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

2   Opinion Number:

3   Filing Date: February 19, 2024

4   **NO. S-1-SC-38941**

5   **STATE OF NEW MEXICO,**

6           Plaintiff-Respondent,

7   v.

8   **RUDOLF AMADOR,**

9           Defendant-Petitioner.

10 **ORIGINAL PROCEEDING ON CERTIORARI**

11 **Melissa A. Kennelly, District Judge**

12   Bennett J. Baur, Chief Public Defender

13   Allison H. Jaramillo, Assistant Appellate Defender

14   Santa Fe, NM

15   for Petitioner

16   Hector H. Balderas, Attorney General

17   Van Snow, Assistant Attorney General

18   Albuquerque, NM

19   for Respondent

1 **OPINION**

2 **VIGIL, Justice.**

3 {1} Defendant Rudolph Amador was convicted of two counts of criminal sexual  
4 contact of a minor, contrary to NMSA 1978, Section 30-9-13(B)(1) (2003), and one  
5 count of child abuse, contrary to NMSA 1978, Section 30-6-1(D) (2009). The district  
6 court sua sponte filed a motion for a new trial, citing prosecutorial misconduct and  
7 ineffective assistance of counsel. After hearing argument, the district court  
8 ultimately ordered a new trial based on four instances of prosecutorial misconduct,  
9 but denied Defendant’s argument that the retrial was barred. Defendant was retried  
10 and convicted on all three counts.

11 {2} Defendant appealed to the Court of Appeals, arguing that retrial was barred  
12 by double jeopardy under *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d  
13 792, and that he received ineffective assistance of counsel. Docketing Statement,  
14 *State v. Amador*, A-1-CA-38665 (N.M. Ct. App. Dec. 27, 2019). The Court of  
15 Appeals rejected Defendant’s arguments and affirmed his convictions. *State v.*  
16 *Amador*, A-1-CA-38665, mem. op. ¶ 1 (N.M. Ct. App. July 19, 2021)  
17 (nonprecedential).

1 {3} We granted Defendant’s petition for writ of certiorari on both issues. We  
2 reverse the Court of Appeals and hold that Defendant’s second trial was barred by  
3 double jeopardy under Article II, Section 15 of the New Mexico Constitution.

#### 4 **I. BACKGROUND**

##### 5 **A. District Court**

6 {4} The charges arose from allegations that Defendant sexually abused his  
7 friend’s eleven-year-old daughter when Defendant spent the night at his friend’s  
8 house. The child’s father testified that he was friends with Defendant, had known  
9 him for more than twenty years, and had invited Defendant to stay at his house for a  
10 couple of nights. The father also testified that his eleven-year-old daughter stayed  
11 with him on the second night.

12 {5} The child testified that she had her own bedroom, which she slept in that night.  
13 She woke up to Defendant touching her “front private part” and “back private part.”  
14 She clarified that the contact to her vagina and buttocks was skin-to-skin, under her  
15 underwear. Defendant left her room once she started to wiggle and move away from  
16 him. After Defendant left her room, she ran to her father’s room screaming, woke  
17 her father, and told him what had happened.

18 {6} The father testified that after his daughter woke him up and when he became  
19 aware of what had happened, he confronted Defendant, who was eating a corndog

1 in the dark in the kitchen. Defendant denied touching the child. However, after  
2 confirming what had happened with his daughter, the father kicked Defendant out  
3 of the house.

4 {7} After the State rested, the prosecutor informed the court and defense counsel  
5 that he planned to impeach Defendant with a prior conviction for child abuse, should  
6 Defendant take the stand. Defense counsel agreed that Defendant had an “ancient  
7 prior,” but she was unsure whether it fell within the ten-year window under Rule 11-  
8 609 NMRA. The prosecutor then stated that the prior conviction was a felony and  
9 fell within the ten-year window. The judge told the prosecutor he could impeach  
10 Defendant with the prior conviction, but he could not get into the specific facts of  
11 the offense.

12 {8} When Defendant took the stand, defense counsel opted to bring up the prior  
13 conviction during her direct examination by asking if he had “ever been charged  
14 with a felony.” Defendant responded that he had been charged with child abuse in  
15 2009. He explained that the charge was based on a fight with his seventeen-year-old  
16 stepson and that he ended up taking a plea deal, serving three years of probation.  
17 Defendant also testified that his girlfriend had three daughters, and that he had never  
18 been accused of any felonies involving them. Concerning his friend’s daughter,  
19 Defendant testified that he had known her all her life and that he would never do

1 anything like what he was accused of doing. He denied entering her room and  
2 touching her. In his closing argument at the end of the evidence, the prosecutor began  
3 with:

4           Basically, what this case is about, I mean, is the criminal sexual contact  
5 of a minor. Defendant says he didn't do it. Okay, and frankly, I think,  
6 you know, for someone who is not a *pedophile*, it's hard to understand  
7 why any grown man would touch a child. Isn't it? When you think  
8 about it, how . . . why would any grown man have any sexual interest  
9 in a child? It seems incomprehensible, but we know it happens all the  
10 time, don't we? I mean something we see a lot in the media, and even,  
11 I'm a lifelong Catholic, I love the Catholic Church, and even in an  
12 institution such as the Catholic Church, you know, as hard as it is to  
13 believe, as painful, I think as a Catholic to see, you know we have  
14 priests, even priests are now abusing these children. Sometimes, these  
15 priests go for years and years and years before they are caught. Umm  
16 . . . you know they have access to these kids, and they have . . .

17 (emphasis added). The judge cut off the closing and directed the parties to approach  
18 the bench. The judge informed the prosecutor that the argument was improper and  
19 that allowing it to go further could result in reversible error. The prosecutor  
20 continued his closing argument,

21           Uh...so...uh...Defendant said he never, he didn't do it, and then he  
22 cites, uh, then he says that he has three, three stepdaughters. We don't  
23 know, that's just what he says. And he did admit that he was a  
24 convicted, you know, felon. That's just what he says. That he didn't, he  
25 never touched his stepdaughters, we don't know . . .

26 Then, the prosecutor summarized the relevant evidence. Next, the prosecutor said,  
27 "This Defendant, here, this guy here, he touched a little eleven-year-old [girl's]

1 vagina and buttocks, for whatever reason—because he’s a *pedophile*, [unintelligible]  
2 to do something like that. Who knows what a *pedophile* looks like—we don’t know,  
3 as we all know, *pedophiles* come in all shapes and forms” (emphasis added). The  
4 prosecutor then sought to describe the reasonable doubt standard:

5         Reasonable doubt is the sort of doubt you would use in making  
6         important decisions about important things in your life. Buy a car, buy  
7         a house, or what have you. In relation to this case, I would ask you to  
8         consider whether you feel safe enough, based on what you heard today,  
9         to let this guy stay in a house with another child.

10 Defense counsel failed to object at any point.

11 {9} Defense counsel gave her closing argument. She argued that there was no  
12 testimony to support the use of the word “pedophile” and that the State was bringing  
13 up the “ugly word” and Catholic priests in an attempt to get the jury to view  
14 Defendant in such a way. Defense counsel then argued that the child’s testimony  
15 was inconsistent: she was coached, could have been dreaming, and did not testify as  
16 though she was traumatized—“not an ounce of nerves.”

17 {10} In rebuttal, the prosecutor again referenced Defendant’s stepdaughters by  
18 asking: “Where are the three stepdaughters?” The judge again asked counsel to  
19 approach the bench. The judge told the prosecutor, “You cannot comment [on] his  
20 failure to present evidence.” After addressing the defense counsel’s arguments, the  
21 prosecutor moved on to discuss motive: “The motives of a *pedophile*, it is an

1 inexplicable, a nonpedophile may think, why do they do things like that?” (emphasis  
2 added). Defense counsel objected, and the judge told the prosecutor that he was  
3 “walking very close to asking [D]efendant to prove himself innocent, that is not his  
4 burden, and you can’t refer to him—you’re not to refer to him as a pedophile again.”  
5 The prosecutor returned to his argument, focusing again on the definition of  
6 reasonable doubt. Again, he asked the jurors whether they “would want a little girl  
7 alone in the house with the defendant.”

8 {11} After the jury returned guilty verdicts for two counts of criminal sexual  
9 contact of a minor and one count of child abuse, the court asked the parties if they  
10 would like to proceed directly to sentencing. Defense counsel said there was  
11 something that needed to be clarified before moving forward:

12 Defense counsel: [Defendant] only has the one prior it was, it was either  
13 a conditional discharge or a deferred and so I think that’s something we  
14 need to clear up before we move forward and uh . . .

15 Prosecutor: It was a conditional discharge.

16 Defense counsel: It was?

17 Prosecutor: Yeah.

18 Judge: And he successfully completed that?

19 Defense counsel: Yes.

20 Prosecutor: I can’t remember now, I think I have the, I gave her the  
21 information.

1 Defendant: Yes, he did.

2 Prosecutor: I think there was, there was some issue, but I think he . . .

3 Judge: You didn't tell me that, and you used it as a . . .

4 Prosecutor: I think he did complete it, uh . . . the conditional discharge  
5 [unintelligible].

6 Defendant: [unintelligible]

7 Prosecutor: I'm not sure. I don't remember but . . .

8 Judge: You represented to the court that it was a prior conviction, and  
9 for that reason, I allowed you to—and [defense counsel], you didn't  
10 object.

11 Defense counsel: I didn't know it was a conditional discharge until he  
12 told . . .

13 Judge: I allowed you to use it as a, as a, as impeachment evidence.

14 Prosecutor: Okay, well I'm not sure, I . . . I . . . I guess, uh, I didn't  
15 realize, uh.

16 Judge: Wow.

17 Prosecutor: And I can't remember. It's been some time since I looked  
18 at it but uh . . . closely, but I think it may, it may have got violated, and  
19 I'm not sure your honor at this point. I'm not sure.

20 Judge: Well, what you represented to the court was that he had a prior  
21 conviction that you were going to impeach him with.

22 Prosecutor: Right, and that's why. . .

1 Judge: And it's not a conviction if it is a completed conditional  
2 discharge. When they plead guilty, they are told if you successfully  
3 complete this, it does not count as a conviction.

4 Prosecutor: Okay.

5 Judge: And you represented to the court, you stand up here and told me  
6 as an officer of the court that he had a prior conviction and now you are  
7 telling me two hours later you're not really sure?

8 Prosecutor: Uh. . .

9 Judge: Mr. [prosecutor]? You're not really sure? You wouldn't know?

10 Prosecutor: I apologize. I guess I didn't think.

11 Judge: Apologize? You just got a conviction, so you used something  
12 improperly to obtain a conviction.

13 Prosecutor: Okay, and I guess I . . . that was my mistake and I  
14 [inaudible].

15 Defense counsel stated that she was "tempted . . . to ask the court for a mistrial"  
16 because the information on the conditional discharge was not disclosed. The judge  
17 then admonished defense counsel: "But you conceded that he had a prior conviction.  
18 We stood up here and talked, and had a conference, and you conceded he had a prior  
19 conviction, and now, two hours later, all of a sudden, oh well, it wasn't really a  
20 conviction." The prosecutor then said he "thought a conditional discharge would  
21 count as a prior conviction" for impeachment purposes. The judge responded, "No

1 it's not. It's not a conviction for anything. It's considered not a conviction if it's  
2 successfully completed.”

3 {12} Concerned with the “prosecutorial misconduct” and “visibly ineffective  
4 assistance of counsel,” the judge filed a sua sponte motion for a new trial—  
5 enumerating the following specific instances of prosecutorial misconduct and  
6 ineffective assistance of counsel:

7 a. When the prosecutor learned that Defendant would testify[,] he  
8 represented to the court and defense counsel that Defendant had a  
9 prior conviction for child abuse which he would use for  
10 impeachment purposes. Defense counsel did not object. When  
11 Defendant testified, [defense] counsel elicited the fact that  
12 Defendant had a prior conviction for child abuse[,] and defendant  
13 gave his version of the events that led to the “conviction.” However,  
14 after trial and after the jury had returned its guilty verdict, defense  
15 counsel advised the Court that Defendant did not[,] in fact[,] have a  
16 prior conviction for child abuse, but rather a conditional discharge  
17 where the Defendant had successfully completed his probation. The  
18 prosecutor stated that he thought a conditional discharge was  
19 synonymous with a prior conviction, which it is not.

20 b. During closing argument the prosecutor repeatedly referred to  
21 Defendant as a “pedophile” and made reference to the Catholic  
22 Church clergy abuse scandal. The prosecutor also referred to himself  
23 as a Catholic. The prosecutor argued that normal people like himself  
24 and the jurors could not understand why pedophiles did what they  
25 did. Defense counsel failed to object to any of these arguments.

26 c. During his closing argument[,] the prosecutor stated that the  
27 [D]efendant should have brought in certain evidence if he wanted  
28 the jurors to believe he was not guilty. This was an impermissible  
29 shift in the burden of proof.

1 d. Defense counsel was patently unprepared for trial.

2 e. During the course of the trial all of the prosecution witnesses  
3 referred to . . . [D]efendant as “the defendant.” They did not refer to  
4 him by name even though he was a family friend of 20 years. The  
5 prosecution had obviously instructed the witnesses, including the  
6 12-year-old child [and alleged victim], to refer to him as the  
7 defendant and not by his name. Defense counsel never objected.

8 Citing *State v. Grogan*, the judge emphasized her judicial “duty to maintain the  
9 integrity of the court” and set a hearing on the motion for a new trial. 2007-NMSC-  
10 039, ¶ 10, 142 N.M. 107, 163 P.3d 494.

11 {13} The day before the hearing on the motion, Defendant moved for a mistrial and  
12 to bar reprosecution under *Breit*, 1996-NMSC-067. At the hearing, the State,  
13 represented by new counsel, did not oppose a new trial but opposed a bar to retrial.  
14 In the State’s response to Defendant’s motion, the State argued that the prosecutorial  
15 misconduct by the initial prosecutor did “not rise to the level of the most severe  
16 prosecutorial transgressions.” The judge retired before ruling on the motion.

17 {14} The new judge who presided over Defendant’s case reviewed the audio  
18 recording of Defendant’s trial and the hearing on the sua sponte motion for a new  
19 trial. Similarly concerned that the prosecutor’s misconduct undermined the court’s  
20 integrity, the judge ordered a new trial based on four instances of prosecutorial  
21 misconduct in closing arguments: (1) the statement that Defendant “did admit he  
22 was a convicted felon,” (2) the statement that Defendant “touched a little eleven-

1 year-old vagina and buttocks for whatever reasons—because he’s a pedophile,” (3)  
2 the statements about the reasonable doubt standard “effectively inverted the  
3 reasonable doubt standard by implying to the jury that they should convict Defendant  
4 if they had a reasonable doubt as to his innocence,” and (4) the line of argument  
5 about the Catholic Church and the prosecutor’s faith. Regarding ineffective  
6 assistance of counsel, the judge noted that defense counsel did not object to the  
7 statements made or request any curative instructions.

8 {15} As to Defendant’s double jeopardy challenge, the court determined that while  
9 the first two prongs of the *Breit* test were met, the third prong was not. The court  
10 found that “there is no indication that the prosecutor intended to provoke a mistrial—  
11 his conduct was simply overreaching and overzealous.” Thus, the issue boiled down  
12 to whether the prosecutor acted in willful disregard that a mistrial would result. The  
13 court found that because the prosecutor stopped his line of argument when  
14 admonished by the court and because his misconduct was primarily confined to the  
15 closing argument, his actions were “reckless and heedless,” not willful. The court  
16 also found that the prosecutor’s “statement that Defendant ‘did admit he was a  
17 convicted felon’ was negligently incorrect.” The judge denied Defendant’s motion  
18 to bar retrial, concluding that any “[p]rejudice to Defendant [could] be rectified by  
19 a new trial.”

1 {16} The case proceeded to a second trial where Defendant was again convicted of  
2 two counts of criminal sexual contact of a minor and one count of child abuse.  
3 Defendant appealed to the Court of Appeals.

#### 4 **B. Court of Appeals**

5 {17} On appeal, Defendant argued that double jeopardy barred the second trial and  
6 that he was deprived of effective assistance of counsel because his attorney had a  
7 conflict of interest. *Amador*, A-1-CA-38665, mem. op. ¶¶ 1, 5. The Court of Appeals  
8 rejected both arguments. *Id.* ¶ 6. The Court rejected Defendant’s *Breit* claim because  
9 the prosecutor’s conduct “did not rise to the level of willful disregard required to bar  
10 retrial.” *Id.* ¶¶ 2-4 (internal quotation marks omitted). While agreeing that “the  
11 prosecutor’s improper remarks may have influenced the jury’s determination of  
12 credibility,” the Court of Appeals said that because “the misconduct itself was  
13 limited to four discreet instances that occurred primarily during closing argument,”  
14 the misconduct was neither pervasive throughout the trial nor intended to inject  
15 unfair prejudice into the trial. *Id.* ¶ 4.

16 {18} In addition, the Court of Appeals reasoned, “while the prosecutor was  
17 negligently incorrect in his belief that Defendant’s conditional discharge could be  
18 used at trial as a prior felony, the prosecutor demonstrated his intent to avoid mistrial  
19 on this issue by notifying defense counsel—without objection—and the court of his

1 intent to use a prior felony when Defendant testified.” *Id.* On the ineffective  
2 assistance of counsel issue, the court held that it would not presume prejudice where  
3 Defendant failed “to establish either the existence of an actual conflict of interest or  
4 that he received ineffective assistance of [counsel] during his second trial.” *Id.* ¶ 5.  
5 The Court of Appeals affirmed Defendant’s convictions. *Id.* ¶ 6.

## 6 **II. DISCUSSION**

7 {19} Defendant timely filed a petition for writ of certiorari with this Court. The  
8 petition was granted on both issues: first, “[w]hether retrial should have been barred  
9 under *State v. Breit* based on the prosecutor’s pervasive misconduct,” and second,  
10 “[w]hether [Defendant] received ineffective assistance of counsel.” We limit our  
11 discussion to the dispositive issue of whether a retrial should have been barred based  
12 on prosecutorial misconduct.

13 {20} In *Breit*, this Court announced a three-prong test for determining when  
14 prosecutorial misconduct bars a second trial as violating double jeopardy under  
15 Article II, Section 15 of the New Mexico Constitution: (1) “when improper official  
16 conduct is so unfairly prejudicial to the defendant that it cannot be cured by means  
17 short of a mistrial or a motion for a new trial,” (2) “the official knows that the conduct  
18 is improper and prejudicial,” and (3) “the official either intends to provoke a mistrial

1 or acts in willful disregard of the resulting mistrial, retrial, or reversal.” *Breit*, 1996-  
2 NMSC-067, ¶ 32.

3 {21} The State concedes that the first two prongs of the *Breit* test are met. Although  
4 we are not bound by it, we accept the State’s concession, as the Court of Appeals  
5 only addressed *Breit*’s third willful disregard prong. *But see State v. Comitz*, 2019-  
6 NMSC-011, ¶ 25, 443 P.3d 1130 (declining to accept State’s concession that some  
7 of the defendant’s convictions violated double jeopardy).

#### 8 **A. Standard of Review**

9 {22} “An appellate review of a prosecutorial misconduct claim presents a mixed  
10 question of law and fact.” *State v. McClaugherty*, 2008-NMSC-044, ¶ 39, 144 N.M.  
11 483, 188 P.3d 1234. We “defer to the district court when it has made findings of fact  
12 that are supported by substantial evidence and [review] de novo the district court’s  
13 application of the law to the facts.” *Id.* On the ultimate question of whether a  
14 defendant’s right to be free from double jeopardy was violated, our review is de  
15 novo. *Comitz*, 2019-NMSC-011, ¶ 26.

#### 16 **B. The Prosecutor Acted in Willful Disregard of the Resulting Mistrial**

17 {23} If a prosecutor “either intends to provoke a mistrial *or* acts in willful disregard  
18 of the resulting mistrial, retrial or reversal,” the third prong of *Breit* is met. 1996-  
19 NMSC-067, ¶ 32 (emphasis added). There is no contention that the prosecutor here

1 acted with an intent to provoke a mistrial; we therefore address whether the  
2 prosecutor acted with a willful disregard of the resulting mistrial, retrial, or reversal.  
3 {24} “[Willful disregard] connotes a conscious and purposeful decision by the  
4 prosecutor to dismiss any concern that his or her conduct may lead to a mistrial or  
5 reversal.” *Id.* ¶ 34 (internal quotation marks omitted). A prosecutor acts with “willful  
6 disregard” of a possible mistrial or reversal when he or she “is actually aware, *or is*  
7 *presumed to be aware*, of the potential consequences of his or her actions.” *Id.* “The  
8 presumption that the prosecutor is aware of such consequences is established by the  
9 prosecutor’s egregious conduct, not necessarily from an inference of a conscious and  
10 purposeful decision to bring about a mistrial.” *McClagherty*, 2008-NMSC-044,  
11 ¶ 58. This is an objective standard. *Id.* ¶ 72. (“We clarify the holding in *Breit* that  
12 the standard by which courts should evaluate a prosecutor’s conduct to determine  
13 whether the conduct is willful is an objective one in light of the totality of the  
14 circumstances of the trial.”). That said, the threshold of willful disregard was  
15 intended to be high—“double jeopardy will rarely bar reprosecution if the  
16 misconduct is an isolated instance during the course of an otherwise fair trial.” *Breit*,  
17 1996-NMSC-067, ¶ 33. That high threshold was met here.

18 {25} Defendant contends that the prosecutor acted in willful disregard of the  
19 resulting mistrial or reversal when he improperly represented Defendant’s

1 conditional discharge as a felony conviction to impeach Defendant and when he then  
2 argued Defendant was not credible in closing arguments. Defendant also contends  
3 that the prosecutor’s misconduct was willful during closing argument, when he  
4 repeatedly called Defendant a pedophile, mentioned the Catholic Church clergy  
5 abuse scandal, inverted the reasonable doubt standard, and shifted the burden of  
6 proof to Defendant. The State, in turn, admits the prosecutor erred in representing  
7 Defendant had a prior felony conviction in his closing and rebuttal arguments. But,  
8 the State asserts that such errors are not egregious or pervasive enough to prove the  
9 prosecutor acted with willful disregard of a mistrial or new trial. We disagree with  
10 the State.

11 {26} We begin with the conditional discharge. After the State rested, the prosecutor  
12 informed the court that he would impeach Defendant with—what the prosecutor  
13 characterized as—a prior felony conviction for child abuse. The only way to refute  
14 the child’s testimony was for Defendant to testify since they were the only ones  
15 present. In reliance on the prosecutor’s representation, defense counsel brought up  
16 the conviction to lessen its impact on the jury. In urging the jury to find Defendant  
17 guilty, the prosecutor argued that Defendant was a convicted felon for child abuse  
18 and, therefore, should not be believed. The jury then found Defendant guilty of  
19 criminal sexual contact of a minor and child abuse. Two hours later, the prosecutor

1 disclosed that Defendant received a conditional discharge, and his exchange with the  
2 judge demonstrates that he did not know a conditional discharge could not count as  
3 a prior felony conviction for impeachment purposes and that he was not clear on  
4 whether Defendant had, in fact, satisfactorily completed the terms of the conditional  
5 discharge. In denying Defendant's *Breit* motion, the judge described the prosecutor's  
6 incorrect representation as "negligently incorrect," not rising to the level of willful  
7 misconduct. We disagree.

8 {27} A basic, fundamental rule of evidence is that impeachment of a defendant in  
9 a criminal case is governed by Rule 11-609. The rule permits impeaching a testifying  
10 defendant's "character for truthfulness" with a felony conviction not older than ten  
11 years "if the probative value of the evidence outweighs its prejudicial effect to that  
12 defendant." Rule 11-609(A)(1)(b). It is settled that the admission of a misdemeanor  
13 or felony conviction must be approached with great caution because it may cause  
14 undue, irreparable prejudice. *State v. Williams*, 1966-NMSC-145, ¶ 11, 76 N.M. 578,  
15 417 P.2d 62. The reasons are part of the fabric of criminal law that any competent  
16 prosecutor knows:

17       When a person is put on trial for an offense, he is to be convicted, if at  
18       all, by evidence which shows that he is guilty of that offense, and not  
19       by evidence showing him guilty of other offenses wholly unconnected  
20       with the one charged, and the evidence on a trial should be confined to  
21       the question in issue. A man cannot be convicted of crime because he  
22       is a bad man generally or has committed other crimes for which he has

1 not been punished, but proof of other crimes has a tendency to prejudice  
2 the minds of the triers against the accused and to predispose them to a  
3 belief in his guilt. In addition, there is the grave danger that the jury  
4 may be confused by the evidence relating to the distinct crime.

5 *State v. Rowell*, 1966-NMSC-231, ¶ 5, 77 N.M. 124, 419 P.2d 966 (quoting 1 Ronald  
6 A. Anderson, *Wharton’s Criminal Evidence* § 232, at 497 (12th ed. 1955)). Simply  
7 stated, the danger is that the jury will believe that because the defendant has  
8 committed a crime in the past, the defendant is predisposed to commit crimes and  
9 return a conviction on this basis. *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y.  
10 1901); *People v. Emmel*, 127 N.E. 53, 57 (Ill. 1920). It is also well recognized that  
11 the danger of prejudice is even more remarkable when the conviction of a prior crime  
12 for the same offense on trial is admitted because the jury might believe “if a  
13 defendant did it before, the defendant probably did so this time.” *State v. Fernandez*,  
14 2023-NMSC-005, ¶ 17, 528 P.3d 621 (text only)<sup>1</sup> (quoting *Gordon v. United States*,  
15 383 F.2d 936, 940 (D.C. Cir. 1967)).

16 {28} There are “rules that every legal professional, no matter how inexperienced,  
17 is charged with knowing.” *Breit*, 1996-NMSC-067, ¶ 33. These are such rules. Since  
18 1966, the rule in New Mexico has been clear: “All reasonable care, and the utmost

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<sup>1</sup>“(Text only)” indicates the omission of nonessential punctuation marks—including internal quotation marks, ellipses, and brackets—that are present in the text of the quoted source, leaving the quoted text otherwise unchanged.

1 good faith, must be exercised by the prosecutor, when questioning an accused about  
2 prior convictions, [so] an accused is not prejudiced by suggestions that he has been  
3 convicted of a misdemeanor or felony, when . . . he has not been so convicted.”  
4 *Williams*, 1966-NMSC-145, ¶ 11; *see Rowell*, 1966-NMSC-231, ¶ 6. The apparent  
5 dangers of unfair, undue prejudice clearly require due diligence. *Williams*, 1966-  
6 NMSC-145, ¶ 11. “Generally, the prosecutor has the burden of going further to  
7 verify the prior conviction[] before he can properly proceed to question the accused  
8 concerning the same.” *Id.* It is, therefore, a basic, fundamental principle that “a  
9 prosecutor[] who seeks to have a defendant make an admission concerning a felony  
10 when there has been no conviction[] hazards a reversal.” *State v. Miller*, 1979-  
11 NMCA-014, ¶ 22, 92 N.M. 520, 590 P.2d 1175. A basic rule of New Mexico law is  
12 that a conditional discharge is not a felony conviction. *See* NMSA 1978, § 31-20-13  
13 (1994); *In re Treinen*, 2006-NMSC-013, ¶ 4, 139 N.M. 318, 131 P.3d 1282 (per  
14 curiam).

15 {29} In *McClagherty*, we said there “must be a point at which lawyers are  
16 conclusively presumed to know what is proper and what is not.” 2008-NMSC-044,  
17 ¶ 49 (quoting *Pool v. Superior Court*, 677 P.2d 261, 270 (Ariz. 1984) (en banc)).  
18 That point was reached in this case. Simply researching the relevant statute shows  
19 that a conditional discharge is entered without an adjudication of guilt. Section 31-

1 20-13(A) (stating, “the court may, without entering an adjudication of guilt, enter a  
2 conditional discharge”). Moreover, since at least 1998, our case law has been clear  
3 that a conditional discharge is *not* a conviction. *State v. Herbstman*, 1999-NMCA-  
4 014, ¶ 20, 126 N.M. 683, 974 P.2d 177 (rejecting the argument that a person who  
5 receives a conditional discharge has been convicted); *State v. Harris*, 2013-NMCA-  
6 031, ¶ 3, 297 P.3d 374 (stating that a conditional discharge cannot serve as a  
7 conviction unless a statute specifically so states). As such, even if the prosecutor did  
8 not actually know his conduct was improper and prejudicial, it must be presumed  
9 that the prosecutor was aware of the consequences of his actions and acted with  
10 willful disregard of a mistrial or reversal in exposing the jury to inadmissible,  
11 prejudicial evidence. If those responsible for enforcing the law do not understand  
12 basic evidentiary rules while wielding the considerable power of the State, it  
13 undermines the public’s confidence in the justice system. Tested against *Breit’s*  
14 objective standard, the prosecutor’s conduct was sufficiently egregious to trigger the  
15 bar of double jeopardy.

16 {30} The district court failed to assess the totality of the circumstances properly,  
17 especially the prosecutor’s apparent lack of understanding of the fundamental  
18 principles of impeachment by a felony conviction, coupled with a lack of diligence  
19 on his part. As we explained in *McClagherty*, we focus “on the *effect* of the

1 prosecutorial misconduct on the defendant, regardless of the prosecutor’s intent.”

2 2008-NMSC-044, ¶ 26. The reason for this approach was clearly explained in *Breit*:

3       The object of constitutional double-jeopardy provisions is not to punish  
4       disreputable prosecutors. The purpose, rather, is to protect the  
5       defendant’s interest in having the prosecution completed by the original  
6       tribunal before whom the trial was commenced. Defendants should be  
7       protected from re prosecution once a prosecutor’s actions, *regardless of*  
8       *motive or intent*, rise to such an extreme that a new trial is the only  
9       recourse.

10 1996-NMSC-067, ¶ 22 (emphasis added) (citation omitted). Therefore, we reject the

11 district court’s findings that the prosecutor had not “intended to provoke a mistrial”

12 and that the prosecutor merely made a “negligently incorrect” statement as clearly

13 erroneous. Clearly erroneous findings by the trial court are not entitled to deference.

14 *McClagherty*, 2008-NMSC-044, ¶ 48.

15 {31} The prosecutor’s misconduct concerning the conditional discharge being

16 represented as a prior felony, then using it to impeach Defendant’s credibility in the

17 closing argument where Defendant’s credibility was critical may have been

18 sufficient to conclude that *Breit* was a bar to Defendant’s second trial. *See*

19 *McClagherty*, 2008-NMSC-044, ¶¶ 60, 70 (concluding that a single incident of

20 misconduct at trial was a “willful disregard of the potential for a mistrial, retrial, or

21 reversal”). However, we need not decide that here because additional instances of

22 prosecutorial misconduct prejudiced Defendant in this case.

1 {32} The prosecutor referred to Defendant as a pedophile *five times* in his closing  
2 argument and rebuttal, referred to the Catholic Church clergy abuse scandal, argued  
3 that Defendant should have brought his stepdaughters to testify, and asked the jurors  
4 to shift the burden of proof and protect other children from Defendant. These  
5 arguments were also extremely prejudicial and improper. *See White v. State*, 228 So.  
6 3d 893, 910-911 (Miss. Ct. App. 2017) (ruling that repeatedly calling the defendant  
7 a pedophile or molester was grounds for reversal); *Rodriguez v. State*, 210 So. 3d  
8 750, 754 (Fla. Dist. Ct. App. 2017) (stating that, by calling the defendant a pedophile,  
9 the prosecutor “suggests the defendant has engaged in repeated sexual abuse of  
10 minors and raises a profiling argument, namely that because he is a pedophile, it is  
11 likely that he would sexually molest children, including this specific victim”);  
12 *People v. Lewis*, 116 N.Y.S.3d 49, 51-52 (N.Y. App. Div. 2019) (finding the  
13 prosecutor’s argument improper where it “referenced the sexual abuse scandals  
14 involving the Catholic Church and Orthodox Jewish communities” and stating that  
15 prosecutors “must stay within the four corners of the evidence and avoid irrelevant  
16 and inflammatory comments which have a tendency to prejudice the jury against the  
17 accused” (internal quotation marks and citation omitted)); *State v. Allen*, 2000-  
18 NMSC-002, ¶ 104, 128 N.M. 482, 994 P.2d 728 (“We agree with Defendant that it  
19 is improper for the prosecution to refer the jury to matters outside the record or to

1 make certain kinds of ‘law and order’ appeals.”); *State v. Paiz*, 2006-NMCA-144,  
2 ¶ 58, 140 N.M. 815, 149 P.3d 579 (cautioning prosecutors not to invite jurors to put  
3 themselves in the victims’ place).

4 {33} These improper arguments compounded to prejudice the jury against  
5 Defendant and, combined, demonstrated the prosecutor’s willful disregard of the  
6 resulting mistrial.

### 7 **III. CONCLUSION**

8 {34} For all the foregoing reasons, we hold that Defendant’s second trial was barred  
9 by double jeopardy under Article II, Section 15 of the New Mexico Constitution.  
10 The Court of Appeals is reversed, and the case is remanded to the district court to  
11 vacate Defendant’s convictions and discharge Defendant from any further  
12 prosecution in this matter.

13 {35} **IT IS SO ORDERED.**

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**MICHAEL E. VIGIL, Justice**

1 **WE CONCUR:**

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**C. SHANNON BACON, Chief Justice**

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**DAVID K. THOMSON, Justice**

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**JULIE J. VARGAS, Justice**

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**BRIANA H. ZAMORA, Justice**