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COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE

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

**STATE OF NEW MEXICO,**

**Plaintiff-Appellant,**

**vs.**

**No. 35,564**

**CHRISTOPHER HEYSER,**

**Defendant-Appellee.**

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
DONA ANA COUNTY  
THE HONORABLE MARCI E. BEYER, PRESIDING**

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**STATE OF NEW MEXICO'S REPLY BRIEF**

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**April 17, 2017**

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## **STATEMENT OF COMPLIANCE**

In accordance with Rule 12-213(F)(2) NMRA, this brief was prepared using Times New Roman, a proportionally-spaced typeface, and the body of the brief does not exceed 15 pages. This brief was prepared using Corel WordPerfect 12.

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## ARGUMENT

**I. Defendant overstates the State's concession in the district court. The State did not concede that Rule 5-203(A) was applicable or that dismissal was warranted under Rule 5-203(A)**

**A. The State merely conceded that the Magistrate Court convictions and the cocaine possession charge were based on a series of acts "connected together," but still asserted that Rule 5-203(A) does not apply and that dismissal was not an appropriate remedy**

Defendant asserts that the State conceded the "applicability" and "consequence" of Rule 5-203 NMRA to this case and that the State "waived its right to argue that Rule 5-203 did not preclude a prosecution of the cocaine possession charge[.]" [e.g., AB 9, 11-12; 18] However, Defendant's position that the State's concession "conceded the applicability of Rule 5-203, and further conceded that dismissal was the sole remedy" vastly overstates the State's concession below. [AB 18] The State did not concede the applicability of the compulsory joinder rule or that the remedy of dismissal was appropriate, and, instead, argued that Rule 5-203(A) and the *Gonzales* remedy should not apply based on the circumstances of the respective prosecutions notwithstanding that the factual bases of the respective charges arising out of a series of acts connected together. [RP 47-55] Stated plainly, the State's concession only pertained to one alternative ground raised in this appeal - that the Magistrate Court convictions and cocaine possession charge arose out of a series of

acts “connected together.” [BIC 11-16] The State did not concede any of the four alternative bases argued in its brief in chief that dismissal under the compulsory joinder rule was inappropriate under these circumstances. [BIC 17, 19, 24, 28]

Therefore, even if this Court holds the State to its concession below that the Magistrate Court convictions and the cocaine possession charge are based on a series of acts “connected together,” this Court should still address the State’s alternative arguments based on (1) a straightforward application of this Court’s opinion in *Aragon* that adopted an exception to compulsory joinder where a defendant pleads to lesser offenses, [BIC 17] (2) that the compulsory joinder rule and *Gonzales*’ remedy are not applicable to the facts and circumstances of this case as a matter of the rule maker’s intent, [BIC 19] and (3) that additional limitations/exceptions should apply to excuse joinder in this instance, particularly (a) a jurisdictional exception, [BIC 24] or (b) where the State lacked sufficient evidence of the greater charge while the lesser charge was pending. [BIC 28] The State asserted these arguments below, did not concede these arguments below, and appealed from the district court’s Order Granting Defendant’s Motion to Dismiss on the basis of these arguments.

**II. This Court is not required to accept the State’s erroneous concession that the Magistrate Court convictions and cocaine possession charge arose out of a series of acts “connected together”**

Defendant contends that the State is bound by its concession that the

Magistrate Court convictions and cocaine possession charge are based on a series of acts “connected together” based on a misapplication of the doctrines of preservation, invited error, waiver, and judicial estoppel. [AB 4-20] Defendant has pointed to no authority stating that an erroneous concession on a legal issue (rule interpretation) in a district court is binding on appeal and instead tries to bind the State into its erroneous concession based on these inapposite doctrines.

**A. The district court preserved the issue despite the State’s concession**

Defendant asserts that the State’s concession implicates a failure to preserve whether the Magistrate Court convictions and cocaine possession charge arose out of a series of acts “connected together.” [AB 10-12] However, the district court sua sponte raised the issue at the hearing, initially reasoning that Defendant’s conduct was too attenuated to bring the offenses within the ambit of Rule 5-203(A). [BIC 8-10] It therefore preserved the issue. [See also BIC 10 (purposes of preservation rule were met)]

The district court invoked its own ruling on the issue of whether the Magistrate Court convictions and the cocaine possession were premised on a series of acts connected together. See *State v. Balderama*, 2004-NMSC-008, ¶ 19, 135 N.M. 329 (reasoning that an issue as to the admissibility of evidence “was fairly presented to the court, and a ruling was fairly invoked inasmuch as the court invoked its own



ruling”). Although the district court ultimately changed its mind and accepted the State’s erroneous concession, the district court’s sua sponte action in raising the issue preserved it for appellate review. *See id.* ¶ 19-21 (district court’s sua sponte exclusion of evidence preserved issue for review). Because “formal exceptions are not required” to preserve an issue, the State’s acquiesce in, and the district court’s ultimate ruling being in favor of, Defendant’s position does not defeat preservation of the issue. *Id.* ¶ 19 (quoting Rule 12-206(A) NMRA); *see id.* (“[W]e have stated that our rule disregards form and relies upon substance, and merely requires that a question be fairly presented to the court and a ruling invoked” (internal quotation marks and citation omitted)).

In fact, because the district court indicated that it did not agree with the State (in arguing that exceptions should apply) or Defendant (in arguing that the conduct was based on a series of act connected together under Rule 5-203(A)), the district court’s acceptance of the State’s concession was determinative of the outcome. [CD 4/15/16. 11:50:05-11:24] The dispositive issue, under the district court’s analysis, cannot be deemed unpreserved.

**B. The doctrine of “invited error” does not apply**

Defendant contends that the State’s concession constitutes “invited error.” [AB 12-14] Defendant has cited no case law applying the invited error doctrine against the

State to bind the State to an erroneous concession that conflicts with Supreme Court precedent. The invited error doctrine appears limited in application as an exception for review for fundamental error. *See, e.g., State v. Ortega*, 2014-NMSC-017, ¶ 34, 327 P.3d 1076 (“The doctrine of fundamental error cannot be invoked to remedy the defendant’s own invited mistakes.”). Regardless whether the invited error doctrine is applicable to the State where an issue is preserved by a district court’s sua sponte actions, it is not applicable to bind a party to an erroneous position below that is the result of oversight or neglect and not the result of a strategic or tactical decision. *See State v. Anderson*, 2016-NMCA-007, ¶ 19, 364 P.3d 306.

The invited error doctrine does not apply because the State’s concession was not the product of a tactic or strategy. *See State v. Foxen*, 2001-NMCA-061, ¶ 12, 130 N.M. 670 (declining to apply the invited error doctrine where “we see no manner in which the deficiencies in the instructions could have been the product of tactic or strategy”). The State’s concession was more akin to a concession ground in oversight or neglect as to how this Court and our Supreme Court construed the phrase series of acts “connected together” in *Aragon and Paiz*. [BIC 13-17] *See Foxen*, 2001-NMCA-061, ¶ 12 (invited error doctrine did not apply where defendant’s error was “simply the result of oversight or neglect”). There is simply no tactical or strategic explanation for the State’s concession that the Magistrate Court convictions and the cocaine

possession charge were based on a series of acts “connected together.” It was a position created by oversight from the State and its overly broad, unreasonable reading of the language in Rule 5-203(A). The State had no strategic or tactical position to gain from the concession and is not trying to now profit on appeal from its erroneous position below. *See Ortega*, 2014-NMSC-017, ¶ 34 (discussing the invited error doctrine as it relates to “the ethical maxim that no party can profit from his own wrong.”).

**C. The doctrine of “waiver” does not apply**

Defendant also argues that the State “knowingly, intelligently, and voluntarily” waived its right to proceed with the cocaine possession charge.<sup>1</sup> [AB 14-16] Defendant’s argument relies on case law addressing a criminal defendant’s intentional waiver of a known constitutional or statutory right. *See Johnson v. Zerbst*, 304 U.S. 458 (1938); *State v. Bishop*, 1988-NMCA-113, 108 N.M. 105. Defendant has cited no authority for the proposition that the waiver doctrine applies to bind the State to a concession made below. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764 (“[The appellate courts] assume where arguments in briefs are unsupported

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<sup>1</sup>Again, this position overstates the State’s concession in this case. The State did not concede that Rule 5-203(A) bars this prosecution, only that the Magistrate Court convictions and cocaine possession charge arise out of a series of acts “connected together.” The State addresses waiver in this context.

by cited authority, [that] counsel ... was unable to find any supporting authority.”).

Further, assuming that the waiver doctrine has application to bind a State’s concession, a “waiver must have been given voluntarily, knowingly, and intelligently, and the person must have been adequately informed as to his rights.” *State v. Boeglin*, 1983-NMCA-075, ¶ 15, 100 N.M. 127. Here, the State’s concession was based on a misapprehension or lack of awareness of the case law construing Rule 5-203(A). Any waiver of a “right” or “privilege” was not intentional, knowing, and informed as the State erroneously believed the language of Rule 5-203(A) was implicated under the facts. The State also did not relinquish a constitutional or statutory “right” or “privilege” and instead merely took an erroneous legal position based on a misapprehension regarding the scope of the language of Rule 5-203(A). [AB 14-16]

The only cases that speak of “waiver” by the State are those that hold that an issue was unpreserved by the State. *See State v. Gutierrez*, 2005-NMCA-015, ¶¶ 20-21, 136 N.M. 779 (State “waived” its right to challenge the timing of a motion to suppress where it did not object on that basis below). Here, the State’s concession was premised on an erroneous interpretation of the language of a rule, the issue was developed through briefing, argument, and a ruling was invoked by the district court, therefore fulfilling the preservation requirement. The doctrine of waiver does not apply.

**D. The doctrine of “judicial estoppel” does not apply**

Defendant contends that the State is judicially estopped from changing its position on appeal. [AB 16] “Judicial estoppel is a doctrine that prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position.” *Santa Fe Pac. Trust, Inc. v. City of Albuquerque*, 2012-NMSC-028, ¶ 32, 285 P.3d 595. In order to prevail under the judicial estoppel doctrine, this Court considers three elements:

First, the party against whom the doctrine is to be used must have successfully assumed a position during the course of litigation. Second, that first position must be necessarily inconsistent with the position the party takes later in the proceedings. Finally, while not an absolute requirement, judicial estoppel will be especially applicable when the party’s change of position prejudices a party who had acquiesced in the former position.

*Id.* This Court should reject Defendant’s judicial estoppel argument because Defendant has failed to show two elements and because the purpose underlying judicial estoppel is not implicated under the facts and circumstances of this case.

First, the State did not “successfully” assume the position that the Magistrate Court convictions and cocaine possession charge arose out of a series of acts connected together. The State acquiesced and conceded to Defendant’s position below to its detriment, not to its success.

Second, Defendant can point to no tangible prejudice caused by the State's change in position on appeal. *See Laughlin v. Convenient Management Serv's*, 2013-NMCA-088, ¶ 17, 308 P.3d 992 (holding that judicial estoppel did not apply where first two elements were met but party was not prejudiced). Regardless of whether the State changed its position on appeal regarding whether his conduct was a series of acts "connected together," the State would have appealed regardless on the alternative grounds argued in the district court below and herein. Even if successful on appeal, Defendant is placed in the same situation as he was below, facing a cocaine possession charge on the same evidence. Defendant made his arguments below, briefed the issue, and asserted his position at the hearing, and his position is not prejudiced by the State's actions. Defendant's arguments that the passage of time might impact his defense due to lost evidence and fading memories is speculative at best and insufficient to establish prejudice. [AB 19] *See State v. Fierro*, 2014-NMCA-004, ¶ 28, 315 P.3d 319 ("Defendant must establish prejudice by more than mere conjecture: vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient ...; [D]efendant must be able to show definite and not speculative prejudice, and in what specific manner missing witnesses would have aided his defense.").

Moreover, application of judicial estoppel under these circumstances would not

further the purpose of judicial estoppel. Judicial estoppel is designed to prevent a party from “playing fast and loose with the court during the course of litigation.” *Laughlin*, 2013-NMCA-088, ¶ 18. Here, the State did not concede that Defendant’s conduct was based on a series of acts connected together for any strategic purpose or to take advantage of such a ruling and, instead, took the position to its detriment. The State is not playing fast and loose with the court, and instead, is now arguing the correct legal position on appeal as Rule 5-203(A) has been construed by our Supreme Court and this Court. *See Laughlin*, 2013-NMCA-088, ¶ 18 (holding that judicial estoppel did not apply where the party changing its position was not playing fast and loose with the court).

**E. Defendant has no answer for *Paiz* or *Aragon***

Defendant focuses his argument on an attempt to hold the State to its erroneous concession below for good reason. Defendant’s brief does not address or discuss our Supreme Court’s construction and application of the phrase series of acts “connected together” in *State v. Paiz*, 2011-NMSC-008, 249 P.3d 1235. [BIC 13-15] Defendant also does not discuss this Court’s opinion in *State v. Aragon*, 2017-NMCA-005, 387 P.3d 320, which likewise held that a tenuous connection between the conduct comprising two offenses did not bring the offenses within the ambit of the compulsory joinder rule. [BIC 15-17] The district court’s decision in this case - that

the Magistrate Court convictions and cocaine possession charge are based on a series of acts “connected together” - conflicts with *Paiz* and *Aragon* and should not stand notwithstanding the State’s erroneous concession below.

**III. Regardless, even if the Magistrate Court convictions and cocaine possession charge are based on a series of acts “connected together,” Rule 5-203(A) does not apply to bar this prosecution**

Even if this Court holds that the State is bound to its erroneous concession below, this Court should reverse the district court’s dismissal of the cocaine possession charge on any one of the four alternative grounds raised herein. [BIC 17, 19, 24, 28] The State primarily relies on the arguments in its brief in chief but submits the following

**A. This Court’s holding in *Aragon* that a plea to a lesser offense does not warrant application of the compulsory joinder rule as to a greater offense is dispositive**

As the State’s brief argues, this Court has already adopted one of the limitations on compulsory joinder that the State argued for below in *Aragon*. [RP 52 (arguing that pleas to select offenses from one criminal episode should not bar subsequent prosecution for greater offenses); BIC 17-19] *Aragon* unambiguously held that a defendant’s plea to a lesser offense in one prosecution does not bar a subsequent prosecution of an additional, greater offense even where the two offenses arose out of one criminal episode. *Aragon*, 2017-NMCA-005, ¶ 9. [BIC 17-19]



Defendant does not acknowledge the dispositive and on-point holding in *Aragon* and, in fact, does not cite *Aragon* in his brief. This Court can decide this case based solely on a straightforward application of *Aragon*.

**B. Defendant does not make a cognizable due process or double jeopardy claim**

Although Defendant's heading asserts that "[a]ny prosecution of [Defendant] for possession of cocaine would violate his due process and double jeopardy rights," Defendant makes no argument under either constitutional ground in his brief. [AB 20] The Magistrate Court convictions and cocaine possession charge in this case are simply not the "same offense[s]" for double jeopardy purposes and double jeopardy is not implicated in this case. *See State v. Rodriguez*, 2005-NMSC-019, ¶ 7, 138 N.M. 21 ("The United States Constitution and the New Mexico Constitution protect criminal defendants against double jeopardy for the same offense."). The dispositive inquiry is the scope of Rule 5-203(A) and whether the *Gonzales* remedy applies under these circumstances, and this case does not present constitutional issues.

**C. Defendant's argument against a jurisdictional exception shows why a jurisdictional exception to compulsory joinder is ideal**

In arguing that a jurisdictional exception would not be good policy in this case, Defendant asserts that the State could have dismissed the Magistrate Court charges without prejudice and reinstated the charges in district court. [AB 24, 27] Defendant

notes that the State could have dismissed the Magistrate Court charges even after obtaining a plea disposing of those charges but prior to sentencing. [AB 24, 27] By construing the compulsory joinder rule as requiring the State to refrain from allowing a defendant to plea to misdemeanor magistrate court charges where there is or may be felony charges filed in district court, Defendant's position would thwart a defendant's interest in finality over misdemeanor magistrate court charges and would unnecessarily result in the squandering of judicial resources in district court. It would defeat one of the purposes of joinder - ensuring finality without unduly burdening the courts - to construe the rule as preventing misdemeanor charges from reaching an efficient resolution where the parties agreed to the disposition by a plea. *See State v. Gonzales*, 2013-NMSC-016, ¶ 26, 301 P.3d 380. [BIC N. 4]

**D. The State did not have sufficient evidence to warrant trying the cocaine possession charge at the time Defendant pleaded to the Magistrate Court charges**

The State's last alternative argument does not argue for an exception premised on there being different prosecutors in the respective prosecutions. [AB 25] The State submits that the Court should excuse compulsory joinder where "the prosecuting attorney did not have sufficient evidence to warrant trying the additional offense at the time of the first trial." ABA Standards for Criminal Justice Section 13-2.3(a), (c). [BIC 29-31] The State's position is that it did not have sufficient evidence to warrant

trying the cocaine possession charge until it received the SNMCL laboratory results on the cocaine found in Defendant's shoe until March 16, 2016. Therefore, his plea to the Magistrate Court charges on November 24, 2015 should not bar the prosecution cocaine possession charge.

### CONCLUSION

The State respectfully requests that this Court reverse the District Court's Order Granting Defendant's Motion to Dismiss and remand this case for trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by placing it in the mail on or before the close of business on the next business day following the filing of this brief in the Court of Appeals on April 17, 2017:

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