proceed in a jury trial in a felony case without counsel . . . into critical stages of such a trial, namely, selection of the jury and opening statements").

As discussed in the brief-in-chief, once Judge Aragon realized that Mr. Hildreth had no participating defense attorney, he needed to stop the trial. Failure to do so was improper judicial conduct requiring reversal, and it satisfies the first prong of the *Breit* test.

II. *Breit* applies in this case and prohibits retrial.

A. The answer brief offers no reason or authority why Breit *should not apply to improper conduct by a judge.*

The answer brief argues that the *Breit* test, 1996-NMSC-067, ¶ 32, applies only to prosecutorial misconduct. **[AB 20-21]** The answer brief does not specify exactly which double jeopardy rule should apply to judicial misconduct, but it appears to accept that the federal rule from *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982), applies to judges as well as prosecutors. **[*See* AB 18]** Implicitly, therefore, the answer brief suggests that this Court should apply *Breit* to prosecutors but *Kennedy* to judges.

This Court considered and rejected the *Kennedy* "goading" standard in *Breit*, holding that the "goading" standard was insufficiently protective of defendants' rights. **[*See* BIC 16]** *Breit*, 1996-NMSC-067, ¶¶ 3, 20-21. The answer brief states correctly that *Breit* itself involved prosecutorial misconduct, but it offers no arguments about why a different standard should apply to judges than to prosecutors. It does not explain why *Breit*'s reasoning would not apply equally to judges. And it does not cite any cases in which a jurisdiction imposed different double jeopardy rules on judicial misconduct than on prosecutorial misconduct.

Applying a more protective rule to prosecutors than to judges would be illogical. A defendant should not be *less* protected against improper conduct from a judge, who is supposed to be a neutral party who protects the rights of the accused and the integrity of the justice system. **[*See* Part I above; BIC 17-18]** Courts overwhelmingly treat the bar to retrial as a single standard, regardless of whether it involves misconduct by a prosecutor, a judge, or another official. **[*See generally* BIC 13-16]** This Court should do the same and apply the *Breit* rule, just as it would to a prosecutor.

B. Other cases in which courts did not apply Breit *do not affect whether* Breit *applies in this case.*

The answer brief argues that "in other jurisdictions where a defense attorney refused to participate, there has been no bar to retrial based on the conduct of the judge." **[AB 24]** There are two problems with this argument.

First, in the cases cited by the answer brief, it does not appear that the defendants sought a bar on retrial. The issue was not before the courts. "[C]ases are not authority for propositions not considered." *Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 1972-NMSC-076, ¶ 23, 84 N.M. 343, 503 P.2d 323.

Second, when those cases were decided, the jurisdictions in which they occurred applied *Kennedy* or a similar rule. None of them applied heightened protections similar to those of *Breit*, 1996-NMSC-067.[2]

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[2] *State v. Brooks*, 452 So.2d 149 (La. 1984), was decided after *Kennedy*, and Louisiana continues to use the *Kennedy* "goading" standard. *See State v. Amato*, 96-0606, p. 13 (La. App. 1 Cir. 6/30/97); 698 So. 2d 972, 984; *State v. Nixon*, 51,319, pp. 20-21 (La. App. 2 Cir. 5/19/17); 222 So. 3d 123, 135; *State v. Sizemore*, 2013-529, pp. 3-4 (La. App. 3 Cir. 12/18/13); 129 So. 3d 860, 864-65; *State v. Jackson*, 2005-1281, p. 8 (La. App. 4 Cir. 11/29/06); 947 So. 2d 115, 121.

At the time of *State v. Lamoreaux*, 525 P.2d 303 (Ariz. Ct. App. 1974), Arizona barred retrial only after "judicial or prosecutorial impropriety or overreaching designed to avoid an acquittal." *City of Tucson v. Valencia*, 517 P.2d 106, 109 (Ariz. Ct. App. 1973). Arizona later adopted a *Breit*-like standard. *Pool v. Superior Court In and For Pima County*, 677 P.2d 261 (Ariz. 1984) (in banc).

When *People v. McKenzie*, 668 P.2d 769 (Cal. 1983), was decided, California used the *Kennedy* standard. *People v. Valenzuela-Gonzales*, 241 Cal. Rptr. 114, 117 (Ct. App. 1983). California subsequently adopted a different standard. *People v. Batts*, 68 P.3d 357 (Cal. 2003).

The briefs have cited only one case that both came from a jurisdiction with stronger double jeopardy protections than *Kennedy* and involved a judge pushing forward with trial despite knowing that the defendant was unrepresented. In that case, *Crim*, 294 N.E.2d at 829-30, the appellate court held that retrial was barred.

The answer brief also points to *State v. Henderson*, 1998-NMSC-018, 125 N.M. 434, 963 P.2d 511, a judicial misconduct case in which the remedy was retrial. **[AB 24-25]** But *Henderson* does not undercut the application of *Breit* to Mr. Hildreth's case. First, as with the out-of-state cases, it does not appear that the parties in *Henderson* made a *Breit* argument; the case does not mention *Breit* or double jeopardy. *See generally Henderson*, 1998-NMSC-018.

Second, not all judicial or prosecutorial misconduct bars retrial. *Breit* imposes a three-prong test. *Breit*, 1996-NMSC-067, ¶ 32. "[I]mproper official conduct [that] 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" is the first of three prongs of the *Breit* test. *Id.* If an official's conduct meets only that first prong, then retrial is *granted* but not barred, even if the misconduct is quite bad.

In order for the double jeopardy bar of Article II, Section 15 to apply under *Breit*, the other two prongs must be met: the official must know that the conduct is

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Finally, *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984), was a federal habeas case, so it applied *Kennedy* rather than a state rule.

improper and prejudicial, and the official must act in willful disregard of the resulting mistrial, retrial, or reversal. *Breit*, 1996-NMSC-067, ¶ 32. *Breit* requires that the official know his actions are improper and do them anyway, willfully disregarding the risk of reversal. It is not clear whether that was the case in *Henderson*, 1998-NMSC-018, but it is the case here. **[*See* BIC 29-37]**

C. Applying Breit *here would not incentivize bad behavior, because courts have the means to address unethical or unprofessional conduct by attorneys.*

The answer brief discusses the possibility that barring retrial in this case could create the possibility of moral hazard. **[AB 26-27]** The brief suggests that defense attorneys could force a continuance by threatening not to participate, or that they could conspire with defendants to force a mistrial and then bar retrial by refusing to participate. **[*Id.*]**

In considering whether to reverse a conviction based on similar facts, the Court of Appeals for the Sixth Circuit held that it was "unwilling to assume that members of the bar will cold-bloodedly adopt the bizarre and irresponsible strategem of abandoning clients at trial." *Martin v. Rose*, 744 F.2d 1245, 1251 (6th Cir. 1984). Mr. Seeger refused to participate in trial once in a long career, and the record suggests that he was sincere in his protests that he could not represent Mr. Hildreth effectively. Any attorney who used non-participation as a regular

courtroom tactic could expect to face serious consequences from the trial court, the disciplinary board, and this Court.

It would be a major ethical breach for an attorney to deliberately abstain from trial in order to create a favorable appellate issue. *See* Rule 16-101 NMRA ("A lawyer shall provide competent representation to a client."). Similarly, a lawyer may not trick the court into mistrying a case and then barring retrial. *See* Rule 16-804(C) NMRA (a lawyer may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); Rule 16-303(A)(1) NMRA (a lawyer may not knowingly make a false statement of fact to a tribunal). If any attorney attempted to manipulate the court in this way, the court could sanction the attorney through its contempt power or through disciplinary proceedings. **[*See* BIC 21-22]** Courts are not powerless to deal with unethical attorneys.

Furthermore, if a lawyer were using non-participation strategically, the court could also address the situation by speaking directly to the defendant. The Sixth Circuit suggested that the trial court "question the defendant to determine whether he understands the implications and consequences of the attorney's proposed tactic and agrees to waive his right to effective assistance of counsel at trial." *Martin*, 744 F.2d at 1251-52. The First Circuit has also advised that courts in this situation should "address the defendants directly, explain the choices available to them, warn them of the consequences, and, if possible, obtain a clear answer on the

record as to the course they wish to pursue." *United States v. Lespier*, 558 F.2d 624, 630 (1st Cir. 1977).

The point of this advice and questioning would be to assess whether the defendant knowingly and intelligently waived his right to effective counsel. *See* Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. Rev. L. & Soc. Change 425, 429 n.27 (2004) (analogizing the "inquiry" required in this case to a hearing under *Faretta v. California*, 422 U.S. 806 (1975)); *Grogan*, 2007-NMSC-039, ¶ 10 (citing Benson-Amram article). If the defendant truly wanted to proceed with a non-participating attorney, the court could allow it. *See Martin*, 744 F.2d at 1251-52; *Lespier*, 558 F.2d at 630-31.

Moreover, the tactics suggested by the answer brief are easy to defuse entirely. An attorney could not create a *Breit* issue by refusing to participate unless the judge pushed forward with trial. A judge could resolve the situation by simply sanctioning or removing the attorney and resetting the trial.

CONCLUSION

The most troubling aspect of this case, and the reason retrial should be prohibited, is that Judge Aragon not only violated Mr. Hildreth's right to counsel, but did so in willful disregard of the likely reversal on appeal. There were many steps Judge Aragon could have taken that would have shown he was trying, in good faith, to protect Mr. Hildreth's right to counsel. If Judge Aragon had tried to find out whether Mr. Hildreth agreed with Mr. Seeger's non-participation, or if he had asked the parties to brief whether he could go forward with trial under the circumstances, or if he had cited any authority for his decision to proceed, or even if he had reconsidered that decision after the trial, it might suggest that he was concerned with Mr. Hildreth's rights and grappling with how to protect them. But the record is bare of any of these indications of concern. Instead, the record shows that Judge Aragon realized that Mr. Hildreth was essentially unrepresented and proceeded anyway, ignoring the risk of reversal.

For the reasons set out above and in his brief-in-chief, Mr. Hildreth asks this Court to hold that retrial would violate Article II, Section 15 of the New Mexico Constitution.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that on December 20, 2019, a copy of this pleading was uploaded to Odyssey File & Serve for service on Emily C. Tyson-Jorgensen in the Office of the Attorney General.

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