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 REPLY BRIEF

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

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INTRODUCTION

The one true victim in this case, baby A.F., was born in a hospital bathroom to his mother, Defendant Alexee Trevizo, in the early morning hours of January 27, 2023 before being placed into a bag in the trash bin where he remained until discovered by hospital staff at least thirty minutes later. **[BIC 4]**

Defendant asserts that (1) she was in police custody and subjected to interrogation, and therefore the *Miranda v. Arizona*, 384 U.S. 436 (1966) advisement was required before her statements could be used against her; (2) medical staff, primarily Dr. Vaskas, acted as an agent of the police and their "interrogation" is imputed to the police; and (3) there was a violation of the physician-patient privilege under Rule 11-504 NMRA.

However, the record and the applicable law shows that Defendant was neither in custody nor interrogated by the police. There was no interrogation by medical staff and the record contradicts Defendant's assertion that medical staff were acting as agents of the police. Defendant's mother conducted the only substantive questioning. Additionally, the physician-patient privilege did not apply because of the reporting exception in Rule 11-504(D)(4). The suppressed statements cannot be described as "confidential" within the meaning of Rule 11-504(A)(5) because they were not made "privately," i.e., they were uttered in the obvious presence of police officers. As a result, even if the privilege applied in the first place, which the State

denies, the privilege was waived by making such statements in the obvious presence of third persons whose presence was not needed in support of any physician-patient purposes of the communication.

Simply put, the police and medical staff properly performed their respective duties, despite that Defendant mistakenly posits that medical staff were somehow acting as agents of law enforcement. The fact that the police and medical staff treated each other respectfully, honoring their different functions, just as they treated Defendant courteously, does not transform the relationship between police and medical staff into a principal-agent relationship in either direction. The State does not further address HIPAA because Defendant does not materially rely upon it in her brief. **[AB 29; BIC 36-38]**

SUPPLEMENTAL SUMMARY OF PROCEEDINGS

It is natural that some factual disputes exist at this current pretrial stage. However, because of assertions set forth in Defendant's brief, many of which are unsupported, the State supplements the summary of proceedings with additional material here.

Defendant claims that, due to medical malpractice or otherwise, the victim (baby) was dead at birth. **[AB 5-6, 41-42 (suggesting that there was no life after birth and using the terms "[s]tillborn" and "stillbirth")]** The State chose not to discuss the evidence bearing on the cause of death, in the interest of brevity and

because it was not directly relevant to the issues in this appeal concerning pretrial evidence suppression. A preliminary examination found probable cause for the charges, with respect to which Defendant raises no issues. However, even acknowledging the pretrial nature of the case, some mention of the medical-related testimony from the preliminary examination is warranted given numerous assertions in Defendant's answer brief.

At the preliminary exam, a forensic pathologist from the Office of the Medical Investigator testified in detail that the baby, which had no injuries or defects, died as a result of entrapment from being placed in a garbage bag in which the oxygen was eventually depleted, and that the manner of death was homicide. **[5-16-23 CD 5:41:53-5:43:00, 5:49:30-5:55:02]** Although a jury has yet to resolve factual disputes, Defendant's answer brief omitted any reference to that forensic testimony, which is clearly contrary to her claim that the baby was dead upon being born.[1]

Defendant's answer brief also contains a broader thematic element attempting to blame the death of the baby on medical staff. **[AB 2-3, 5, 14]** For example, Defendant asserts, with no relevant, record citation whatsoever, that Dr. Vaskas

[1] As a result of Defendant's failure to include any reference to such testimony, the State filed, on October 30, 2024, an unopposed motion to supplement the transcripts with the audio from the May 16, 2023 preliminary examination held in the concluded but related case, D-503-PD-2023-00010. This Court granted that motion on November 12, 2024.

"prioritiz[ed] a police interrogation over" a medical transfer to another facility, appearing to suggest that medical staff purposely delayed that transfer. **[*Id.* 14]** Such a claim is not only unsupported by, but affirmatively controverted by, the record. Because Defendant failed to include any detailed transcription of the police lapel video bearing on her assertions, the State will discuss what occurred in more detail here because it will also inform this Court as to some of the *Miranda* aspects.

As noted in the Brief-in-Chief, the doctor told the police at 2:41 a.m. that Defendant had been accepted at Lovelace (in Roswell) and needed to be moved there quickly. **[BIC 5]** The doctor noted that she still needed to tell Defendant what was going on, implicitly referencing that she needed to obtain Defendant's consent to transfer her. **[Def. Ex. H. 2:15-30]** Without prompting from the police, the doctor asked if one of the officers could be present in the room. **[*Id.* 2:31:-3:00]** The police did not tell the doctor what to say. **[*Id.*]** Because some nuances are not captured by even an accurate summary, the State sets forth the exchange which occurred immediately after the exchange set forth in the State's Brief-in-Chief. **[BIC 6]**

> Doctor: Number one priority guys, number one priority. She just had a baby, I don't know if she delivered the placenta. She's bleeding significantly. I've spoken to the obstetrician at Lovelace, they want her up there as soon as possible. I need your I just need your permission [looking towards Defendant's mother] to transfer her for medical . . .
>
> Charge Nurse: She's 19.

Doctor: Oh, you're right.

Mother: But she is a student too.

Charge Nurse: She's still 19 years old.

Doctor: You're right, you're right, I forgot she's 19.

Defendant: [unintelligible] . . . came out of me.

Doctor: You need to for to make sure your safe. I need to send you to Lovelace to labor and delivery. Will you please agree to that?

Defendant: Yes, yes I agree.

Doctor: OK. I'm going to work on that. In terms I'm sorry about this but in terms of delivering a baby and it looked like you tried to hide it, we do need to have the police involved.

Defendant: [unintelligible] nothing was crying. It came out with nothing.

Doctor: I know but the baby's going to have to be taken for autopsy and there will be an investigator and everything. I'm sorry. I'm so sorry. But we need to do this correctly and I want to be transparent with you about what our steps are going to be.

[slight pause]

Officer, do you need to do you guys need to talk to her before we get her transferred?

Sergeant: How long is it going to be before you have the transfer out?

Doctor:	I don't know [unintelligible] Maria what do you think 20 30 minutes?
Maria:	Yeah hopefully yes.
Doctor:	OK OK.
Sergeant:	I got a detective on the way, so they're going to be talking to her.
Doctor:	OK [Doctor leaves]
Charge Nurse:	Do you guys have I'm the charge nurse here do you guys have any questions for me?
Mother:	Like how big is the baby?
Charge Nurse:	It's full term.
Mother:	What?!
Defendant:	Nothing . . .
Mother:	[overtalking] Nine months?!
Defendant:	. . . nothing was crying.
Mother:	Lexi have you watched the news of the girls that what they do to their babies and what they go to jail?
Defendant:	Nothing was crying.

[Def. Ex. H 3:32-5:40]

The police did not ask any questions of Defendant during that time, and the doctor, as seen above, was expressly concerned, justifiably, with Defendant's medical well-being. Following that exchange, as noted in the Brief-in-Chief, the

police told Defendant that a detective was on the way and that she was detained, two and one-half minutes and three minutes, respectively, after the doctor and police entered the room. Despite Defendant's claim that the officers remained in the room until she departed for Roswell, **[AB 9]** the officers waited in the hallway for most of the time between about 3 a.m. and when she departed via helicopter. That is evident from Sergeant Anaya's lapel video showing that he later stepped into the room (in which only Defendant was present) from the hallway and told Defendant that they would continue to wait in the hallway because they did not want to add to her stress given the situation. **[*See* BIC 10-11 (citing video)]** Defendant also implies that officers, despite having already told her that she was detained and her status as a 19 year old adult, somehow improperly isolated her from her mother while waiting for the detective. **[AB 9 n. 9]** However, it is clear from the video that the officers, quietly talking in the hallway, viewed the mother as unduly adding to Defendant's stress. One officer noted that he had to previously tell the mother to stop aggressively questioning Defendant, referencing the mother's "yelling" earlier. **[Def. Ex. H 50:35-51:20; BIC 9-10]**

Additionally, the fact that the helicopter's arrival was apparently later than initially expected is immaterial.[2] Defendant noticeably fails to allege that medical

[2] Given the discussion, transcribed above, which occurred around 2:45 a.m., the helicopter was initially expected to arrive by about 3:15 a.m. The record is clear that Defendant was loaded into the helicopter at 4:30 a.m. **[BIC 10]** Although the

staff or the police negatively influenced the helicopter's arrival time. Crucially, the record fails to support Defendant's bare assertion that police or medical staff were "prioritizing" an alleged interrogation over a medical transfer. **[AB 14]** There is no evidence to suggest that anyone caused any delay in Defendant's medical treatment or transfer, which occurred prior to a detective's arrival. **[BIC 10]**

Defendant's claims of medical malpractice starkly contrast with her failure at any point to assert, even at the hospital, any basis explaining why she was unable to call for help from the bathroom by simply yelling out that she was having a baby or had just given birth and needed help. Defendant observes that Dr. Vaskas did not attempt resuscitation of the baby but fails to note that Dr. Vaskas testified that the baby, found at least thirty minutes **after** it was placed in the trash bag, was cold and had no pulse and, accordingly, no resuscitative efforts were made because there was no hope of reviving the baby. **[AB 21 n. 18; BIC 4; 5-16-23 CD 4:25:30-4:27:00, 4:40:00-4:42:40]** Defendant may be found criminally liable independently and apart

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record does not reveal exactly when the helicopter landed outside the hospital, it is reasonable to estimate, given that it is **not** an essential fact needed for purposes of resolving this pretrial appeal, that the helicopter landed sometime around or even after 4 a.m., in light of the time presumably needed to ensure some coordination between the helicopter crew and the hospital staff prior to Defendant's departure.

from issues of alleged medical malpractice which must be resolved in a civil proceeding, and this Court's focus should not be improperly drawn to such matters.[3]

ARGUMENT

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

Defendant asserts that she was in custody and was interrogated, although she contends she was interrogated by the doctor she characterizes as an agent of the police. **[AB 13, 19]** However, the material facts and relevant law establish that Defendant was neither in custody nor interrogated.

Defendant asserts that she was in custody because several "adult authority" figures blocked the exit to the room, despite that Defendant was 19 and was an adult. **[*Id.* 20]** Related to this, Defendant notes that the charge nurse, who was also present, had shared his concerns with the police. **[*Id.* 14 n. 10, 15-16]** Similarly, Defendant relies indirectly on an officer's having written in his report that he stood by the doorway to ensure that Defendant could not leave. **[*Id.* 9; RP 158 ¶ 13]** However, nothing in the record suggests that anything the charge nurse said to the police, or

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[3] A civil lawsuit has been filed. First Amended Complaint, *Bustos v. The Artesia Special Hospital District et al.*, D-412-CV-2023-00260 (4th Jud. Dist. Ct. Jul. 31, 2023) (asserting malpractice claims against medical staff and hospital on behalf of the estate of the baby). Defendant's numerous references to alleged malpractice unnecessarily divert attention from her actions as the mother of the baby, particularly considering the limited legal issues in this pretrial appeal.

anything written in a report, was known to Defendant, nor does she claim otherwise. As previously noted, information not known by the subject is not relevant to the custody determination. **[BIC 17]**

The State agrees that various factors may be relevant in a particular case in determining whether a subject had a reasonable belief that they were in custody. **[BIC 18-19]** *State v. Munoz,* 1998-NMSC-048, ¶ 40, 126 N.M. 535. However, the mere presence of police officers is not sufficient to constitute custody, **[*id.* 18]** yet that factor was the primary, if not nearly exclusive, factor upon which Defendant relies, and which appears to have been the primary factor underlying the district court's ruling. **[RP 159 ¶ 5]** Well-reasoned decisions have correctly concluded that the presence of police officers questioning a subject in a hospital does not, without other factors, equate to custody. *See, e.g., State v. Garrison*, ___ A.3d ___, 2024 WL 3558270 ** 2, 5 (Conn. 2024) (noting that the tone and tenor of questioning in a hospital weighed against a conclusion that the subject was restrained to a degree associated with a formal arrest, despite that subject was questioned by five different police officers).

As here, the police in *Garrison* did not cause any delay in treatment or hinder medical staff nor was there any evidence that medical staff were acting at the direction of law enforcement. *Id.* * 10 (concluding that nothing suggests that a reasonable person would perceive the officers to be exercising any control over the

medical staff, and the record actually demonstrated that officers exercised no such control nor did the officers delay or hinder medical care). Likewise, there was no "police dominated" environment in this case. *See State v. Filemon V.*, 2018-NMSC-011, ¶ 27 (noting that custody involves a "police dominated" situation); *Garrison*, ___ A.3d ___, ** 5 (observing that not all restrictions on a suspect's freedom of movement rise to the level of custody and that the concern focuses on whether it was a police dominated environment). Defendant tries to distinguish *Munoz*, **[AB 22]** but the fact that the subject in *Munoz* was told that he did not have to go with the officers or talk with them does not materially distinguish this case from the underlying principle of *Munoz* and similar cases, which is that the presence of police officers[4] is relevant but not determinative, because it is not alone sufficient to result in a finding of custody. *Munoz*, 1998-NMSC-048, ¶¶ 5, 44.

Defendant made 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. Defendant cannot

[4] Defendant notes that the officers were armed, **[AB 7, 24]** a fact that is of no substantive consequence. It is common knowledge that police are armed, and there is not even a suggestion that the police emphasized that fact in any manner whatsoever.

logically claim that, because she later found out she was detained,[5] her prior statements were inadmissible. The suppressed statements, which were not even the result of interrogation, occurred before Defendant was told she was detained and no material facts known to her prior to that point, or even after, would have caused a reasonable person to believe that she was in custody. *Cf. State v. Ybarra*, 1990-NMSC-109, ¶¶ 4, 7, 111 N.M. 234 (noting that subject was in custody because he was "placed under arrest" **before** being taken to the hospital).

Defendant also asserts, largely relying upon *State v. Santiago*, 2009-NMSC-045, 147 N.M. 76, that she was subjected to interrogation by the police through Dr. Vaskas, whom Defendant describes as the "conduit." **[AB 14-15, 18]** In *Santiago*, this Court found that private security guards' unilateral action of searching a suspect for evidence could not be attributed to the State. *Id.* ¶ 28. *Santiago* adopted the federal formulation for analyzing whether conduct performed by a private actor could be imputed to the police but expressly noted that the Court was open to further refinements. *Id.* ¶ 18.[6] **[*Id.* 14-16]** However, this case is similar to *Santiago*, in which this Court concluded that mere awareness of a private party's actions fell short of

[5] As previously noted, being "detained" does not necessarily render a person subject to custody for *Miranda* purposes. **[BIC 21-22]**

[6] The State agrees that the basic analysis of *Santiago* has been applied in the context of *Miranda*. **[AB 15 n. 11]**

establishing an "agency relationship" and was nothing more than "speculation." *Id.* ¶¶ 22-23.

First, there is no evidence that the police and doctor agreed or conspired to interrogate Defendant through the doctor or otherwise. Further, as to the second factor, Defendant has offered no evidence that the doctor was not naturally motivated in part by professional, medical concerns, i.e., concerns related to her "own ends[,]" in attempting to ascertain for practical, legal and other reasons what happened to a baby in the department in which she worked. *See id.* ¶ 24 (noting that even if a private citizen is motivated both to assist government and to further his or her own objectives, the private citizen is not acting as an agent of the government). The lack of either *Santiago* factor is dispositive of Defendant's attempt to impute the doctor's actions to the police. *Id.* ¶ 27. As a result, it does not matter whether the statement initially made by the doctor would have been the functional equivalent of interrogation **had it been stated** by the police. **[BIC 23-25, AB 24-25]** Because there was no agency between the police and the doctor, there was no interrogation; Defendant's reliance on *Ybarra* is misplaced because *Ybarra* involved custody and interrogation, each of which is missing here. No evidence, and certainly no substantial evidence, supports the district court's finding that Dr. Vaskas acted as an agent of law enforcement. **[RP 158 ¶ 3, 159-60]** *State v. Almanzar*, 2014-NMSC-001, ¶ 9. Further, as seen in the video portions transcribed above and in the Brief-in-

Chief, no evidence supports the district court's characterization of the doctor as being "confrontational." **[RP 159, BIC 6]**

In a nutshell, Defendant's claim that the doctor must have been an agent of the police because the doctor allegedly prioritized the investigation over medical concerns has been shown above to be false. **[AB 17]** Further, it was Defendant's mother who was asking Defendant questions. **[BIC 25]** There was simply no interrogation here within the meaning of *Miranda*-related caselaw.

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

Defendant asserts that her statements are inadmissible due to the physician-patient privilege. **[AB 28]** However, Defendant fails to squarely address the express language of Rule 11-504(D),[7] which demonstrates that it does not apply here in the first place. 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.

[7] Defendant also squarely fails to address the State's argument that, even if the privilege could apply despite the express exception in Rule 11-504(D) and the clear circumstances of waiver, it depends on the patient being reasonably honest with medical staff, a fact woefully lacking here including particularly at and after the point of birth. **[BIC 31-32]**

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

Given the express exception in the rule for what would otherwise be confidential communications, the privilege must be construed in light of any applicable mandatory reporting law. The physician attending to Defendant was required to report the discovery of the newborn. Under NMSA 1978, § 32A-4-3(A) (2021), "**[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. (Bold emphasis added). *See State v. Strauch*, 2015-NMSC-009, ¶¶ 1-2, 46-47 (discussing Section 32A-4-3(A) and Rule 11-504(D)(4)). That duty to report is meaningless if it does not include the duty to report a full term, apparently healthy newborn baby found in a trash bag in a hospital bathroom. Defendant's claim that there is no overriding public interest in investigating the death of a deceased but otherwise apparently healthy newborn baby, in a hospital of all places, defies logic. **[*Id.* 41]**

Defendant also claims that she did not waive any privilege, even assuming the privilege applied in the first place. **[*Id.* 37-40]** Defendant misconstrues the State's point, which was that Defendant cannot avoid waiver by asserting that the police were merely acting as security agents of medical staff, which might otherwise prevent an inference of waiver. **[BIC 35]** Despite Defendant's assertion, the State never argued that the police were there merely for security. *Cf., e.g., State v. Salas*,

408 P.3d 383, ¶¶ 40-53 (Wash. App. 2018) (concluding that, because officer was present essentially for security purposes, the officer was an agent of medical staff and therefore there was no waiver of the privilege). Defendant also asserts that the State cannot have it "both ways[,]"citing *Salas* for the proposition for which the State cited it. **[AB 18; BIC 35]** The State's assertion was diametrically opposed to the manner in which it is now characterized by Defendant. The State correctly observed that the disclosure of information to or in the obvious presence of third parties, not necessary to further the privilege at issue, waives or vitiates any such privilege. **[BIC 33-34]** The State had further asserted that this was "not a case" in which a police officer can be viewed as merely an agent of the physician, such as when the police are there merely for the physician's protection, in which case a defendant might otherwise avoid a finding of waiver.[8] ***[Id.* 35]** That the police were there investigating a potential crime does not prevent the application of the doctrine of waiver within the context of the physician-patient privilege, just as the fact that police were

[8] Similarly, Defendant asserts that the State relied on a case, *People v. Salinas*, 182 Cal.Rptr. 683 (App. 1982), to support a contention that the doctor sought police presence for her own safety. **[AB 18 (citing BIC 25-26)]** Yet, a cursory examination reveals that the State cited that case at that point for the basic proposition that a physician does not become an agent of law enforcement merely because the police are visibly present while the physician interacts with the patient. **[BIC 25-26]** Defendant appears to have confused the issue of alleged interrogation with the issue of waiver of the physician-patient privilege.

investigating a crime does not entail a finding that Defendant was subjected to custodial interrogation.

Defendant has failed to rebut the obvious truth that the presence of third parties, here the police and Defendant's mother, waives the privilege. **[*Id.* 33-34]** Defendant's mother was **not** needed to provide medical care; Defendant was age 19 and 2 months at the time. **[BIC 2 n. 2]** Rule 11-504(A)(5) itself provides that a communication is not "confidential" if not made "privately," i.e., if it is disclosed to others (or made in the presence of others) when such disclosure is not in furtherance of the purpose of the communication. *See, e.g., People in Interest of R.G.*, 630 P.2d 89, 93 (Colo. Ct. App. 1981) (concluding that admission of minor's statement to a physician, that he had cut his finger on a knife, did not violate physician-patient privilege because it was knowingly made in presence of police). Just as there was no evidence that the medical staff were acting as agents of the police, there was no evidence that the police were acting as agents of the doctor or other medical staff. Accordingly, Defendant waived the privilege, even if it applied in the first place, due to the obvious presence of third persons.

CONCLUSION

Defendant was not in custody nor was she interrogated; accordingly, *Miranda* was inapplicable. Additionally, the physician-patient privilege does not apply here to prevent admission of the statements. For the reasons set forth in the Brief-in-Chief

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

Respectfully submitted,

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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 **4,177** words (using Microsoft Word, latest version) using Times New Roman, a proportionally-spaced typeface, less than the 4,400 word limit applicable to reply briefs in lieu of the default fifteen page limit.

CERTIFICATE OF SERVICE

I certify that, on November 18, 2024, I filed a true and correct copy of the foregoing *Reply Brief* electronically through the Odyssey E-File & Serve System, causing service to occur on all parties of record by electronic means.

/s/ Michael J. Thomas
Assistant Solicitor General