IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v. **No. S-1-SC-40478**

ALEXEE J. TREVIZO,

Defendant-Appellee.

STATE OF NEW MEXICO'S BRIEF-IN-CHIEF

Appeal from the Fifth Judicial District Court
D-503-CR-2023-00159
Eddy County, New Mexico
The Honorable Jane Shuler-Gray

RAÚL TORREZ
Attorney General

MICHAEL J. THOMAS
Assistant Solicitor General
New Mexico Department of Justice

Attorneys for Plaintiff-Appellant
201 Third Street NW
Suite 300
Albuquerque, NM 87102
(505) 717-3500
mthomas@nmdoj.gov

TABLE OF CONTENTS

Citations to the record proper are in the form **[RP__]**. Citations to the audio transcript of proceedings are in the form **[Date CD Hour:Minute:Second]**. The audio transcript was prepared with For the Record software.

TABLE OF AUTHORITIES

NEW MEXICO CASES

DECISIONS FROM OTHER JURISDICTIONS

NEW MEXICO CONSTITUTIONAL PROVISIONS

NEW MEXICO STATUTES

NEW MEXICO COURT RULES

FEDERAL STATUTES AND REGULATIONS

OTHER SOURCES

INTRODUCTION

Defendant was charged with murder after she gave birth in a hospital bathroom and—without calling for medical assistance or immediately informing anyone—put the baby boy in a plastic bag and left him in the bathroom trash. Shortly after, but before Defendant told anyone that she had given birth, the baby was found by hospital staff and was soon declared dead. When a physician told Defendant that a dead baby had been found in the bathroom, Defendant made spontaneous statements in the visible presence of law enforcement, without any questioning or prompting by law enforcement. Defendant later moved to suppress her statements, claiming that the physician-patient privilege applied. Defendant's motion also claimed that there was a violation of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

After an August 2023 hearing, the district court granted the suppression motion, from which the State appeals. The district court erred in suppressing Defendant's statements because neither the physician-patient privilege nor *Miranda* applied to protect her statements from being admitted against her at trial in this matter. The district court's suppression order must be reversed.

SUMMARY OF PROCEEDINGS

The material facts in this case are essentially undisputed.[1] Around midnight on January 26, 2023, Defendant, age nineteen at the time,[2] visited the emergency room of Artesia General Hospital in Artesia, New Mexico. Affidavit for Arrest Warrant ¶¶ 1-5, *State v. Alexee Trevizo*, M-18-FR-2023-00053 (Eddy Co. Mag. Ct. May 10, 2023). Defendant reported that she was experiencing lower back pain and denied being pregnant, claiming that she had been experiencing regular periods. *Id.* ¶ 5. It appears that Defendant may have also denied, even if implicitly, having had any sexual relations, whether ever or at any material time. *Id.* Consistent with medical procedures, laboratory tests were run to determine whether Defendant was pregnant.

Video footage from a public hallway of the hospital shows that Defendnat walked to the bathroom just before 1:39 a.m.[3] on January 27, 2023. **[Def. Ex. F**

---

[1] Because of the pre-trial procedural posture, some reliance on filings, such as those in magistrate court, are necessary.

[2] While Defendant was a high school senior, it is undisputed that she was nineteen years of age at the time. Defendant was born in November 2003, according to the criminal information filed in district court. **[RP 1-2]** As a result, she would have attained nineteen years of age in November 2022, two months before the incident date.

[3] Due to the many references to the actual time, reference is made (for that exhibit) to the time stamps at the upper left corner of the video showing the date (January 27, 2023) and times.

(exhibit is labeled "Full Hospital Surveillance Footage")] Less than a minute later, Defendant's mother walked to the bathroom door, apparently to check on Defendant. **[*Id.*]** Defendant's mother stood by the bathroom door for approximately fifteen seconds, before she walked back down the hallway at 1:40 a.m. and went out of view of the camera. **[*Id.*]** Nearly nine minutes later, just before 1:49 a.m., Defendant's mother walked to the bathroom again. **[*Id.*]** She stood at the bathroom door for about thirty seconds before she walked towards the camera, away from the bathroom, before she went out of sight at 1:49:40 a.m. **[*Id.*]** A hospital employee then stood outside the bathroom, apparently to be present in case Defendant needed assistance.

Approaching 1:56 a.m., the emergency room doctor walked towards the bathroom and another medical worker knocked on the bathroom door. **[*Id.*]** Just before 1:57 a.m., the bathroom door opened and the medical assistant and the doctor briefly spoke with Defendant. **[*Id.*]** At 1:57:05 a.m., the doctor pointed in a certain direction (towards the camera) as if to indicate that Defendant needed to go back to the exam room. **[*Id.*]** The doctor then accompanied Defendant down the hall before they both went out of view at 1:57:17 a.m. **[*Id.*]** The video footage established that Defendant was in the bathroom for eighteen minutes, from 1:39 a.m. until exiting the bathroom at 1:57:06 a.m. **[*Id.*]** During that entire time, no other patient entered the bathroom.

Within the next minute, other medical staff walked towards the bathroom and visibly noticed something on the floor in the hallway before focusing on the bathroom. **[*Id.*]** In a separate video, a janitorial employee explained to a detective that that there was "blood" everywhere including from where Defendant exited the bathroom, making it apparent that it was blood drops or bloody shoe prints seen in the hallway. [**Def. Ex. H (exhibit labeled "Video Tape – AGH – Vaskas – APD") at 1:26:00-20]** At 2:08 a.m., a janitorial employee entered to clean the bathroom. **[Def. Ex. F]** Shortly after 2:26 a.m., cleaning staff noticed something concerning in the trash. **[*Id.*]** Moments later, just before 2:27 a.m., medical staff including a nurse responded to the area, it being apparent that they realized that there was likely a baby in the trash. **[*Id.*]**

At that point, a half hour had passed since Defendant left the bathroom (at 1:57 a.m.), and she had not told any person that she had placed her baby in the trash. At 2:27:33 a.m., the emergency room doctor walked somewhat quickly to the area and looked into the trash bin and, by 2:28:00 a.m., a nurse took the trash bin into a room into which the doctor had already proceeded. **[*Id.*]** Between 2:31:00 and 2:32:00 a.m., the doctor and other medical staff comforted the cleaning employee who discovered the baby in the trash. **[*Id.*]** The police were called at some point around that time. It is undisputed that the baby was declared dead around 2:38 a.m.

[RP 112 ¶ 34] The timeline is not in dispute in this or any other material aspect. **[*See* RP 109, 111-112 ¶¶ 28-33 (containing Defendant's requested factual findings)]**

Artesia Police Department lapel camera video reveals that the emergency room doctor, at 2:41 a.m., told the police officers that Defendant had been accepted at Lovelace (apparently the facility in Roswell) and needed to be moved there quickly. **[Def. Ex. H 2:15-30]** The emergency room doctor also stated that she needed to tell Defendant and the mother what was going on.[4] **[*Id.* 2:15-30]** The doctor asked if one of the officers could be present in the room, and they (doctor, nurse and at least one police officer) walked towards the room in which Defendant sat on a hospital bed. **[*Id.* 2:31-3:00]** The officers did not tell the doctor what to say. **[*Id*]**

At nearly 2:42 a.m., the doctor walked into the exam room, followed by at least one, and likely two, police officers.[5] Upon entering the room, Defendant and her mother, each, at virtually the same time, looked at the police officer(s) for a brief moment and were aware of the officers' presence standing closer to the door, while

---

[4] Reference is made to the play progress stamp at the **lower left** of the body camera footage. The point corresponding to exactly 2:41:00 a.m. (upper right) correlates to 2:16 (bottom left) in terms of how far into the video that occurs.

[5] The district court's findings state that there were two officers. **[RP 157 ¶¶ 6-7]** That seems corroborated by the fact that the video footage from one police officer shows another officer at various points.

the doctor went to the farther side of the room next to the bed in which Defendant sat. **[*Id.* 3:03-08]** In the visible presence of the police officer and Defendant's mother, the doctor told Defendant and her mother that they, i.e., hospital staff, found a dead baby in the bathroom. **[*Id.* 3:08-13]** The following exchange occurred:

Doctor:	I'm sorry to tell you but we discovered a dead baby in the bathroom.
Defendant's mother:	Oh my gosh.
Defendant:	I'm sorry it came out of me and I didn't know what to do.
Defendant's mother:	Lexi I told you about this. I just asked you baby to tell me the truth.
Defendant:	I was scared . . . it was not crying or nothing.
Defendant's mother:	[aggressively] What did you do to it ?
Doctor:	OK stop right there.

[*Id.* 3:08-32]

The doctor then explained that the number one priority was to make sure Defendant is medically stable and that she will be transported to another facility if she agreed, noting that she was nineteen and it was her choice, to which Defendant agreed. **[*Id.* 3:33-4:11]** During this time, Defendant looked towards the police officer and male nurse at least once. **[*Id.* 3:49-4:08]** The doctor then told Defendant that because of the circumstances in which Defendant delivered the baby and appeared to be trying to hide the baby, "we do have to have the police involved" and

further explained that the baby would have be taken for an autopsy. **[*Id.* 4:11-4:40]** Defendant again stated that the baby was not crying when it came out. **[*Id.* 4:19-25]** The doctor noted that this situation needed to be handled correctly and that she wanted to be transparent about everything. **[*Id.* 4:36-45]** During all that time, officers did not say anything or take any action.

After the doctor finished talking with Defendant, the doctor (in Defendant's presence) asked the officers if they needed to talk with Defendant, to which the officer (appearing to speak to the doctor) answered simply that a detective was on the way to talk with Defendant. **[*Id.* 4:47-5:03]** During that exchange, the doctor confirms that the transport (helicopter) was expected to be there in twenty to thirty minutes, before leaving the room. **[*Id.* 5:02-5:05]** At that point, just before 2:44 a.m., the nurse (who identified himself as the charge nurse) asked Defendant and her mother if they had any questions, to which Defendant's mother asked how big the baby was. **[*Id.* 5:05-5:18]** Defendant's mother was visibly surprised when the nurse responded that the baby was "full term." **[*Id.*]** At that point, Defendant's mother talked with Defendant about whether she has seen news reports of girls having babies and getting in trouble for hiding them or discarding the babies. **[*Id.* 5:19-5:35]** The charge nurse confirmed that Defendant and her mother have no other questions and then leaves the room. **[*Id.* 5:35-5:40]**

It is only at that point, two and a half minutes **after** the doctor, nurse and police officers entered the room, that Artesia Police Sergeant Anaya first spoke with Defendant in any manner. Sergeant Anaya primarily explained that a detective would speak with Defendant so that she would have an opportunity to provide a statement and noted that statements would be gathered from the medical staff.[6] **[*Id.* 5:41-6:05]** Nearly three full minutes after the doctor, nurse and officers entered the room, Sergeant Anaya told Defendant that she was currently being detained. **[*Id.* 6:06-6:18]** Sergeant Anaya, who did not ask Defendant any substantive questions, clarified further that Defendant was **not** under arrest but was being detained and that, at that time, the paramount concern was her medical care, hinting that she may be transported to another facility before a detective can take her statement in those early a.m. hours. **[*Id.* 6:16-45]** Sergeant Anaya, whose demeanor was polite and matter of fact, asked Defendant if she understands that she is not free to leave, and she states yes. **[*Id.* 7:00-08]**

---

[6] At that point in the video, it is more clear that there were two police officers, because one officer's lapel camera video shows Sergeant Anaya, identifiable from the "chevron" patch (associated with sergeants) visible briefly on his uniform at that point and easily seen earlier in the video. **[Def. Ex. H 1:30-2:30, 5:40-43]** Additionally, it is clear from the video that Defendant and her mother are looking in one direction and the officer whose lapel video is recording is at a slight angle off to the side.

At that point, Defendant's mother asked where the baby was found, to which Sergeant Anaya stated he did not know and that they were still gathering information, suggesting it would be best to wait until the detective talks with Defendant. **[*Id.* 7:09-28]** At that point, Sergeant Anaya asked to see Defendant's driver's license, which Defendant's mother handed to him. **[*Id.* 7:30-7:52]** After handing the driver's license to the second police officer, Sergeant Anaya told that officer to call in the information and then left the room. **[*Id.* 7:52-8:00]** It was obvious, based on the ensuing phone call between the other officer and dispatch, that the officer was checking both Defendant and her mother for any warrants, a common police practice when interacting with persons (even witnesses) for any length of time. [***Id.* 7:52-8:00, 8:22-9:10]**

Defendant's mother stepped out of the room for a moment, stating that she wished to call her husband, but returned to the room in less than thirty seconds. **[*Id.* 8:15-8:45]** While the other police officer was still on the phone with dispatch, Defendant's mother returned and asked Defendant where she put the baby and asked why she had not said anything to "us." **[*Id.* 8:43-9:02]** Defendant's mother then asked Defendant, rhetorically, "do you want to get in trouble for this now?" and that Defendant could "be in trouble" for this. **[*Id.* 9:02-9:06]** The police officer, still on the call with dispatch, then told Defendant's mother to "give it time," hinting that she should stop questioning Defendant. **[*Id.* 9:05-9:10]** The officer reminded

Defendant's mother that they were waiting until the detective arrived to get relevant statements including from Defendant "whenever she is ready." **[*Id.*]** A substantial amount of time passed without the officer or Defendant saying anything substantive or related to the case. **[*Id.* 9:30-32:00]** During that time, a nurse examined Defendant, at which time the officer looked towards the wall, apparently in an attempt to avoid his camera recording anything visually. **[*Id.*]**

After Defendant was apparently left alone in the room for some time, Sergeant Anaya re-entered the room and reminded Defendant that detectives were on the way to get her statement. **[*Id.* 35:00-36:30]** Sergeant Anaya told Defendant that they would not stay in there waiting with her (and would continue to wait in the hallway outside the room), because they did not want to make it "worse" and add to her anxiety given the situation. **[*Id.* 35:40-36:15]** Within the next hour, the police criminalistics technician took photographs of the dead newborn on a hospital gurney. **[*Id.* 1:25:30-1:30:45]** Eventually, around 4:30 a.m. that morning, Defendant was transported by helicopter to another facility before she could meet with detectives. **[*Id.* 1:50:35-1:55:00]** Before Defendant is placed into the helicopter by the associated medical crew, Sergeant Anaya told Defendant that detectives would get in touch with her at a later point. **[*Id.* 1:52:18-52]** It is apparent from the video that Defendant, apart from some nurse visits, was alone in the room for most of the time from approximately 3:00 a.m. until leaving the hospital by helicopter around 4:30

a.m. **[*Id.* 21:30-1:55:00 (during almost all of which time the video is of the hallway outside the room)]**

Defendant was later charged in May 2023 in magistrate court. Criminal Complaint, *State v. Alexee Trevizo*, M-18-FR-2023-00053 (Eddy Co. Mag. Ct. May 10, 2023). Because the State filed for pretrial detention, the case was moved to district court for the hearing on that motion as well as for a preliminary examination for probable cause. Defendant filed a motion to suppress evidence assertedly received in violation of any doctor-patient privilege, citing Rule 11-504 NMRA and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d to d-9. **[RP 37-50]** The motion also sought suppression of evidence allegedly taken in violation of *Miranda*. **[*Id.*]** The defense motion to suppress did not appear to specifically seek suppression of the video footage of the hospital public hallway but did refer generally to "videos[.]" **[*Id.* 41]** Although the motion set forth the text of Rule 11-504, the motion did not discuss or specifically bring to the court's attention the exception in Rule 11-504(D)(4). **[*Id.* 39-40]** Defendant's motion also referred to media or online publicity about the incident. **[*Id.* 42 ¶¶ 16-17]**

The State's responded that the privilege, even if it otherwise possibly applied, was waived due to the presence of known third persons. **[*Id.* 79-91]** The response also argued that the privilege was inapplicable in any event because Rule 11-504(D)(4) provides for an exception for communications required by law to be

reported to a public agency. **[*Id.*]** Specifically citing NMSA 1978, Section 32A-4-3(A) (2021), the State observed that physicians in New Mexico are required to report child abuse and neglect. **[*Id.* 88]** The response also noted that HIPAA was not a bar to use of the statements because HIPAA itself contains an exception for disclosure of otherwise potentially protected health information when needed for law enforcement purposes. **[*Id.*]** As to Defendant's *Miranda*-related argument, the State's response further asserted that there was no such violation because Defendant was neither in custody nor interrogated. **[*Id.*]** Defendant's August 2023 reply failed to provide any response to the State's argument concerning the mandatory reporting exception contained in Rule 11-504(D)(4). **[*Id.* 94-100]** Instead, Defendant's reply largely claimed that the doctor and hospital committed malpractice, listing a litany of allegedly wrongful actions by hospital staff including letting her go to the bathroom alone. **[*Id.* 95-96 ¶¶ 4-5]**

A hearing was held in August 2023, at which no witnesses testified. Defendant admitted that HIPAA provides no remedy to an individual, stating that she was relying on New Mexico law and citing Rule 11-504. **[8-22-23 CD 1:46:25-1:47:30]** Defendant summarized her argument as: "everything's privileged up to the time she goes into the bathroom everything's privileged after she comes out[.]" **[*Id.* 1:57:00-15]** Defendant failed to address the exception contained in subsection (D)(4) of Rule 11-504, despite that the State had raised that specific aspect. Although Defendant's

written motion mentioned *Miranda*, her argument at the hearing focused mainly, if not almost exclusively, on privilege.

The State addressed *Miranda* first by asserting that Defendant was simply not in custody when she made the various statements which were the subject of her motion, noting that Defendant "blurted out" statements without any police questioning. **[*Id.* 2:03:14-2:04:00]** The State also accurately observed that it was Defendant's mother who was questioning Defendant and that it was the **police officer** who told the mother to stop. **[*Id.* 2:03:55-2:04:24]** The State also asserted that HIPAA was a "red herring" with no relevance to the criminal case, in part because HIPAA, being a largely civil matter, was not a constitutional protection applicable to criminal defendants. **[*Id.* 2:04:24-50]** Finally, the State argued that the physician-patient privilege does not apply for several reasons, including the fact that Defendant was an adult and had her mother present, noting that the privilege does not apply when third persons (i.e. implying those not needed in providing medical care) are present. **[*Id.* 2:05:16-2:06:42]** The State noted that the police obtained hospital records pursuant to a search warrant, related to a possible crime, appearing to also implicitly allude to the exception in Rule 11-504(D)(4). **[*Id.* 2:06:50-2:07:30]** The State also observed that there was no reason to suppress the video from the hospital hallway, as it is a public corridor and there can be no claim of privilege in a video that simply shows Defendant walking to and from the bathroom located

in a public part of the hospital. **[*Id.* 2:07:32-45, 2:08:12-2:09:20]** The court stated that it was skeptical that the video from that area could possibly be privileged. **[*Id.* 2:11:35-2:12:00]**

The district court issued its findings and conclusions, and related order, in mid-May 2024 and early June 2024, respectively, following submission of the parties' proposed findings and conclusions the previous year.[7] **[RP 154-60, 162-63]** In its findings, the court found that the emergency room doctor acted as an agent of law enforcement and concluded that Defendant should have been read her *Miranda* rights. **[*Id.* 158-60]** The court did not address in any manner the exception in Rule 11-504(D)(4) in its findings and conclusions or in the order. The court's findings included this item:

> 8. While the law enforcement officers did not speak to [Defendant] at that point, [the doctor] did, and confronted her with the statement: "We discovered a baby in the bathroom." Such disclosure to [Defendant] was made by her treating physician in a public setting, further more, it was made in the presence of law enforcement who had been summoned there by hospital personnel.

[*Id.* 157 ¶ 8]

[7] Defendant submitted her proposed findings and conclusions at the end of August, 2023, and the State submitted its proposed findings and conclusions in September 2023. **[RP 109-125, 131-144]** It is not clear what caused the nearly nine month delay between those filings and the issuance of the district court's findings and conclusions, and related order, in May and early June 2024.

The court's key conclusions of law are as follows:

> 3. [The doctor] by failing to advise [Defendant] of her right of confidentiality pursuant to Rule 11-504 NMRA and Section 14-6-1 NMSA, by failing to invoke the privilege on behalf of her patient pursuant to Rule 11-503 NMRA, **and by entering only when accompanied by law enforcement**, acted as an agent of law enforcement.[8]
>
> 4. The statements made by [Defendant] in response to the accusations made by her physician, who was by then acting as an agent of law enforcement, were made without [Defendant] being advised of her *Miranda* rights.
>
> 5. By the time [Defendant] made her statements in response to the remarks made by her physician that a baby had been found, [Defendant] was surrounded by law enforcement officers and she was not free to leave, and she was therefore, effectively in custody.
>
> 6. Statements made by a defendant who has not been advised of their *Miranda* rights in the presence of law enforcement in a custodial setting are suppressible.

[*Id.* 158-59 ¶¶ 3-6 (bold emphasis added)]

The court's order suppressed all "statements" made by Defendant. **[*Id.* 163]** The court did not suppress the hospital hallway video footage.

The State timely appealed by filing a notice of appeal within ten days of the order. **[*Id.* 164-68]** *See* N.M. Const. art. VI, § 2 (providing that appeals in cases imposing or involving a possible sentence of life imprisonment shall be taken

---

[8] Because Rule 11-503 NMRA pertains to the lawyer-client privilege, which is clearly inapplicable here, it is obvious that the district court intended to refer to Rule 11-504.

directly to this Court); NMSA 1978, § 39-3-3(B)(2) (1972) (authorizing appeal by state within ten days of a decision or order of court suppressing or excluding evidence provided district attorney certifies, inter alia, that evidence is a substantial proof of a fact material in the proceeding); *see also State v. Smallwood*, 2007-NMSC-005, ¶¶ 6-11, 141 N.M. 178 (observing that the New Mexico Supreme Court has jurisdiction to hear interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death).

ARGUMENT

I. THE DISTRICT COURT ERRED IN SUPPRESSING ALL STATEMENTS MADE BY DEFENDANT WHO WAS NOT IN CUSTODY AND NOT SUBJECT TO INTERROGATION.

A district court's ruling on a motion to suppress involves both factual and legal issues. An appellate court reviews factual matters with deference to the district court's findings if substantial evidence exists to support them, and reviews the court's application of the law de novo. *State v. Almanzar*, 2014-NMSC-001, ¶ 9. The State preserved this issue through its response to Defendant's motion, its argument at the suppression hearing, and in its proposed findings and conclusions, as noted above. *Miranda* applies only to custodial interrogation, *State v. Ybarra*, 1990-NMSC-109, ¶ 10, 111 N.M. 234, so it is not applicable here because Defendant was not in custody and was not interrogated. Defendant's failure to establish either custody or interrogation is dispositive of her *Miranda* argument.

a. Custody

Defendant was not in custody at the time she made the statements about which she sought suppression. The question is whether the person was actually deprived of their freedom to a degree associated with a formal arrest, or reasonably believed that they were not free to leave the scene. *See State v. Munoz*, 1998-NMSC-048, ¶ 40, 126 N.M. 535 (noting that, in the absence of restrictions on movement to a degree associated with a formal arrest, courts must examine whether a reasonable person in the suspect's position would believe that he is not free to leave); *see also State v. Widmer*, 2018-NMCA-035, ¶¶ 16-17 (noting that defendant was in custody because officer handcuffed him almost immediately after arriving at scene, and discussing that the ultimate inquiry is how a reasonable person in the defendant's position would have understood their situation), *rev'd on other grounds by State v. Widmer*, 2020-NMSC-007, ¶¶ 1, 44.

Because this is an objective test, the subjective beliefs of the police or the subject are not material. *Munoz*, 1998-NMSC-048, ¶ 40; *see also United States v. Arellano-Banuelos*, 927 F.3d 355, 359 (5th Cir. 2019) (noting that the subjective intent of the questioners and the subjective fear of the questioned person are irrelevant); *People v. Salinas*, 182 Cal.Rptr. 683, 688-89 (App. 1982) (noting that the test of custody is not dependent upon the subjective intent of the interrogator, but whether the subject was actually deprived of freedom or would reasonably

believe his freedom was restricted). Custody exists when a "reasonable person would have believed they had no choice but to submit" to questioning. *Munoz*, 1998-NMSC-048, ¶ 41 (internal quotation and citation omitted).

Defendant was not actually deprived of her freedom to a degree associated with a formal arrest; her freedom of movement was not physically or overtly restricted by the police. As a result, the only possible basis for a finding of custody in this matter, as noted above, is that the police took action which would lead a reasonable person to believe that, as a result of police verbalizations or actions, they were not free to leave. *Munoz*, 1998-NMSC-048, ¶ 40; *see also, e.g.*, *United States v. Brave Heart*, 397 F.3d 1035, 1038-39 (8th Cir. 2005) (only relevant inquiry is whether a reasonable person in the subject's position would have felt at liberty to end the interrogation and leave). No such facts are present here. The mere presence of police officers, erroneously treated by the district court as a sufficient fact in and of itself, does not equate to a person being in custody. *See Munoz,* 1998-NMSC-048, ¶¶ 3-7, 42-44 (concluding that defendant was not in custody despite being questioned for one hour and forty minutes in an FBI car by two agents, one of whom sat in the back seat with defendant for officer safety reasons); *see also, e.g., State v. Cobb*, 789 S.E.2d 532, 538-39 (N.C. Ct. App. 2016) (trial court was correct to conclude that defendant was not in custody, because the mere presence of even **four** uniformed

officers at defendant's house, without more, does not equate to "constant police supervision" or to being "in custody").

Additional factors, which militate against Defendant having a reasonable belief that she was in custody, are that she made statements in response to the doctor's statements in a hospital, **not** in response to an officer's questions, and certainly not in response to an officer's questions at a police station in a "police dominated" environment. *Brave Heart*, 397 F.3d 1035, 1039. Nor is there any reason to conclude that she was restricted merely by the fact that she was already sitting in a hospital bed. She was not tethered to the hospital bed or otherwise limited in leaving the hospital. Although Defendant was in a hospital, the hospital was not restricting her ability to leave, and the police took no action, prior to her making the statements, that would cause a reasonable person to believe that her movement was otherwise limited, or was further limited beyond the situation in which she would have been regardless. *Salinas*, 182 Cal.Rptr. 683, 689-693 (defendant was not in custody despite that she accompanied a police officer to the hospital and that police officers, who actually brought suspect to hospital, stood by while doctor questioned subject).

Defendant made spontaneous statements despite clearly observing the police and before being told, **nearly three minutes later**, that she was detained. The police did not say or do anything that would cause a reasonable person in Defendant's

situation to believe that she was in custody prior to her making the statements. It was, as noted, minutes **later** that the police told Defendant that she was being detained.[9] Defendant cannot logically claim that, because she later found out she was detained, her prior statements were inadmissible. Moreover, the police had no obligation to affirmatively tell Defendant that she was free to leave. *Arellano-Banuelos*, 927 F.3d 355, 361 (observing that the absence of an explicit statement that an interviewee is free to leave does not compel a finding of *Miranda* custody). Defendant's argument was based on an unduly expansive view that if police are present, and despite their remaining silent, the situation necessarily constitutes custody. That overly broad view is contrary to prevailing case law. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 435-442 (1984) (holding that roadside questioning incident to normal traffic stop did not constitute custody as to require *Miranda* warnings even though person is detained).

Further, the district court's conclusions of law also contain implicit factual findings unsupported by the evidence. The court's conclusions of law include its view that Defendant was "surrounded" by law enforcement. **[RP 159 ¶ 5]** Yet, as explained above, the two officers stood back from the hospital bed while the doctor approached Defendant and went over to the far side of the room closest to her.

[9] As discussed in the next few pages, merely being "detained" does not necessarily render a person as being in custody for *Miranda* purposes.

During much of the time, only one officer was present in the room and at many points, as noted above, Defendant was alone in the hospital room. The findings and conclusions, referenced earlier, in referring to the presence of officers, reveal that the court proceeded under a mistaken belief that the mere presence of police officers resulted in Defendant's being in custody. The court's order suppressing statements made by Defendant in the "presence" of police officers is legally erroneous and must be reversed. *Almanzar*, 2014-NMSC-001, ¶ 9. **[RP 163]**

To the extent Defendant seeks suppression of statements based on a predicate of being in custody, she should have limited her motion to suppress to statements made **after** the point at which Defendant was told she was detained. Even then, one can be **detained** without necessarily being subject to restrictions on their freedom of movement to a degree associated with a formal arrest. *See, e.g., People v. Davis*, 449 P.3d 732 (Colo. 2019). In *Davis*, two deputies went to a house, owned by the defendant's parents, to question him about an alleged sexual assault in which he was a suspect. *Id.* ¶¶ 1-3. Although the defendant was detained in the basement for approximately one and one-half hours (during some of which time he was questioned), the appellate court concluded that the investigatory detention did not escalate to an arrest, and reversed the trial court's suppression order which had erroneously concluded that he was in custody for purposes of *Miranda*. *Id.* ¶¶ 4-14, 24-26. The appellate court noted that "police presence—even when unwanted by the

defendant—does not automatically render" an otherwise neutral location as "police dominated." *Id.* ¶ 28. The court noted that there was no display of a gun or the use of handcuffs. *Id.* ¶ 21. The court also emphasized that the tone used by the officers was "conversational" and that the record failed to support the trial court's conclusion that the questioning was conducted in an "accusatory mood." *Id.* ¶¶ 10, 34. As a result, the trial court's suppression order was reversed. *Id.* ¶ 37.

Accordingly, one who is detained may or may not be in "custody" for *Miranda* purposes. *See, e.g., United States v. Sullivan*, 138 F.3d 126, 130-32 (4th Cir. 1998) (while a motorist is detained and not free to leave, he or she is not in custody for *Miranda* purposes). Simply put, because of the difference between an investigative detention and an arrest, labeling a particular situation as involving a person being "detained," and even informing such a person that they are detained, does not alone render the situation as "custody" subject to *Miranda*.

Defendant's attorney glossed over the custody issue by first referring to the doctor's entering the room and mentioning that a dead baby was found. **[8-22-23 CD 1:51:30-42]** Defendant's attorney then told the court that it has the videotape (for its own review) and stated that the officers told Defendant that she was being detained, as if to imply that the officers mentioned anything (let alone being detained) as soon as Defendant first observed a police officer. **[*Id.* 1:51:42-1:52:15]** Despite Defendant's implication, it is clear from the video that Defendant made spontaneous

statements three minutes **before** she was told that she was being detained. As a result, nothing was said to Defendant by the police to cause her to believe that she was detained, let alone which would cause a reasonable person to believe that she was not free to leave the scene as a result of police action or statements, **before** she voluntarily made the statements. *Munoz*, 1998-NMSC-048, ¶ 40.

Given the societal interest in reporting crimes against children (discussed in the next section), the mere presence of a police officer in a hospital setting when the medical staff have complied with their duty to report child abuse or a child's death, does **not** suffice, absent other facts not present here, to result in a person's being in custody for *Miranda* purposes. Defendant's arguments below are unsupported by precedent. Accordingly, the district court's legal conclusion that Defendant was "effectively in custody" is erroneous and must be reversed. **[RP 159 ¶¶ 5-6]** *Almanzar*, 2014-NMSC-001, ¶ 9.

b. Interrogation

An interrogation for *Miranda* purposes consists of express questioning or its functional equivalent, designed to elicit an incriminating response. *Widmer*, 2020-NMSC-007, ¶ 14. In most cases, the existence of express questioning constituting interrogation will be clear. However, as noted, the functional equivalent of express questioning can also constitute interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("interrogation" under *Miranda* includes words or actions on the

part of the police, other than those attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response).

Innis simply extended *Miranda* beyond express questioning to include its "functional equivalent." *Id.* 300-01. In that case, after the suspect was arrested and read *Miranda* rights and stated he wished to speak with a lawyer, three police officers began to transport him to the central police station during which trip one officer stated it would be "too bad" if a child were to pick up the missing gun used in a murder and robbery, and hurt themselves. *Cf. id.* 293-95. That prompted the suspect, less than a mile into the trip, to tell the officers to turn the car around so he could show them where the gun was located. *Id.* 295. *Innis* and cases like it—even aside from the lack of custody here as noted above—are materially different, due to the lack of any police interrogation in this matter even under the "functional equivalent" standard in *Innis*.

There was no interrogation by the police in this matter. As noted, after the dead newborn was discovered, the doctor went into the room and simply told Defendant (and her mother) that a dead baby had been found in the bathroom. It is undisputed, after all, that a baby was found in the trash. The doctor did not accuse Defendant, despite the district court's order stating, somewhat inexplicably, that the doctor made "accusations" against her. **[RP 163]** A review of the video as detailed above vitiates any claim that the doctor made "accusations" against Defendant; in

fact, the doctor, as well as law enforcement, appeared at all times to be acting neutrally and treating Defendant with respect given the circumstances.

Defendant made statements without being asked any substantive questions by the police or, for that matter, by the doctor. The district court's findings even noted, correctly, that the law enforcement officers did **not** speak with Defendant at that point. **[RP 157 ¶ 8]** The record is clear that, at all relevant points, the police simply did not interrogate Defendant. In fact, as noted, it was Defendant's mother who engaged in the only substantive questioning of Defendant before a police officer affirmatively told her to stop. Had the police wanted to interrogate Defendant, they could have refrained from saying anything to Defendant's mother and let her own questioning take its course.

Neither did the police take any action that was reasonably likely to evoke an incriminating response. The police did not say anything in this case even remotely similar to the statement, designed to elicit an incriminating response, uttered by the police in *Innis*. Moreover, the fact that Sergeant Anaya asked to see Defendant's driver's license does not constitute interrogation. *See, e.g., Widmer*, 2020-NMSC-007, ¶¶ 18-20 (limited police questioning as to name, address and similar procedural facts, related to identifying a suspect, normally does not constitute interrogation).

Additionally, there is no evidence to support the district court's finding that the medical staff were acting as agents of the police. *See, e.g., Salinas*, 182 Cal.Rptr.

683, 689-693 (observing that physician was not an agent of law enforcement despite that police officers, one of whom actually brought suspect to hospital, stood by while doctor questioned subject). In this matter, Defendant, although with her mother, brought herself to the hospital. There is no evidence to support the court's conclusion that any medical staff were acting as agents of the police such as to cause the doctor's questions to constitute interrogation. For example, there is no evidence that the police colluded with the doctor about what to say before going into the room. As a result, the court's factual finding that the physician was acting "as an agent of law enforcement" is not supported by any evidence, let alone substantial evidence, and is more akin to an erroneous legal conclusion subject to de novo review. The doctor did not even ask Defendant any questions, and certainly no crime -elated questions, in the presence of the police. *See id.* 693 (observing that even if the emergency room doctor asked defendant questions in the presence of police, that does not necessarily make the doctor a police agent).

The bottom line is that *Miranda* was simply not applicable here because there was no custodial interrogation. *Munoz*, 1998-NMSC-048, ¶ 40; *see also State v. Salas*, 408 P.3d 383, ¶¶ 43-46 (Wash. App. 2018) (concluding that, despite the defendant's request for an attorney, there was no *Miranda* or related violation because he was not subjected to interrogation, noting that the doctor and nurse were not acting as state agents and there was no evidence that the officer influenced the

nurse or doctor in their verbal interactions with the defendant). Given Defendant's failure to establish that she was in custody, or that she was even interrogated, there was a complete absence of custodial interrogation in this matter.

II. THE DISTRICT COURT ERRED IN SUPPRESSING ALL STATEMENTS MADE BY DEFENDANT BASED ON ASSERTED PHYSICIAN-PATIENT PRIVILEGE.

The district court's order also suppressed all statements made by Defendant, on the asserted basis that they were subject to any doctor-patient privilege. **[RP 163]** The court's ruling presents an issue of law which is reviewed de novo. *Allen v. Lemaster*, 2012-NMSC-001, ¶ 11 (observing that the application of evidentiary privileges involves de novo review). While no New Mexico Supreme Court case appears to have addressed that interpretive aspect, the Court of Appeals has held that the privilege is in derogation of the common law and should be construed strictly. *State v. Roper*, 1996-NMCA-073, ¶ 6, 122 N.M. 126. In this matter, the privilege did not apply in the first place given the very rule upon which Defendant relies. Second, any possible privilege that would have applied was waived due to the presence of third persons not reasonably necessary to further the interest to be served by the privilege. *State v. Gutierrez*, 2021-NMSC-008, ¶¶ 44-45; *Roper*, 1996-NMCA-073, ¶ 10. The State preserved this issue through its response to Defendant's motion, its argument at the suppression hearing, and in its proposed findings and conclusions, as noted above.

a. Inapplicability of Privilege

The language of Rule 11-504(D) demonstrates that it does not apply here. Rule 11-504(D) lists exceptions to the privilege, one of which is as follows:

> (4) ***Required reports.*** No privilege shall apply for confidential communications concerning any material that a physician, psychotherapist, state or nationally licensed mental-health therapist, or patient **is required by law to report** to a public employee or public agency.

Rule 11-504(D)(4) (bold emphasis added).

Given that exception in the rule itself, the privilege must be construed in light of any mandatory reporting law. The physician attending to Defendant was required to report the dead newborn. Under New Mexico law, § 32A-4-3(A), "**[e]very person**, including a licensed physician . . . who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately" to authorities.[10] (Bold emphasis added). *See State v. Strauch*, 2015-NMSC-009, ¶¶ 1-

[10] The omitted language includes the phrase "or a member of the clergy who has information that is not privileged as a matter of law[.]" It appears that the language about having information "not privileged" as a matter of law applies only to **clergy**. However, even if that language applied to some other persons, the language of Rule 11-504 NMRA, as noted above, clearly excepts from the physician-patient privilege any information that the physician has a duty to report. As physicians and similar medical personnel are the most likely to observe child abuse, it would be illogical to read the two statutes in a circular manner that would negate the clear legislative intent that physicans (like all persons) report child abuse and neglect. *See, e.g., State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372 (noting that when possible, the courts must read different legislative enactments as harmonious, particularly in the interest of avoiding absurd or unreasonable results).

2, 46-47 (discussing Section 32A-4-3(A) and Rule 11-504(D)(4)). If child abuse or neglect must be reported, then *a fortiori* the death of a newborn baby found in a hospital bathroom must also be reported. Neither Defendant nor the district court below explained why Rule 11-504(D) and Section 32A-4-3 did not apply.

As seen above, the evidentiary rule upon which Defendant relies contains an express exception applicable when a physician, or similar person, has a duty to report an incident or facts to law enforcement or other public agencies. But even apart from the language of Rule 11-504(D)(4), which itself references any reporting law, the common law process of drawing proper contours to any right, including the physician-patient privilege, is properly informed by related legislative enactments. That principle was observed by a prominent former California Supreme Court Chief Justice, whose writings and opinions have often been cited by this Court as well as the Court of Appeals. *See generally* Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U.L. REV. 401 (1968); *Brooks v. Beech Aircraft Corp.*, 1995-NMSC-043, ¶ 14, 120 N.M. 372 (citing a concurring opinion by Traynor); *Sanchez v. San Juan Concrete Co.*, 1997-NMCA-068, ¶ 15, 123 N.M. 537 (citing the referenced Traynor article among other sources in support of the idea that statutes are often a more reliable source of information concerning community norms and policy, and urging that courts should continue to look to legislation as a source of policy when making decisions). Therefore, it is entirely appropriate for

this Court to look to Section 32A-4-3(A) in ensuring that Rule 11-504 is properly construed and applied.

The physician-patient privilege is an evidentiary rule necessarily informed by legitimate public interests in all respects, not solely by the privacy concerns of an individual patient. It is not an absolute right. Courts have recognized that the public's interests sometimes legitimately outweigh an individual's interest. *See People v. Gomez*, 556 N.Y.S.2d 961, 965 (Sup. Ct. Queens Cty. 1990) (concluding that in balancing the physician-patient privilege against the public's interest regarding prosecution of those possessing controlled substances, a condition that has reached "epidemic proportions," the "scales of justice will lean in favor of the public's interest").

It appears that Defendant's theory was that the physician-patient privilege was some kind of absolute evidentiary privilege. However, to that extent, Defendant's approach (and the district court's ruling apparently based on that view) was inherently flawed. The physician-patient privilege is no different than other rights at a foundational level, in the sense that virtually all rights are limited in some manner. It is commonly acknowledged that virtually no right is absolute and that rights are associated with concomitant responsibilities. *See* N.M. Const. art. II, § 17 (guaranteeing every person's ability to speak freely and providing that persons are responsible for "abuse of that right"); *Best v. Marino*, 2017-NMCA-073, ¶ 23

(neither the United States nor New constitutions provide for absolute right of free speech); *see also People v. Adams*, 627 N.E.2d 322, 325 (Ill. App. 1993) (trial court did not err in refusing to appoint lawyer to assist defendant attempting to withdraw from self-representation at trial after jury selection, noting approvingly of principle that "with rights come responsibilities" (internal quotation marks and citation omitted)); *People in Interest of T.W.*, 519 P.3d 1071, ¶ 10 (Colo. Ct. App. 2022) (observing in parental rights context that "[w]ith rights come responsibilities"). As a further example, parents have constitutionally-based rights with regard to raising their children, yet those rights can be forfeited. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting that parental rights are perhaps the oldest of the recognized fundamental liberty interests); *T.W.*, 519 P.3d 1071, ¶¶ 10-11 (observing that while they remain unfit to parent, parents forfeit their constitutional parenting rights to the State due to its legitimate *parens patriae* obligation to ensure children are safe). Accordingly, it is readily observed that virtually all rights can be, and typically are, limited at some outside perimeter for public policy reasons.

The responsibilities of a patient purporting to claim the benefit of the physician-patient privilege in good faith include being honest with medical staff and not hiding material facts or developments from them, even apart from the implicit legal and moral duty to notify medical staff if one gives birth in a hospital bathroom. *See, e.g., Roper*, 1996-NMCA-073, ¶ 6 (discussing that the privilege implicitly

encourages "complete disclosures" of symptoms and conditions); *State ex rel. Lutman v. Baker*, 635 S.W.3d 548, 551 (Mo. 2021) (noting that complete and appropriate medical treatment depends on "candid" communication).

There is nothing about the physician-patient privilege which places it outside the principle that virtually all rights are limited in accordance with overarching societal rules and values. This Court can and should look to Section 32A-4-3(A) for guidance in interpreting Rule 11-504 and the express exception found in (D)(4). The facts of this case clearly triggered the duty to report, given the salient facts implicating child abuse (and possibly worse). The exception found at Rule 11-504(D)(4), as further informed by the mandatory reporting duty, demonstrate that there was no privilege here.

Defendant also nominally relied upon NMSA 1978, Section 14-6-1 (1977). **[RP 37]** However, that statute was barely mentioned in the arguments in district court, although it was cited in the court's order. **[*Id.* 81, 162]** The lack of meaningful reliance on that statute is not surprising given that Section 14-6-1 must be read reasonably in light of Rule 11-504(D)(4) and Section 32A-4-3(A). *See, e.g., State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372 (noting that when possible, the courts must read different legislative enactments as harmonious, particularly in the interest of avoiding absurd or unreasonable results). While Section 14-6-1 provides that health information is confidential, the statute also provides, tellingly, that a custodian

of such information "may furnish" such information "upon request to a governmental agency." Section 14-6-1(B). The statute further provides that the custodian furnishing such information shall not be liable for damages to any person for having furnished such information. *Id.* Nothing in that statute remotely suggests that otherwise private health or hospital information cannot be used in a criminal prosecution against a patient when relevant as it is here. Defendant's reliance on Section 14-6-1 is misplaced and any concerns about that statute are subsumed within the more material discussion above concerning Rule 11-504(D)(4) and Section 32A-4-3(A).

b. Waiver

Even if the privilege would otherwise have applied, Defendant waived the privilege. Numerous cases have concluded that the physician-patient privilege does **not** apply when third parties not reasonably needed for medical care or work, i.e., excluding medical workers working under the supervision of a physician, are openly present. That is in accord with the general rule that the disclosure of information while third parties (not necessary to further the privilege at issue, such as an attorney's paralegal or a doctor's assistant) are visibly present vitiates any such privilege. *See, e.g., Gutierrez*, 2021-NMSC-008, ¶¶ 44-45; *People in Interest of R.G.*, 630 P.2d 89, 93 (Colo. Ct. App. 1981) (minor's statement that he had cut his finger on a knife, in response to a physician's question, was admissible and did not

violate physician-patient privilege because it was knowingly made in presence of police officer); *State v. LaRoche*, 442 A.2d 602, 603-04 (N.H. 1982) (presence of emergency medical technician destroyed physician-patient privilege, given absence of any showing that the presence of the EMT was required by the police or that the physician or EMT misrepresented his role in the emergency room); *People v. Hartle*, 995 N.Y.S.2d 424, 425 (App. Div. 2014) (physician-patient privilege did not apply because defendant made statements despite being aware that he was in the presence of police investigator); *cf. also Salinas*, 182 Cal.Rptr. 683, 693 (observing that if the person knows the statements can be used against her in a criminal prosecution, the person may "choose silence" and deprive the doctor of the information, but refusing to impose a rule that would exclude statements made by "potential abusers" to doctors).

Here, several third parties destroyed the privilege—Defendant's mother and the police officers as noted by the State. **[RP 87]** Defendant's mother was **not** needed to provide medical care; Defendant was age nineteen and two months at the time of the incident. Rule 11-504(A)(5) itself provides that a communication is not "confidential" if disclosed to others when such disclosure is not in furtherance of the purpose of the communication. The paradigmatic example of such being that the communication is made in the presence of third persons not furthering the purpose of the privilege.

Defendant was aware that the police officers were present. The police were not hiding behind a curtain or exercising some subterfuge. As noted above, the privilege does not apply when it is clear that third persons (who are clearly not medical staff) are present. The district court even observed that Defendant's statement was made in a "public" setting of the hospital, perhaps an implicit recognition that the presence of third parties would vitiate the privilege even if it were to otherwise apply, i.e., even putting aside subsection (D)(4) of Rule 11-504. **[RP 157 ¶ 8]** Related to this, there is no evidence that the officers were asked to leave at any point.

Finally, this is not a case in which the police officer can be properly viewed as merely an agent of the physician (or other medical personnel) for medical purposes, such as when an officer is present for the physician's protection as well as detention of a prisoner. *See, e.g.*, *Salas*, 408 P.3d 383, ¶¶ 40-53 (concluding that, because officer was present essentially for security purposes, the officer was an agent of the doctor and nurse and therefore the defendant's statement remained privileged). In this case, there was no suggestion, let alone evidence, that Defendant posed a danger to the physician or other medical staff and that law enforcement was there simply, and only, to protect the doctor, in which case the privilege (assuming it even applied in the first place) would have possibly avoided a waiver.

There was no valid legal reason to suppress the statements made by Defendant openly in the presence of third persons. Excluding the statements made by Defendant would not further the underlying purpose of the physician-patient privilege in this matter, in which there is reason to suspect that Defendant was purposely withholding key information from medical staff about, from her own viewpoint at that point, the possible death of a child. *See State v. Richardson*, 121 N.E.3d 730, ¶ 35 (Ohio Ct. App. 2018) (observing that excluding testimony related to defendant's statements and reactions would not "further the purposes of the physician-patient privilege" and that the only purpose served by considering the statements to be privileged would be to obstruct the course of justice). Nor would there by any reason to suppress observations made by the officers at the time. *Gomez*, 556 N.Y.S.2d 961, 962 (physician patient-privilege did not extend to prevent police officer, present in operating room when balloons with drugs were removed from defendant, from testifying as to her observations during procedure).

III. HIPAA IS NOT RELEVANT IN THIS CRIMINAL CASE.

As noted above, Defendant asserted in district court that the hospital or doctor violated her rights under HIPAA, providing another possible basis to prevent her statements from being used against her. However, HIPAA is largely a civil statute restricting certain covered entities from disclosing a patient's private medical information without consent or unless certain conditions are met. It is not a criminal-

focused statute. Moreover, HIPAA is not violated by a disclosure when an exception in HIPAA itself allows such disclosure.

The HIPAA regulations provide that a covered entity may disclose protected health information which is believed in good faith to constitute evidence of criminal conduct occurring on the **premises** of the covered entity. 45 C.F.R. § 164.512(f)(5) (2024). The activity occurring in this case clearly falls within that exception, given the placement of a newborn in the trash in the hospital bathroom combined with the failure to notify any medical personnel of the birth of the newborn. Additionally, a covered entity may disclose protected health information when the covered entity believes the person (here a newborn) is a victim of abuse, neglect or domestic violence. 45 C.F.R. § 164.512(c)(1) (2024). *See, e.g., United States v. Mathis*, 377 F.Supp.2d 640, 645-46 (M.D. Tenn. 2005) (noting that HIPAA is not violated when psychotherapist disclosed to FBI that a sixteen year old had told her he had seen child pornography on his father's computer, because of an exception applying to victims of abuse or neglect). This is because HIPAA allows disclosure when the disclosing party is authorized by state law, such as a mandatory reporting law, to make disclosures. *Id.* 646 (observing that Tennessee law provided that a psychiatrist may disclose patient information to the extent necessary to warn or protect any potential victim). Such a mandatory reporting duty existed here as discussed above.

Accordingly, there is no HIPAA violation from the disclosure of the items which were the subject of Defendant's motion to suppress.

However, even if Defendant is convinced that HIPAA was violated and that she has some cause of action, or that the hospital is subject to some civil penalty, that is logically and legally irrelevant to her arguments in this criminal case. Defendant's claim to putative HIPAA relief must be brought in a different forum, and is simply not appropriate for this case. *See, e.g., State v. Williams*, 75 A.3d 668, 689 (Conn. Ct. App. 2013) (observing that even if certain conditions for release of medical information or records under HIPAA had not been met, the defendant's "relief had to be obtained in a different forum"). As noted above, Defendant appeared to concede that a criminal defendant cannot use HIPAA as a bar to the use of evidence against him or her, in admitting that HIPAA provides no remedy relevant in this case. **[8-22-23 CD 1:46:25-1:47:15]**

CONCLUSION

This is not a case in which a person sought medical assistance during which he or she was candid with the doctor in the interest of receiving treatment in good faith. Absent extenuating circumstances, his or her communications between such a patient and medical staff would be privileged. However, this case presents the rare, but sadly too real, circumstance in which the privilege, by law, does not apply; the specific rule establishing the privilege provides an exception that covers this very

case. Despite being raised by the pleadings and argument at the hearing and clearly presented by the salient circumstances of this case, the mandatory reporting law and the exception in Rule 11-504 were not addressed by the court's order, or related findings and conclusions. Moreover, Defendant was not in custody and was not interrogated, making *Miranda* inapplicable to her statements.

Obviously, a trial has yet to occur in this matter. But the physician-patient privilege was not intended or designed to prevent a defendant's statements made around the time and immediately after her delivery of a baby in a medical facility bathroom and her placing the baby in the trash, despite being in a hospital and knowing medical staff are literally seconds away. The failure to notify medical staff deprived them of the chance to save the baby.

The State asks that this Court reverse the district court's suppression order in all respects, and remand this matter for further proceedings.

RULE 12-318(F) CERTIFICATION

I certify, pursuant to Rule 12-318(F)(3) NMRA, that the body of this brief, as defined in Rule 12-318(F)(1), contains **9,593** words using Times New Roman, a proportionally-spaced typeface, less than the 11,000 word limit applicable in lieu of the default thirty-five page limit.

Respectfully submitted,

RAÚL TORREZ
Attorney General

Electronically Filed

/s/ *Michael J. Thomas*
Michael J. Thomas
Assistant Solicitor General
New Mexico Department of Justice
201 Third Street NW
Suite 300
Albuquerque, NM 87102
(505) 717-3500
mthomas@nmdoj.gov

CERTIFICATE OF SERVICE

I certify that, on September 11, 2024, I filed a true and correct copy of the foregoing *Brief-in-Chief* electronically through the Odyssey E-File & Serve System, on any parties of record by electronic means.

/s/ Michael J. Thomas
Assistant Solicitor General