

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

No. 29,775

CYNTHIA MARTINEZ, a/k/a
CYNTHIA NAVARETTE,

Defendant-Respondent.

**BRIEF AMICUS CURIAE OF PB&J, FAMILY SERVICES, INC.,
IN SUPPORT OF RESPONDENT**

*On Writ of Certiorari to the New Mexico Court of Appeals
In an Appeal from the Fifth Judicial District Court
Lea County, New Mexico
The Honorable William A. McBee, District Judge*

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INTEREST OF AMICUS CURIAE

PB&J, Family Services, Inc. (PB&J), is a New Mexico non-profit corporation that serves women and their children in the mental health and substance abuse systems, and thus has expertise on the effect of substance abuse on families. Specifically, PB&J works with women to help them understand their substance abuse, recognize the effects this abuse has on their children, and overcome the traumatic events that often give rise to this abuse. PB&J offers five prison-related family support services programs. One such program, “ImPACT” (The Importance of Parents and Children Together), operates in three New Mexico correctional facilities and works to reunify children with their incarcerated parents. A second, “KidPACT,” provides support groups and other services for school-aged children of incarcerated or formerly-incarcerated parents. Through these programs, PB&J has developed expertise and an understanding of the devastation that incarceration has on the family.

PB&J respectfully submits this brief, as *amicus curiae* on behalf of Ms. Martinez, to share its expertise about the socioeconomic impact of the State’s proposed interpretation of NMSA 1978, § 30-6-1(D) (1973). Interpreting Section 30-6-1(D) to apply to women who give birth after having used substances during pregnancy would affect the New Mexico mothers, children, and families served by the PB&J therapy programs. First, this Court should not interpret Section 30-6-1(D) to apply to women who use substances during their pregnancies, because the Legislature, as the policy making body, has the plenary power to define crimes and establish criminal penalties and has chosen not to criminalize this very behavior. Second, interpreting this statute to apply to women who give birth after having used substances during pregnancy would likely deter pregnant women, fearful of arrest and prosecution, from seeking invaluable prenatal care and substance abuse treatment, leading to dire but otherwise preventable

consequences for their children. This interpretation of the statute would also have a disparate impact on low income women and women of color in New Mexico. Finally, children of incarcerated women often cycle into the overburdened foster care system. For these reasons, PB&J respectfully asks this Court to uphold the decision of the New Mexico Court of Appeals and find that NMSA 1978, § 30-6-1(D) (1973) does not apply to women who give birth after having used substances during pregnancy.

SUMMARY OF PROCEEDINGS

Cynthia Martinez, a.k.a. Navarette, a.k.a. Luna (hereinafter Ms. Martinez), a thirty-four year old single mother, gave birth to her daughter Rene Nicole on January 12, 2003. RP 9. Shortly after Rene Nicole's birth, the hospital staff tested her for drugs and found that she had cocaine in her blood stream. RP 9. As a result, Ms. Martinez was separated from her daughter who has since been placed in foster care. RP 9–10. Ms. Martinez is not employed and her total annual income amounts to only \$3,600. RP 16. Ms. Martinez reported that she had no assets. RP 16. She had no cash on hand, no bank account, no real estate, and no car. RP 16. Based on the eligibility determination for indigent defense services, Ms. Martinez was found to be indigent. RP 17.

On January 14, 2003, only two days after the birth of her daughter, Ms. Martinez was questioned by the police. RP 9. At that time, Ms. Martinez admitted that four days prior to Rene Nicole's birth she had ingested crack cocaine. RP 9. She also admitted that she had used crack cocaine four or five times while she was pregnant. RP 9. Ms. Martinez stated that she sought prenatal care at the State of New Mexico health clinic during her pregnancy. RP 9. She said that she had spoken with the staff about the possible adverse effects of cocaine on the unborn child. RP 9. At that time, the police did not effectuate an arrest warrant. RP 9, 13.

On March 10, 2003, the police responded to a call from the emergency room of Lea Regional Hospital in response to a battery victim. RP 10. That battery victim was Ms. Martinez. RP 10. The police officer who responded noted that Ms. Martinez had a large bruise on her face along her left jaw. RP 10. Ms. Martinez was not able to identify her attackers and did not press charges. RP 10. Importantly, during the interview regarding the battery, the police officer questioned Ms. Martinez about her cocaine use during her pregnancy, which was unrelated to the

battery incident. RP 11. Ms. Martinez’s responses to the officer’s questions about her drug use appear in the criminal complaint relating to the child abuse allegations. RP 11. Although the police did not seek an arrest warrant based on their initial interview of Ms. Martinez after Rene Nicole’s birth, they effectuated a warrant just two days after interviewing Ms. Martinez at the emergency room. RP 13.

On April 14, 2003, Ms. Martinez was charged with child abuse under NMSA 1978, § 30-6-1(D) (1973) based on her admissions of ingesting crack cocaine during her pregnancy. RP 1. Ms. Martinez entered into a conditional guilty plea on July 14, 2003, for the crime of Abandonment or Abuse of a Child, a third degree felony. RP 42–43, 54. On November 24, 2003, Ms. Martinez was sentenced for a term of three years to be served in the Penitentiary of New Mexico. RP 54. The court suspended one year of her sentence. RP 54. Ms. Martinez appealed her conviction to the New Mexico Court of Appeals. *State v. Martinez*, 2006-NMCA-068, 139 N.M. 741, 137 P.3d 1195.

On April 3, 2006, the New Mexico Court of Appeals held that Ms. Martinez was not guilty of child abuse under Section 30-6-1(D). *State v. Martinez*, 2006-NMCA-068, ¶ 1, 139 N.M. 741, 137 P.3d 1195, 1195. The New Mexico Court of Appeals held that the New Mexico Legislature did not include fetus within the meaning of a human being in Section 30-6-1(D) and so the statute did not apply to Ms. Martinez’s conduct because “[the] Court may not expand the meaning of ‘human being’ to include an unborn viable fetus because the power to define crimes and to establish criminal penalties is exclusively a legislative function.” *Id.* ¶¶ 7, 9, 139 N.M. at 742–43, 137 P.3d at 1196–97. The Court of Appeals further noted that “[a]ccepting the State’s interpretation of Section 30-6-1 to include a fetus would offend [Ms. Martinez’s] due process rights.” *Id.* ¶ 11, 139 N.M. at 743, 137 P.3d at 1197. Because Ms.

Martinez could not have known that her conduct was criminal, the Court of Appeals held that the statute did not apply to her conduct. *Id.* ¶ 11, 139 N.M. at 743, 137 P.3d at 1197. The New Mexico Court of Appeals reversed the trial court’s decision. *Id.* ¶ 13, 139 N.M. at 743–44, 137 P.3d at 1198. The State appealed and the New Mexico Supreme Court granted certiorari. *Id.*, *cert. granted*, 2006-NMCERT-006, 140 N.M. 226, 141 P.3d 1280.

ARGUMENT

I. NEW MEXICO CHILD ABUSE STATUTE SECTION 30-6-1(D) SHOULD NOT BE INTERPRETED TO APPLY TO WOMEN WHO GIVE BIRTH AFTER HAVING USED SUBSTANCES DURING PREGNANCY, BECAUSE THE NEW MEXICO LEGISLATURE HAS PLENARY POWER TO DEFINE AND ESTABLISH CRIMINAL PENALTIES AND HAS CHOSEN NOT TO CRIMINALIZE SUCH CONDUCT

NMSA 1978, § 30-6-1(D) (1973) should not be interpreted to apply to women who give birth after having used substances during pregnancy, because the New Mexico Legislature has plenary power to define and establish criminal penalties and has chosen not to criminalize such conduct. The New Mexico Legislature has exclusive authority to define crimes and to establish criminal penalties in New Mexico. As this Court has stated, “[I]t is the particular domain of the legislature, as the voice of the people, to make public policy....The judiciary, however, is not as directly and politically responsible to the people as are the legislative and executive branches of government.” *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995). Therefore, the Legislature makes the laws, while the courts have the duty to “expound” upon the laws and only “undertake[] to make the law by mere declaration (of public policy)...[when there are] the clearest reasons and the most pressing necessity.” *State v. Lavender*, 69 N.M. 220, 231–32, 365 P.2d 652, 660 (1961) (*quoting Barwin v. Reidy*, 62 N.M. 183, 193, 307 P.2d 175, 181 (1957)).

This Court, when attempting to discern the Legislature’s beliefs regarding a particular piece of legislation, has looked to whether the legislation passed or failed. *See Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶ 10, 140 N.M. 16, 139 P.3d 176, 180 (noting that “there have been several failed attempts in recent legislative sessions to pass legislation intended to extend the rights, protections and benefits enjoyed by spouses in a marriage to domestic partners”). For example, this Court viewed failed attempts to pass legislation as indicative of the Legislature’s reticence to expand the definition of family members to include domestic partners. *Id.* Similarly,

other state courts have acknowledged the legislature's role, and the passage or failure of legislation, when deciding whether to penalize a woman who gave birth after having used substances during pregnancy. *See, e.g., People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) (“The Legislature is an appropriate forum to discuss public policy as well as the complexity of prenatal drug use, its effect upon an infant, and its criminalization.”); *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988) (“[I]f a legally cognizable duty on the part of pregnant women to their developing fetuses is to be recognized, the decision must come from the legislature only after thorough investigation, study and debate.”); *State v. Gray*, 584 N.E.2d 710, 712–13 (Oh. 1992) (refusing to criminalize prenatal substance abuse because the Legislature had before it a bill that would have criminalized such behavior). Therefore, this Court should look to the passage or failure of legislation to aid in determining the Legislature's intent.

In *State v. Martinez*, the New Mexico Court of Appeals correctly noted that the Legislature has the exclusive function of defining crimes and establishing criminal penalties. *State v. Martinez*, 2006-NMCA-068, ¶ 9, 139 N.M. 741, 743, 137 P.3d 1195, 1197 (citing *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993); *State v. Thompson*, 57 N.M. 459, 465, 260 P.2d 370, 374 (1953) (“By the constitution of [New Mexico] the legislature is invested with plenary legislative power, and the defining of crime and prescribing punishment therefore are legislative functions.”)). The Court of Appeals further noted that the Legislature has chosen not to criminalize pregnant women who use drugs and then subsequently give birth. *Id.* In fact, the Legislature, through the rejection and modification of two pieces of legislation, has demonstrated its intent to reject the criminalization of pregnant women who give birth after having used drugs during their pregnancy.

During the 2005 legislative session, the New Mexico Legislature was presented with Senate Bill 1022: Drug Addiction as Child Abuse. *S.B. 1022*, 47th Leg., 1st Sess. (N.M. 2005). Senate Bill 1022 proposed amending Section 30-6-1, the very statute at issue in this case, to include drug addiction and fetal alcohol syndrome in the definition of child abuse. *Id.* Significantly, Senate Bill 1022 never passed. Several concerns about Senate Bill 1022 are evidenced by the *Fiscal Impact Report* prepared in response to the introduction of the bill. *See* N.M. Legislative Fin. Comm., *Fiscal Impact Report, S.B. 1022*, at 3 (2005). In particular, the *Fiscal Impact Report* discusses the negative impact on mothers and their children, including “longer lengths of stay in foster care resulting in an increase in the number of children receiving foster care....” *Id.* at 3. The *Fiscal Impact Report* also notes that the bill “may have the unintended consequence of discouraging pre-natal care.” *Id.* Senate Bill 1022 was never passed.

In 2007, House Bill 141: Establishing the Offense of Giving Birth to a Child Who Has Fetal Alcohol Syndrome was introduced, with one significant difference—the current bill has eliminated any reference to drug addiction, instead focusing solely on criminalizing alcohol use by a pregnant woman who gives birth to a child diagnosed with fetal alcohol syndrome. *H.B. 141*, 48th Leg., 1st Sess. (N.M. 2007). The fact that substance abuse has been removed from the statute evidences the Legislature’s intent not to criminalize the type of action alleged in this case. The *Fiscal Impact Report* reflects some of the concerns of the Legislature in regard to this bill. *See* N.M. Legislative Fin. Comm., *Fiscal Impact Report, H.B. 141*, at 2 (2007). The *Fiscal Impact Report* acknowledges that, despite the fact that other states have passed legislation regarding maternal substance abuse, “the incidence of the problem has not decreased.” *Id.* at 2. The report reiterated the same concerns voiced about Senate Bill 1022: “[C]riminalization of pregnant women does not solve their substance abuse problems; such efforts could frighten

women away from needed treatment for themselves and for their families. Instead, efforts could be directed at programs to educate and treatment facilities.” *Id.* The report further noted that criminalizing birth may lead to a higher rate of abortions, because women could be arrested and prosecuted under this statute only after giving birth to a child. *Id.*

The New Mexico Legislature’s choice not to enact Senate Bill 1022 and the modification of House Bill 141 demonstrate their rejection of an expansion of the definition of the child abuse statute to include substance abuse. If the Legislature had intended to include this conduct in the definition of child abuse, it could have adopted Senate Bill 1022 or could have chosen to maintain the language about substance abuse in House Bill 141.¹ As in *Hartford Insurance Co.*, this Court should regard the failed attempt to pass Senate Bill 1022 and the modification of House Bill 141 as indicative of the Legislature’s intent to not criminalize drug abuse during pregnancy.

Because the Legislature has chosen not to criminalize this conduct, this Court should not interpret NMSA 1978, § 30-6-1(D) (1973) to apply to Ms. Martinez’s conduct. Consistent with the Legislature’s intent not to criminalize this behavior, this Court should uphold the decision of the Court of Appeals and should remand this case with instructions that the charges against Ms. Martinez be dismissed with prejudice. Such a decision is not only in line with the Legislature’s decision not to criminalize this behavior but also comports with the sound socioeconomic policies described in the remainder of this brief.

¹ Such a statute would have constitutional problems but that discussion is beyond the scope of this brief.

II. NEW MEXICO CHILD ABUSE STATUTE SECTION 30-6-1(D) SHOULD NOT BE INTERPRETED TO APPLY TO WOMEN WHO GIVE BIRTH AFTER HAVING USED SUBSTANCES DURING PREGNANCY, BECAUSE SUCH AN APPLICATION WILL MATERIALLY HARM THE HEALTH OF THE MOTHER AND THE CHILD DUE TO THE HEALTH CARE CHOICES A MOTHER MAY BE FORCED TO MAKE

NMSA 1978, § 30-6-1(D) (1973) should not be interpreted to apply to women who give birth after having used substances during pregnancy because such an application will materially harm the health of the mother and the child. New Mexico's pregnant women face a myriad of socioeconomic factors that make them less likely than other American women to receive health care for themselves and their unborn fetuses. Criminalizing these acts will only worsen and endanger the lives of New Mexico's women and children because it will deter drug-using mothers from seeking much needed prenatal and postnatal health care for their children. Additionally, enforcing such a policy creates an incentive for a mother to terminate her pregnancy to avoid risking prosecution and incarceration, thus limiting her reproductive choices.

A. Deterring Pregnant Women from Seeking Prenatal Care

New Mexico's pregnant women face a variety of socioeconomic factors that make them less likely than other American women to receive health care for themselves and their unborn fetuses. A total of 27.4% of New Mexican women live at or below the poverty line, and 28.1% do not have health insurance. *See* Inst. for Women's Policy Research, *The Status of Women in the States* tbls.6, 7, available at <http://www.iwpr.org/States2004/PDFs/National.pdf>. Furthermore, 34.1% of Native American women, 22.8% of Hispanic women, and 19.4% of African American women live at or below the poverty line in New Mexico. *Id.* at tbl.7. In contrast, 10.3% of Anglo women live below the poverty line in New Mexico. *Id.* Additionally, New Mexico ranks last in the United States for the percentage of women who begin prenatal care

in the first trimester of pregnancy. *Id.* at tbl.10. 31% of New Mexico’s pregnant women currently do not receive crucial prenatal care in the first trimester. *Id.*

While nearly a third of New Mexico’s pregnant women do not receive adequate prenatal care, the majority of drug-addicted mothers face additional unique and severe barriers and stresses in their lives.

[M]ost women in the criminal justice system come from neighborhoods that are entrenched in poverty and largely lacking in viable systems of social support....[L]arge numbers of these women have experienced very serious physical and/or sexual abuse, often commencing when they were young children....[M]ost of these women are plagued with high levels of physical and mental health problems as well as substance abuse issues....[T]he great majority of [these] women...are mothers—they are...[likely]...to be the sole support and caregivers for their children.

Judith Greene & Kevin Pranis, Inst. on Women & Criminal Justice, *Hard Hit: The Growth of the Imprisonment of Women, 1977–2004*, at 22 (2006). “Punishing pregnant women who use drugs only exacerbates the causes of addiction—poverty, lack of self esteem, and hopelessness.” Judith G. Greenberg et al., *Mary Joe Frug’s Women and the Law* 769 (2d ed. 1998). Essentially, pregnant women suffering from drug addictions are more likely to belong to minority groups, live below the poverty line, be victims of physical and sexual abuse, and have less access to education, employment, and health care.

Ms. Martinez embodies these statistics and the facts surrounding her case provide a prime example of the gravity of the problems arising from criminalizing prenatal acts. Ms. Martinez is a battery victim. RP 10. She went to a hospital after being physically assaulted, was questioned about drug use, told the truth, and her statements were used against her. RP 11. She was jailed within two days. RP 13. Because they fear incarceration, pregnant women in Ms. Martinez’s position will be less likely to seek prenatal care or general health care. Lynn M.

Paltrow, ACLU Found., *Criminal Prosecutions Against Pregnant Women* 43 (1992) (quoting Amer. Soc’y of Addiction Med., Inc., *Public Policy Statement, Chemically Dependent Women and Pregnancy* (1989) (noting that criminal prosecution of pregnant women “will have an overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing rather than preventing, harm to children and society as a whole”) (internal quotation marks omitted).

NMSA 1978, § 30-6-1(D) (1973) should not be interpreted to apply to prenatal acts because it will deter pregnant drug-using women from seeking the proper health care and protection from physical and sexual abuse. The cycle of abuse and victimization these New Mexican women experience would not only continue, it will be magnified and perpetuated by an interpretation of Section 30-6-1(D) that criminalizes prenatal acts. Criminalizing the prenatal acts of pregnant women will disproportionately affect the groups of pregnant women who already receive the least care during pregnancy and who are already most at risk for negative health outcomes. *See infra* Part IV. Thus, criminalization will not benefit the lives and health of New Mexico’s children because it will only exacerbate the problem of pregnant women not receiving proper prenatal care.

B. Limiting Women’s Reproductive Choices

Beyond the more obvious negative health consequences caused by a lack of prenatal care, criminalizing giving birth after using substances during pregnancy may lead to a higher incidence of abortions. Because they fear prosecution, pregnant women with substance use histories might choose abortion over the risk of incarceration. This fear of prosecution and incarceration operates as an undue burden on women’s reproductive choices.

Criminalizing the prenatal acts of a New Mexico mother who gives birth after using drugs during pregnancy will allow governmental coercion of a woman's decision whether to carry her pregnancy to term or have an abortion. Thus, the State's proposed interpretation of Section 30-6-1(D) to criminalize prenatal substance use would limit women's reproductive choices. This interpretation would constitute an undue burden on a New Mexico woman's right to choose. "If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it..." See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992). Simply put, the State cannot place undue burdens on a woman's right to carry a pregnancy to term just as it cannot place undue burdens on a woman's right to have an abortion – the right to choose is constitutionally protected. See *id.*

In this instance, the State could prosecute and incarcerate a woman for deciding to carry her pregnancy to term. "When a drug-addicted woman becomes pregnant, she has only one realistic avenue to escape criminal charges: abortion....It is the *choice of carrying a pregnancy to term* that is being penalized." Greenberg et al., *supra*, at 768. This trend has proven true in other states. For example, after North Dakota criminalized similar behavior, a woman who was charged under the statute chose to have an abortion rather than carry the fetus to term.² See Paltrow, *supra*, at 30. If the State's argument were to prevail, it would restrict a New Mexico woman's reproductive liberty by creating an undue burden on substance-dependant women by forcing them to either chose to carry the pregnancy to term and be arrested, prosecuted, and incarcerated, or chose to seek an abortion in order to avoid criminal sanctions.

² While this case involved a woman who was prosecuted while pregnant, the same disincentive to carry the fetus to term would apply were New Mexico to adopt the State's proposed interpretation of NMSA 1978, § 30-6-1(D) (1973).

Because the State's proposed application of NMSA 1978, § 30-6-1(D) (1973) to women who give birth after using drugs during pregnancy will materially harm the health of the mother and the child, this Court should not interpret Section 30-6-1(D) to apply to Ms. Martinez's conduct. This interpretation will deter pregnant women from seeking crucial prenatal care and will severely limit a New Mexico woman's reproductive choices. Therefore, this Court should uphold the decision of the Court of Appeals and should remand this case with instructions that the charges against Ms. Martinez be dismissed with prejudice.

III. NEW MEXICO CHILD ABUSE STATUTE SECTION 30-6-1(D) SHOULD NOT BE INTERPRETED TO APPLY TO WOMEN WHO GIVE BIRTH AFTER HAVING USED SUBSTANCES DURING PREGNANCY, BECAUSE SUCH AN APPLICATION WILL MATERIALLY HARM THE RELATIONSHIP BETWEEN THE MOTHER AND THE CHILD THEREBY DAMAGING THE CHILD'S DEVELOPMENT

Just as applying NMSA 1978, § 30-6-1(D) (1973) to women who give birth after having ingested substances during pregnancy will force a mother to make poor choices during the prenatal period, incarceration pursuant to the State's proposed interpretation of Section 30-6-1(D) will also materially harm the relationship between the mother and her child. This, of course, will lead to poor outcomes for children. Incarcerating women who give birth after taking drugs during pregnancy will inflict trauma on the child resulting in a decreased ability to bond with and relate to people, poor performance in school, and psychological damage. Moreover, upon the mother's release from prison, the reunification process will be difficult for the mother and for the child. As the mother searches for avenues to connect with and provide for her child, and as the child struggles to muster the courage necessary to trust his mother, the mother-child relationship suffers and reunification will be affected.

A. Negative Effects on the Infant

Incarcerating a newborn's mother instantly inflicts trauma on the infant and leads to further negative experiences for the child during the term of the mother's imprisonment.³ Early on in a child's development, it is imperative that he be with his mother to form the necessary bonds of trust in order to begin to explore the world around him. "The newborn infant must rely on those around him to meet his every need....The basic trust in the environment which must be learned during the first year can only develop if the infant has a secure, continuous relationship with one person." Brenda G. McGowan & Karen L. Blumenthal, *Why Punish the Children?: A Study of Children of Women Prisoners* 35 (1978).

While some may argue that a mother substitute can provide this "secure, continuous relationship" for the child while the mother is completing her sentence, "there is strong evidence that suggests that 'if [the infant] is cared for by a number of mother substitutes and does not have a continuing, close relationship with one "mother person," he is likely to develop later problems in his ability to relate to people.'" *Id.* This inability to relate to people can stem from either psychological problems such as anxiety, guilt, shame and fear or negative behavioral manifestations including sadness, withdrawal, low self-esteem, the use of drugs or alcohol, and aggression. *See* Charlene Wear Simmons, Ca. Research Bureau, *Children of Incarcerated Parents* 4 (2000) (citation omitted), *available at* <http://www.library.ca.gov/crb/00/notes/v7n2.pdf>. These psychological problems may all be associated with the parent's imprisonment. *See id.* Placement in a single home cannot be

³ "Children of offenders are traumatized by the events relating to parental...arrest.... One role of parents is to help children deal with stressful events and master trauma. When trauma involves parental loss, children also lose their helper, and their ability to address and master trauma is seriously impaired." Barbara Bloom & David Steinhart, *Why Punish the Children?: A Reappraisal of the Children of Incarcerated Mothers in America* 16 (1993) (quoting Ctr. for Children of Incarcerated Parents, *Report No. 6, Children of Offenders* (1992)).

guaranteed during the mother's sentence, often resulting in multiple placements, escalating the potential for the child's poor social development. *See infra* Part V.

B. Negative Effects on the School-Aged Child

When a mother's conviction leads to a prison sentence, the consequences for the child are severe and include poor performance in school and anti-social behavior. Because of unstable and inconsistent living arrangements, children's school attendance often suffers. Children may be forced to attend new schools depending on the location of their new living arrangement or may not immediately be enrolled in school at all. *See* Ann M. Stanton, *When Mothers Go to Jail* 89–90 (1980). The students who are unable to attend school lose out on valuable classroom time, and often get behind in graduation requirements. *See id.* at 90–91. Moreover, many children with parents who are incarcerated develop anti-social behavior in school and play. *See id.* at 92. Researchers have found that children whose parents are absent due to incarceration are rated by teachers as below average in social and psychological characteristics. *See id.* at 89 (*citing* S. Freidman & T.C. Estylmen, *The Adjustment of Children of Jail Inmates*, 29 *Fed. Probation* 55 (1965)). According to Stanton, teachers reported that these children lacked enthusiasm and were often distracted when their mothers were away. *See id.* at 92. “[Other teachers] reported children being sullen and still others more aggressive and with occasional tantrums.” *Id.*

When the mother is released from prison and becomes the primary caretaker for the child, the child's understanding of his environment is severely damaged. Somehow, he must reconstruct the understanding and trust previously formed with his mother-substitute and transfer that understanding and trust to his mother. This is an extremely difficult task for a young child and places significant strain on the reunification process. While the mother is in prison, it is difficult for her to maintain a relationship with her children. She may be incarcerated at a facility

far from the child, making it hard on the child's caregivers to arrange visits. *See Simmons, supra*, at 5. Additionally, caregivers may refuse to return the child or may move without informing the mother. McGowan & Blumenthal, *supra*, at 20. In either case, the relationship between mother and child is damaged and is difficult to repair upon the mother's release.

C. Negative Effects on the Mother-Child Relationship and Reunification Process

A mother, recently released from prison, faces a uniquely stressful situation. Aside from attempting to self-rehabilitate, she must also find some means to provide basic necessities for her family. "The need for economic independence is the first major difficulty confronted on the release from prison...." McGowan & Blumenthal, *supra*, at 20. When women are released from prison they often have no means to provide for themselves or their children. The prison experience affects women's ability to provide for their families, and "because of the dependency fostered by prison life, many women feel uncertain about their capacity to manage their own lives." *Id.*

Additionally, psychological trauma is inflicted on the child upon reunification: he may not remember his mother, he may be angry or hurt because his mother has been away; or he may feel rejected because he believes that his mother left voluntarily. *Id.* The child also feels the mother's stress during the post-release reunification period. For example, when the mother has little money and works extra hours, the child interprets this as less time she can devote to him, not understanding the dire situation his mother is facing in the job market. Stanton, *supra*, at 116. As a child reacts to the stress he sees in his mother, the child's behavior becomes even more unpredictable. *Id.*

Inflicting these consequences on the mother and child through the State's proposed application of Section 30-6-1(D) will result in damage to the mother-child relationship. First,

such an application will result in damage to the development of the infant. Second, such an application will negatively impact the school-aged child. Finally, such an application will result in a psychologically difficult reunification process for both the mother and the child. The State's interpretation of NMSA 1978, § 30-6-1(D) (1973) should not be applied to Ms. Martinez's conduct or to other women in similar circumstances, because such an application will have negative implications for the child. Therefore, this Court should uphold the decision of the Court of Appeals and should remand this case with instructions that the charges against Ms. Martinez be dismissed with prejudice.

IV. NEW MEXICO CHILD ABUSE STATUTE SECTION 30-6-1(D) SHOULD NOT BE INTERPRETED TO APPLY TO WOMEN WHO GIVE BIRTH AFTER HAVING USED SUBSTANCES DURING PREGNANCY, BECAUSE SUCH AN APPLICATION WILL LIKELY HAVE A DISPARATE IMPACT ON LOW INCOME WOMEN, WOMEN OF COLOR, AND THEIR CHILDREN BECAUSE LOW INCOME WOMEN AND WOMEN OF COLOR ARE MORE LIKELY TO BE PROSECUTED

NMSA 1978, § 30-6-1(D) (1973) should not be interpreted to apply to women who give birth after having used substances during pregnancy because the devastation described in the previous section will likely have a disparate impact on low income women, women of color, and their children. Low income women and women of color are more likely to be prosecuted under this statute, because their doctors are more likely to seek state intervention for substance use by low income women and women of color than for other women. Low income women and women of color, who are currently over represented in the criminal justice system, are more likely to be incarcerated for drug use and drug sales than are white women. Additionally, most incarcerated women come from economically distressed communities with little or no support. Finally, because the State's interpretation of the statute would have a disparate impact on low income

women and women of color, there would be a concomitant impact on their children as described in the previous section. *See supra* Part III.

Low income women and women of color are more likely to be prosecuted under the State's proposed interpretation, because studies show that doctors are more willing to pursue state intervention when treating women from a lower socioeconomic class or women of color. "Selective testing of pregnant women of color for drug use and heightened surveillance of poor mothers of color in the context of policing child abuse and neglect exacerbate these racial disparities for women." ACLU et al., *Caught in the Net: The Impact of Drug Policies on Women and Families*, Executive Summary (2005), available at <http://www.fairlaws4families.org/final-caught-in-the-net-report.pdf>. In a national survey, 81% of the women who were referred for court ordered obstetrical intervention were African American, Asian, or Hispanic. Cheryl E. Amana, *Drugs, Aids and Reproductive Choice: Maternal-State Conflict Continues Into the Millennium*, 28 N.C. Cent. L.J. 32, 34 (2005) (citing Veronika E.B. Kolder et al., *Court Ordered Obstetrical Intervention*, 316 New Eng. J. Med. 1192, 1193–94 (1987)). The study showed that "doctors tend to communicate with their private white patients when conflict arises during treatment, but are more inclined to use the courts for treatment conflicts when dealing with poor patients, patients of color and/or patients with language barriers." *Id.* Therefore, because many doctors are more willing to refer low income women and women of color to the authorities when drug abuse is suspected, low income women and women of color are more likely to be prosecuted under the State's proposed interpretation of NMSA 1978, § 30-6-1(D) (1973).

Low income women and women of color are already overrepresented in the criminal justice system. The fact that low income women and women of color have a higher likelihood of being prosecuted and subsequently incarcerated under the State's interpretation of the statute will

only aggravate this situation. A Bureau of Justice study estimated that the chance of imprisonment for African Americans is 16.2%, 9.4% for Hispanics, and 2.5% for whites. Anne Morrison Piehl, Bert Useem, & John J. Dilulio, Jr., Ctr. for Civic Innovation, *Right-Sizing Justice: A Cost-Benefit Analysis of Imprisonment in Three States* 3 (1999). According to the Prison Policy Initiative, Latinos are overrepresented in prisons and jails in New Mexico. Prison Policy Initiative, http://prisonpolicy.org/graphs/NM_Latino.html. While 42.1% of the total population of New Mexico was Hispanic in 2000, the data compiled by the Prison Policy Initiative shows that 57.3% of the incarcerated population in New Mexico was Hispanic in that year. *Id.* Application of this statute to women of color will only exacerbate the racial and economic disparities already present in the New Mexico prisons and jails.

Not only are women of color more likely to be incarcerated than white women, women of color are more likely to be incarcerated for drug use and drug sales than are white women. Women of color use drugs at rates equal to, or lower than, those of white women. ACLU et al., *supra*, at 17; *see also* Josephine Gittler, *The American Drug War, Maternal Substance Abuse and Child Protection: A Commentary*, 7 J. Gender Race & Just. 237, 249 (2003) (“Illegal drug use by pregnant women cuts across racial and class lines. However, illegal drug use by pregnant women has been portrayed...as a problem of crack use by African-American pregnant women, living in poverty....This portrayal mirrors, and at the same time reinforces, negative race and class-based stereotypes about these women.”) (footnote omitted). While the rate of drug use is largely the same among racial and class lines, women of color and women from lower socioeconomic classes feel the effects of drug laws more harshly than other women. *Id.* “In 1997, 44% of Hispanic women and 39% of African American women incarcerated in state prison were convicted of drug offenses, compared to 23% of white women....” *Id.* at 1. Nationally, “[a]n

overall increase of 433 percent in the female drug prisoner population between 1986 and 1991 was comprised of a 241 percent increase for white women, a 328 percent increase for Latina women, and a staggering 828 percent increase for African American women.” Greene & Pranis, *supra*, at 24. “Yet despite their roles as relatively minor players in the drug trade, women—disproportionate numbers of them African American and Latina—have been ‘caught in the net’ of increasingly punitive policing, prosecutorial, and sentencing policies.” *Id.* Because low income women and women of color are more likely to be incarcerated for drug offenses, the application of NMSA 1978, § 30-6-1(D) (1973) to women who give birth after using substances will only contribute to the racial and socioeconomic disparities in the New Mexico criminal justice system.

Further, most incarcerated women come from “economically distressed communities lacking in social supports.” Greene & Pranis, *supra*, at 22. Many of these women turn to substance abuse to “ease the pain and suffering brought about by the circumstances of their life histories.” *Id.* Poverty continues to be a systemic problem for New Mexico women and for women of color in particular. In 1999, 34.1% of Native American women, 22.8% of Hispanic women, and 19.4% of African American women in New Mexico were living at or below the poverty line. *See* Inst. for Women’s Policy Research, *The Status of Women in the States*, tbl.7, available at <http://www.iwpr.org/States2004/PDFs/National.pdf>. In 2004, in Lea County, New Mexico, the county where Ms. Martinez resides, 17.6% of people lived below the poverty line. *See* USDA, Econ. Research Serv., *2004 County Level Poverty Rates for NM*, available at <http://www.ers.usda.gov/data/povertyrates/povlistpct.asp?st=nm&view=percent>. Additionally, in 2004, in Lea County, 23% of children under eighteen lived below the poverty line. *Id.* Further, Hobbs has only two substance abuse treatment centers. U.S. Dep’t of Health & Human Servs.,

SAMHSA, *State Profile - New Mexico, National Survey of Substance Abuse Treatment Services 3*, available at http://www.dasis.samhsa.gov/webt/state_data/NM04.pdf. This lack of access to treatment is especially disturbing “[i]n smaller municipalities, such as Hobbs and Silver City, [where] crack cocaine use and distribution is at a level that is considered dangerous to the quality of life.” U.S. Drug Enforcement Admin., *State Factsheets*, http://www.dea.gov/pubs/state_factsheets.html.

Data compiled on women offenders underscores the reason why NMSA 1978, § 30-6-1(D) (1973) should not be interpreted to women in Ms. Martinez’s situation. She fits the profile of women offenders who are “disproportionately women of color, [i]n their early to mid-30s, [m]ost likely to have been convicted of a drug-related offense, ..., [s]urvivors of physical and/or sexual abuse, ..., [i]ndividuals with significant substance abuse problems, [and] [u]nmarried mothers of minor children.” Greene & Pranis, *supra*, at 25. Like the women described in *Hard Hit*, Ms. Martinez is a Hispanic thirty-four year old single mother, with few assets. RP 16. Ms. Martinez has very few resources available to her. RP 16–17. She has no car, she reported annual income of only \$3,600, and she was found to be indigent by the indigent defense services. RP 16–17. Ms. Martinez resides in Hobbs, New Mexico, where according to the DEA, “crack cocaine use ... is at a level that is considered dangerous to the quality of life.” U.S. Drug Enforcement Admin., *supra*. What makes Ms. Martinez’s plight even more desperate is the fact that Hobbs has only two drug treatment centers. *See* SAMHSA, *supra*. Therefore, the State’s attempted prosecution of Ms. Martinez is representative of the disparate impact that the State’s proposed interpretation of the statute will have on low income women and women of color.

Not only will the State’s proposed interpretation of this statute have a disparate impact on low income women and women of color, prosecution of these women will consequently have a

disparate impact on minority children. There is a direct correlation between the race, class, and gender of the incarcerated parent and the likelihood of the child entering the foster care system. *See* ACLU et al., *supra*, at 50. As a result, these minority children are more likely to be relegated to the child welfare system, increasing the likelihood that they will one day find themselves in Ms. Martinez's position, thereby reinforcing the cycle of disparate impact. *See infra* Part V.

Because prosecuting women who give birth after using substances while pregnant will have a disproportionate impact on low income women or women of color, this Court should not interpret Section 30-6-1(D) to apply to Ms. Martinez's conduct. Incarcerating Ms. Martinez and other women in her position would only exacerbate the existing disparities in the State of New Mexico. Further, incarcerating women of color and low income women will have a disparate impact on low income children and children of color. Therefore, this Court should uphold the decision of the Court of Appeals and should remand this case with instructions that the charges against Ms. Martinez be dismissed with prejudice.

V. NEW MEXICO CHILD ABUSE STATUTE SECTION 30-6-1(D) SHOULD NOT BE INTERPRETED TO APPLY TO WOMEN WHO GIVE BIRTH AFTER HAVING USED SUBSTANCES DURING PREGNANCY, BECAUSE SUCH AN APPLICATION WILL OVERWHELM NEW MEXICO'S FOSTER CARE SYSTEM BY PLACING MORE CHILDREN IN FOSTER CARE FOR LONGER PERIODS OF TIME

Finally, a cost-benefit analysis cautions against applying NMSA 1978, § 30-6-1(D) (1973) to mothers who give birth after using substances during pregnancy. This Court should not uphold such an application, because such an application will cause more children to be placed in foster care for longer periods of time. This increase in placement, in turn, will further burden New Mexico's foster care system. Additionally, this increased placement will likely inhibit the New Mexico Children, Youth, and Families Department's (CYFD) ability to meet the national foster care goals upon which federal funding depends. New Mexico's children will ultimately

bear the burden as the foster care system becomes overwhelmed by the increased number of children placed in its care.

Incarcerating women who give birth after using substances during pregnancy will likely lead to an increase in foster care placements, because incarceration increases the probability that these children will be left without caregivers when their mothers are jailed. Indeed, Ms. Martinez is herself a single mother whose child was placed in foster care when she was arrested. RP 9–10. In 1998, 44% of all births in New Mexico were to single mothers. N.M. Dep’t of Health, N.M. Comm’n on the Status of Women, *New Mexico Women’s Health Profile* 10 (2001). In 2001, 88% of incarcerated New Mexico women were single mothers, compared to 75% of incarcerated women nationally. N.M. Dep’t of Health, *supra*, at 8. When single women are incarcerated, their children are often left without caregivers, and as a result must enter the foster care system.⁴

This potential increase in the number of children in foster care as a result of incarceration will further burden the currently strained New Mexico foster care system. Although foster care placements are currently decreasing at the national level,⁵ between January 2003 and June 2006, the number of children in New Mexico’s foster care system increased by 31%. N.M. Citizen Review Bd., *2007 Annual Report and Recommendations* 3 (2007). From June 30, 2005 to June 30, 2006, New Mexico’s foster care system served 4,628 children. N.M. Children, Youth, & Families Dep’t, *Protective Services Fact Book, Second Quarter 2006*, at 16 (2006). Further increases in these numbers represent a significant financial burden on the system in light of the fact that, in 1996, the annual cost per foster child averaged \$6,000. Shelley Waters Boots & Rob

⁴ For more information, see ACLU et al., *Caught in the Net: The Impact of Drug Policies on Women and Families* 50–51 (2005), available at <http://www.fairlaws4families.org/final-caught-in-the-net-report.pdf>.

⁵ In 2002, there were 533,000 children in foster care. See U.S. Dep’t of Health & Human Servs., *Adoption and Foster Care Analysis and Reporting System (AFCARS) Report 12* (2006). In 2005, there were 513,000 children in foster care. See U.S. Dep’t of Health & Human Servs., *Adoption and Foster Care Analysis and Reporting System (AFCARS) Report 13* (2006).

Green, Urban Inst., *Family Care or Foster Care? How State Policies Affect Kinship Caregivers* 1 (1999). According to the New Mexico Citizen Review Board, the strain on CYFD and the courts is “immense.” N.M. Citizen Review Bd., *supra*, at 3. This burden will manifest itself in increased social worker caseloads, shortages in available foster homes, and an overall decrease in the quality of care children in the New Mexico foster care system receive. *See* N.M. Legislative Fin. Comm., *Fiscal Impact Report, S.B. 1022*, at 3 (2005).

Not only will an increase in the number of children in foster care strain system resources, it will inhibit New Mexico’s ability to meet national foster care performance standards in the area of permanency, thus threatening New Mexico’s federal foster care funding.⁶ The Adoption and Safe Families Act of 1997 (ASFA) establishes the three foster care system goals of 1) safety, 2) permanence, and 3) well-being. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 215. The regulations that implement the Act condition federal matching funds on each state’s progress toward performance standards for outcome measures designed to accomplish each of these three goals. 45 C.F.R. § 1355.34 (2006). The permanency outcome measures include: Increasing permanency for children in foster care, reducing time in foster care to adoption, and reducing time in foster care to reunification without increasing re-entry. *See* Dep’t of Health & Human Servs., Admin. for Children & Families, *Achieving Permanency-Related Outcomes for Children in Foster Care*, available at <http://www.acf.hhs.gov/programs/cb/pubs/cwo03/chapters/chapterthree2003.htm>.

New Mexico’s ability to meet national performance standards in the area of permanence will be inhibited in several ways. First, incarceration could result in a termination of parental rights as mandated by ASFA, which, in turn could affect CYFD’s ability to meet standards for

⁶ For a discussion of the effects of incarceration of mothers on the foster care system, see Miriam Ehrensaft et al., Vera Inst. of Justice, *Patterns of Criminal Conviction and Incarceration Among Mothers of Children in Foster Care in New York City 2* (2003).

the permanency outcome measures of increasing permanency for children in foster care and reducing time in foster care while awaiting adoption. Second, even if parental rights are not terminated as an indirect result of incarceration, jailing mothers could inhibit CYFD's ability to meet standards for the permanency outcome measure of reducing time in foster care while awaiting reunification without increasing re-entry.

ASFA requires states to terminate parental rights for parents of children who have been in foster care for fifteen out of the previous twenty-two months so that these children may be adopted into a permanent family situation. 42 U.S.C. § 675(5)(E) (2000). New Mexico's termination of parental rights statute is consistent with these requirements. NMSA 1978, § 32A-5-15 (1993) & NMSA 1978, § 32A-5-18 (1993). An offense under Section 30-6-1 carries with it a basic sentence of three to eighteen years. *See* NMSA 1978, § 30-6-1 (1973); NMSA 1978, § 31-18-15 (2005). Indeed, Ms. Martinez was sentenced to three years with one year suspended under NMSA 1978, § 30-6-1 (1973). RP 54. A sentence of this length could therefore lead to the eventual termination of Ms. Martinez's parental rights pursuant to ASFA.

Termination of parental rights could affect CYFD's ability to satisfy permanency outcome measures designed to meet the outcome of increasing permanency for children in foster care. Among other things, outcome measures for the outcome of increasing permanency in foster care include the percentage of children exiting foster care who are reunified with their families, adopted, or enter a legal guardian's care. *See* U.S. Dep't of Health & Human Servs., *Achieving Permanency-Related Outcomes for Children in Foster Care*, *supra*. In the first quarter of 2006, 63.9% of children exiting foster care in New Mexico were reunified with their parents. N.M. Children, Youth, & Families Dep't, *supra*, at 19. If the reunification option is removed due to termination of parental rights, the percentage of children exiting foster care to a permanent home

will decrease, thereby inhibiting New Mexico's ability to meet standards for the outcome of permanency in foster care.

Termination of parental rights could also affect CYFD's ability to satisfy the permanency outcome measure designed to meet the outcome of reduction in the time children spend awaiting adoption. Termination of parental rights due to incarceration will likely result in an increase of the number of children awaiting adoption. Currently, New Mexico is struggling to work towards compliance in this area.⁷ Increasing the number of children awaiting adoption will likely increase the amount of time each child waits, making it more difficult to meet the national performance standard upon which federal funding ultimately depends.

Even if parental rights are not terminated as an indirect result of incarceration, application of NMSA 1978, § 30-6-1(D) (1973) to women who give birth after using substances during pregnancy could inhibit CYFD's ability to meet the federal permanency performance measure for the permanency outcome of timely reunification with the child's family. ASFA suggests permanency for children through reunification with their parents, if possible. *See* 42 U.S.C. § 671(15)(B) (2000). Although New Mexico recently exceeded the federal goal in this area,⁸ incarceration of single mothers could have an impact on compliance. Because an offense under Section 30-6-1 carries with it a basic sentence of three to eighteen years, *see* NMSA 1978, § 30-6-1 (1973); NMSA 1978, § 31-18-15 (2005), fewer children will return to their mothers within

⁷ The federal round one measure for 2006 mandated that adoptions be completed within twenty-four months for 32% of children awaiting adoption. N.M. Children, Youth, & Families Dep't, *Protective Services Fact Book, Second Quarter 2006*, at 22 (2006). New Mexico's compliance with this standard is threatened, because between April 2004 and June 2006, adoptions were only finalized within twenty-four months for 26.2% of children awaiting adoptions. *Id.* Currently, children in New Mexico must wait for an average of 38.8 months to be adopted after parental rights are terminated. *Id.* at 21.

⁸ In the second quarter of 2006, this measure required that 76.2% of children who were reunified with their families were reunified within twelve months of entry into foster care. *See* N.M. Children, Youth, & Families Dep't, *supra* note 7, at 23. In the second quarter of 2006, 87.7% of New Mexico children in foster care who were reunified with their parents were reunified within twelve months, exceeding the standard for the national round one outcome measure. *Id.*

twelve months, potentially resulting in a negative impact on New Mexico's ability to meet the national reunification goal. As a result, New Mexico's federal foster care funding could be threatened.

Indeed, a 2005 New Mexico fiscal impact report came to this conclusion, finding that a bill incarcerating mothers for drug and/or alcohol use during pregnancy would have negative administrative consequences for CYFD leading to an inability to meet federal performance standards. *See* N.M. Legislative Fin. Comm., *Fiscal Impact Report, S.B. 1022*, at 2–3 (2005). According to the report, inability to meet federal standards could mean a loss of \$30,000,000 in federal funding. *Id.* This bill failed to pass in 2005.

Alternatively, providing treatment for these women instead of incarcerating them would give them the opportunity to involve themselves in their children's lives, even if their children are in foster care. *See supra* Part III. This involvement could prevent termination of parental rights and shorten the amount of time their children spend in the foster care system, thereby decreasing the cost to the State of New Mexico. At the very core of the foster care crisis is the need to support families so that entry into the system is prevented. Treatment supports this goal. Incarceration does not.

NMSA 1978, § 30-6-1(D) (1973) should not be interpreted to apply to women who give birth after using substances during pregnancy. Such an application will likely cause more children to be placed in foster care and will further burden the foster care system. This, in turn, will inhibit CYFD's ability to comply with national foster care standards upon which federal foster funding is based. Ultimately, the State of New Mexico will bear the burden created by increased caseworker caseloads, shortages in foster care families, and decreased federal foster care funding. Thus, the above cost-benefit analysis suggests that this Court should uphold the

decision of the Court of Appeals and remand this case with instructions that the charges against Ms. Martinez be dismissed with prejudice.

CONCLUSION

PB&J, Family Services, Inc., through this brief as amicus curiae, has demonstrated that the decision rendered by the Court of Appeals was correct. The New Mexico Legislature did not draft NMSA 1978, § 36-6-1(D) (1973) to encompass the situation of a pregnant woman using drugs or alcohol during pregnancy. The Legislature's failure to pass legislation specifically criminalizing such conduct after careful consideration indicates that the Legislature did not intend for the statute to be so broadly construed. This is particularly true when considering the fiscal impact reports accompanying the proposed legislation. This decision by the Legislature is consistent with sound socioeconomic policy that was cited in the fiscal impact reports accompanying the proposed bills.

Criminalizing drug use during pregnancy would have a devastating effect on pregnant women and their fetuses' health. In addition, criminalizing behavior during pregnancy would also likely burden a pregnant woman's decision to carry her fetus to term. Further, the children of these women would also suffer the effects of separation from their mothers at critical developmental stages. These women and children would likely have better psychological outcomes from treatment not incarceration. In addition, studies of attempts to criminalize behavior during pregnancy nationally indicate that prosecution under the State's proposed interpretation of NMSA 1978, § 36-6-1(D) (1973) would in all probability have a disparate effect on low-income women, women of color, and their children.

Finally, a cost-benefit analysis of the potential impact of prosecuting women for using drugs during pregnancy reveals a negative financial impact on the foster care and juvenile justice

systems of this State. New Mexico cannot afford to create an additional category of children likely to end up in the foster care system. Treatment is a more cost-effective option.

For the foregoing reasons, this Court should:

1. Uphold the reversal entered by the Court of Appeals.
2. Remand with instructions to dismiss the charges against Cynthia Martinez with prejudice.

Respectfully submitted,

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