IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40210

STATE OF NEW MEXICO,
Plaintiff-Petitioner,

v.

BENNIE LEWIS GARDNER,
Defendant-Appellee.

STATE'S BRIEF IN CHIEF

Appeal from the District Court of Union County
Melissa A. Kennelly, District Judge

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Oral arguments are requested pursuant to Rule 12-319(B) NMRA.

Note Regarding Citations to the Record

The pertinent proceedings in this case are on the FTR-formatted CD. These are cited as **[Date CD HR:MN:SD]**. References to the record proper are cited as **[RP page]**. References to exhibits are cited as **[State's Ex. No.]** or **[Def. Ex. No.]**.

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SUMMARY OF PROCEEDINGS

Nature Of the Case

Pursuant to N.M. Const. Art. VI, § 2, the State appeals the July 29, 2021 amended order granting Defenant's motion to suppress all evidence and denying the State's motion to reconsider. Defendant was charged with one count of criminal sexual penetration in the first degree (child under thirteen) contrary to NMSA Section 30-9-11(D)(1), one count of child abuse of a child contrary to NMSA Section 30-6-1(D), and a count of enticement of a child contrary to NMSA Section 30-9-1.

The courts below erred by ignoring or misreading the new-crimes exception and the live-witness testimony to the exclusionary rule. The courts below gave cursory and erroneous analysis to the attenuation doctrine, focusing solely on the temporal separation between the traffic stops.

Disposition of the Courts Below

After police stopped the commercial truck that Defendant was driving, they found a twelve-year old girl hiding in the bedding of the truck's sleeping compartment. Approximately 48 hour later, the girl revealed to her assigned foster family that Defendant had sexual intercourse with her during a twenty-four commercial-vehicle-hold period ordered by the New Mexico state police.

On July 29, 2021, the district court granted Defendant's motion to suppress all evidence following the initial stop, finding that the "second stop during which the

child was taken into custody was a continuation of the investigation into possible child abuse that began as a result of the first stop's unlawful search and seizure." **[RP 1911, ¶ 112]**

The Court of Appeals, in affirming the district court's order, declared that neither the inevitable discovery doctrine nor the attenuation doctrine applied. *State v. Gardner*, mem. op., ¶¶ 8 – 14, (non precedential). The Court of Appeals appears to have ignored aspects of the attenuation doctrine, analyzing only the temporal separation between the first stop and the child's revelation. *Id.*

This Court has postulated "[w]hether new crimes exception is part of the attenuation doctrine or a separate exception to the exclusionary rule is unclear." *State v. Tapia*, 2018-NMSC-017, ¶ 17. This case offers this Court the opportunity to clarify where the new crimes and live-witness testimony exceptions fit within with exclusionary rule.

QUESTION PRESENTED FOR REVIEW

1. In failing to consider the new crimes and live-witness testimony exceptions, did the Court of Appeals wrongly ignore precedential development of the attenuation doctrine in affirming suppression of all evidence following an unlawful search?

Preservation

The issues in this appeal have been preserved. In response to Defendant's April 9, 2021 Motion to Suppress, the State argued in its June 17, 2021 response

that, even if the first stop was unlawful, the inevitable discovery doctrine and the attenuation doctrine allowed for the admissibility of the evidence discovered during the second stop. **[RP 1691- 1694]** The State preserved its claim under the attenuation doctrine because it expressly invoked a ruling on that issue. And the fundamental goals of Rule 12-216, 1978 NMRA were met in this matter because the facts necessary for a ruling on attenuation was fully developed and the district court made findings of law and fact.

Preservation is not a substantive limitation on the power of this Court. *State v. Gomez*, 1997-NMSC-006, paragraph n. 2, 122 N.M. 777. Moreover, this Court recognizes "three exceptions to the [preservation] rule. . .jurisdictional questions, questions of a general public nature, and questions involving fundamental right of a party." *Id.* ¶ 15. Under the New Mexico Constitution, the exclusionary rule is essential to due process, rendering the issue in this appeal a question of both general public concern and the parties' fundamental rights.

Facts And Procedural History

On March 16, 2017, Defendant was driving a commercial vehicle on a public highway in Clayton, New Mexico, when he by-passed a designated, open, weigh-station. Because New Mexico law requires all commercial vehicle drivers to enter an open weigh-station, an officer with the New Mexico State Police Vehicle Enforcement Division initiated a traffic stop. During the stop, the officer believed

the vehicle cab smelled like marijuana. **[10/7/2021 CD #5 1:06:17-1:07:06, 1:08:00-1:10:30, 1:30:30-1:32:10, 1:39:00-1:42:00, 2:04:50-2:06:31; Def. Ex. D 5:05-10:20; 7 RP 261]**

The officer asked Defendant if anybody else was in the vehicle and if he would consent to a search of the cab. Defendant denied that anybody was with him and declined the request to search. **[10/4/19 CD #3 10:01:00-10:04:00; 10/7/2021 CD #5 2:25:10-2:26:47; Def. Ex. D 13:14-13:30]** The officer told Defendant that he might as well consent because the officer could get a warrant anyway. **[5/10/2021 CD #5 3:07:20- 3:08:03; Def. Ex. D 13:30-15:02, 21:27-30:24]**

Defendant continued to deny consent until thirty-five minutes into the stop, at which point he gave oral consent to search the cab of the truck. Having obtained permission, the officer searched the cab and found a twelve-year-old girl (the child) hiding under the blankets in the bed. He also found sexual lubricant and condoms, one of which appeared to have been used. **[5/5/2021 CD #5 1:54:40-1:55; Def. Ex. D 38:50; 7 RP 214, 261; 8 RP 114; 7 RP 261-62]**

Another officer interviewed the child, and she provided her and her mother's name. She called Defendant her "stepfather" and said that she lived in Texas and had to go back to school the following Monday. She confirmed that Defendant had told her to hide in the bedcovers immediately before the stop. In response, the officer asked if she "fel[t] comfortable with [Defendant]," and she indicated that she did.

The officer also asked: "When you go to truck stops, do you stay in the truck" and "Does he ever introduce you to any other guys when you go to truck stops?" She responded "no" to each question and gave the officer her mother's phone number. **[Def. Ex. D 47:50-51:30; 7 RP 261]**

Officers contacted the mother who told police that the child had her permission to be in the truck. Officers put the truck out of service for twenty-four hours because they found a bottle of Tylenol/codeine in the vehicle. The stop ended when Defendant was allowed to take the child and drive the vehicle to a nearby truck stop to begin the out-of-service period. **[5/10/2021 CD #5 1:27:00-14, Def. Ex. D 1:54:34-2:17:58; 7 RP 261-62]**

After the twenty-four hour out-of-service period ended, Defendant continued on his journey. Soon after, the arresting officer's supervisor instructed the officer to contact the owner of the truck, Quality Trucking, about finding the truck's location electronically. Quality "pinged" the truck and it sent Defendant a message to stop at a gas station in Raton, New Mexico and meet with state police officers. Defendant did not comply with the company's directive. Quality wanted the truck stopped because of the child was not authorized to be in the vehicle as a passenger. At that point, a state police patrol officer stopped the truck, took possession of the child, and allowed Defendant to continue on his way. **[5/7/10 CD 5 2:14:26-2:18:00; 5/7/2021 CD 2:38:22-2:45:55; 7 RP 262]**

The child was placed in foster care in New Mexico and, on March 18, disclosed to her foster mother that Defendant had had sexual intercourse with her while they were at the truck stop during the twenty-four hour out-of-service period. Later, a sexual assault nurse examiner (SANE) conducted a physical examination of the child that revealed recent vaginal injuries consistent with blunt force penetrative trauma. The child told the nurse that Defendant was "a good dad" because he used a condom during sexual intercourse with her. **[2 RP 117-19 and 7 RP 62-63]**

The district court granted Defendant's motion to suppress all evidence obtained during the initial and subsequent traffic stops, including the child's voluntary revelation that Defendant had sexual intercourse with her during the twenty-four hour out-of-service impound. The district court found that the initial stop, although initially regulatory, "turned into a drug interdiction stop" and suppressed the evidence of the child, her disclosures, the condoms, and the lubricant. **[5/10/2021 CD 5 3:53:00-4:09:03]**

The district court rejected the attenuation doctrine and its new crimes exception. **[RP 1816 - 1844, ¶¶121-123]** The court found that the new crimes exception did not apply because "New Mexico courts have applied the attenuation doctrine under the state constitution only to 'new crimes' committed by a defendant in reaction to unlawful police conduct." **[*Id.*, ¶122]** The court also found that "the second stop during which the child was taken into custody was a continuation of the

investigation into possible child abuse that began as a result of the first stop's unlawful search and seizure." **[*Id.*, ¶112]** The court concluded that "the second stop was unlawful because it was a continuation of the first unlawful search and seizure." **[*Id.*]** Accordingly, the court suppressed all evidence from the initial and subsequent stop, including the statements from the child concerning Defendant's sexual abuse made to her foster mother the day after the police ended their investigation and released Defendant. **[*Id.* ¶, 24]**

On appeal the State argued that the district court misapplied the attenuation doctrine. **[COA BIC, p. 40]** Specifically, the State argued that the district court misapplied attenuation doctrine's new-crime exception and ignored the doctrine's live-witness exception in its analysis. In affirming suppression of all evidence, the Court of Appeals affirmed the district court's finding that the initial stop continued uninterrupted through the subsequent stop. *State v. Gardner*, A-1-CA-39914, ¶ 8. Accordingly, the Court found that attenuation does not apply because there was no temporal separation between the unlawful stop, finding "there is no question that the discovery of the child occurred during the course of the unlawful search." *Id.* ¶ 9. The Court found further the attenuation fails "on the second prong because there was not an intervening circumstance creating a break in the causal chain." *Id.* ¶ 13. The Court summed up that "there was no causal break, and therefore, the attenuation doctrine does not apply." *Id.* ¶ 13. The Court erred because it never fully considered the

attenuation doctrine, seemingly ignoring the doctrines new crime exception argued in the district court and its live-witness exceptions, argued in the appellate briefs.

ARGUMENT

Standard of Review

"The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing the facts in a manner most favorable to the prevailing party." *State v. Garcia*, 2009-NMSC-046, ¶ 9, 147 N.M. 134. "Factual determinations are reviewed for substantial evidence and the application of the law to the facts is reviewed de novo." *Id.*

Under the New Mexico Constitution, the exclusionary rule is not an evidentiary rule but is essential to constitutional due process. *See State v. Gutierrez*, 1993-NMSC-062, ¶¶ 52, 53, 116 N.M. 431. As discussed below, because the Court of Appeals did not fully consider the attenuation doctrine's new crimes exception, *State v. Tapia*, 2018-NMSC-017, or live-witness testimony exception, *State v. Martinez*, 2015-NMCA-012, it failed to follow established precedent.

Attenuation

"The purpose of the exclusionary rule under the Fourth Amendment has been articulated as the deterrence of unlawful government behavior" by excluding the use at trial of unlawfully obtained evidence. *Tapia*, 2018-NMSC-017, ¶ 13. But the exclusionary rule is not absolute, "but applicable only ...where its deterrence benefits

outweigh its substantial social costs." *Id.* (citations omitted). One exception to the exclusionary rule is the attenuation doctrine. Under the attenuation doctrine

> evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by the suppression of the evidence obtained.

Id. ¶ 14 (*citing Utah v. Strieff*, 579 U.S. 232, 240 (2016)).

In this case, law enforcement pulled-over Defendant's commercial truck because he failed to stop at an open weighing station. At the conclusion of that stop, and because the officers discovered prescription narcotics, Defendant was ordered to spend twenty-four hours in impound. When the twenty-four hours passed, the officers allowed him to continue on his way. It was only after the commercial truck owner contacted law enforcement requesting that it stop Defendant and remove the child, that law enforcement effected a second stop to remove the child. It was only because of the truck owner's request that the child was placed with foster care where she revealed Defendant's abuse of her.

The State urges this Court to find that the truck owner's request served as an intervening event sufficiently removing any taint of unlawful police conduct.

Attenuation and New Crime Exception

Defendant used the time of his police ordered detention to commit new abuses to the child, constituting new crimes that are not subject to the exclusionary rule.

The new-crime exception is a facet of the attenuation doctrine. "It was the attenuation doctrine that spawned the new crime exception to the exclusionary rule." *Tapia*, 2018-NMSC-017, ¶ 16 (quotations marks, citations, and brackets omitted). When the new-crimes exception is employed, courts allow the prosecution to introduce evidence of the defendant's subsequent criminal behavior despite the officers' initial unlawful conduct.

In *Tapia*, this Court reasoned that when considering the admissibility of evidence of a defendant's new crime during an unlawful search, the Court "look[s] to the penalty for an offense as it reveals the legislature's judgment about the offense's severity," rather than draw a bright line between violent and non-violent new crimes. 2018-NMSC-017, ¶23, quoting *Lewis v. United States*, 518 U.S. 322, 326, (1996). In so doing, this Court expanded the new crimes exception to include "passive" non-violent crimes for which the penalty is severe. *Id.* ¶23-31.

In *Tapia*, during an unlawful traffic stop, the officer noticed that Defendant-passenger was not wearing a seatbelt. When the officer asked for his identity, Defendant, "unprompted" and "of his own free will," misrepresented his identity to the officer and signed his brother's name to a citation. *Id.* ¶37. This Court observed that, the Defendant's action was "not the natural or predictable progression from the unlawful seizure" so it constituted an intervening circumstance. *Id.* ¶¶36, 37. Therefore, under Federal Fourth Amendment attenuation doctrine analysis, this

Court found that evidence of this non-violent crime (forgery) committed during the unlawful stop could be admitted "because it was free of the taint of unlawful seizure." *Id.* ¶38.

The *Tapia* Court recognized that the federal attenuation doctrine applies to claims under Article II, Section 10 of the New Mexico Constitution. Even though, under the New Mexico Constitution, the exclusionary rule is not primarily an evidentiary deterrence but a function of due process, this Court found that the three-part federal attenuation analysis "comports with [the Court's] preference to assess the reasonableness of law enforcement by considering the totality of the circumstances of each case." *Id.* ¶ 47. Under the facts in *Tapia*, this Court concluded "that the benefits of deterrence...are not outweighed by the cost of excluding the evidence of Defendant's crimes." *Id.* ¶ 48. The defendant's

> unprovked and willful criminal acts after an unreasonable traffic stop cannot be sanctioned. The violation of Defendant's Fourth Amendment or Article II, Section 10 rights does not confer upon him a license to commit new crimes.

Id.

In this case, a third-party unassociated with the illegal activity requested that law enforcement stop its truck because of an unauthorized passenger. Law enforcement removed the child from the truck. The State assigned her to a foster family to whom the child revealed the abuse a day later. Independently of each other, and certainly together, the truck owner's request to stop and remove the unauthorized

passenger and the child's unproved statements were "not the natural and predictable progression from the unlawful seizure," and so constituted an intervening circumstance that the Court of Appeals ignored.

Below, the Court of Appeals found that Defendant was under police investigation without interrupted starting with the initial unlawful stop through the subsequent stop, and that this investigation included the seizure of the child. During that time, while remaining at a truck stop pursuant to police order, Defendant sexual assaulted the child. The Court found further that "there was no causal break, and therefore, the attenuation doctrine does not apply." *Garnder*, ¶ 8. The Court erred in not applying *Tapia*'s analysis to Quality's request and the child's statements; if it had, it would have discovered that individually and collectively they serve as "an intervening circumstance." *Tapia*, 2018 N.M. 017, ¶37.

The district court found that the sexual assault of the child was not a "new crime" because it was not in response to unlawful police conduct. The Court of Appeals was silent on the issue of new crimes.

The district court was wrong for a couple of reasons. First, but for the unlawful police conduct, Defendant would not have spent twenty-four hours impounded at a truck stop, which he used to sexually assault the child. Second, although the facts in *Tapia* gave a clear indication that Defendant's crime was in "response to unlawful police action," the case's factual analysis suggests that there is no "in response to"

bright line, rather it seems that the rule considers whether police action gave rise to the opportunity or otherwise facilitated a new crime.

In *Tapia* this Court stated that it was not drawing "a line based merely upon the nature of the violation, [because that] would embolden individuals to engage in non-violent yet still criminal acts that compromise the integrity of the criminal justice system." *Id.* ¶18. The Court reasoned that Defendant "forging his brother's signature on a traffic citation could have caused his brother real harm" and that the severity of the crime's punishment "shows [the legislature] considers this crime harmful to society." *Id.*

Here, Defendant committed a most heinous act against the child while in police detention and, arguably, police detention provided the opportunity to sexually assault the child, while in New Mexico, rather than continuing his journey to another state. At the very least, Defendant's new-crime was facilitated by the law enforcement ordered detention if not "in response to" police action.

Further, a day after the police ended their investigation and released Defendant, the child spontaneously confided in her foster family that Defendant had sexual intercourse with her during the twenty-four-hour hold. The child's unprovoked revelation to her foster family that Defendant sexually assaulted her while in police detention is an intervening circumstance "that breaks the relationship between the illegal conduct and the evidence obtained." *Id.* ¶36.

The State asks this Court to find Defendant's use of the police detention to commit new abuses to the child are new-crimes in response to police action that remove the discovered evidence from the exclusionary rule.

Attenuation and Live-Witness Testimony

The child revealed Defendant's abuse within hours of being placed with a foster family, which is evidence that she was determined and eventually would have come forward, seeking help. In *State v. Martinez*, the Court of Appeals employed without adopting the *Ceccolini* attenuation analysis of live-witness testimony. 2015-NMCA-013, ¶18, *citing United States v. Ceccolini*, 435 U.S. 268 (1978). In *Ceccolini* the U.S. Supreme Court distinguished live witnesses from "inanimate objects" with no volition. *Id.* ¶20. "To proffer a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects legally seized." *Ceccolini*, 435 U.S. at 277 (citation omitted). A "living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence." *Id.*

The *Martinez* Court cited *Ceccolini*'s rationale to allow live-witness testimony: "the fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human

personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." *Id.* citing *Ceccolini*, 435 U.S. at 276-77.

Because of this distinction, the *Ceccolini* Court cautioned courts "to use the exclusionary rule for the testimony of live witnesses, and admonished courts to apply it with circumspection to determine its usefulness in any particular context." *Id.* ¶21. The *Martinez* Court pointed out that the *Ceccolini* Court was "particularly concerned with a situation in which the exclusion would perpetually disable a witness who is not the putative defendant from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby." *Id.* (quotations and brackets omitted).

Applying the *Ceccolini* principles to the facts of this case the child's statements of sexual abuse become "sufficiently attenuated because (1) the free will [that] the witness exhibited made it more likely that she would eventually have come forth on her own, (2) the Supreme Court is less willing to exclude live-witness testimony than to exclude inanimate document or objects, (3) other illegally seized evidence was not used in questioning the witness, (4) substantial periods of time elapsed between the time of the illegal search [initial regulatory stop] and the initial contact with the witness [the child's disclosure to the foster parent] and the contact with the witness and the testimony at trial, and (5) it did not appear that the officer

conducted the illegal search with the intent of seeking out evidence [of sexual abuse]." *Martinez*, 2015-NMCA-013, ¶22 (internal citations and quotations omitted, brackets added).

As in *Martinez*, the Court of Appeals' "focus was erroneous" in that it was limited to what it perceived as a lack of temporal separation between the illegal search and the child's statements of abuse. It did not consider the fullness of the attenuation doctrine, including the exclusion of live-witness testimony is disfavored. Here, the child came forward within hours of being removed from the influence of Defendant, the likely inference is that she had determined to seek help and would have eventually, of her own volition, sought out help on her own.

As discussed above, there is clear precedent and there was ample reason for the Court of Appeals to follow precedent and apply the attenuation doctrine in-full, but it failed to do so. We ask this Court to find that the live-witness testimony is an appropriate doctrine for this case and to remand the matter to the district court for proceedings consistent with it.

CONCLUSION

The Court of Appeals erred in failing to apply the evolving precedent of New Mexico's attenuation, new-crime exception, and live-witness doctrine. The State requests that this Court reverse the Court of Appeals and vacate the district court's

order suppressing *all* evidence following the initial search of Defendant's vehicle with an order to proceed accordingly.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

As required by Rule 12-318(F)(3) NMRA, this brief uses Times New Roman, a proportionately spaced typeface, and in compliance with the rule, the body of the brief contains less than 3,720 words out of a maximum permitted word count of 11,000. This petition was prepared using the most recent version of Microsoft Word.

/s/ Peter James O'Connor
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CERTIFICATE OF SERVICE

I hereby certify that this brief was electronically filed using Odyssey E-File, which caused a copy to be served on the New Mexico Law Office of the Public Defender at lopd-appealsservice@lopdnm.us on this 10th day of April 2024.

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