**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**No. S-1-SC-37558**

**STATE OF NEW MEXICO,**

**Plaintiff-Respondent,**

**v.**

**HENRY HILDRETH JR.,**

**Defendant-Petitioner.**

**ON CERTIORARI TO THE NEW MEXICO COURT OF APPEALS**
**Original Appeal from the Eleventh Judicial District Court**
**McKinley County, New Mexico**
**The Honorable Robert Aragon**

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# STATE OF NEW MEXICO'S ANSWER BRIEF

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## SUMMARY OF PROCEEDINGS

## INTRODUCTION

Defendant's attorney, Steven Seeger, refused to participate in his trial and intentionally denied him effective assistance of counsel. Following his conviction, Defendant appealed to the Court of Appeals and the State conceded that he did not receive assistance of counsel, so a new trial was required. The Court of Appeals agreed that Steven Seeger was per se ineffective and remanded for a new trial. The Court rejected Defendant's other argument that retrial should be barred based on the conduct of Judge Aragon, the district court judge who oversaw the trial. Defendant petitioned this Court for certiorari review on this issue.

Defendant asks this Court to extend the double jeopardy bar to retrial based on prosecutorial misconduct announced in *State v. Breit*, 1996-NMSC-067, 122 N.M. 665, to judges. Currently, *Breit* does not apply to judges and, even if this Court were to extend this rule to judicial conduct, it cannot extend to intentional conduct by defense counsel for the purpose of provoking a mistrial. Because Judge Aragon committed no misconduct that would necessitate a mistrial or a new trial, Defendant's new trial is not barred.

## STATEMENT OF FACTS

### Pre-Trial Proceedings

On July 11, 2016, Steven Seeger ("Seeger") entered his appearance as defense counsel in this case. **[RP 31]** Following a waiver of preliminary hearing or presentment to a grand jury, Defendant was charged by Criminal Information with aggravated battery against a household member (no great bodily harm), unlawful taking of a motor vehicle, aggravated battery of a household member (great bodily harm), and attempted kidnapping. The Criminal Information indicated that the State would have called Darlene Benally, Officer Joshua Riley, and Ryan Mitchell as witnesses at the preliminary hearing. **[RP 1, 6]** Defendant's arraignment took place on October 21, 2016 with Seeger appearing as his counsel. **[RP 51-2]** On October 24, 2016, the court scheduled Defendant for a three day jury trial starting March 14, 2017. **[RP 54]**

On March 1, 2017 the State filed its witness list, which included Darlene Benally, Officer Riley, and Ryan Mitchell, all of whom were listed in the Criminal Information. **[RP 1, 64]** The State also filed a notice of disclosure, stating that all evidence in its possession was available to Defendant. **[RP 65]** On March 10, 2017, Seeger filed a motion to continue the jury trial. **[RP 71-2]** In this motion, he asserted that: (1) the case had been assigned to three different prosecuting attorneys, all of whom made different representations regarding pleas; (2) the State

filed its disclosures and witness list late; (3) the State disclosed a video on March 9, 2017, which defense counsel had not yet had the chance to review; (4) Defendant had several witnesses he "may wish to call" but had "not yet done his Disclosure and witness [sic]"; and (5) to "force the undersigned to go to trial on March 14, 2017 would deny the Defendant effective assistance of counsel and thereby deny him his 6th Amendment to counsel [sic]." **[RP 71-2]** The State responded to this motion and opposed the continuance, pointing out that Defendant did not obtain the State's position before filing the motion, he had rejected the State's plea offer, and that the disc is question was not in control of the State until March 9, 2017, which is when it was disclosed to defense counsel. **[RP 77-8]**

Also on March 10, a pre-trial hearing was held. Judge Aragon denied Defendant's motion for a continuance. **[03/10/17 CD 09:50:34-09:51:01]** Upon denial of this continuance, defense counsel informed the court: "I will not be ready, your honor. I will not participate in the trial, I will be present but I will not participate." **[Id.]** The judge informed him that trial would remain scheduled and Seeger again represented that he would not be ready. In response, Judge Aragon said: "If that is true, then [Defendant] would have an excellent grounds for appeal on incompetency of counsel." Seeger agreed, saying, "Absolutely. I will not participate." **[Id. 09:51:01-18]** Judge Aragon then pointed out that the notice for the trial had been sent on October 24, 2016 (more than four months before this

hearing). **[Id. 09:51:21-26]** Defense counsel argued that the State made its disclosures late and had not acted diligently in prosecution. He again asked for a continuance so that the case could potentially be resolved through plea agreement. But defense counsel told the court that his schedule was so busy that there was no way there could be a resolution before the scheduled trial. **[Id. 09:51:26-09:53:21]**

The following exchange then took place:

> Judge Aragon: Well, Mr. Seeger, I've known you for years. I know you are an extremely competent and diligent attorney and it is precisely because of the potential arisal [sic] of contingencies such as you have just described that notice of trial in these cases [is] sent out far in advance of the date. My schedule cannot accommodate this case being placed number one on next month's docket. It's very simple.
>
> Seeger: I'm not gonna do a C-minus job on the trial on Tuesday.
>
> Judge Aragon: 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.
>
> Seeger: That's my plan.
>
> Judge Aragon: Well, that's not a good plan. And you didn't solicit my opinion but I will offer it out of admiration of your past work and friendship with you personally. That's not a good plan. If they have not made timely discovery or they are completely unorganized downstairs you can raise those matters by motion in limine. And I will hear you out on that before we commence trial on Tuesday.

**[Id. 09:53:21-9:54:51]**

The formal order denying Defendant's motion to continue made the following relevant findings: (1) the notice of trial was mailed on October 24, 2016,

(2) the motion for a continuance was filed "one work day before scheduled commencement of trial," and (3) "Defendant had abundant time to prepare for trial." **[RP 178]**

On March 13, 2017, defense counsel filed a "Motion for Sanctions for Failure to Timely Comply with Discovery Rules." In this motion, he asked that witnesses be suppressed due to late filing of the witness list and late disclosure of a video. **[RP 79-80]** The State responded that the witness list, although it was filed outside the time limits, included only individuals who were already listed in the incident report and witness statements provided to the defense on June 30, 2016. **[RP 81]** The State indicated that the disc disclosed on March 9, 2017 was outside the control of the State and was disclosed as soon as it was received. **[RP 82]** Finally, the State requested that, if any sanctions were imposed, the court should continue the trial instead of suppressing witness testimony. **[RP 83]**

**Defendant's Trial**

On the morning of Defendant's trial, Seeger renewed the motion to continue and asked that the court address his motion for sanctions for failure to comply with discovery timelines. **[03/14/17 CD 09:04:09-37]** Seeger said that he was short two support staff and, when Judge Aragon told him that he had already ruled on the motion to continue, Seeger responded: "I'm taking the same position today that I did Friday. I will be here but I'm not participating." **[Id. 9:04:38-9:05:05]**

In his argument for sanctions, Seeger informed the judge that, in addition to the State's aforementioned late disclosures, "in the last ten days or so" one of the contract attorneys for the public defender's office died suddenly. Seeger represented that, as the managing attorney for the Gallup office, he spent a "good portion of last week" reassigning counsel and determining conflicts. Over the weekend, he had gone to his colleague's viewing and then spent the rest of his weekend reassigning files. **[Id. 9:07:33-9:08:30]** Judge Aragon did not impose Seeger's requested sanctions, informing him that if he felt he was being "deprived of information" he should have filed the motion earlier, and that there was no showing of prejudice based on the late disclosures or changes in prosecutors. **[Id. 09:16:52-09:17:57]**

During voir dire, Seeger told the panel: "It is with a heavy heart that I announce the following: I advised Judge Aragon that I was not prepared to go to trial." At this point Judge Aragon cut him off and told him that was improper commentary to the jury that would not be allowed, to which Seeger responded: "Thank you." **[Id. 9:49:07-20]** Judge Aragon cautioned the jury: "You are to ignore anything that 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 [sic] the emotion with which it was presented to you." **[Id. 9:49:21-40]**

After voir dire, Seeger did not participate in challenges to potential jurors. Whenever Judge Aragon requested Seeger's position on the State's challenges for cause, he responded: "No comment." **[Id. 10:00:54-10:06:48]** When asked if he had any challenges for cause, Seeger responded: "No comment." **[Id. 10:06:48-52]** Judge Aragon then noted for the record that Seeger had announced his intention not to participate and that he was assuming that "no comment" was a "rhetorical affirmation of that intention," to which Seeger responded: "Correct." **[Id. 10:06:53-10:07:07]** Seeger did not participate in the remainder of the jury selection. **[Id. 10:08:08-10:19:28]** The selected jurors were sworn in by the bailiff. **[Id. 10:33:54-10:34:16]**

After the jury was sworn, Seeger made his first request for a mistrial, arguing: "My client would move for a mistrial because he's been denied effective assistance of counsel." The judge denied this motion, stating: "He has not been denied effective assistance of counsel. He has been *refused* any assistance of counsel. There's a world of difference there." (Emphasis added.) Judge Aragon clarified that Seeger did not intend to mount a defense and Seeger replied that he was "correct." **[Id. 10:48:07-50]**

When it was Seeger's turn to give an opening statement the following exchange took place:

> Judge Aragon: Mr. Seeger, do you have any comments to make regarding opening statement? I ask you to remember, as an officer of the court, opening statement is reserved to evidence that is going to be presented.
>
> Seeger: I don't know what you mean.
>
> Judge Aragon: I mean the weight of your heart at the moment is of no consequence whatsoever to the duty the jury is intended to perform today.
>
> Seeger: Okay.
>
> Judge Aragon: Proceed if you wish to address the evidence.
>
> Seeger: 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 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.
>
> Seeger: I have nothing further then.
>
> Judge Aragon: You are to ignore the civics lesson which was presumptuously offered by Mr. Seeger.

**[Id. 11:00:49-11:02:13]**

The State's first witness was Darlene Benally, the victim in this case. She testified that, on June 23, 2016, she arrived at the school she worked at early in the

morning. While she was retrieving some mail from her truck, she felt the door of her truck being forcefully pushed into her. She looked and saw that it was being pushed by Defendant, her ex-husband. **[Id. 11:05:24-11:06:27]** He told her to "scoot the fuck over." She asked what he was doing and he took out a belt and said "let me see your hands." He grabbed her hands forcefully. She told him to stop but he kept holding her hands and then tried to grab her keys. She attempted to move to the other side of the truck and he began to grab her leg, neck, and arms. He used so much force that she had bruises afterwards and felt scared. While he was doing this he said he would tie her up and "take her somewhere." She resisted his attempts to tie her – he then grabbed her throat and put his arms around her throat. The entire time, he was telling her: "I'm going to end your life today." **[Id. 11:07:53-11:11:22]** She could not scream or breathe while his arms were on her neck. Once she was able to get him to let go, she opened the door of the truck to crawl out, but he grabbed her pants, ripped them, and threw her back into the truck. **[Id. 11:11:23-11:12:51]**

Defendant was very angry and yelling at her. Defendant told her: "I am going to kill today. I'm tired of you." **[Id. 11:12:53-11:13:50]** She finally managed to get her feet on the pavement and saw her coworker, Ryan Mitchell, walking by in the distance. She screamed "Ryan" as loud as she could and he came over. Defendant took out a knife and told Ryan not to come any closer or else he would

"do it." **[Id. 11:13:51-11:17:24]** Ryan went into the school building and Defendant said: "If I let you go don't tell the police what I did because if you do, I'll come find you, I know where you live." Darlene promised not to say anything and Defendant let her go. **[Id. 11:18:00-11:19:20]**

Judge Aragon asked Seeger if he had any questions for Darlene. He responded: "I assume your response is the same as my response?" When Judge Aragon asked: "Response to what?" Seeger stated: "My position on this case." Judge Aragon confirmed that he knew Seeger's position but was asking if he had any questions to ask Darlene. Seeger replied: "For the reasons that I articulated Friday and before this case commenced, I renew my position." Judge Aragon asked: "So you have no questions?" Seeger said: "I cannot provide effective assistance of counsel, your honor." **[Id. 11:21:04-41]** Judge Aragon then asked a few questions and the State asked some follow-up questions. Judge Aragon asked Seeger if he had any questions as a result of this and Seeger said: "I reaffirm my prior position, your honor." **[Id. 11:21:43-11:22:58]**

Ryan Mitchell testified that he was employed at the same school as Darlene. On June 23, 2016, he arrived at work around 8:00 a.m. **[Id. 11:25:11-11:26:47]** He was walking from his car to the building when he heard Darlene scream his name. He approached her truck and saw that the door was open and saw Defendant and Darlene. **[Id.11:27:53-11:28:33]** When he approached, he saw Darlene being

choked from behind by Defendant. He described this choke as "violent" and said it looked like Darlene was losing consciousness and changing color. He told Defendant to let her go, but when he came close, Defendant choked Darlene tighter. **[Id. 11:29:25-11:31:08]** Defendant told Ryan to "back the fuck off" and that he was saving his son from Darlene. **[Id. 11:32:15-11:35:08]** Ryan took some steps to the right and, as he came back towards the open passenger door, he saw that Defendant had a knife that he was holding it six to eight inches from Darlene. He immediately ran into the building for help. **[Id. 11:36:32-11:37:25]**

After this testimony, Judge Aragon asked Seeger if he had any cross-examination. Seeger replied: "My position's the same as before, is your position the same as before?" Judge Aragon told Seeger it was his turn to ask questions of the witness, not to question the judge, and asked again if he had any cross-examination. Seeger said: "Your honor, I will decline because I don't think I can provide effective assistance of counsel." Judge Aragon stated: "Your declination is noted by the record and the court. Mr. Seeger declines to ask any cross-examination questions of Mr. Mitchell." **[Id. 11:41:00-39]** When asked if he was releasing Mr. Mitchell as a witness, Seeger responded: "No comment." **[Id. 11:42:04-07]**

Following the lunch break, Seeger requested another mistrial, citing ineffective assistance of counsel. **[Id. 01:40:21-01:41:17]** Judge Aragon denied this motion. **[Id. 01:45:37-44]**

The State's final witness was Officer Joshua Riley with the New Mexico State Police. Officer Riley testified that on June 23, 2016, he was called to a domestic incident at the school where Darlene worked. When he arrived, he spoke to Darlene and observed that her pants were torn near her crotch and she had bruising. **[Id. 1:49:15-1:51:33]** The State tried to admit Darlene's torn pants into evidence, but Seeger objected to this admission because the pants were not disclosed by the State prior to trial. Because they were not disclosed, Judge Aragon did not allow the pants into evidence. He also gave an instruction directing the jury to ignore the presentation of the pants. **[Id. 1:52:07-1:53:11, 1:57:39-1:58:54]** When Judge Aragon asked if he had any questions for Officer Riley, Seeger responded: "Your Honor, pursuant to my prior position, I don't feel that I can provide effective assistance of counsel and I have no comment regarding Mr. Riley." Judge Aragon noted for the record that Seeger waived his right to cross-examine Officer Riley. **[Id. 1:59:01-25]**

After the State rested, Judge Aragon asked Seeger if there were any motions he would like to make. Seeger responded: "No comment." Judge Aragon noted that this was a waiver of the right to ask for a directed verdict. **[Id. 2:02:30-54]** When

asked if the defense planned to put on a case, Seeger said he had "planned on potentially disclosing up to four to five witnesses" and that he never had a "meaningful discussion" about a plea agreement. Judge Aragon interrupted to ask if he was going to call any witnesses and Seeger yelled over him: "May I finish?" Judge Aragon told him "no" because he was not answering the question. Seeger again said he intended to call undisclosed witnesses, so Judge Aragon concluded that he did not intend to call anyone. **[Id. 2:02:55-2:03:44]** When the jury returned, Judge Aragon told the jurors that the State had rested its case. He continued, saying: "The defense may present a case but they are not required to. The burden of proof as to guilt beyond a reasonable doubt always rests with the State, so the defense is not required to present any witnesses or exhibits of their own. Mr. Seeger informs me that he is not going to present any witnesses." **[Id. 2:05:11-33]**

At the conference on jury instructions, Seeger stated that he had not prepared any jury instructions and was not prepared for the trial. **[Id. 02:37:54-02:38:07]** He also expressed concern about the judge's "bias" in this case, to which the judge responded: "I cannot help that Mr. Seeger. You seem to be troubled by a number of things, namely your obligation to abide by your oath and defend the people that you take as clients." Seeger said he was trying to comply with his "oath" and "duties" to provide effective assistance of counsel and that the judge was not

giving any "credence [to his] representations of unpreparedness." Judge Aragon urged Seeger to report him to judicial standards so that an "objective, impartial body" could determine if he was biased. He continued: "I profoundly resent you making an unfounded accusation like that against me." **[Id. 02:38:13-2:39:00]** The discussion of jury instructions continued, and Seeger briefly participated when he inquired as to a step-down instruction, which was ultimately included in the jury instructions by the judge. **[Id. 03:04:05-22; 03:07:18-20; 03:11:01-41]**

Before closings, Seeger renewed his motion for a mistrial, arguing that "because the continuance was denied" he was unable to subpoena or disclose witnesses. He also stated that Defendant received ineffective assistance of counsel because the way the trial proceeded. Judge Aragon denied the motion and responded that if Seeger knew his witnesses, he could have subpoenaed them for trial. **[3/15/17 9:16:44-9:17:50]**

During the State's closing argument, Seeger objected because the prosecutor was expressing his personal opinion about the evidence. Seeger asked for, and received, a curative instruction. **[Id. 9:44:35-9:45:33]** After the State's closing, Judge Aragon asked Seeger if he intended to "exercise [his] opportunity to argue the evidence that has been presented." Seeger responded: "Your Honor, as stated before, I think given the circumstances I cannot provide effective assistance of counsel." Judge Aragon stopped him and told him that was not evidence and "if

you don't intend to argue the evidence, please return to your seat." **[Id. 9:48:30-48]** The jury returned a guilty verdict for aggravated battery against a household member with great bodily harm. **[RP 137]** Defendant was acquitted of unlawful taking of a motor vehicle. **[RP 136]**

**Post-Trial Proceedings**

Following Defendant's guilty conviction, the Court issued an order for a presentence report. This order was filed on March 21, 2017 and indicated that Seeger did not respond regarding his position on this order. **[RP 175-6]** At the conclusion of Defendant's sentencing hearing, Judge Aragon sentenced him to three years in prison, followed by two years of parole. **[6/2/17 CD 11:40:12-11:41:04, 11:42:12-11:43:01]** On September 6, 2017, a judgment and sentence was filed, but Seeger did not provide any response to this submission. **[RP 190-2]** On September 15, 2017, Defendant filed a motion requesting a reduction of sentence. In this motion, he stated that he followed the direction of the first prosecutor assigned to the case and entered counseling, he complied with all conditions of release, had family support, and his child would be negatively affected by his incarceration. **[RP 195-6]** This motion was denied by the court on September 25, 2017. **[RP 201]**

**The Appeal and the Court of Appeals' Decision**

On appeal, the State conceded that Defendant was denied his Constitutional right to the effective assistance of counsel. *State v. Hildreth*, 2019-NMCA-047, ¶ 5, 448 P.3d 585. The Court of Appeals agreed and reversed Defendant's convictions, finding that his defense counsel's choice "rose to the level of a constructive denial of counsel sufficient to create a presumption of prejudice." *Id.* ¶ 14. The Court then addressed the "unusual and unseemly situation occasioned by Seeger's adamant refusal to provide his client with a defense in a felony trial and this district judge's decision to proceed with such a 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.

First, the Court found that Seeger's conduct "violated [his] constitutional responsibility to his client and his duty to the tribunal for which, as a licensed attorney, he serves as an officer." *Id.* Then, the Court provided guidance to district courts for how to deal with a similar situation in the future, and made the following recommendations: (1) "order new counsel to represent the defendant," (2) "impose a sanction on the culpable attorney while at the same time granting a continuance," and (3) invocation of "contempt powers against the obstructionist attorney." *Id.*

The Court of Appeals also held that retrial was not barred by double jeopardy and disagreed with Defendant's contention that Judge Aragon's conduct

satisfied the *Breit* test. *Id.* ¶¶ 17-18. The Court explained that, in *Breit*, the prosecutor's "pervasive, incessant, and outrageous" misconduct was apparent from "opening statements to closing arguments." *Id.* ¶ 19. The Court then determined that *Breit* had "no bearing on this case" because, even if *Breit* were to be extended to judicial conduct, "the district court judge here acted appropriately and appeared impartial throughout the proceedings." *Id.* ¶ 20. The Court found "no instance in which the district judge's tone of voice sounded inappropriate or improper," that he "did not raise his voice," and "kept his commentary on Seeger's actions to a minimum in front of the jury." *Id.* He repeatedly gave Seeger "the opportunity to change course and participate in the trial proceedings" at every opportunity, and Seeger replied with either "no comment," refusing to participate, or by "improperly commenting on the right to counsel." *Id.*

The Court of Appeals determined that Judge Aragon was not "dismissive" or "biased" but, instead, "was responding to Seeger's repeated attempts to argue that he was ineffective as counsel, a legal matter wholly inappropriate for the jury to consider." *Id.* Further, he tried to ensure that Seeger could participate appropriately by reminding him to "confine himself to discussing the evidence" in opening and closing arguments. *Id.* The judge also reminded the jury multiple times that the "State had the burden of proof." *Id.* Finally, the Court found that Judge Aragon did not act in "willful disregard" of a reversal, but instead "made every attempt to have

Seeger participate and defend his client, all to no avail." *Id.* Because the Court of Appeals found no misconduct, it refused to extend *Breit* to judicial conduct and found that double jeopardy did not bar retrial. *Id.*

## ARGUMENT

### I. THE FEDERAL *KENNEDY* RULE DOES NOT BAR DEFENDANT'S RETRIAL

Federally, if a prosecutor engages in misconduct, double jeopardy bars a new trial "[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). *Kennedy* dealt with prosecutorial misconduct, but Justice Stevens' recognized in his concurring opinion that "the exception also encompasses comparable judicial misconduct." *Id.* at 683 n. 12 (Stevens, J., concurring in the judgment).

Defendant refers to multiple cases decided before *Kennedy* wherein bad faith conduct by a judge barred retrial of a defendant. **[BIC 13-16]** *See United States v. Dinitz*, 424 U.S. 600, 611 (1976) (retrial barred when judge or prosecutor engages in bad-faith conduct); *Gori v. United States*, 367 U.S. 364, 369 (1961) (recognizing judicial misconduct when a judge "exercises his authority to help the prosecution"); *United States v. Tateo*, 377 U.S. 463, 468 n.3 (1964) (retrial would have been barred if prosecutorial or judicial conduct resulting "from a fear that the

jury was likely to acquit the accused" caused a mistrial); *State v. Rathbun*, 600 P.2d 392, 393-4, 398 (Or. 1979) (retrial barred when bailiff made comments to jurors regarding the judge's sentencing habits and the "criminal element of society").

Defendant also cites *Crim v. State*, 294 N.E.2d 822, 823 (Ind. Ct. App. 1973), where the defendant's attorney did not show up on the day of trial. When asked where his attorney was, the defendant informed the court that he thought his attorney had withdrawn and requested that counsel be appointed. *Id.* at 823-4. Both the trial court and the prosecutor stated that this request was too late and the defendant must move forward to trial. *Id.* at 826. The Indiana Court of Appeals barred retrial because defendant was coerced into trial without counsel, which violated his constitutional rights. *Id.* at 830. None of these cases are comparable to Defendant's case because neither the judge nor the prosecutor denied him counsel. Instead, it was his own counsel who refused to represent him.

Defendant then argues that the *Kennedy* rule has been applied to judges, and cites *Butler v. State*, 95 A.3d 21 (Del. 2014), as an example. In *Butler* the trial judge severely limited her schedule for trial following jury selection, asked additional questions of jurors after the jury was sworn, excused all but 12 jurors, and continually urged the parties to plea. *Id.* at 27-31. The *Butler* court found that

these "improper actions, taken together, goaded defense counsel into doing what [the judge] wanted," so retrial was barred. *Id.* at 39-40.

Defendant does not cite any New Mexico case in which a judge's conduct barred retrial under the *Kennedy* standard, and this Court should therefore assume that "counsel after diligent search, was unable to find any supporting authority." *Matter of Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764. Regardless, he does not argue that Judge Aragon "goaded" him into moving for a mistrial. To the contrary, Judge Aragon afforded Seeger every opportunity to defend his client and there is no evidence that any of his rulings were made in bad faith. He did not "goad" Defendant into moving for a mistrial and at no time utilized his position to help the prosecution. Therefore, Judge Aragon's conduct does not meet the *Kennedy* standard.

## II. *BREIT* IS LIMITED TO PROSECUTORIAL MISCONDUCT

In response to a prosecutor's "pervasive and outrageous" misconduct during a murder trial, this Court expanded upon the *Kennedy* rule in *State v. Breit*, 1996-NMSC-067, ¶ 3, 122 N.M. 655, to better protect the double jeopardy interests of defendants. The appendix to *Breit* outlines the prosecutor's misconduct, which included attempts to inflame the jury, a reference to evidence that would not come in at trial, sarcastic responses to objections, improper argument, sneering, rolling of eyes, and exaggerated expressions. *Id.* ¶¶ 57-67. Because this conduct was not

specifically meant to cause a mistrial, this Court concluded that the *Kennedy* bar against retrial would not apply. *Id.* ¶ 2. To address the issue of a prosecutor who engages in severe misconduct but does not intend to cause a mistrial, this Court stated:

> We therefore adopt the following test … when a defendant moves for a mistrial, retrial or reversal *because of prosecutorial misconduct*: 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.

*Id.* ¶ 32 (emphasis added).

Defendant argues that, "[o]n its face, *Breit* applies to 'improper official conduct' and is not limited to prosecutors." **[BIC 17]** This is incorrect. As shown above, the sentence directly preceding the test set forth in *Breit* applies only to instances of prosecutorial misconduct. The Court of Appeals tacitly recognized that *Breit* does not apply to judges when it declined "Defendant's invitation to *extend* *Breit* to judicial conduct." *Hildreth*, 2019-NMCA-047, ¶ 20 (emphasis added).

**a. Judge Aragon did not commit judicial misconduct.**

Defendant urges this Court to apply *Breit* to judicial conduct. **[BIC 17]** To extend *Breit* as Defendant requests, there must be a threshold showing of judicial misconduct. Here, there was none.

Judge Aragon was faced with a defense attorney who was frustrated that he did not receive a continuance. Instead of participating to the best of his ability in the trial, Seeger decided to completely abandon his client and defy the ruling of the district court. By refusing to participate, he no doubt intended to force the judge into granting his continuance or force a mistrial based upon his own behavior. Judge Aragon, when faced with a defense attorney who was simultaneously arguing that Defendant was entitled to effective assistance of counsel and refusing to provide such assistance, tried to ensure Defendant's right to counsel by offering Seeger every opportunity to participate. The Court of Appeals recognized this in its decision, stating that "the district court judge here acted appropriately and appeared impartial throughout the proceedings." *Hildreth*, 2019-NMCA-047, ¶ 20.

When there is "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. Defendant argues that "[w]hen a judge abdicates this responsibility, the defendant faces the ordeal of successive prosecutions and improper convictions just as surely as he would in the face of prosecutorial misconduct." **[BIC 18]** Defendant presents no evidence that his conviction was improper. Further, Judge Aragon did fulfill his responsibility to inquire into representation. Seeger was intentionally and clearly refusing to participate in the trial. Nevertheless, Judge Aragon asked him multiple

times if he was going to participate in the trial and, at every opportunity, gave him the ability to defend his client. Seeger's behavior directly violated his obligation to provide Defendant with competent representation under Rule 16-101 NMRA and qualified as misconduct. *See* Rule 16-804 NMRA (it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice").

The Louisiana Supreme Court recognized that a defense attorney's refusal to represent his client "may be subject to some type of sanction" if the "lawyer's intentional lack of participation was a ploy to force the continuance." *State v. Brooks*, 452 So.2d 149, 157 (La. 1984). Additionally, an attorney was publicly condemned by the Arizona Court of Appeals for refusing to represent his client and was referred by the court to the State Bar of Arizona for "such investigation and action as it may deem appropriate." *State v. Lamoreaux*, 22 Ariz. App. 172, 175, 525 P.2d 303 (1974). This Court also recognized in *Breit* that a prosecutor's intent to force a mistrial via prejudicial misconduct is "a violation of professional standards that can lead to disbarment or other discipline." *Breit*,1996-NMSC-067, ¶ 22 (favorably quoting *State v. Kennedy*, 295 Or. 260, 275, 666 P.2d 1316 (1983)). The same must also be true of a defense attorney's conduct.

Defendant argues that Seeger "had no ability to stop the trial, and he believed that without a continuance, he could not provide effective assistance of counsel to [Defendant] whether he participated in the trial or not," so he "sat out

the trial to call attention to its unfairness." **[BIC 28]** But Seeger *did* have other options. He could have built a "careful record" to demonstrate that he was "compelled to proceed with a case in which he was unprepared," and provided Defendant with counsel while preserving his ineffectiveness claim for appeal. *People v. McKenzie*, 34 Cal. 3d 616, 632, 668 P.2d 769 (1983), *abrogated on other grounds by People v. Crayton*, 28 Cal. 4th 346 (2002).

Finally, in other jurisdictions where a defense attorney refused to participate, there has been no bar to retrial based on the conduct of the judge. *Brooks*, 452 So.2d at 153-7 (defendant's conviction reversed and remanded for a new trial when defense counsel was denied a continuance and refused to participate in the trial); *Lamoreaux*, 22 Ariz. App. at 173-75 (defendant's attorney filed a motion for a continuance because he needed to interview witnesses and filed a motion to suppress evidence. When this continuance was denied, defense counsel refused to participate and "remain[ed] mute at the counsel table" throughout trial. The case was reversed and remanded for a new trial); *McKenzie*, 34 Cal.3d at 623, 637 (reversing and remanding for a new trial when defense counsel actively refused to participate); *Martin v. Rose*, 744 F.2d 1245, 1247, 1252 (6th Cir. 1984) (new trial ordered when defense counsel refused to participate in trial after his motion for a continuance and speedy trial motion were denied). Even in *State v. Henderson*, 1998-NMSC-018, ¶¶ 4-5, 7, 10-14, 20, 125 N.M. 434, where the judge made

repeated, improper comments to the jury about the judicial system, the case, the legislature, the potential sentence of the defendant, the defense attorney, and witnesses, this Court's remedy was to reverse and remand for a new trial. Although Judge Aragon did have other courses of action available to him, his actions in this case do not rise to the level of misconduct contemplated by *Breit*.

**b. If this Court were to extend *Breit* to judicial conduct, Judge Aragon's conduct does not satisfy all prongs of the *Breit* test.**

"Raising the bar of double jeopardy should be an exceedingly uncommon remedy." *Breit*, 1996-NMSC-067, ¶ 35. Judge Aragon's actions do not necessitate raising this bar or the expansion of the rule announced in *Breit* to judicial conduct. Claims of prosecutorial misconduct under the *Breit* standard present a "mixed question of law and fact," and appellate courts defer "to the district court when it has made findings of fact that are supported by substantial evidence and reviews de novo the district court's application of law to the facts." *State v. McClaugherty*, 2008-NMSC-044, ¶ 39, 144 N.M. 483. Here, the claims of misconduct relate to Judge Aragon himself and were not raised before the district court, so review is de novo.

**i. Judge Aragon's actions did not necessitate a new trial or mistrial.**

The first prong of *Breit* is that the "improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or

motion for a new trial." *Breit*, 1996-NMSC-067, ¶ 32. Here, Judge Aragon was faced with the difficult and unexpected circumstance of an experienced defense attorney who was raising his client's right to counsel while simultaneously denying him this very right. Defendant argues that Judge Aragon was required to step in "as soon as it became apparent to Judge Aragon that Mr. Seeger was not going to represent [Defendant] at trial" and that, once the trial began "there was no way to cure the violation of the right to counsel other than a mistrial or new trial." **[BIC 20, 24]** But Judge Aragon did step in and try to ensure that Defendant received a fair trial. *See Hildreth*, 2019-NMCA-047, ¶ 20 (discussing Judge Aragon's repeated attempts to have Seeger participate and attempts to "mitigate Seeger's inaction in the eyes of the jury").

Most importantly, the action that necessitated the new trial or mistrial was that of Seeger. Although this was clearly a strategy on the part of Seeger to force a continuance or a mistrial, it does not make his representation any less deficient. Seeger ignored his duty to "respectfully yield to the rulings of the court, *whether right or wrong*." *McKenzie*, 34 Cal. 3d 616, 632 (emphasis in original, internal quotation omitted)

There is no way to know when it "became clear" that Seeger would not actually represent his client. Prior to trial, this was a threat to Judge Aragon in an attempt to force his hand. If this were the standard, then any defense attorney who

did not receive a continuance or favorable ruling could force a continuance by threatening to not participate. If, instead, the standard were that, once trial started it was the judge's duty to declare a mistrial based on defense counsel's non-participation, this would beg the question: at what point has defense counsel fulfilled his promise to be ineffective? Also, this could create a situation wherein defense counsel and the defendant enter into a trial strategy to force a mistrial based on non-participation of counsel and then bar a new trial because the judge did not stop the initial trial soon enough.

Defendant argues that Judge Aragon could have imposed sanctions, such as granting the continuance with an admonition to Seeger for not calling his witnesses earlier. **[BIC 21]** But Seeger had several months to disclose his witnesses and, even when asking for the continuance, never disclosed who these potential witnesses were. Defendant also suggests that Judge Aragon could have ordered Seeger to participate, held him in contempt, or removed Seeger as counsel. **[BIC 21-22]** Although these were options available to Judge Aragon, the mere fact that he did not exercise them does not import Seeger's misconduct to Judge Aragon. Ultimately, it was Seeger's actions that deprived Defendant of his right to counsel, resulting in the necessity of a new trial or mistrial, not any action by Judge Aragon. Thus, the first prong of *Breit* is not satisfied.

### 1. Judge Aragon did not act improperly in front of the jury.

Defendant makes an additional argument that his retrial should be barred under the first prong of *Breit* because the jury witnessed "tense, fraught, interactions between Judge Aragon and [Seeger]." He states that the jury saw Seeger refuse to ask questions and then, when he told the jury he was unprepared, Judge Aragon "interrupt[ed] and talk[ed] over him." **[BIC 24]**

Defendant claims that Judge Aragon stepped over the boundary imposed upon judges that they 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. He additionally claims that Judge Aragon's comments to the jury were "categorically improper" and that he acted inappropriately when he called Seeger's actions "presumptuous." **[BIC 26]** Defendant relies upon *State v. Henderson*, 1998-NMSC-018, ¶¶ 10-12, 125 N.M. 434, for his claim that a judge's statements about defense counsel may necessitate a new trial. In *Henderson*, the district judge's comments were pervasive and directed not only at the defense attorney, but also included criticisms of the judicial system, the case, witnesses, and sentencing requirements. *Id.* ¶¶ 4, 7, 10-14. Specifically regarding defense counsel, the judge did the following in front of the jury: (1) told defense counsel he was getting "smart" and not to "go parading around and … mouthing off"; (2) told defense counsel to "pipe down right now";

(3) addressed the defendant and told him that his attorney "misbehaved"; and (4) said that the lawyer needs to "do what he damn well should." *Id.* ¶¶ 10-13. As shown below, none of Judge Aragon's comments rose even remotely to this level of criticism, even though Seeger was making improper argument and ignoring Judge Aragon's direct instructions.

Defendant specifically cites Judge Aragon's comments during voir dire and opening statements. **[BIC 24-25]** He argues that, during voir dire Judge Aragon interrupted Seeger and went beyond telling the panel to ignore Seeger's comments when he added that the potential jurors should not concern themselves with the "emotion with which [the comments] were presented." **[BIC 25]** But this was part of Judge Aragon's admonition to the jury and properly limited the jury to considering only those questions by the attorneys that addressed their qualification to serve as jurors in the case. *See* UJI 14-122 NMRA; UJI 14-120 NMRA (voir dire instructions).

Defendant claims that Judge Aragon was the "most clearly critical" of Seeger during his opening statement. **[BIC 25]** Defendant's brief seems to accuse Judge Aragon of *sua sponte* referring back to Seeger's "heavy heart" comment during voir dire. **[BIC 25]** This is inaccurate. Before Seeger's opening statement, Judge Aragon told Seeger that his opening statement is "reserved to evidence that is going to be presented." It was when Seeger said: "I don't know what you mean"

that Judge Aragon referenced the "weight of [his] heart" being of "no consequence whatsoever to the duty the jury is intended to perform today." **[3/14/17 CD 11:00:49-11:02:13]**

Taken in context, Judge Aragon's comment to Seeger was an attempt to signal what he believed would be improper argument and caution him away from raising anything other than potential evidence at trial. After this warning, Seeger went on to inform the jury about the right to counsel and the Sixth Amendment. Judge Aragon interrupted Seeger, saying that this was an improper argument, and told the jury to "ignore the civics lesson which was presumptuously offered by [Seeger]." **[3/14/17 CD 11:00:49-11:02:13]** Defendant claims that this was improper because Judge Aragon could not denigrate Seeger in front of the jury. **[BIC 26]** Far from denigrating Seeger, Judge Aragon was trying to keep the trial on track and ensure that the jury did not consider irrelevant information. *See* UJI 14-101 NMRA ("The opening statement is simply the lawyer's opportunity to tell you what the lawyer expects the evidence to show").

Defendant also claims that Judge Aragon "unnecessarily declared for the record" that Seeger was refusing to ask questions. **[BIC 25]** These clarifications were not unnecessary. When asked if he wanted to question witnesses, Seeger did not simply say he had no questions. Instead he raised an ineffective assistance of counsel claim, said he "renew[ed his] position," or that he had "no comment."

Judge Aragon's brief notations that Seeger had either waived or declined to ask questions were necessary for clarity of the record and did not involve any comment on the propriety of these decisions. **[3/14/17 CD 11:21:04-41; 11:41:00-39; 1:59:01-25]**

Judge Aragon cut off Seeger or commented on his statements to the jury only when he was forced to do so by Seeger's actions. Defendant claims that "the jury would have noticed the tension between [Seeger] and Judge Aragon and wondered what was going on." **[BIC 26]** The Court of Appeals held that, after listening to "the entire audio recording of the trial … there was no instance in which the district court's tone of voice sounded inappropriate or improper." *Hildreth*, 2019-NMCA-047, ¶ 20. The judge also "did not raise his voice, and he kept his commentary on Seeger's actions to a minimum in front of the jury." *Id.* The State agrees with this characterization and sees nothing in the record that supports Defendant's claim that Judge Aragon "criticiz[ed Seeger] in front of the jury." **[BIC 27]** Because Judge Aragon conducted himself properly, his behavior during trial could not have prejudiced the jury against either Seeger or Defendant.

**ii. Judge Aragon's conduct was not improper or prejudicial.**

The second prong of *Breit* requires that the "official knows that the conduct is improper and prejudicial." *Breit*, 1996-NMSC-067, ¶ 32. As explained above, the only conduct that necessitated a new trial or mistrial was that of Seeger. Judge

Aragon knew that Seeger's conduct was improper, as shown in his multiple statements to Seeger regarding this decision, including that he thought Seeger was not abiding by his oath to "defend the people that [he took] as clients." **[3/14/17 02:38:13-2:39:00]** Defendant makes several claims that Judge Aragon knew Seeger was not participating so he should not have conducted the trial. **[BIC 30-32]** However, it was not Judge Aragon's decision to continue with trial that resulted in the need for a new trial. It was Seeger's violation of Defendant's right to counsel. Therefore, the "knowing" element of *Breit* cannot be applied to Judge Aragon because he did not engage in the misconduct that required a mistrial or new trial.

### iii. Judge Aragon did not act in "willful disregard" of reversal on appeal.

The final prong of the *Breit* test is that the official "intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal." *Breit*, 1996-NMSC-067, ¶ 32. "Willful disregard" requires that the "prosecutor is actually aware, or is presumed to be aware, of the potential consequences of his or her actions," and the term "connotes a conscious and purposeful decision by a prosecutor to dismiss any concern that his or her conduct may lead to a mistrial or reversal." *Id.* ¶ 34. The Court of Appeals determined that Judge Aragon did not "act in 'willful disregard' of an obvious reversal" and that, "[t]o the contrary, the

district court made every attempt to have Seeger participate and defend his client, all to no avail." *Hildreth*, 2019-NMCA-047, ¶ 20. This conclusion is correct because Judge Aragon was not dismissive of the issue created by Seeger's conduct. He consistently gave Seeger the opportunity to defend his client and took extra steps to remind the jury of the "burden of proof and that Defendant was not required to put on any witnesses or make a closing argument." *Id.* ¶ 20. Even without a participating attorney, the jury acquitted Defendant of one of the charges, signaling their recognition that the burden of proof was on the State. **[RP 136]**

The Court of Appeals recognized that Defendant's conviction had "no realistic chance of being upheld on appeal." *Hildreth*, 2019-NMCA-047, ¶ 16. Defendant claims that Judge Aragon knew this, and cites the conversation he had with Seeger prior to trial about Seeger's intention to not participate. **[BIC 32]** But Judge Aragon was not required to take defense counsel's threat to violate his client's constitutional rights at face value. Once the jury selection began and Seeger did not participate, Judge Aragon could have reasonably assumed that, once trial began in earnest, Seeger would fulfill his duty to represent Defendant. Defendant also argues that Judge Aragon could have granted one of Seeger's requests for a mistrial. **[BIC 33]** Although he did not grant these requests, this does not show a "willful disregard" of an ultimate reversal because Judge Aragon continued to ensure that the jury was fully aware that Defendant need not put on a

case. **[3/14/17 CD 2:05:11-33]** If this Court disagrees and finds that Judge Aragon did act in willful disregard of the impending reversal, the other two prongs of the *Breit* test are still not met and, therefore, retrial is not barred. *McClaugherty*, 2008-NMSC-044, ¶¶ 38, 65 (recognizing that retrial is barred only when all three prongs of *Breit* are met).

Defendant's recitation of Judge Aragon's decisions following the verdict are beyond the scope of this analysis. **[BIC 33-36]** The issue here is whether Judge Aragon's conduct was so beyond the pale that it bars a new trial. Indeed, if a new trial were barred based on conduct at trial, any actions taken after the verdict to "limit the damage" would be irrelevant. **[BIC 35]** However, there is nothing in the record showing that Judge Aragon's actions were the underlying cause of any argument for mistrial or the reason that the Court of Appeals granted a new trial. Seeger bears the responsibility for failing to represent Defendant, and Defendant cannot now utilize his counsel's misbehavior to bar a retrial.

## CONCLUSION

There is no disagreement that Defendant was denied his Constitutional right to the effective assistance of counsel and that he should receive a new trial. This denial was accomplished solely by Seeger. Faced with a competent attorney who undermined his denial of a continuance, Judge Aragon took steps to ensure that

Defendant received a fair trial despite the nonparticipation of his attorney. Judge Aragon's actions did not amount to judicial misconduct and do not satisfy any of the prongs of the *Breit* test. Defendant's retrial therefore should not be barred.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2019, I filed a true and correct copy of the foregoing Answer Brief electronically through the Odyssey/E-File system, which caused opposing counsel Caitlin Smith to be served by electronic means at caitlin.smith@lopdnm.us

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