New Mexico Law Review

28 N.M. L. Rev. 151 (Winter 1998 1998)

Winter 1998

State Constitutional Law - New Mexico Rejects Prosecutorial Goading as Test for Double Jeopardy Bar - State v. Breit

Rosario Dyana Vega

STATE CONSTITUTIONAL LAW—New Mexico Rejects Prosecutorial Goading as Test for Double Jeopardy Bar—*State v. Breit*

I. INTRODUCTION

In *State v. Breit*,[1] the New Mexico Supreme Court expanded the state constitutional protection against double jeopardy to prohibit the reprosecution of a defendant when the court grants the defendant's motion for a retrial, mistrial or reversal of a conviction based on prosecutorial misconduct. The supreme court broadened the doctrine beyond the federal approach by applying double jeopardy even if the prosecution did not intend to force the defendant to request a new trial but did act in willful disregard of the defendant's right to a fair trial.[2]

Breit changed the New Mexico double jeopardy law standard as applied to prosecutorial misconduct in criminal cases. Previously, the state rule, which was similar to the federal rule, barred reprosecution in situations where the prosecutor engaged in misconduct intended to precipitate a defense motion for a mistrial.[3] The federal standard requires that a defendant prove that the prosecutor intended to "goad" the defendant through misconduct to move for a mistrial.[4] The *Breit* court chose to afford the defendant more double jeopardy protection by imposing a higher standard under the New Mexico Constitution—in effect eliminating the need for the defendant to prove the subjective intent of the prosecutor as required by the federal standard. Instead of using the "goad" standard, the *Breit* court focused on the prosecutor's "willful disregard" of the defendant's right to a fair trial.[5] This note reviews New Mexico and United States Supreme Court decisions relevant to the issue of prosecutorial misconduct, examines the rationale of *Breit*, and discusses the significance of the *Breit* decision.

II. STATEMENT OF THE CASE

In 1993, a jury convicted Foster James Breit (Breit) of aggravated assault with a deadly weapon and first-degree murder.[6] At the initial trial, Breit and his counsel chose to hear the jury verdict despite their beliefs that the prosecutor had behaved inappropriately throughout the trial.[7] After the jury announced the guilty verdict,

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1. 122 N.M. 655, 930 P.2d 792 (1996). Several opinions were written by various courts during the course of this litigation. Throughout this Note, *Breit* refers to the supreme court opinion, while *Breit Slip Opinion* refers to the district court opinion, State v. Breit, No. CR-88-175, slip op. (N.M. Dist. Ct. Aug. 2, 1990).

2. *See id.*

3. *See* State v. Day, 94 N.M. 753, 617 P.2d 142 (1980), *cert. denied*, 449 U.S. 860 (1980).

4. *See* Oregon v. Kennedy, 456 U.S. 667 (1982).

5. *See Breit*, 122 N.M. at 666, 930 P.2d at 803.

6. *See id.* at 658, 930 P.2d at 795. On September 1, 1988, Foster James Breit went to his neighbor's home, where his estranged wife had moved, to try to persuade her to return to him. Plaintiff-Appellee State of New Mexico's Answer Brief at 8, State v. Breit, 122 N.M. 655, 930 P.2d 792 (1996) (No. 21,954). Breit, who smelled strongly of alcohol, told his estranged wife to pack her belongings, but she refused. *See id.* Before leaving the home Breit told Oscar Hill, who was in the home, that he would be back. *See id.* Hill, making a motion with a gun, told Breit not to return if he had been drinking. *See id.* Later that day, Breit returned with a shotgun and killed Oscar Hill who was sitting in his chair watching television. *See id.* at 9.

7. During the first trial, before the case went to the jury, Breit expressed great concern to the trial judge about the prosecutor's actions and indicated that the only proper solution might be the granting of a mistrial. *See id.* However, because he had already endured the ordeal and expense of the entire trial, he chose to hear the jury's

Breit filed a motion for a new trial.[8] The trial court granted Breit's motion because the prosecutor had engaged in extreme misconduct.[9] Thereafter, Breit filed a motion to dismiss all the charges on double jeopardy grounds.[10] The trial court granted this motion by memorandum opinion.[11] The state responded by asking the trial court to reconsider the dismissal. The trial court denied the state's motion.[12] The New Mexico Court of Appeals reversed the trial court's dismissal, explaining that a new trial would not violate the defendant's double jeopardy rights.[13] Breit appealed to the New Mexico Supreme Court but that court denied certiorari.[14] In the second trial for the same charges, Breit was convicted and sentenced to life imprisonment.[15] Breit then directly appealed to the New Mexico Supreme Court.[16]

In turn, the New Mexico Supreme Court reviewed Breit's appeal and decided to base its decision upon the state constitution's prohibition of double jeopardy. The court decided to interpret state law to provide greater protection than that guaranteed under the federal constitution and ruled that Breit should not have been forced to endure another trial after the trial court had granted his motion to dismiss.

III. HISTORICAL AND CONTEXTUAL BACKGROUND

A. *Double Jeopardy Interests*

The double jeopardy clause of the Fifth Amendment of the United States Constitution reads in part, "nor shall any person be subject for the same offence to

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verdict. *See id.*

8. *See id.* at 660, 930 P.2d at 797.

9. *See id.* at 658, 930 P.2d at 795. The Memorandum Opinion authored by the trial judge and attached to the supreme court opinion included the prosecutor's remarks to the jury. *See id.* at 667, 930 P.2d at 804.

The court determined that the prosecutor painted defense counsel as an accomplice to perjury. *See Breit*, 122 N.M. at 673, 930 P.2d at 810. The prosecutor said that "all of this [goes] to this story that was rehearsed, rehearsed, rehearsed, with six lawyers." *Id.* at 672, 930 P.2d at 809. The prosecutor also said, "I've got a great idea. Why don't I get mad at somebody, go over and murder them, and then I'll hire six lawyers, they'll put together a case, we'll claim self-defense." *Id.* at 673, 930 P.2d at 810. The prosecutor went on to say "[I]t is not up to the state to show self-defense. That is a legal theory concocted by the defendant and his lawyers to sell to you." *Id.* The prosecutor later said,

> And then to sit there and say, "Oh, by the way, we don't have to prove a thing." Well, they don't. They don't. You can sit back and you can watch the evidence that we put on. And that's fine. [And that's fine.] That's fine with me. But you can also look at the absurdity of this fantasy woven in front of you . . . .

Id. Lastly, the prosecutor said, "Who is on trial here, that's the question, and that's what it boils down to. I mean, whose idea was it to cook up a story of self-defense?" *Id.* at 674, 930 P.2d at 811.

10. *See id.* at 658, 930 P.2d at 795.

11. State v. Breit, No. CR-88-175, slip op. (N.M. Dist. Ct. Sept. 12, 1990).

12. *See id.* at 2.

13. *See Breit*, 122 N.M. at 658, 930 P.2d at 795.

14. *See* Breit v. State, No. 20149, *cert. denied*, 113 N.M. 1, 820 P.2d 435 (1991).

15. *See Breit*, 122 N.M. at 658, 930 P.2d at 795. Breit was retried by a jury for first degree murder and aggravated assault on December 13, 1993. Defendant-Appellant's Brief in Chief at 2, State v. Breit, 122 N.M. 655, 930 P.2d 792 (1996) (No. 21,954).

16. *See Breit*, 122 N.M. at 658, 930 P.2d at 795. Appeals from the district courts in which there is a sentence of death or life imprisonment are to be taken directly to the Supreme Court. *See* N.M. R. App. P. 12-202(A)(1). *See also* N.M. CONST. art. VI, § 2. In reversing Breit's life sentence, the court emphasized that although it originally denied Breit's petition for certiorari, that did not mean that the Court of Appeals mandate denying Breit's motion to have all of the charges against him dismissed on double jeopardy grounds was correct. *See Breit*, 122 N.M. at 659, 930 P.2d at 795.

be twice put in jeopardy of life or limb . . . ."[17] The New Mexico Constitution in similar wording also protects citizens against double jeopardy.[18]

1. Individual Interests

The Double Jeopardy Clause of the Fifth Amendment protects individuals from: reprosecution after acquittal; reprosecution after conviction; separate punishments for the same offense and sometimes from reprosecution after an aborted trial.[19] The basis for protecting the defendant from the state stems from the Supreme Court's belief that the states, with resources that in many cases dwarf the defendant's, should be forbidden from making repeated attempts to convict an individual.[20] The court reasoned that if an individual did not have double jeopardy protection, that person would be subjected to the "embarrassment, expense and ordeal and . . . a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[21]

2. Societal Interests

The fundamental principle behind the Double Jeopardy Clause is that the state should be prevented from oppressing an individual through abuses of the criminal process.[22] The Supreme Court has recognized that the general rule barring retrial on the same charge by the same sovereign after jeopardy has attached may be relaxed in three different situations: 1) when the defendant has successfully appealed his conviction or otherwise managed to have his conviction overturned; or 2) when the trial judge dismisses the case against the defendant prior to the verdict; or 3) when the judge declares a mistrial.[23]

Specifically, the Supreme Court stated in *United States v. Jorn*[24] that the bar against double jeopardy is not absolute.[25] Sometimes a defendant will have to undergo several trials because the Fifth Amendment "does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the societal interest . . . [in] a single proceeding for a given offense."[26] Additionally, in observing

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17. U.S. CONST. amend. V.

18. The New Mexico Constitution provides:

> No person shall be compelled to testify against himself in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.

N.M. CONST. art. II, § 15.

19. *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE, §30.01 (3d ed. 1993) [hereinafter WHITEBREAD].

20. *See* Green v. United States, 355 U.S. 184 (1957).

21. *Id.* at 187-88.

22. *See, e.g.*, Lockhart v. Nelson, 488 U.S. 33, 42 (1988) (acknowledging that the Double Jeopardy Clause aims to prevent governmental oppression); United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) ("At the heart of [the double jeopardy] policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression.").

23. *See* WHITEBREAD, *supra* note 19, §30.03.

24. 400 U.S. 470 (1971).

25. *See id.* at 484.

26. *Id.* at 483-84.

that reprosecution is allowed when a defendant wins a reversal on appeal of a conviction, the Supreme Court has stated that the defendant's double jeopardy concerns do not extend so as to compel society to "be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error."[27] Justice Harlan, in *United States v. Tateo*,[28] noted that, as a matter of practical necessity, double jeopardy generally does not prohibit the retrial of a defendant after the reversal of his conviction on appeal: "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."[29]

In instructing appellate courts on double jeopardy, the Supreme Court cautioned that overzealousness on their part in protecting "against the effects of improprieties" at the trial or pretrial proceedings could place an accused person irrevocably beyond the reach of further prosecution if the double jeopardy clause were interpreted to prohibit retrial.[30]

Based on the foregoing, it is clear that striking a balance between society's needs and an individual's rights with regard to double jeopardy is an ongoing process, requiring state and federal courts to periodically revise the standard used in assessing when double jeopardy bars further prosecution. It is in this context that the New Mexico Supreme Court decided *Breit*.

B. Prosecutorial Role

One of the vehicles by which society's interests are protected and its laws enforced is the prosecutor. The role of the prosecutor in criminal cases is not merely to enforce societal rules but also to ensure justice for both the state and defendant. In *Berger v. United States*,[31] the Court detailed the duties of a prosecutor as:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[32]

Ethically, the prosecutor is also obligated to protect the innocent as well as to convict the guilty.[33]

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27. *Id.* at 484.
28. 377 U.S. 463 (1964).
29. *Id.* at 466.
30. *See id. See also* Oregon v. Kennedy, 456 U.S. 667, 682 (1982) (Stevens, J., concurring) ("The defendant's interest in finality . . . must be balanced against society's interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury."); Arizona v. Washington, 434 U.S. 497, 505 (1978) ("[The defendant's] valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.").
31. 295 U.S. 78 (1935).
32. *Id.* at 88.
33. *See* American Bar Ass'n Standards of Criminal Justice (3d ed. 1992).

C. *The Supreme Court Standard*

In *Oregon v. Kennedy*,[34] the United States Supreme Court ruled that no matter how egregious, a prosecutor's misbehavior at trial will not bar a subsequent retrial so long as the prosecutor did not act with the specific intent to deprive the defendant of the protection of the double jeopardy clause, and the defendant did not object to the mistrial.[35] To apply the bar, the prosecutor's primary motivation for such "goading" must be to obtain a second chance to try the defendant to obtain a "more favorable opportunity to convict."[36] In circumstances where the defendant moves for a mistrial, retrial, or reversal of a conviction, it is the defendant's burden to prove that it was the prosecutor's motive to force the defendant to do so.[37]

Prior to *Kennedy*, the Supreme Court, in dictum, suggested a range of factors to gauge whether the prosecutor engaged in misconduct and retrial should be barred.[38] The factors formally considered by the Supreme Court were proof of bad faith, harassment, or prejudice by the prosecutor that led the defendant to move for a mistrial—any one of the factors were sufficient to bar a retrial.[39] The Court also considered any oppressive practices on the part of the prosecutor.[40] After *Kennedy*, the Court narrowed the bar to reprosecution, specifically looking to whether the prosecutor intended to cause the retrial. The Court chose not to concentrate on the egregiousness of the prosecutor's overall conduct at trial, preferring instead to focus on the prosecutor's intent.[41] The *Kennedy* Court reasoned that this prosecutorial-intent standard was preferable in situations involving prosecutorial misconduct because a more general test "would permit a broader exception" and could have a "chilling effect" on the prosecution.[42] The Supreme Court added that this narrower standard was also more "manageable"[43] because it "merely calls for the court to make

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34. 456 U.S. 667 (1982).

35. *See id.* at 669. The United States Supreme Court in *Kennedy* based its decision on the Fifth Amendment of the United States Constitution. *See id.* at 671. During Kennedy's trial for theft, the state's expert witness, who testified during direct examination concerning the value of the stolen property, admitted on cross-examination that he had once filed a criminal complaint against Kennedy, but that no action had been taken by authorities on the complaint. On redirect, the prosecutor tried to establish why the witness had filed the complaint, but the defense repeatedly and successfully objected to her questions. After having elicited from the witness that he had never done business with the defendant, the prosecutor asked, "Is that because he is a crook?" *Id.* at 669. After the statement, the trial court granted respondent's motion for a mistrial. *See id.*

36. *Kennedy*, 456 U.S. at 684 n.13 (quoting Downum v. United States, 372 U.S. 734, 736 (1963)).

37. *See id.* at 683-684.

38. *See* Green v. U.S., 355 U.S. 184, 187-88 (1957).

39. *See generally* United States v. Dinitz, 424 U.S. 600, 611 (1976) (holding that the trial court's expulsion of a lawyer from the courtroom, leaving co-counsel unprepared to continue, was insufficient to bar retrial on double jeopardy grounds because the trial court was not committing acts of misconduct in that it did not banish the lawyer with the intention of goading the defendant into requesting a mistrial or to prejudice his prospects for an acquittal).

40. *See* Wade v. Hunter, 336 U.S. 684, 689 (1949) (finding that a trial may be discontinued and a retrial would not be barred on double jeopardy grounds when particular circumstances manifest a necessity for so doing and when failure to discontinue would defeat the ends of justice).

41. *See Kennedy*, 456 U.S. at 675-76.

42. *Id.* at 674. The prosecutor's role in trial "is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt." *Id.*

43. *Id.* at 675.

a finding of fact"[44] as to the prosecutor's intent based on available objective facts and circumstances.[45]

In *Kennedy*, four members of the United States Supreme Court disagreed with the plurality, contending that the *Kennedy* test would seldom be met because it would be difficult for a defendant to prove that the prosecutor intended by deliberate misconduct to provoke a mistrial and not merely to prejudice the defendant.[46] Justice Stevens wrote a concurring opinion which identified circumstances that would fall outside the *Kennedy* rule:

> For example, a prosecutor may be interested in putting the defendant through the embarrassment, expense, and ordeal of criminal proceedings even if he cannot obtain a conviction. In such a case, with the purpose of harassing the defendant the prosecutor may commit repeated prejudicial errors and be indifferent between a mistrial or mistrials and an unsustainable conviction or convictions. Another example is when the prosecutor seeks to inject enough unfair prejudice into the trial to ensure a conviction but not so much as to cause a reversal of that conviction. This kind of overreaching would not be covered by the Court's standard because, by hypothesis, the prosecutor's intent is to obtain a conviction, not to provoke a mistrial. Yet the defendant's choice-to continue the tainted proceeding or to abort it and begin anew-can be just as "hollow" in this situation as when the prosecutor intends to provoke a mistrial.[47]

Justice Stevens believed that double jeopardy should bar reprosecution when "the court is persuaded that egregious prosecutorial misconduct has rendered unmeaningful the defendant's choice to continue or to abort the proceeding."[48]

D. State Criticisms of the Federal Law

Several states have rejected the Supreme Court's narrow standard barring reprosecution when interpreting their own state constitutions.[49] The states have reasoned that occasionally prosecutors, in bad faith, overreach or harass the defendant with the intention of prejudicing his chance for acquittal.[50] The most notable rejection is the Oregon Supreme Court which, on remand of *Oregon v. Kennedy*,[51] chose not to follow the United States Supreme Court's rationale in interpreting its state constitution double jeopardy bar.[52]

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44. *Id.*
45. *See id.*
46. *See id.* at 688.
47. *Id.* at 689 (Stevens, J., concurring).
48. *Id.*
49. Arizona, New Mexico, Oregon, Pennsylvania, and Texas are among the states that have published opinions expanding the federal standard in assessing their own state constitutional double jeopardy bar. *See generally infra* notes 51, 62, 71, 78 and accompanying text.
50. *See, e.g.*, People v. Dawson, 397 N.W.2d 277, 284 (Mich. Ct. App. 1986), *aff'd*, 427 N.W.2d 886 (Mich. 1988) (formally adopting a three part test to determine when to apply jeopardy); State v. White, 354 S.E.2d 324, 329 (N.C. Ct. App. 1987), *aff'd*, 369 S.E.2d 813 (N.C. 1988) (holding that the standard should be bad faith prosecutorial overreaching or harassment aimed at prejudicing the defendant's chances for acquittal).
51. 666 P.2d 1316 (Or. 1983).
52. *See id.* at 1325-26.

1. Oregon

The Oregon court decided to adopt a broader interpretation of the double jeopardy clause than afforded by the Supreme Court in *Kennedy*.[53] Oregon concluded that the Supreme Court decision would provide less protection to defendants in state criminal proceedings than Oregon would permit under its state constitution.[54] The Oregon court did not limit itself to the federal test because it decided that to do so would result in punishment to prosecutors in that prosecutors would be sanctioned for unlawful official conduct.[55] The Oregon court explained that the objective of the state double jeopardy provision is not to punish prosecutors but to protect the defendant from reprosecution after a prosecutor's actions have left the defendant with no other recourse but to request a new trial.[56] In its ruling, the Oregon court interpreted its state constitution to provide greater protection than *Kennedy* by creating a standard of "'knowing' misconduct coupled with indifference"[57] on the part of the prosecutor.[58] This interpretation was necessary, according to the Oregon court, because the court wanted double jeopardy to attach to situations where improper official conduct is so prejudicial to the defendant that the court would have to order a mistrial.[59] The Oregon court determined that *Kennedy* would prevent retrial in these situations.[60] Additionally, the Oregon court stated that *Kennedy* also would not apply in situations where the prosecutor did not intend to provoke the mistrial but knows that the conduct is improper and prejudicial and is indifferent to the danger of a resulting mistrial or reversal.[61]

2. Arizona

Two years after the Supreme Court decision in *Kennedy*, the Arizona Supreme Court had to decide whether to interpret its state constitution consistently with the federal constitution or to apply a broader rule.[62] Like the Oregon state court, Arizona chose to provide greater protection than the U.S. Supreme Court did in *Kennedy*. Arizona noted that *Kennedy* would bar retrial in situations where the court permitted

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53. *See id.* at 1325.
54. *See id.* at 1326.
55. *See id.* at 1324.
56. *See id.*
57. *Id.* at 1327.
58. *See id.* at 1323, 1326 (concluding that because the defendant's offense implicated state law, the Oregon court could demand a different constitutional standard than that imposed by the United States Supreme Court in cases arising out of the federal constitution).
59. *See id.* at 1326.
60. *See id.*
61. *See id.*
62. *See* Pool v. Superior Court, 677 P.2d 261 (Ariz. 1984). *Pool* involved a criminal prosecution for theft where the prosecutor engaged in misconduct while cross-examining a witness. *See id.* at 265. The trial court found, and the Arizona Supreme Court agreed, that the prosecutor: (1) made irrelevant and prejudicial references to the defendant's handling of a gun while intoxicated and to the defendant's drinking habits (who was not testifying); (2) repeated questions objected to by the defense and sustained, thus exhibiting an impertinence to the court; (3) made an argumentative, grossly improper and prejudicial remark in characterizing the defendant as a "cool talker" and "good buddy" of defense counsel; (4) invited speculation and argument from a witness by asking him what he thought of the evidence received or what evidence he expected to be introduced; (5) asked a witness to speculate on what type of testimony the co-defendant would give after the co-defendant claimed his right not to testify under the Fifth Amendment; and (6) suggested by question or innuendo unfavorable and unprovable matter which was not in evidence and which was irrelevant. *See id.* at 265-66.

a defendant be retried only if the defendant could prove (or a court *sua sponte* determined) that the prosecutor intended to cause a mistrial by pursuing an improper course of conduct.[63] *Kennedy*, according to the court, would be insufficient to enforce the state constitutional guarantee against double jeopardy because it could intentionally expose the defendant to multiple trials for the same crime.[64] This is so, said the court, since the defendant would be retried in situations where the defendant chose to start anew rather than to complete a "trial infected by error."[65] The court considered the burden of another trial arising from prosecutorial misconduct, while not intended to force the defendant into moving for a new trial or to complete the infected trial, would nonetheless result in a mistrial and destroy the defendant's expectation of completing the proceeding before the original tribunal.[66]

While recognizing the need for uniformity in federal and state constitutional interpretations, the Arizona court decided that it should not blindly follow federal precedent in interpreting its state constitution.[67] The court then barred another trial under the state constitution when a mistrial is granted on a defendant's motion or declared by the court under all of the following conditions: 1) because of improper conduct or actions by the prosecutor;[68] and 2) when prosecutorial misconduct is not a result of legal error, negligence, mistake or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and pursues with indifference to the danger of mistrial or reversal;[69] and, (3) when the conduct causes prejudice to the defendant which cannot be cured by any means short of a mistrial.[70]

3. Pennsylvania

A more recent criticism of *Kennedy* was *Commonwealth v. Smith*.[71] *Smith* also presented a situation where the prosecutor intentionally undertook to prejudice the defendant to the point of denying him a fair trial despite the lack of prosecutorial intent to provoke a mistrial.[72]

Before *Smith*, Pennsylvania had adopted the *Kennedy* prosecutorial intent standard.[73] However, in *Smith* the Pennsylvania court concluded that the *Kennedy* intent standard was too narrow in the case before it because the prosecutor did not

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63. *See id.* at 270.
64. *See id.* at 272.
65. *Id.* (quoting *Kennedy*, 666 P.2d at 1326).
66. *See id.*
67. *See id.* at 271.
68. *See id.*
69. *See id.* at 271-72. A prosecutor will not be absolved when he or she claims lack of experience. *See id.* at 270. "The law cannot reward ignorance; there must be a point at which lawyers are conclusively presumed to know what is proper and what is not." *Id.*
70. *See id.*
71. 615 A.2d 321 (Pa. 1992). Mr. Smith was sentenced to death for first-degree murder. *See id.* at 322. After the conviction and sentencing, the defense discovered that the prosecutors had withheld potentially exculpatory evidence during the first trial, and had knowingly denied that its chief witness had been given a favorable sentencing agreement in exchange for testifying. *See id.* On appeal, the prosecutor intentionally suppressed the exculpatory evidence while arguing in favor of the death sentence, and attempted to discredit the state trooper who had testified at trial by stating that the trooper had "fabricated" and "planted" evidence. *See id.* at 322-24.
72. *See id.* at 325.
73. *See* Commonwealth v. Simmons, 522 A.2d 537, 540 (Pa. 1987).

intend to goad the defendant into moving for a mistrial.[74] Rather, the prosecutor's intent was the opposite: to prevent the defendant from moving for a mistrial by concealing how the defendant had been wrongfully convicted.[75] The *Smith* court reasoned that, if the federal *Kennedy* standard was applied in state cases where the prosecution purposefully prejudiced the trial against the defendant, the defendant could be reprosecuted in violation of his state-constitutional right to be free from double jeopardy.[76] Thus, the court concluded, double jeopardy should bar a new trial in *Smith* because the Pennsylvania constitution gives greater protection to a Pennsylvania defendant and applying *Kennedy* would "ris[e] to the level of subversion of [the defendant's] constitutional rights."[77]

4. Texas

Similarly, the Texas Court of Criminal Appeals expressed concern that applying *Kennedy* would yield suspect results because the prosecutor's subjective intentions are inherently unknown and *Kennedy* would leave unclear what standards of proof to apply when measuring the intentional violation of the defendant's right to a fair trial.[78] In the Texas Court of Appeals decision (*Bauder I*),[79] the dissenting judge noted that using intent to decide what the prosecutor actually intended at trial amounts to nothing more than guesswork.[80]

The Texas Court of Criminal Appeals reversed the appellate court decision, agreeing with the dissenting judge. The court ruled that in Texas double jeopardy bars reprosecution after a mistrial has been granted at the defendant's request, not only when the objectionable conduct of the prosecutor was intended to induce a defendant's motion for mistrial (applying *Kennedy*), but also when the prosecutor was aware of and consciously disregarded the defendant's risk of being forced to

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74. *See Smith*, 615 A.2d at 322.

75. *See id.*

76. *See id.*

77. *Id.* at 325.

> [T]he double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of denying him or her a fair trial.

Id.

78. *See* Bauder v. State, 880 S.W.2d 502, 504 (Tex. App. 1994) (Butts, J., dissenting) [*Bauder I*], *rev'd*, 921 S.W.2d 696 (Tex. Crim. App. 1996) (en banc) [*Bauder II*] (refusing to apply *Kennedy*, and expressing approval of the appellate court dissent). The defendant was charged with driving while intoxicated. *See Bauder II*, 921 S.W.2d at 697. After the trial court had granted a motion in limine barring evidence of any uncharged misconduct by the defendant, the prosecutor presented the arresting officer's testimony that when the appellant got out of the car, he was barely able to stand and his pants were unbuttoned. *See Bauder I*, 880 S.W.2d at 503. The officer thought the driver was intoxicated. *See id.* Additional testimony covered the arrest and transportation for an intoxilyzer test. *See id.* [The prosecutor in eliciting testimony about an uncharged offense implying that the defendant was soliciting a prostitute] asked [the officer] what appellant had been doing in the parked car before the alleged crime. *See id.* The officer responded that the defendant was engaged in oral sex. Defense counsel moved for a mistrial. *See id.* The prosecution argued for a curative instruction but the court granted the mistrial. *See id.*

79. Texas has different appellate courts: Texas Court of Appeals, Texas Court of Criminal Appeals, Texas Court of Appeals (previously Court of Civil Appeals), and Texas Supreme Court. Criminal appeals from the Texas Supreme Court are heard in the Texas Court of Criminal Appeals which has statewide final appellate jurisdiction of criminal cases. Death sentences imposed by the trial court are directly appealed to the Texas Court of Criminal Appeals. *See* TEX. CONST. art. V, § 5.

80. *See Bauder I*, 880 S.W.2d at 504 n.1.

move for a mistrial.[81] The Court of Criminal Appeals reasoned that *Kennedy* did not provide as much protection as the Texas Constitution. The reason cited by the court was that *Kennedy* did not make a distinction of "constitutional significance" as to situations when the prosecutor intends to cause a mistrial or when the prosecutor engages in such conduct that a mistrial is reasonably certain.[82] The Texas Court of Criminal Appeals also noted its preference that the prosecutor's subjective intent not be at issue in determining whether or not to bar retrial because of the forecasted ambiguity.[83] Thus, the Texas Court of Criminal Appeals, while continuing to apply *Kennedy*, has allowed defendants in criminal trials an added protection against double jeopardy.

E. New Mexico Law

The New Mexico Constitution protects any person from being "twice put in jeopardy for the same offense."[84] Under New Mexico law, double jeopardy "may be raised by the accused at any stage of a criminal prosecution, either before or after judgment."[85] Furthermore, the New Mexico Supreme Court, prior to *Breit*, had ruled that the double jeopardy clause in the New Mexico Constitution was subject to the same construction and interpretation as its counterpart in the Fifth Amendment of the United States Constitution.[86]

The U.S. Supreme Court decided *Kennedy* in 1982. It was not until 1996, with *Breit*, that the New Mexico Supreme Court decided whether to follow the *Kennedy* prosecutorial intent standard when interpreting the double jeopardy provision of the New Mexico state constitution.[87] New Mexico's position on double jeopardy and prosecutorial misconduct prior to *Breit* followed *Kennedy* and barred reprosecution in those situations in which the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials.[88]

IV. RATIONALE OF THE BREIT COURT

In *State v. Breit*, the New Mexico Supreme Court determined whether to apply a narrow federal double jeopardy standard when interpreting the state constitution.[89] In doing so, the supreme court addressed a question of first impression in New

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81. *See id.* at 699.
82. *See id.*
83. *See id.*
84. N.M. CONST. art. II, § 15.
85. *Id.*
86. *See* State v. Day, 94 N.M. 753, 756, 617 P.2d 142, 145, (1980), *cert. denied*, 449 U.S. 860 (1980). New Mexico applied double jeopardy to a case where the prosecutor, rather than risking an acquittal, purposely created a situation necessitating a mistrial (or a reversal) to have a more favorable climate for conviction upon retrial. *See id.* at 757, 617 P.2d at 146.
87. *Cf.* State v. Aragon, 116 N.M. 291, 861 P.2d 972 (1993). The state supreme court decided not to consider whether the *Kennedy* decision altered the state precedent in *Day*, and held that "even under the *Day* test" the trial court "properly determined that the prohibition against double jeopardy did not bar a retrial." *Id.* at 296, 861 P.2d at 977.
88. *See Day*, 94 N.M. at 757, 617 P.2d at 147.
89. *See Breit*, 122 N.M. 655, 658, 930 P.2d 792, 795 (1996).

Mexico: Under the New Mexico Constitution, must the court conclude that the prosecutor intended to cause a defendant to move for mistrial, retrial or reversal before finding a legitimate double jeopardy violation?[90] In argument, the defendant requested that the court adopt a modified standard of the double jeopardy bar pursuant to Article II, Section 15 of the New Mexico Constitution and not follow *Kennedy*.[91] The state argued that the court should apply the law of the case doctrine and that the supreme court's denial of certiorari (from the appellate court decision) prevented the court from addressing the issue of double jeopardy in *Breit* altogether.[92] The supreme court decided that it could hear the case because the law of the case doctrine was not applicable being that its denial of certiorari was not an indication that the appellate court ruling was correct.[93]

Before *Breit*, New Mexico followed the standard expressed in *State v. Day*[94] which was similar to *Kennedy* in that it barred reprosecution[95] in situations where "the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials."[96] The *Breit* court expanded *Day* in creating the prosecutor's willful disregard test. As explanation, the *Breit* court added that *Day* should be interpreted as describing "instances of misconduct in which the prosecutor acts in willful disregard of the resulting mistrial, retrial, or reversal on appeal."[97]

In deciding not to limit New Mexico state courts to the *Kennedy* precedent, the supreme court stressed that state courts do not have to follow the federal rulings blindly in applying state law.[98] However, it recognized its boundaries in noting that it is obligated to follow United States Supreme Court decisions when deciding matters stemming from the federal constitution.[99]

The court noted that if it were to apply only the federal *Kennedy* standard, Breit's reprosecution would not be barred.[100] The New Mexico Supreme Court discussed at length other states' criticisms of the *Kennedy* decision, and the ability of state courts to interpret their state constitutions utilizing federal decisions for guidance only. However, the *Breit* court chose not to entirely disregard the United States Supreme

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90. *See id.* at 660, 930 P.2d at 797.
91. *See id* at 663, 930 P.2d at 800.
92. *See id.* at 659, 930 P.2d at 796.
93. *See id.*
94. 94 N.M. 753, 617 P.2d 142 (1980), *cert. denied*, 449 U.S. 860 (1980).
95. N.M. CONST. art II, § 15.
96. *Day*, 94 N.M. at 757, 617 P.2d at 146.
97. *Breit*, 122 N.M. at 658, 930 P.2d at 795.
98. *See also* State v. Gutierrez, 116 N.M. 431, 863 P.2d 1052 (1993).

> [W]hen this Court cites federal opinions . . . in interpreting a New Mexico constitutional provision we do so not because we consider ourselves bound to do so by our understanding of federal or state doctrines, but because we find the views expressed persuasive and because we recognize the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions.

Id. at 436, 863 P.2d at 1057.

See e.g., State v. Gomez, 122 N.M. 777, 783, 932 P.2d 1,7 (N.M. 1997) (state courts may diverge from federal precedent on basis of flawed federal analysis, structural differences between state and federal government or distinctive state characteristics). *See also infra* note 107.

99. *See Breit*, 122 N.M. at 664, 930 P.2d at 801.
100. *See id.* at 667, 930 P.2d at 804.

Court's ruling in *Kennedy*. Rather, the court chose "a narrow expansion"[101] of the federal standard established by *Kennedy*, rationalizing that the plurality of the United States Supreme Court simply did not foresee the effects of misconduct of prosecutors who do not subjectively intend to provoke a mistrial.[102] In this expansion, the court decided that the prosecutor's intent, while important, should not be the only factor in deciding whether double jeopardy bars retrial in a state case involving prosecutorial misconduct. Instead, the court preferred to use the prosecutor's "willful disregard" as the state standard in addition to prosecutorial intent.[103]

The court explained that, according to the case record summarized in the trial court's memorandum opinion and append in its entirety to the supreme court decision, the prosecutor in *Breit* engaged in various acts that would not individually raise the bar to retrial.[104] However, the court concluded that in Breit's first trial the misconduct was so unrelenting and pervasive that the trial was "out of control."[105] The supreme court, in barring retrial, applied a new "willful disregard" standard and determined that under minimal legal, ethical and professional standards, the prosecutor acted knowingly and intentionally and lacked "an underlying respect for our system of justice."[106]

V. ANALYSIS AND IMPLICATIONS

The New Mexico Supreme Court decision in *Breit* is another example of New Mexico construing its state constitution to accord defendants more protections than the federal courts, something the New Mexico state courts have done before.[107] *Breit*

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101. *Id.*

102. *See id.* at 660, 930 P.2d at 797.

103. *See id.* at 666, 930 P.2d at 803.

> The court chose the term "willful disregard" because it is a predominantly legal expression with a well-developed jurisprudential meaning . . . emphasizing that the prosecutor is actually aware, or is presumed to be aware of the potential consequences of his or actions. The term connotes a conscious and purposeful decision by the prosecutor to dismiss any concern that his or her conduct may lead to a mistrial or reversal.

Id.

104. *See id.* at 668, 930 P.2d at 805.

105. *See id.* at 667-8, 930 P.2d at 804-5 (noting the trial court judge's opinion of the prosecutor's conduct). There were many examples of the prosecutor's misconduct. In his opening, the prosecutor attempted to inflame the jury with allegations that were irrelevant. When the trial court sustained objections, the prosecutor expressed sarcasm and scorn toward defense counsel and the court. During witness questioning, the prosecutor engaged in improper arguments with witnesses. The prosecutor directed belligerent remarks at opposing counsel and, had the defense counsel objected at every opportunity, the defense would have been placed in the position of appearing to hamper proceedings and hide evidence from the jury. During closing, the prosecutor belittled the defendant's fundamental right to remain silent, and portrayed his right to counsel as a ploy to avoid punishment. Finally, in numerous comments, he suggested that opposing counsel had engaged in perjury, lying and had collaborated with the defendant to fabricate a defense. *See id.* 667, 930 P.2d at 804.

106. *Id.* at 668, 930 P.2d at 805.

107. For example, New Mexico has construed the state constitution's search and seizure provision to accord defendants more protection than the federal courts. *See* Campos v. State, 117 N.M. 155, 870 P.2d 117 (1994) (holding that warrantless public arrest must be based upon both probable cause and sufficient exigent circumstances, rejecting the more lenient federal rule requiring only probable cause); State v. Gutierrez, 116 N.M. 431, 863 P.2d 1052 (1993) (holding that the good-faith exception to the federal exclusionary rule was incompatible with state constitutional protections); State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989) (refusing to follow the totality of the circumstances standard when evaluating the validity of a search warrant based on an informant's tip); *See also* State v. Wright, 119 N.M. 559, 893 P.2d 455 (Ct. App. 1995), *cert. denied*, 119 N.M. 389, 890 P.2d 1321 (1995) (rejecting federal doctrine of "apparent authority" to consent to search).

significantly changed New Mexico law to bar reprosecution in situations where the prosecutor engaged in willful misconduct to get another chance to convict the defendant or when the prosecutor expressed a willful disregard for the defendant's right to a fair trial by engaging in such misconduct during the trial.[108] Thus, the court placed constraints on prosecutors and demonstrated its unwillingness to defer to prosecutors by rejecting the intent-to-goad requirement used in federal constitutional interpretation in state constitutional law analyses.

With *Breit*, New Mexico has armed the defendant in a criminal proceeding with more double jeopardy protection than available under the federal constitution. The defendant has the right to request a mistrial because of the prosecutor's willful disregard for the defendant's right to a fair trial or because the prosecutor wanted another bite of the apple in his or her efforts to convict.[109]

The potential problem with *Breit* lies in the fact that the court never mentions which party has the burden of proving what the prosecutor intended at trial. Rather, the court merely applies the "test" to the case at hand and determines that a double jeopardy bar exists in *Breit*.[110] The court did mention that the defendant can raise the issue of double jeopardy at any time during or after the trial but did not mention if the defendant has the burden of proof.[111] However, the court noted that if the defendant raises double jeopardy at trial, it is the trial court judge who is in the best position to evaluate the prosecutor's credibility and record it for possible appellate court review.[112] The court reasoned that this is so because the trial court, with the court record at hand and with the testimony of the prosecutor and other pertinent witnesses, would be in the best position to evaluate the prosecutor's credibility.[113] As such, the reviewing court should refer to the trial court opinion and the court record on the issue in assessing double jeopardy bars.[114]

Another potential problem with *Breit* is that the New Mexico Supreme Court declined to specifically define the term "willful disregard." The court chose instead to explain that the term means nothing more than the prosecutor is actually aware, or is presumed to be aware, of the potential consequences of his or her actions.[115] According to the court, the term connotes a conscious and purposeful decision by the prosecutor to dismiss any concern that his or her conduct may lead to a mistrial or reversal.[116] However, as an aid, the court did indicate that the "totality of the circumstances at trial would be worth looking into to determine if the prosecutor acted in willful disregard."[117]

Nonetheless, the New Mexico Supreme Court's willingness to afford more double jeopardy protection to defendants than the U.S. Supreme Court should be

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108. *See Breit*, 122 N.M. at 666, 930 P.2d at 803.
109. *See id.* at 661, 930 P.2d at 798.
110. *See id.* at 667, 930 P.2d at 804.
111. *See id.* at 659, 930 P.2d at 796.
112. *See id.* at 667, 930 P.2d at 804.
113. *See id.*
114. *See generally id.* at 667-8, 930 P.2d at 804-5 (deferring to the conclusion of the trial judge who oversaw the proceedings and was critical of the prosecution).
115. *See id.* at 666, 930 P.2d at 803.
116. *See id.*
117. *Id.* at 667, 930 P.2d at 804.

commended as an effort that would have been supported by the late U.S. Supreme Court Justice William Brennan.[118] In a rare law review article, Justice Brennan warned that state courts cannot rest when they have afforded their citizens the full protections of the federal constitution because federal law should not be allowed to inhibit the independent protective force of laws that states have enacted to protect its citizenry.[119] According to Justice Brennan, without state constitutional law interpretation, the full realization of guarantees afforded to citizens by the Bill of Rights could no longer be guaranteed.[120] Justice Brennan warned that it would be an error for states to consider U.S. Supreme Court constitutional rulings as dispositive of state constitutional issues.[121]

Breit demonstrates that New Mexico will continue to heed the advice of Justice Brennan and will protect its citizens from prosecutorial over-reaching in criminal cases. Further, this decision also reflects the supreme court's contention that a charged person will not be convicted at the cost of his or her constitutional rights regardless of the state's interests.

VI. CONCLUSION

The *Breit* decision held that the State may not retry a defendant after the prosecutor engages in misconduct that displays the prosecutor's willful disregard for the defendant's double jeopardy rights. The law in New Mexico is clear: this court will not tolerate misconduct of this sort by prosecutors. With this decision New Mexico reasserts its willingness to analyze the New Mexico Constitution independently of federal precedent when state courts decide that federal law does not adequately protect the state constitutional rights of New Mexico citizens.

ROSARIO DYANA VEGA

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118. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

119. *See id.* at 491. Justice Brennan, as one of the last members of the liberal Warren court, subscribed to the Warren sentiment that neither the states nor the federal governments should infringe the rights guaranteed by the Bill of Rights and wrote the article in response to the recent conservative rulings of the Supreme Court. *See id.* at 489. Although written twenty years ago, the Warren sentiment Justice Brennan imparted in his article is as applicable today.

120. *See id.*

121. *See id.*