**IN THE SUPREME COURT FOR THE COMMONWEALTH OF PENNSYLVANIA**

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**Nos. 0113 and 0114**

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**COMMONWEALTH OF PENNSYLVANIA,**

**Plaintiff-Appellee,**

**-- versus --**

**ROSA M. HARTFORD,**

**Defendant-Appellant**

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# BRIEF OF DEFENDANT-APPELLANT

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## STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal of the Superior Court Order remanding this case for a new trial pursuant to 42 Pa. Cons. Stat. § 724, which provides that final Orders of the Superior Court may be reviewed by this Court upon an allowance of appeal.

## ORDERS IN QUESTION

This appeal is submitted with regard to both the October 28, 1997, and the December 22, 1997, Orders of the Superior Court of Pennsylvania. The October 28th Order reads:

> *ON CONSIDERATION WHEREOF*, it is now here ordered and adjudged by this Court that the Court of Common Pleas of SULLIVAN County be, and the same is hereby REVERSED AND REMANDED FOR A NEW TRIAL.

The December 22nd Order reads:

> AND NOW, this 22nd day of December, 1997, IT IS HEREBY ORDERED:
>
> > THAT appellant's petition for permission to file a petition for reargument nunc pro tunc is DENIED; and
> >
> > THAT appellant's cross-petition is DISMISSED.

## STATEMENT OF THE QUESTIONS INVOLVED

I. Whether, in a case of first impression, Pennsylvania's Interference with Custody statute, 18 Pa. Cons. Stat. § 2904, may be applied to Defendant-Appellant where, in accordance with Pennsylvania's Abortion Control Act and relevant federal constitutional principles, the minor whom Appellant accompanied to Binghamton, New York to obtain a legal abortion was not in her mother's "custody" for the purpose of exercising that choice?

The Superior Court answered Yes.

II. Whether Defendant-Appellant has standing to raise the minor's constitutional rights in challenging the applicability of § 2904 to Defendant-Appellant's conduct in the case at bar?

The Superior Court answered No.

III. Whether, where prior counsel failed to challenge the sufficiency of the evidence underlying Defendant-Appellant's conviction on her appeal to the Superior Court, and that challenge is properly raised before this Court by new counsel asserting ineffective assistance of counsel below, this Court should reverse the Order of the Superior Court remanding the case for a new trial and vacate the conviction?

The Superior Court did not answer this question. This question is raised for the first time before this Court.

## STATEMENT OF THE CASE

Appellant Rosa Hartford ("Hartford") appeals from the Superior Court's October 28, 1997, Order and Opinion which, in concluding that the trial court had erred in instructing the jury, reversed her conviction under Pennsylvania's Interference With Custody of Children Statute,18 Pa. Cons. Stat. § 2904 (1997) and remanded her case to the trial court for a new trial. In declining Hartford's request that the conviction be vacated, the Superior Court held that Mrs. Hartford lacked standing to "vicariously assert the rights of the minor," Appendix C, Super. Ct. Mem. Op. at 12 (hereinafter "Mem. Op."), and that "Section 2904 of the Crimes Code can be employed to prevent a person from taking a minor under the age of fourteen out of the Commonwealth for an abortion without the consent or knowledge of the parent." Id. Hartford also appeals from the Superior Court's dismissal of her Petition for Reargument in which she raised, at her first opportunity, an ineffective assistance of counsel claim, based on prior counsel's failure to challenge the sufficiency of the evidence in Hartford's appeal to the Superior Court. The facts underlying this appeal are as follows.

In the summer of 1995, 13-year-old Crystal L. realized that she was pregnant. After consulting with her older sister and several friends, and after considering all her options, Crystal L. decided to terminate her pregnancy. (Tr. at 83, 85-86, 95-100, 118-19m 208, 238.[1]). Hartford's daughter, Melissa Hartford, with whom Crystal had consulted, made an appointment for Crystal to have an abortion at a clinic in Binghamton, New York on August 31, 1995. (Tr. at 213-14). Crystal did not want her mother, who had legal custody of her, to know about either the pregnancy or the

[1]Citations to the trial transcript are in the form of "Tr. at __." Pursuant to Pennsylvania Rule of Appellate Procedure 2151(b), Hartford was not required to reproduce the record since she is proceeding in forma pauperis.

abortion and, consequently, did not advise her of her plans. (Tr. at 60-63, 92, 97, 218, 241.)

On August 31, 1995, at approximately 7:00 a.m., Crystal L. traveled to the home of Hartford with her friend, Alana Dingle. (Tr. at 88). Although Crystal thought that Melissa Hartford was going to drive her to New York, Crystal learned for the first time that morning that Hartford was going in Melissa's place, because Melissa was not feeling well. (Tr. at 219-20). Hartford, Crystal and Alana then went to the home of Paul "Butch" Kemp, a neighbor of Hartford's, whom Mrs. Hartford had asked to drive them to Binghamton. (Tr. at 124-127).[2] At the clinic in Binghamton, Crystal obtained counseling and a lawful abortion.[3] "Butch" Kemp, Hartford, Crystal and Alana returned to Pennsylvania that same day, at approximately 5:30 p.m., after Crystal had undergone the procedure. (Tr. at 111-18, 245-69.)

Crystal testified at trial that she was neither coerced into traveling to Binghamton nor coerced into having the abortion. (Tr. at 85, 96-99). Moreover, she testified that she arrived at her decision to terminate her pregnancy on her own after consultation with various people, including her older sister. (Tr. at 96-99). Crystal's mother, Joyce Farley, testified at trial that she learned of her daughter's whereabouts at approximately 11:00 a.m. on August 31. Although she had reason to believe that her daughter was at an abortion clinic in Binghamton, New York, she testified that she did not try to contact the abortion clinic nor try to stop her daughter from having the abortion. (Tr. at 42-43, 57-68). There is no evidence in the record below that Farley objected to what happened on that day, nor did she testify that she bore any animosity toward Hartford. Indeed, Farley did not file

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[2] Neither "Butch" Kemp nor Alana Dingle were charged with violating Section 2904.

[3] Under N.Y. Penal Law §§ 125.00, 125.05, 125.40, a young woman need not obtain the consent of either parent before obtaining an abortion.

a criminal complaint against Hartford.

On September 12, 1995, Hartford was charged by criminal complaint with interference with custody of children, 18 Pa. Cons. Stat. § 2904(a).[4] Under § 2904, a "person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so." On November 1, 1995, following a preliminary hearing, a district justice found that the Commonwealth had established a prima facie case of interference with parental custody under § 2904.

The case was referred for criminal prosecution to the Court of Common Pleas for Sullivan County. In a pre-trial omnibus motion, Hartford moved to dismiss the complaint, arguing, inter alia, that, as a matter of federal and state law, a parent has no right of "custody" to control his or her daughter's decision to choose abortion and that § 2904 was being wrongly applied to prosecute Hartford under these facts. (R.R. at 5-42.[5]) Hartford further argued that prosecution under § 2904 for accompanying a young woman to obtain an abortion violated the young woman's constitutionally protected right to choose to have an abortion, as well as the young woman's right to travel to a state whose laws permit her obtain an abortion without parental consent.

On May 3, 1996, in a written opinion, the Court of Common Pleas denied Hartford's omnibus motion to dismiss, as well as Hartford's requested jury instructions. See Appendix A, Commonwealth v. Hartford, No. 95-98 (Pa. Ct. C.P. May 3, 1996). The Superior Court denied

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[4] Hartford was also initially charged with corruption of minors under 18 Pa. Cons. Stat. Sec. 6301; this charge was withdrawn.

[5] Citations to the reproduced record are in the form "R.R. at __." As noted above, supra n.2, Hartford was not required to reproduce the record pursuant to Pennsylvania Rule of Appellate Procedure 2151(b).

Hartford's interlocutory appeal of the trial court's denial of the omnibus motion. Commonwealth v. Hartford, No. 104 MDE 1996 (Pa. Super. Ct. Aug. 16, 1996).

On October 28 and 29, 1996, Hartford was tried before a 12-person jury in Sullivan County. Upon the conclusion of testimony, the trial court charged the jury. Defense counsel objected to the mens rea portion of the charge and the court amended the charge. However, the jury remained confused about the elements of the crime and twice sent notes seeking clarification. Over the repeated objections of defense counsel, the trial court refused to alter the instruction. Instead, the court re-instructed the jury with the initial charge. (Tr. at 344-53; R.R. at 142-51.)

The jury returned a verdict of guilty, grading the offense as a third degree felony. (Tr. at 358-59.) On December 5, 1996, the Court of Common Pleas sentenced Hartford to 12 months of probation, ordered her to complete 150 hours of community service, and to pay the costs of the prosecution. Commonwealth v. Hartford, No. 95-98 (Pa. Ct. C.P. Dec. 5, 1996); see also R.R. at 152-53.

Hartford appealed her conviction to the Pennsylvania Superior Court. After briefing and argument, the Superior Court decided the matter on October 28, 1997. See Appendices C & D, Commonwealth v. Hartford, (Pa. Super. Ct. Oct. 28, 1997). The Superior Court reversed Hartford's conviction and remanded for a new trial, finding that the jury charge used by the Court of Common Pleas was confusing and therefore flawed. Id. at 6-12. However, the Superior Court rejected all of Hartford's other claims and found that prosecution of Hartford under § 2904 was legally permissible.

Hartford's prior counsel withdrew shortly after the Superior Court's October 28th decision and Hartford retained new counsel.

The Commonwealth filed a Petition for Reargument or Panel Reconsideration on November

10, 1997, seeking limited reargument as to the jury charge issue only. Hartford filed a Cross-Petition for Reargument on November 26, 1997. The Superior Court rejected Hartford's Cross-Petition as untimely even though Hartford filed that Petition within 14 days (plus three days to compensate for the Commonwealth's service by mail) from receipt of the Commonwealth's Petition. Hartford then filed, on December 1, 1997, a Petition for Permission To File a Petition for Reargument Nunc pro Tunc. On December 22, 1997, the Superior Court denied Hartford's Nunc pro Tunc Petition, and dismissed her Cross-Petition for Reargument. (See Appendix E). On January 9, 1998, the Superior Court also denied the Commonwealth's Petition for Reargument. (See Appendix F ).

On February 9, 1998, Hartford filed a Petition for Allowance of Appeal with this Court. The Commonwealth filed a Cross- Petition for Allowance of Appeal. On August 5, 1998, both Hartford's Petition for Allowance of Appeal and the Commonwealth's Cross-Petition were granted.

## SUMMARY OF ARGUMENT

The Superior Court erred in applying 18 Pa. Cons. Stat. § 2904, Pennsylvania's Interference With Custody statute, to Defendant-Appellant Rosa Hartford. Section 2904 on its face requires that, in order to sustain a conviction under the statute, the person charged must have taken the minor from the "custody of its parent." Where, as provided in the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. § 3204, and as required by the United States Constitution, a minor has the right to voluntarily choose whether to terminate her pregnancy or carry her pregnancy to term without first consulting with or obtaining the consent of her parent or guardian, a minor is deemed by law to be outside her parent's "custody" at the time she exercises that statutorily-permitted and constitutionally- mandated choice. Accordingly, Defendant-Appellant Hartford could not have taken the minor, Crystal L., from her parent's custody.

Additionally, the Superior Court has wrongly extended the reach of Pennsylvania's Abortion Control Act beyond Pennsylvania's borders. As the United States Supreme Court has squarely held, a state may not constitutionally regulate the behavior of its citizens in another state, nor may it prevent its citizens from traveling to another state to obtain a lawful abortion in that state. By criminalizing Hartford's conduct in accompanying Crystal L. to Binghamton, New York, the Superior Court has not only usurped the authority of the General Assembly to designate what constitutes criminal behavior in this Commonwealth, it has also accorded to Crystal's mother expectations which she cannot constitutionally or statutorily have. The Abortion Control Act is a comprehensive criminal statute which reflects the extent to which the General Assembly intended to criminalize abortion-related activity in this State. As such, the Superior Court may not rely on the provisions of a general criminal statute not specifically concerned with the regulation of abortion to

trump or add to the provisions of the Abortion Control Act. Nor may the Superior Court accord a parent the expectation that her child will exercise her right to abortion in Pennsylvania only and in accordance with the provisions of the Abortion Control Act. That Act neither prohibits Pennsylvania residents like Crystal L. from traveling to another state to exercise their rights there, nor does it prohibit third parties like Hartford from assisting Pennsylvania minors in their exercise of those rights.

The Superior Court further erred in holding that Hartford lacked standing to assert Crystal L.'s constitutional rights to abortion, to travel, and to engage in interstate commerce, in Hartford's defense of her prosecution under the statute. Contrary to United States Supreme Court precedent, the Superior Court wrongly limited third-party standing to those situations where the party stands in a "special or legally cognizable relationship to the minor (or individual) whose rights are being asserted." The Superior Court erred by ignoring the fact that the Supreme Court has recognized three exceptions to the prudential rule that ordinarily a litigant may not assert the rights of an absent party: (1) where substantial legal and/or practical obstacles prevent the absent party from vindicating her own rights; (2) where the defendant and the absent party share a common interest and the conduct of the defendant is sufficiently bound up with the absent party's constitutionally protected activity such that resolution of the case will impact the third party's rights, and; (3) where application of the challenged statute is overbroad and will have a chilling effect on the exercise of protected activity by the third party. The Supreme Court has further held that if a litigant meets any one of these exceptions, she must be granted standing to assert the absent party's rights. Hartford readily meets the requirements for third-party standing as defined by the Supreme Court.

Finally, the Order of the Superior Court reversing Hartford's conviction and remanding her

case for a new trial must be reversed and Hartford's conviction should be vacated where prior counsel failed to challenge the sufficiency of the evidence underlying the conviction in Hartford's appeal to the Superior Court, and Hartford has properly raised it before this Court. The Commonwealth bears the burden of proving each element of the crime beyond a reasonable doubt. Here, the Commonwealth failed to present evidence of each element of § 2904, namely (1) that Hartford "took" the minor and (2) that Hartford "substantially interfered" with parental custody. The Superior Court unanimously agreed that the Commonwealth had failed to carry its burden as to these elements of the crime, but subjected Hartford to a new trial because Hartford's prior counsel failed to raise a claim of legal insufficiency in either post-verdict motions or on appeal. An Order which subjects appellant to a second, unnecessary and unconstitutional trial when prior counsel's ineffectiveness is both apparent on the face of the record and properly raised before this court must be reversed.

## ARGUMENT

### I. The Superior Court Erred in Applying Pennsylvania's "Interference with Custody" Statute, 18 Pa. Cons. Stat. § 2904, to Appellant Hartford Under the Facts of this Case Since Crystal L. Was Not in Her Mother's Custody for Purposes of Securing A Lawful Abortion

Hartford's criminal conviction under Section 2904 must be reversed because Crystal L. was not in her mother's "custody" at the time Hartford accompanied Crystal to Binghamton, New York for a lawful abortion. In approving the application of § 2904 to Hartford under the circumstances herein, the Superior Court erroneously concluded that a Pennsylvania resident minor's right to seek an abortion without parental consent is limited to in-state abortions that satisfy the procedures of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. §§ 3201 et seq. (1997). (See Appendix C, Super. Ct. Mem. Op. at 4-5, hereinafter "Mem. Op.) For the reasons set forth below, this conclusion is contrary to both the United States Constitution and basic tenets of custody law.

As a criminal statute, § 2904 must be narrowly construed. Section 2904 is a general criminal statute prohibiting unlawful interference with parental custody of a child. 18 Pa. Cons. Stat. § 2904 provides in pertinent part:

> (a) Offense defined. - A person commits an offense if he knowingly or recklessly takes or entices any child under the age of eighteen years from the custody of its parent, guardian, or other lawful custodian, when he has no privilege to do so.
>
> (b) Defenses. - It is a defense that:
>
> (1) the actor believed that his action was necessary to preserve the child from danger to its welfare; or
> (2) the child, being at the time, not less than fourteen years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child; or
> (3) the actor is the child's parent or guardian or other lawful custodian and is not acting contrary to an order entered by a court of competent jurisdiction.

It is well-settled that "[i]n enacting § 2904, the legislature was focusing primarily on the

problem of 'parental kidnapping.'" Commonwealth v. Rodgers, 410 Pa. Super. 341, 344, 599 A. 2d 1329, 1331 (1991) (citing Commonwealth v. Thrush, 23 Pa. D. & C. 3d 302, 305 (Cumberland County 1980)). The analogous Model Penal Code section, from which the Pennsylvania provision is derived, notes that the primary interest to be protected by this provision is that of the custodial relationship. Id. (citations omitted). While the Superior Court has recognized that "it is not beyond the trial court's scope of authority or [the Superior Court's] to extend the purview of this statute to protect children from unlawful taking by individuals who are not necessarily their parents, custodians or guardians," Commonwealth v. McClintock, 433 Pa. Super. 83, 89, 639 A.2d 1222, 1225 (1994), the few prosecutions that have been brought under the statute have plainly involved charges of interference with the custody of one parent or legal guardian by another parent.

### A. Under Pennsylvania Law, A Parent Has No "Custodial" Right to Require that Her Minor Child Follow the Provisions of Pennsylvania's Abortion Control Act When The Minor Child Chooses to Exercise Her Constitutional Right to Abortion in a Neighboring Jurisdiction

Under § 2904, a "person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so." 18 Pa. Cons. Stat. § 2904 (emphasis added). A conviction under the statute thus should not be sustained absent proof, inter alia, that the defendant took the minor from the "custody" of his or her parent or other legal guardian.

While the criminal statute itself does not define custody, custody is defined in the Domestic Relations Code which governs, inter alia, custodial rights of parents and third parties over children involved in custody disputes.

The Domestic Relations Code recognizes that custody entails two separate elements,

"physical" and "legal" custody. "Physical custody" refers to "the actual physical possession and control of a child." 23 Pa. Cons. Stat. § 5302. "Legal custody" refers to "the legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions." Id. "Legal custody" thus confers on the parent or guardian decision-making authority regarding a wide array of issues in a child's life. It is clear under Pennsylvania law that the custodian's ability to make decisions for the minor is an essential element of legal custody. Cf. Hill v. Hill, 422 Pa. Super. 533, 619 A.2d 1086 (1993) (finding that "shared" legal custody order that granted only one parent final decision-making authority in the event of a dispute effectively granted sole legal custody to that parent).

While this Court has not yet had the occasion to interpret or apply § 2904, the Superior Court has held that § 2904 is only violated when an individual interferes with both physical and legal custody.[6] In defining a "taking" from custody, the Superior Court has held not only that an "affirmative physical removal of the child is necessary, " Commonwealth v. Rodgers, 410 Pa. Super. at 345, 599 A.2d at 1331 (citing Commonwealth v. Stewart, 375 Pa. Super. 585, 544 A.2d 1384 (1988), alloc. denied, 520 Pa. 604, 533 A.2d 967 (1988)), but also that "it is the interruption of

[6] Moreover, were this Court to find that the scope of parental custody is ambiguous under § 2904, that ambiguity must be resolved in Mrs. Hartford's favor. It is a well-settled rule of statutory construction that, "[w]hen a criminal statute is susceptible of two constructions, both reasonable, it is not the construction that is supported by the greater reason that is to prevail but the one that operates in favor of the defendant's liberty . . . ." Commonwealth v. Smith, 333 Pa. Super. 155, 161, 481 A.2d 1352, 1355 (1984) (citations omitted); see also Commonwealth v. Jones, 432 Pa. Super. 97, 107-08, 637 A.2d 1001, 1006 (1994); Commonwealth v. Eyster, 401 Pa. Super. 477, 488, 585 A.2d 1027, 1033 (1991). Section 2904 contains no definition of custody; under the above-stated principle, any ambiguity regarding the meaning of the term must be decided in Appellant's favor and the definition of "custody" most favorable to Hartford must be adopted by this Court. Thus, § 2904 must be construed to require interference with both physical custody and legal custody as those terms are defined in the Domestic Relations Code.

lawful custody, and not merely the 'taking,' that constitutes the statutory offense." Stewart, 375 Pa. Super. at 593, 544 A.2d at 1388. "We are persuaded that it is not merely the act of taking . . . that constitutes the offense, but rather the continued maintenance of the child outside of the custodian's dominion," id., in a way that results in "'substantial interference with parental control.'" Rodgers, 410 Pa. Super. at 344-45, 599 A.2d at 1331 (quoting Toll, Pennsylvania Crimes Code Annotated § 2904, at 348 (1974)) (emphasis added). Indeed, the Superior Court in Stewart made clear that physical removal alone without interference with parental control did not violate the statute, stating: "[I]f the statute was only intended to prohibit the physical taking, there would be no reason for the Joint State Government Commission to have commented [in reference to this section] that 'removal of the child for a brief period is not covered by this section.'" 375 Pa. Super. at 593, 544 A.2d at 1388.

Hartford argued below that the Commonwealth failed to establish that, in accompanying Crystal to Binghamton so that she might have a pregnancy test and then an abortion, Hartford interfered with either the physical or legal custody of Crystal's mother within the meaning of the statute. Relying on the parental consent provisions of the Abortion Control Act of Pennsylvania, 18 Pa. Cons. Stat. § 3206,[7] which authorize physicians to perform abortions on young women under

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[7] As Hartford has argued, "legal custody" refers to the custodian's right to make "major decisions affecting the best interest of a minor child." 23 Pa. Cons. Stat. § 5302. While legal custody generally includes the right to exercise control over, inter alia, medical, educational, and religious decisions in a child's life, Crystal's mother did not have the exclusive right to exercise control over Crystal's decision whether to have an abortion.

Under the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. § 3201 et seq. (1992), the General Assembly has provided a mechanism for pregnant minors to obtain an abortion without the consent, knowledge, or notification of their parents. Id. §§ 3206(c)-(d). This mechanism allows a pregnant minor to by-pass the need for parental consent by obtaining judicial authorization for the abortion (either if the court finds that she is mature and capable of giving informed consent or if the court finds that the abortion is in her best interest). See Id. Clearly, under this provision, parents

eighteen without parental consent or knowledge where the minor obtains a court order authorizing the procedure, Hartford argued that, pursuant to this provision, Crystal's mother did not have "legal custody" -- i.e., the legal right to make this medical decision for her -- with respect to Crystal's exercise of that choice. As Hartford argued, if Crystal was not in her mother's "legal custody" at the time she elected voluntarily to travel to Binghamton, New York, to undergo the abortion procedure, then Hartford could not have violated § 2904.

The Superior Court did not dispute that Crystal has a right to have an abortion without parental consent under the Abortion Control Act, and "that a parent's right to make decisions is tempered in the instance of abortion....." Mem. Op. at 4. They disagreed with Hartford, however, that this exemption of the abortion decision from the scope of parental custodial rights under Pennsylvania law precluded prosecution of Hartford under § 2904. As the Superior Court held:

> [W]e agree with appellant that a minor in Pennsylvania is entitled to have an abortion without parental consent pursuant to the Abortion Control Act...(footnote omitted)...However, under that law, another responsible adult (i.e., a judge) will provide some oversight to that decision. Consequently, although a parent's right to make decisions for her child is tempered in the instance of abortion, at least in Pennsylvania that parent has the legitimate expectation that procedural safeguards designed to protect the minor child will be observed. Therefore, section 2904 can be applied where an unauthorized adult takes a minor across the Commonwealth's border in order to evade Pennsylvania's statutory scheme and, without the consent of the parent, exercises a custodial function related to the performance of the abortion.

Id.

As discussed below, in thus approving the application of § 2904 to Hartford's conduct here,

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and other legal custodians in Pennsylvania do not have the exclusive right to exercise decision-making authority over their minor child's decision to terminate her pregnancy. Because parents lack such a right, a pregnant minor cannot be deemed to be in her parent's custody for the purpose of deciding whether or not to obtain an abortion. See Hill, 422 Pa. Super. at 537-39, 619 A.2d at 1088-89 (holding that only the parent who had been given final decision-making authority with regard to minor children had "legal custody" of those children).

the Superior Court purports to grant more authority to the Commonwealth and/or parents to dictate the terms of the minor's exercise of her constitutional right to abortion than expressly provided them under the terms of the Abortion Control Act itself -- and more authority over the decision than is constitutionally permissible. Thus, this Court must reverse because the Superior Court may neither rewrite Pennsylvania's criminal statutes by criminalizing behavior that the General Assembly has not itself chosen to criminalize, nor enforce the terms of the Abortion Control Act beyond Pennsylvania's borders.

### B. The Superior Court May Not Criminalize Behavior That the Legislature Itself Has Not Chosen to Criminalize

Interpreting § 2904 to prohibit an adult from "tak[ing] a minor across the Commonwealth's border in order to evade Pennsylvania's [Abortion Control Act] and, without the consent of the parent, exercis[ing] a custodial function related to the performance of an abortion," Mem. Op. at 4-5, not only is contrary to the plain meaning of "custody" set forth above, it also creates a conflict with 18 Pa. Cons. Stat. § 3206, undermining the careful remedial scheme that the General Assembly created in enacting the Abortion Control Act. This Court has long refused to interpret a general criminal statute, such as § 2904, to supplement the remedies provided in a more specific statute. It is a well-established "policy of the law not to permit prosecutions under the general provisions of a penal code when there are applicable special penal provisions available." Commonwealth v. Brown, 346 Pa. 192, 199, 29 A.2d 793, 796-797 (1943).

For example, in Brown, this Court held that the state could not prosecute the defendant under the general criminal statute for false statements for perjury in an election affidavit where the legislature specifically criminalized the making of a false affidavit under the Election Code. Noting that the legislature had "specifically provided" criminal penalties for the making of a false statement

in an election affidavit, this Court refused to "presume[] or infer [] that the legislation intended to provide for two different prosecutions for the same identical offense, prosecutions which provide widely divergent penalties in the event of convictions." Id. at 197, 29 A.2d at 796; see also Commonwealth v. Davis, 421 Pa. Super. 454, 459-61, 618 A.2d 426, 428-29 (1992) (specific classification of crime in the Controlled Substance Abuse Act trumped general statute dealing with classification of crimes); Commonwealth v. Bidner, 282 Pa. Super. 100, 105-08, 422 A.2d 847, 850-51 (1980) (rejecting prosecution under general perjury statute where legislature specifically provided criminal penalties for perjury under the Election Code).

Underlying these cases is the notion that where, as here, the General Assembly has enacted a comprehensive regulatory scheme addressing certain conduct, prosecution under a more general criminal statute undermines that remedial scheme and frustrates legislative intent. In Bidner, for example, the Superior Court pointed out that the enactment of a "comprehensive scheme of offenses and penalties' in the election Code demonstrated that "the legislature intended to accord special treatment to this area of criminal conduct to the exclusion of the more general provisions of the Crimes Code." Bidner, 282 Pa. Super. at 106, 422 A.2d at 850. Likewise, in Davis, the court explained that it would be "unreasonable to presume the legislature would intend or desire to have the specifics of its comprehensive Controlled Substance Act nullified by general provisions of a general Crimes Code not particularly intended for narcotics offenses." Davis, 421 Pa. Super. at 461, 618 A.2d at 429.

These principles apply squarely in the case at bar. In passing § 3206 as part of its comprehensive regulation of abortion, the General Assembly sought to mandate, as a general matter, that a young woman obtain parental consent before obtaining an abortion in the Commonwealth of

Pennsylvania. However, recognizing, as required by U.S. Supreme Court decisions,[8] that because not all young women can discuss their abortion decision with their parents, they may constitutionally be required to do so, the Pennsylvania legislature also created a judicial bypass procedure to permit a young woman to obtain an abortion in Pennsylvania without parental consent by showing that she is mature and capable of consenting or that the abortion is in her best interests.

On its face, however, § 3206 does not impose criminal liability on parties that assist a young woman to obtain an abortion, reflecting the legislature's intent to make physicians and other health care professionals, not other third parties, subject to liability for failure to comply with these provisions. § 3206(i). Nor does § 3206 impose criminal penalties on the young woman or any other third party when a young woman in Pennsylvania decides to travel to a neighboring state to avail herself of the abortion laws of that state. Respecting the sovereignty of surrounding states, the plain language of the statute only requires parental consent or a judicial waiver before a physician in Pennsylvania performs an abortion. See § 3206(a).

More importantly, the Abortion Control Act does not even impose criminal penalties on physicians or health care providers for the performance of abortions on minors in violation of these consent provisions. To the contrary, § 3204(i) expressly provides that "[f]ailure to comply with the requirements of this section is prima facie evidence of failure to obtain informed consent and of

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[8] See e.g. Bellotti v. Baird, 443 U.S. 622, 643 (1979) ( "'[T]he State may not impose a blanket provision ...requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy.' Although,...such deference to parents may be permissible with respect to other choices facing a minor, the unique nature and consequences of the abortion decision make it inappropriate 'to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.'") (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976)).

interference with family relations in appropriate **civil** actions." 18 Pa. Cons. Stat. § 3204(i) (emphasis added).[9] If the General Assembly has not seen fit to impose criminal penalties on physicians under the Abortion Control Act when the minor consent requirements of the Act are not complied with, the Superior Court's imposition of such penalties upon Hartford – a third party whose conduct the General Assembly did not choose to regulate at all under its comprehensive abortion regulatory scheme -- is wholly unwarranted and would "nullify" the specific regulation of the abortion procedure set forth in the Abortion Control Act.

Additionally, by interpreting § 2904(a) to prohibit an adult from accompanying a young woman "across the Commonwealth's border in order to evade Pennsylvania's procedural scheme," Mem. Op. at 3, the Superior Court has effectively created a new crime.[10] Under established principles of Pennsylvania law, however, the courts lack the power to rewrite Pennsylvania's

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[9] This section also provides that any person who performs an abortion on an unemancipated minor or an incapacitated person without complying with the consent requirements shall be guilty of "unprofessional conduct" and subject to the suspension of his license for the practice of medicine or surgery for at least three months. 18 Pa. Cons. Stat. § 3294(i). Significantly, again, no criminal penalties are imposed for failure to comply with the consent provisions of this section.

[10] Even a cursory review of the record before the trial court reveals that the "crime" articulated by the Superior Court is not the crime the Commonwealth charged Hartford with, or prosecuted her for. While § 2904 required the Commonwealth to endeavor to prove that Hartford took a child under the age of eighteen "from the custody of its parent," the crime created by the Superior Court would require the Commonwealth to prove that Hartford took "a minor across the Commonwealth's border in order to evade Pennsylvania's procedural scheme and, without the consent of the parent, exercised a custodial function related to the performance of the abortion." But, because the Commonwealth was trying to prove a violation of § 2904 and not the "crime" imagined by the Superior Court, it made no effort to prove that Hartford was even aware of the requirements of Pennsylvania's Abortion Control Act, let alone that she acted deliberately to thwart its provisions. Nor did the Commonwealth elicit any testimony from Crystal that she was aware of the judicial bypass provisions of the Act. Finally, since there is no "custodial function related to the performance of an abortion" where the minor exercises her constitutional right not to consult with or notify her parents of her decision, there can be no such "crime" as created by the Superior Court.

criminal laws. See Commonwealth v. Williams, 539 Pa. 249, 253, 652 A.2d 283, 285 (1994); Commonwealth v. Gibbs, 533 Pa. 539, 548, 626 A.2d 133, 138 (1993). The General Assembly, not the courts, "has the exclusive power to pronounce which acts are crimes, to define crimes, and to fix the punishment for all crimes." Commonwealth v. Church, 513 Pa. 534, 544, 522 A.2d 30, 35 (1987). As this court explained in Commonwealth v. Zankowski, 377 Pa. Super. 256, 546 A.2d 1254 (1988), "our state Constitution has delegated the function of legislative drafting to the General Assembly. Any change forthcoming with regard to . . . any . . . statutory provision constitutionally vests in that body." Id. at 260, 546 A.2d at 1256.

The Superior Court cannot avoid the application of these settled principles of statutory construction. Indeed, the Superior Court has plainly usurped the authority of the legislature to "pronounce which acts are crimes," Church, 513 Pa. at 544, 522 A.2d at 35, by declaring an entirely new abortion-related crime: "[T]aking a minor across the Commonwealth's border in order to evade Pennsylvania's procedural scheme and, without the consent of the parent, exercis[ing] a custodial function related to the performance of an abortion." Mem. Op. at 4-5. But under the principles of statutory construction set forth above, unless the Commonwealth can demonstrate that the Pennsylvania legislature had the "manifest intent []" that § 2904 should prevail over the more specific provisions of § 3206, Bidner, 282 Pa. Super. at 106, 422 A.2d at 850, the Superior Court cannot criminalize individual behavior or conduct on its own.

The Superior Court cites no evidence that the Pennsylvania legislature intended § 2904 to override the provisions of the Abortion Control Act. Certainly, nothing in the Abortion Control Act's comprehensive scheme evidences the "manifest intention' necessary to justify application of § 2904. Indeed, it would be "unreasonable to presume that the legislature would intend or desire to

have the specifics of its comprehensive [Abortion Control Act] nullified by general provisions of a general Crimes Code not particularly intended for [abortion] offenses." Davis, 421 Pa. Super. at 461, 618 A.2d at 429.[11] Accordingly, "the conflict between the [statutes] is best resolved...by construing the special provision ([§ 3206]) as an exception to the general ([§ 2904])." See Bidner, 282 Pa. Super. at 107, 422 A.2d at 851.

### C. The Superior Court's Construction of § 2904 Directly Conflicts with the General Assembly's Intent to Both Limit the Reach of § 3206 to Abortions Performed in Pennsylvania, and to Protect the Rights of Minor Women to Decide Voluntarily Whether to Terminate Their Pregnancies

Though Pennsylvania's Abortion Control Act places limits on a minor's ability to obtain an abortion without parental consent in the Commonwealth of Pennsylvania, the Act does not restrict in any way a minor's right to travel to another state in order to obtain a legal abortion. Nor could it. Indeed, a minor's right to travel is a fundamental right under the constitution. See Shapiro v. Thompson, 394 U.S. 618 , 629 (1969); Gaffney v. City of Allentown, No. 97-CV4455 1997 WL 597989 (E.D. Pa. Sept. 17, 1997).[12] Though a state may, in certain circumstances, regulate a

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[11] Recognizing that the Abortion Control Act might conflict with general statutory provisions, the Pennsylvania General Assembly specifically limited the effect of the Abortion Control Act on certain general statutes involving vital statistics. 18 Pa. Cons. Stat. § 3220. Fully cognizant of the possibility of conflict, the legislature refused to similarly leave § 2904 unaffected by the provisions of the Abortion Control Act. If anything, this is evidence of a manifest intent to override conflicting general statutes not covered by § 3220.

[12] While the constitutional right to travel is not contained in the text of the Constitution, the Supreme Court "has recognized that the historical foundation upon which this Republic was structured was that we are all citizens of the United States, one people, and, as such, we 'must have the right to pass and repass through every part of [the country] without interruption, as freely as in our own states.'" Maldonado v. Houstoun, No. 97-1893, 1998 U.S. App. LEXIS 21909, (3d Cir. September 9, 1998) (quoting The Passenger Cases, 48 U.S. (7 How.) 283 (1849)). The Supreme Court has repeatedly and consistently recognized a fundamental right to interstate travel, see, e.g., United States v. Guest, 383 U.S. 745, 757-758 (1966) ("The constitutional right to travel from one

minor's right to travel based on a state's heightened interest in the protection of children, see Hutchins v. District of Columbia, 144 F.3d 798 ( D.C. Cir. 1998), Pennsylvania's Abortion Control Act, by its terms, does not do so. The Abortion Control Act on its face only controls the actions of physicians who perform abortions in the Commonwealth. See generally, 18 Pa. Cons. Stat. §§ 3201 et seq. Thus, the Act fully preserves a minor's ability to travel to another state to obtain an abortion legal in that state.

As such, the Abortion Control Act is in line with the Supreme Court's decision in Bigelow v. Virginia, 421 U.S. 809 (1975), where the Court made clear that a State may not forbid its citizens from traveling across state lines to obtain abortion services legal under the laws of another state. In Bigelow, the Court overturned a conviction against a Virginia newspaper editor for advertising the availability of abortion services in New York. In finding that Virginia could not bar its citizens from receiving information about abortion services that were legal in New York, the Court made clear that Virginia could neither "prevent its residents from traveling to New York to obtain those services [n]or . . . prosecute them for going there." Id. at 824. Similarly, under the Abortion Control Act, Pennsylvania could not prevent Crystal from traveling to New York to obtain an abortion, nor could it prosecute Crystal for her decision to do so.

Despite the fact that Pennsylvania could neither restrict Crystal from traveling to New York to obtain an abortion, nor prosecute her for doing so under the Abortion Control Act, the Superior

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state to another ... occupies a position fundamental to the concept of our federal union. It is a right that has been firmly established and repeatedly recognized."). See also, Crandall v. Nevada, 73 U.S. (6 Wall) 35 (1867); The Passenger Cases. See also, Stottlemyer v. Stottlemyer, 458 Pa. 503, 508, 329 A.2d 892, 8984 (1974) ("the right to move freely from state to state has long been recognized as a basic right of every American").

Court found that Crystal's parents had a "legitimate expectation," pursuant to the Abortion Control Act, that "procedural safeguards designed to protect the minor will be observed." It is these so-called "legitimate expectations" that led the court to criminalize Hartford's conduct in accompanying Crystal to Binghamton. The Superior Court's holding, however, is overbroad, and thus its analysis is seriously flawed.

Under the Abortion Control Act, a parent's only "legitimate expectation" is that the procedural safeguards delineated in the Abortion Control Act will be observed **in Pennsylvania by physicians**. First, with respect to the expectation that the procedures will be observed in Pennsylvania, a Pennsylvania parent cannot "legitimately" expect that Pennsylvania's procedural safeguards would be observed in New York or in any other state. Pennsylvania's laws regulating physicians who perform abortions in Pennsylvania do not also regulate physicians who perform abortions in New York. Indeed, any effort by Pennsylvania to unilaterally extend the Abortion Control Act extraterritorially would be unlawful. Huntington v. Attrill, 146 US. 657, 669 (1892). In Bigelow, the Court recognized:

> The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State. . . . Virginia possessed no authority to regulate the services provided in New York - the skills and credentials of the New York physicians and other New York professionals who assisted them, the standards of the New York hospitals and clinics to which patients were referred, or the practices and charges of the New York referral services.

Bigelow, 421 U.S. at 822-23.

Second, Crystal's mother can only "legitimately expect" that physicians in Pennsylvania will comply with the procedures of the Act. Since Crystal herself is not subject to any sanctions whatsoever, civil or criminal, for failing to comply with § 3206, there is no mechanism under the

Act to assure Crystal's compliance with the consent provisions, including obtaining a judicial bypass, and thus it is not reasonable to conclude that her mother can "expect" that Crystal herself will comply with those provisions.

Moreover, there is nothing in the Act to suggest that the Legislature was specifically concerned with protecting a parent's rights with respect to the abortion decision of their minor child, such that a parent could "legitimately expect" their rights to be honored. To the contrary, the Legislative intent states specifically that it is "to protect the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term." 18 Pa. Conn. Stat. § 3202. If anything, this express legislative intent to preserve Crystal's right to choose voluntarily underscores the error of the Superior Court's reasoning. By purporting to vest Crystal's mother with the right to dictate the terms of her right to abortion by criminalizing the behavior of an adult who aids her in the entirely "voluntary" exercise of that choice, the Superior Court negates the Act's intent to protect her right to choose "voluntarily."[13]

Once Crystal exercised her rights under the Abortion Control Act to voluntarily travel to New York, the procedural safeguards delineated in the Act became irrelevant. So too did any

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[13] Just as it is proscribed from enforcing the Abortion Control Act extraterritorially, so is the Commonwealth prohibited from achieving such a result indirectly by expanding parental custody to include control over a child's decision to seek an out-of-state abortion. Yet this is precisely the authority the Superior Court purports to confer on parents. By limiting Crystal's right to terminate her pregnancy without parental consent exclusively to the procedures available under the Pennsylvania Abortion Control Act, the Superior Court effectively granted her parents the right to veto her choice should she choose to exercise her right outside of Pennsylvania. But, the Superior Court's attempt to expand parental custody to include authority over a minor's decision to seek an out-of-state abortion runs afoul of the U.S. Constitution and prevailing precedent. Accordingly, Crystal was not, and could not have been, within her mother's legal custody when she chose to travel to New York to exercise her constitutional right to abortion, and Hartford was wrongly prosecuted for assisting Crystal in her exercise of that right.

expectations that her parents had pursuant to the Act. Without such expectations, no custodial right of her parents could have been interfered with by Hartford, and the Superior Court wrongly held that § 2904 could be applied to Hartford's conduct.

## II The Superior Court Erred in Holding that Hartford Lacked Standing to Raise the Violation of Crystal L.'s Rights, Because This is Precisely the Kind of Case In Which the U.S. Supreme Court Has Granted Standing to Third Parties

In her appeal to the Superior Court, Hartford argued that her prosecution under § 2904 violated the constitutional rights of Crystal L. and other minors to seek an abortion without the consent or knowledge of their parents, as well as their rights to interstate travel and commerce.[14] The Superior Court held that "appellant has no standing to assert these rights, for she stands in no special or legally cognizable relationship to the minor (or individual) whose rights are being asserted."[15] Mem. Op. at 3. This holding that Hartford lacked standing to assert Crystal L.'s rights is contrary to established United States Supreme Court precedent, and must be reversed.

The Supreme Court has identified three constitutional requisites for standing to ensure that a litigant fulfills the "case or controversy" requirement of Article III of the U.S. Constitution. Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663-64 (1993) (citations omitted). A party must demonstrate, first, that she has suffered or will

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[14] Throughout this case, Hartford has consistently raised these three constitutional claims in her defense.

[15] If the rule was as the Superior Court framed it -- that Hartford is not entitled to standing because she is not in a professional or otherwise close relationship with Crystal but instead is just an "ordinary citizen" -- application of such a rule would produce bizarre results. Under this flawed reasoning, for example, Hartford would have standing to assert Crystal's rights if Hartford had advertised in the newspaper that she was selling her services as a companion or escort for minors going to abortion clinics, while Hartford would not have standing if, as in the instant case, she accompanied Crystal for free. Surely the Supreme Court could not have intended such an absurd result.

imminently suffer an "injury in fact"; second, that the injury was caused by or can be fairly traced to the opposing party's conduct; and third, that a favorable judicial decision will likely redress the injury she has incurred. Id. Hartford satisfies these constitutional requirements. First, she has been convicted under § 2904 and thus has already suffered an "injury in fact"; second, the Commonwealth caused this injury by prosecuting her under § 2904; and third, a favorable ruling from this Court that Hartford's conduct is not subject to prosecution under § 2904 and thus vacating her conviction would redress her injury.

Although, generally, a litigant may not raise the rights of third parties in seeking relief from the courts, Powers v. Ohio, 499 U.S. 400, 410 (1991) (citations omitted); Barrows v. Jackson, 346 U.S. 249, 255, reh'g. denied, 346 U.S. 841 (1953), this rule disfavoring third-party standing is a rule of practice, or prudential rule, and is not constitutionally mandated. Craig v. Boren, 429 U.S. 190, 193 (1976) ("[O]ur decisions have settled that limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary `rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative.") (citing Barrows, 346 U.S. at 255, 257; Singleton v. Wulff, 428 U.S. 106, 123-24 (1976) (Powell, J., dissenting)), reh'g. denied, 429 U.S. 1124 (1977); Amato v. Wilentz, 952 F.2d 742, 748 (3d Cir. 1991) (same) (citations omitted). See also Erwin Chemerinsky, Federal Jurisdiction, § 2.3.1, at 57-58 (2d ed. 1994) (noting that the Court has identified, in addition to the constitutional requirements for standing, certain prudential standing principles that are not constitutionally mandated, including the general prohibition against asserting the claims of third parties not before the court).

The Supreme Court has relaxed this prudential rule on a number of occasions in order to

protect the constitutional rights of parties not before the court. Powers, 499 U.S. at 410-11; Craig, 429 U.S. at 193-94; Barrows, 346 U.S. at 257. In a series of cases, the Court has developed at least three exceptions to the general rule against third-party standing. Chemerinsky § 2.3.4., at 82. As will be discussed infra, if a litigant satisfies the constitutional requirements for standing described above and also fulfills the criteria of any one of the three exceptions, the Supreme Court has held that the litigant has standing to assert the constitutional rights of a party not before the court. Chemerinsky, § 2.3.4., at 82-83.[16]

### A. Hartford Has Standing to Assert Crystal L.'s Constitutional Rights Because Substantial Legal and Practical Obstacles Prevent Crystal L. From Vindicating Her Own Rights

Under this first exception, the Supreme Court has granted standing to a litigant to raise the constitutional rights of a third party when significant barriers or obstacles – either legal or practical – prevent the third party from asserting her constitutional rights in an appropriate forum. Powers, 499 U.S. at 414-15; Eisenstadt v. Baird, 405 U.S. 438, 446 (1972); Barrows, 346 U.S. at 257.

For example, in Barrows, a property owner was sued for damages by the other parties to an agreement for allowing a black person to occupy her property in violation of a restrictive covenant contained therein. 346 U.S. at 251. The property owner raised the equal protection rights of potential non-Caucasian purchasers and occupiers of the land in arguing that court enforcement of the racially-restrictive covenant would violate their constitutional rights. Id. at 253-54. After

[16]Some lower federal courts have used a balancing approach to the third-party standing question, weighing all the criteria discussed in Part II in reaching their rulings. See, e.g., Hutchins by Owens v. District of Columbia, 144 F.3d 798, 803-04 (D.C. Cir. 1998); Amato, 952 F.2d at 750. But these courts also have emphasized that a party's failure to fulfill one criterion is not dispositive of his/her third-party standing claim. Hutchins, 144 F.3d at 804; Amato, 952 F.2d at 750. Moreover, even applying the balancing approach favored in these cases, Mrs. Hartford would have standing for the reasons discussed herein.

finding that the property owner would suffer imminent injury — specifically, monetary damages — if a court enforced the covenant, id. at 255-56, the Court went on to hold that the property owner had standing to assert the equal protection rights of parties not before the Court. Id. at 257.

Key to the Barrow Court's holding was its finding that since potential non-Caucasian buyers or occupiers of the property were not parties to the covenant, "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." Id. The Court emphasized that considerations underlying the rule of practice generally disfavoring third-party standing "are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained." Id. (Citation omitted). Moreover,

> [t]he relation between the coercion exerted on [the property owner] and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that [the property owner] is the only effective adversary of the unworthy covenant in its last stand.

Id. at 259. The Court reasoned that the property owner would be an effective advocate for these absent parties because of the real and immediate injury that she would suffer if the state were to enforce the unconstitutional covenant.

Similarly in Eisenstadt, the defendant was criminally prosecuted for violating a state statute prohibiting distribution of contraceptives to single persons, after he handed a package of vaginal foam to a young woman attending a lecture which he was delivering. 405 U.S. at 440-41. The defendant argued in his defense that the statute violated the equal protection rights of single people who wished to use contraceptives, even though the statute did not directly prohibit use. Id. at 443-46. The Court held that the defendant had standing to assert these third-party rights because single people denied access to contraceptives "are not themselves subject to prosecution [under the

challenged statute] and, to that extent, are denied a forum in which to assert their own rights." Id. at 446 (citation omitted). The Court pointed out that third-party standing does not depend on whether the litigant is in a professional or personal relationship with the third party because "more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests." Id. at 445. In Eisenstadt, because the defendant was actually convicted under the statute, he had an "adequate incentive" to advocate on behalf of unmarried users of contraceptives. Id. at 443-46.

More recently in Powers, the Court found that a criminal defendant had standing to raise the equal protection rights of potential jurors excluded from service on a petit jury because of their race through the prosecutor's use of peremptory strikes. 499 U.S. at 402. Finding first that a criminal defendant suffers a real injury when the prosecutor strikes potential jurors on racial grounds and that the criminal defendant and excluded jurors shared a "common interest in eliminating racial discrimination" in the courtroom, id. at 413, the Court then went on to consider whether excluded jurors had access to a judicial forum where they could assert their own rights. Id. at 409, 414-15. The Court noted that under a previous holding, jurors excluded on racial grounds have a legal right to bring suit, id. at 414 (citation omitted); thus, Powers is distinguishable from cases such as Barrows and Eisenstadt where an absolute legal barrier existed. Nevertheless, the Court found that the barriers to such a suit were "daunting," given, inter alia, the economic costs of litigation and the fact that jurors are not parties to the jury process and have no chance to voice an objection at the time of exclusion. Id. at 414-15.

As in Barrows and Eisenstadt, in the instant case, absolute legal barriers prevent Crystal L. from asserting that the prosecution of Hartford under § 2904 violates her own constitutional rights.

As in Barrows and Eisenstadt, Crystal L. is not herself subject to prosecution under § 2904, and thus she could neither bring a suit challenging it nor assert her constitutional claims in defense of the statute's enforcement against her. The remaining criterion for standing is met as well: The fact that Hartford was actually convicted under the challenged statute gives Hartford "adequate incentive" to vigorously advocate Crystal L.'s rights.

Even assuming *arguendo* that no legal barriers existed, significant practical obstacles, as in Powers, also preclude Crystal L. from litigating her claims in court. First, such litigation might well lead to the disclosure of her desire to terminate her pregnancy to her parents -- the very people she is trying, and entitled, to prevent from knowing of her decision to have an abortion. Second, Crystal's need, as a minor, for the assistance of other adults to obtain an attorney and get to the courthouse would likely dissuade her from seeking redress on her own.

Because Crystal L. and similarly situated minors will not be able to challenge in an appropriate forum the wrongful application of § 2904 to Hartford's action of accompanying Crystal L. to the New York clinic as violating their own constitutional rights, Supreme Court precedent requires that Hartford has standing to raise Crystal L's rights in this litigation.

### B. Hartford Has Standing to Assert Crystal L.'s Constitutional Rights Because Hartford and Crystal L. Share A Common Interest and the Activity Which Subjected Hartford to Prosecution Under § 2904 Is Part of Crystal's Constitutionally Protected Activity, Such That Resolution of This Case Will Impact Crystal's Rights

Under the second exception to the traditional rule disfavoring third-party standing, even where the third party has recourse to an appropriate forum, the Supreme Court has granted third-party standing to the litigant where: (a) there exists a common interest between the litigant and the third party; and (b) the litigant's activity is linked to the constitutionally-protected activity of the

third party such that (i) disposition of the litigant's claims will directly impact the third-party's exercise of her own constitutional rights and (ii) the litigant has an incentive to advance the interests of the third party. Craig, 429 U.S. at 195-97 (1976); Pierce v. Society of Sisters, 268 U.S. 510, 531-32, 535 (1925). See also Amato, 952 F.2d at 751-52. This exception is distinguished from the first exception discussed above in that typically no legal barriers block third parties from challenging the statute in question in a judicial forum. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 480-81 (1965) (third parties not before the court -- users of contraceptives -- were subject to prosecution under the statute in question); Pierce, 268 U.S. at 530 (challenged statute subjected parents -- the third parties not part of the litigation -- to criminal prosecution if they failed to send their children to public school). Even assuming *arguendo* that this Court found that there are no obstacles preventing Crystal from bringing suit to challenge the application of § 2904 to Hartford's conduct, Hartford still has standing under this second exception.

Under this exception, the Court has found third-party standing in cases where the litigant's conduct for which she is subject to prosecution is part of or intertwined with the third party's constitutionally-protected activity. For example, in Craig, the Court held that a bartender had standing to raise the equal protection claims of males aged 18-20 in contesting a state statute banning the sale of beer to males under 21 while allowing sales to women aged 18 and above. 429 U.S. at 197.[17] In reaching this holding, the Court emphasized that enforcing the statute against the bartender-vendor would indirectly violate the equal protection rights of males aged 18-20, by

[17]The bartender and a male between the ages of 18-20 originally brought the suit seeking injunctive and declaratory relief. The Court was faced with the question of whether to allow the bartender to continue to assert the constitutional rights of males in this age group when his co-plaintiff turned 21, thus mooting the young man's individual claim. Craig, 429 U.S. at 192.

materially impairing their ability to purchase beer. Id. at 195-96. The bartender was entitled to assert the absent party's rights because such rights would be "diluted or adversely affected" should the bartender's litigation fail. Id. at 195 (citations omitted). Moreover, there was no question that the bartender would be an effective advocate of the third-party's rights because she would either have to abide by the statute, thus incurring economic injury, or be subject to sanctions and loss of her license if she disobeyed it. Id. at 194.

The threat of economic injury to the litigant also was critical to the Court's holding in Pierce, in which two private schools sought to enjoin enforcement of a statute subjecting parents to prosecution if the latter failed to send their children to public school. 268 U.S. at 531-32. The Court held that the private schools had standing to argue that the statute unconstitutionally infringed on the liberty rights of parents to educate and raise their children as they see fit. Id. at 534-36. The schools and parents who wished to enroll their children in private institutions shared a common interest, i.e., that parents not be legally prohibited from doing so; resolution of the school's suit for injunctive relief would directly affect the parents' liberty interest such that their fates were intertwined; and the schools had a strong incentive to fight on behalf of these parents because they were "threatened with destruction through the unwarranted compulsion which the [state was] exercising over present and prospective patrons." Id. at 235.

The Court also has granted standing in situations where the litigant has a professional relationship, as opposed to economic dealings, with the third party. In these cases, the Court has also relied on the nature of the relationship between the parties -- that is, that they share a common interest and the litigant's activity is intertwined with the third-party's ability to exercise her own rights, such that the litigant will advocate on the third-party's behalf and resolution of the

suit/prosecution will affect the third-party's rights. This is most commonly seen in cases where physicians and other medical professionals bring suit on behalf of their patients, both current and prospective. See, e.g., Singleton v. Wulff, 428 U.S. 106, 108, 110, 114-15, 118 (1976) (plurality opinion) (holding that physicians had standing to challenge state statute denying Medicaid payment for abortions not medically necessary on grounds that it violated prospective patients' fundamental right to seek an abortion; physicians' activity of performing abortions was "inextricably bound up" with the exercise of third-party rights at stake, and physicians will be effective proponent of the third-party's rights due to nature of relationship); Griswold, 381 U.S. at 481 (holding that clinic director and physician convicted of state statute outlawing contraceptive use on accessory theory had standing to assert rights of prospective patients, since third-party rights would likely be adversely impacted if the rights were not considered in litigation involving those who are in a confidential relation to them).

Thus, contrary to the Superior Court's holding that Hartford lacked standing because she had no "special or legally cognizable relationship" to Crystal L., "a close personal relationship is neither necessary nor sufficient for third party standing." Amato, 952 F.2d at 751. "Moreover, the relationship between the third party and the plaintiff only counts insofar as it is linked to the right asserted." Id. at 752, citing Singleton, 428 U.S. at 114-15. See also Eisenstadt, 405 U.S. at 445 (holding that impact of litigation on third-party's interests is more important than nature of relationship between litigant and those whose rights she seeks to assert). Under this analysis, Hartford has standing to assert Crystal L.'s rights because: (a) she and Crystal L. share a common interest in assuring that Hartford and other adults who help young people exercise their constitutional rights will not be deterred by possible prosecution and (b) Hartford's conduct in this

case is linked to Crystal L.'s exercise of her rights. As explained in Part II.A. supra, as a practical matter Crystal L. and other minors need adult assistance to obtain an abortion. Accordingly, resolution of Hartford's appeal will (i) substantially impact the ability of Crystal L. and other minors to obtain abortions and (ii) Mrs. Hartford has a strong incentive to further the minors' rights because she has been prosecuted for the very conduct that aided Crystal in the exercise of her own rights.

### C. Hartford Has Standing to Raise Crystal's Constitutional Rights Because Application of § 2904 to Hartford's Conduct Is Unconstitutionally Overbroad and Will Have a Chilling Effect on the Exercise of Constitutionally-Protected Activity

The Supreme Court has recognized a third exception to the prudential rule disfavoring third-party standing in cases where the statute is attacked for being overbroad and casting a chilling effect on constitutionally-protected activity. See Alexander v. U.S., 509 U.S. 544, 555 (1993); Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392-93 (1988); Secretary of State of Maryland v. Munson, 467 U.S. 947, 956-58 (1984). See also Chemerinsky, s. 2.3.4, at 86.[18]

Thus, in Munson, the Court granted third-party standing to a professional fundraising corporation to assert the First Amendment rights of free speech and assembly of charities, in challenging a state statute prohibiting charities from paying as expenses to a fundraiser more that 25 percent of the amount raised in any single fundraising activity. 467 U.S. at 950, 955-59. After finding that the fundraiser had suffered threatened and actual injury due to the statute sufficient to satisfy Article III's case or controversy requirements, id. at 954, the Court went on to consider

[18] Although the overbreadth doctrine is most commonly invoked in the context of First Amendment rights of speech and association, the Court also has applied the doctrine to other freedoms guaranteed by the Bill of Rights. See, e.g., Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964) (applying overbreadth analysis to the Fifth Amendment right to travel).

whether the entity could raise the constitutional rights of the absent charities when (a) the fundraiser did not allege that the statute violated its own First Amendment rights and (b) the charities could bring a direct challenge to the statute. Id. at 955-56.

The Munson Court reasoned that because individuals engaged in constitutionally-protected activity would possibly refrain from such activity instead of risking punishment or incurring the cost of bringing suit, the "concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." Id. at 956. "`Litigants, therefore, are permitted to challenge a statute not because their own [constitutional rights] are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected [activity].'" Id. at 956-57, quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). See also Am. Booksellers, 484 U.S. at 387, 392-93 (applying same reasoning as in Munson to hold that booksellers had standing to assert First Amendment rights of potential book buyers in contesting statute prohibiting the display of books "harmful to juveniles" ).

In the overbreadth exception, the fact that the absent parties had access to a judicial forum to assert their own rights is not dispositive. Munson, 467 U.S.at 956. Instead, the critical inquiry in these cases is whether: (a) application of the statute will have a chilling effect on the constitutionally protected activities of third parties; (b) the litigant has suffered an injury-in-fact; (c) the litigant and third-party share a common interest in the outcome of the litigation; and (d) the litigant has sufficient incentive to fully advocate on behalf of the third party. Id. at 956-58.

These criteria are met in the instant case. Application of § 2904, a parental kidnapping statute, to prosecute Hartford for accompanying Crystal L. to obtain an abortion, will "chill" both

young women from seeking the help of concerned adults in exercising their constitutional rights, as well as limit the likelihood that these young women will find concerned adults willing to risk assisting them in that exercise. Similarly, as set forth in Part II.B. supra, Hartford has suffered an injury-in-fact, Hartford and Crystal L. share a common interest in preventing § 2904 from being applied in this way, and Hartford has the incentive to zealously advocate on behalf of these absent parties.[19]

## III. Where Prior Counsel Failed to Challenge the Sufficiency of the Evidence in Hartford's Appeal to the Superior Court, and Defendant Properly Raises it Before This Court, the Decision of the Superior Court Must Be Reversed and Hartford's Conviction Should Be Vacated

Hartford retained new counsel shortly after the Superior Court's decision to reverse her conviction and remand for a new trial. Substitute counsel reviewed the entire record and concluded that prior counsel provided ineffective assistance by failing to raise a fundamental principle of jurisprudence: the Commonwealth bears the burden of proving each element of the crime charged beyond a reasonable doubt. In this matter, the Commonwealth failed to present evidence of each element of the offense of interfering with the custody of children, specifically (1) that Hartford "took" the minor and (2) that Hartford "substantially interfered" with parental custody. The

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[19]The overbreadth doctrine is properly raised and applied in the instant case. First, the conduct threatened by § 2904 — that is, the ability of a minor under the age of fourteen to seek the assistance of an adult in the exercise of her statutory and constitutional right to have an abortion without parental consent — falls within the array of rights protected by the Bill of Rights. See Roe v. Wade, 410 U.S. 113 (1973) (holding that women have constitutional right to abortion); Bellotti v. Baird, 443 U.S. 622 (1979) (extending the constitutional right to abortion to minors). See also Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). These rights have been codified in Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. § 3206. Moreover, the right of a woman to decide whether to terminate her pregnancy derives from the Constitution's general protection of the right to privacy, which itself is derived in part from the First Amendment. See Roe, supra; Stanley v. Georgia, 394 U.S. 557 (1969).

Superior Court unanimously agreed, but subjected appellant to another trial because Hartford's prior counsel failed to raise a claim of legal insufficiency in either post-verdict motions or on appeal. Hartford, through new counsel, now challenges the sufficiency of the evidence. This Court must not turn away from reversing a decision that subjects appellant to a second, unnecessary trial when prior counsel's ineffectiveness is apparent on the record.

Here, where a unanimous Superior Court held the Commonwealth presented insufficient evidence to convict appellant, a new criminal trial violates double jeopardy as set forth in Article I, § 10 of the Pennsylvania Constitution and the Fifth Amendment to the Federal Constitution. Double jeopardy has been held to preclude retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. Burks v. U.S., 437 U.S. 1, 18 (1978). "[W]here there is an insufficiency of evidence determination, the only remedy is the discharge of the defendant for the crime or crimes charged." Commonwealth v. Vogel, 501 Pa. 314, 324, 461 A.2d 604, 609 (1983) (emphasis added). Double jeopardy "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Id. at 501 Pa. at 318, 461 A.2d at 606 (citing Burks at 11). A remand in this matter effectively gives the Commonwealth precisely what the constitutions proscribe against, allowing the Commonwealth another "bite" of the proverbial apple.

### A. A Challenge to the Sufficiency of the Evidence May be Raised for The First Time on Appeal Where the Record Clearly Demonstrates Insufficient Evidence to Sustain A Conviction

Though raised for the first time, this Court is not barred from reviewing appellant's challenge to the sufficiency of the evidence. Under Pennsylvania Rule of Criminal Procedure 1124(A)(7) and its explanatory comment, a challenge to the sufficiency of the evidence can be made

for the first time on appeal. See Concurring Mem. Op. at 2 n.3 (citing Commonwealth v. Wertelet, ___ Pa. Super. ___, 696 A.2d 206, 208 n.2 (1997) (same)).[20] New counsel took the first available opportunity to raise this sufficiency challenge in its Petition for Allowance of Appeal. Its assertion does not prejudice the Commonwealth. The evidence presented at trial, or lack thereof, will not and cannot change. Nor can the Commonwealth claim that the present challenge is unanticipated given the attention paid to the issue by the Superior Court. The Commonwealth will have ample opportunity to provide this Court with authority substantiating the challenged elements of the offense.

Moreover, this Court has recognized, in limited instances, an exception where there exists a strong public interest in protecting the judicial system from harm caused by improperly preserved issues. In such a case, an issue may be raised by the court *sua sponte*, or the court may permit a party to raise the new issue or theory. Klein v. Commonwealth, State Employees' Retirement System, 521 Pa. 330, 555 A.2d 1216 (1989) (court cited exception and *sua sponte* raised issue concerning legal infirmity of pension statute, because infirmity though not raised by parties below, threatened the unity and harmony of the unified judicial system). This Court has acknowledged that there are "occasional rare situations where an appellate court must consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be the normal procedure." Commonwealth v. McKenna, 476 Pa. 428, 439, 383 A.2d 174, 180 (1978).

### B. The Evidence Presented at Trial was Legally Insufficient to Sustain Appellant's Conviction.

Before branding a citizen a criminal, the Commonwealth bears the burden of producing

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[20] Similarly, substitute counsel's challenge to the effectiveness of Hartford's prior representation, discussed infra at Section III. C. infra, is properly raised.

sufficient evidence on each element of the crime charged to establish beyond a reasonable doubt that a crime has been committed by the person charged. When reviewing a sufficiency challenge, this Court must view the evidence in the light most favorable to the Commonwealth, as verdict winner, and determine whether sufficient evidence was proffered to prove each element of the crime beyond a reasonable doubt. Commonwealth v. Cox, 546 Pa. 515, 686 A.2d 1279, 1285 (1996); Commonwealth v. Murphy, 540 Pa. 318, 657 A.2d 927, 930 (1995). Few cases have provided Pennsylvania courts an opportunity to examine the elements of Section 2904, but a review of their holdings shows that the Commonwealth did not sustain its burden of proof. Here, a unanimous panel of the Superior Court held, even drawing all inferences in favor of the Commonwealth, that the evidence failed to establish that Hartford "took" a minor from her mother's custody and against her mother's wishes. (See Mem. Op. at 12 n.14.)

### 1. The Record is Barren of Any Evidence that Rosa Hartford "Took" the Minor

The offense for which appellant was tried is defined as follows:

> A person commits an offense if he knowingly or recklessly takes or entices any child under the age of eighteen years from the custody of its parent, guardian, or other lawful custodian, when he has no privilege to do so.

18 Pa. Cons. Stat. § 2904(a) (emphasis added). In this case the charge was not that Hartford "enticed" the child; rather she was accused of having "taken" the minor. The "taking" aspect of this statute has been interpreted as being more than the mere transporting of a minor from one location to another. Commonwealth v. Rodgers, 410 Pa. Super. 341, 345, 599 A.2d 1329, 1331 (1991) (holding that absent an "affirmative physical removal of the child" Section 2904 is not violated.); Concurring Mem. Op. at 2. In Rodgers, appellant was convicted for interfering with the custody of

children who came to her apartment to sell drugs. The appellate court vacated the judgment of sentence and discharged the appellant because the Commonwealth "utterly failed" to prove appellant took or enticed minors from their parents to sell contraband. Id. at 1331. The evidence showed that appellant had interacted with the minors in a few instances, but the children worked for other individuals in the apartment complex.

At least one member of the Superior Court panel recognized that "the Commonwealth must show that the accused's conduct constituted a 'substantial interference with parental control.' [citing Commonwealth v. Rodgers, 410 Pa. Super at 341, 599 A.2d at 1331] Thus, it is not enough that the accused be in the company of the minor unbeknownst to the parent (or parents), it must also be demonstrated that the accused was exercising control over the situation, and that that control rose to a level of 'substantial interference.'" Concurring Mem. Op. at 2-3.

In the case at bar, the Commonwealth plainly failed to establish that Hartford affirmatively removed the child from her parents' physical custody within the meaning of the statute. The evidence merely shows that Hartford and two other persons accompanied the minor to the New York Abortion Clinic. The Commonwealth established that on the morning of August 31, 1995, the minor left her parent's house to meet with her girlfriend (Tr. at 36, 48), went to a pre-arranged location (Tr. at 86-87), was picked up by Hartford's son (Tr. at 84, 87) and was then driven to Hartford's house (Tr. at 88). Thereafter Hartford's neighbor drove the minor, the minor's girlfriend, and Hartford to New York in the neighbor's car. (Tr. at 84, 124-127). Hartford was not even the driver, nor was Hartford's car used to drive the minor to New York. There was no evidence that Hartford exercised control over the actions of the minor, or even influenced the minor's decision. The minor testified that she was not coerced by Hartford or anyone else into this trip, or into having

the abortion. She testified that she arrived at the decision to have the abortion on her own after consultation with people other than the Hartford (Tr. at 85, 96-99).

Putting aside Hartford's argument that Crystal was not in her parents' legal custody for purposes of traveling out of state to get a pregnancy test and an abortion, the Commonwealth failed to present sufficient evidence that Hartford took or enticed the minor. Rather, where the record establishes that Hartford was with the minor for less than eight hours, did not own or drive the vehicle which transported the minor across state lines, and did not in any way coerce the minor to go on the trip, Hartford's actions were not a "taking" within the meaning of the Crimes Code.[21]

**2. The Record is Barren of Any Evidence That Hartford "Substantially Interfered" with Parental Prerogative.**

The requirement that one "substantially interfere" with parental custody necessitates a showing of something more than that the parent merely did not know the whereabouts of her child. The Superior Court has held that "the Commonwealth must at least show that a defendant was engaged in activity that the parent (or parents) found objectionable." Concurring Mem. Op. at 3 (emphasis added). Parental disapproval must not be presumed but proven, and, absent an expression of such disagreement, the Commonwealth's disapproval is no substitute. In a criminal prosecution for interference with parental custody, the Commonwealth bore the burden "of demonstrating that the minor's mother objected to the activity which transpired while the minor was in the company of the accused." Id. The record is noticeably barren of any such evidence. The parent of the minor neither testified that she objected to what happened on the day in question, nor

[21] None of the other individuals who were in the vehicle which transported the minor to and from the abortion clinic, including the driver, were charged with a crime (as principals or conspirators). In the absence of any other prosecution, the actions of other persons must not be ascribed to Hartford.

that she held any animosity or resentment toward the accused. (Tr. at 57-68) In fact, the parent never filed a criminal complaint. "Although it is clear that a prosecuting attorney may initiate a prosecution where the alleged victim does not, that authority does not relieve the prosecution of sustaining its burden of proof." Id. In this case that burden required evidence on the record of the "substantial interference": some expression of disagreement on the part of the parent with the action or decision which allegedly usurped the parental function. There is no such evidence. Thus this conviction cannot be sustained on this record.

### C. Prior Counsel's Ineffectiveness Prejudiced Hartford Because it Subjected Her to an Unnecessary Second Trial

Anyone convicted of a crime has an absolute right to appeal, Commonwealth v. Wilkerson, 490 Pa. 296, 416 A.2d 477 (1980), Pa. Const., Article V, § 9, and is entitled to effective assistance of counsel in perfecting an appeal. Commonwealth v. McCandless, 301 Pa. Super. 128, 447 A.2d 275, 276 (1982). Counsel's failure to properly effectuate an appellant's constitutional right to appeal is ineffective per se. See Commonwealth v. Wilkerson, 490 Pa. at 299, 416 A.2d at 479. Where new counsel begins representing a defendant after the verdict and direct appeal, and determines that prior counsel failed to raise challenges that were likely to abrogate the conviction, new counsel must raise a claim of ineffectiveness at the earliest opportunity. See Commonwealth v. Shannon, 530 Pa. 279, 285 608 A.2d 1020, 1023 (1992) ("It is well established that the ineffectiveness of prior counsel must be raised as an issue at the earliest stage in the proceedings at which the counsel whose effectiveness is being challenged no longer represents the defendant."); see also Commonwealth v. Collins, 538 Pa. 477, 479, 649 A.2d 432, 433 (1994) ("[S]ince current counsel was not required to argue its own ineffectiveness, the failure to argue ineffectiveness with regard to withdrawing the guilty plea can be excused and it was premature for the Superior Court to conclude that trial counsel's actions operated as a waiver of Appellant's rights to raise this issue."). This Court has held it "will excuse the waiver only as to claims of ineffectiveness of counsel at trial and on direct appeal, and provided the standards announced in Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987) and its progeny are met." Commonwealth v. Christy, 540 Pa. 192, 202, 656 A.2d 877, 881 (Pa. 1995).

The present posture of this case dictates that this Court excuse the waiver of evidentiary sufficiency and hear Hartford's present challenge because of the ineffective assistance of prior

counsel. Hartford cannot raise this challenge in a petition under the Post Conviction Relief Act because she does not satisfy the first requirement for statutory post-conviction relief, conviction of a crime. See 42 Pa. Cons. Stat. § 9543(a)(1). Consequently, if the glaring inadequacies in the record below are not reviewed Hartford's ineffective challenges will be waived by the remand for a new trial. Such an outcome would contradict Commonwealth v. McBee, 513 Pa. 255, 520 A.2d 10 (1986), where this Court, reviewing a claim of ineffective assistance held that "the case should be remanded for the appointment of new counsel except (1) where, it is clear from the record that counsel was ineffective." 513 Pa. at 261, 520 A.2d at 13 (emphasis added).

In order to establish ineffective assistance of counsel, "appellant must demonstrate that: (1) the underlying claim is of arguable merit; (2) the particular course chosen by counsel did not have any reasonable basis designed to effectuate his client's interests; and (3) counsel's ineffectiveness prejudiced appellant." Commonwealth v. Speight, 544 Pa. 451, 460-61, 677 A.2d 317, 321 (1996) (citing Commonwealth v. Edmiston, 535 Pa. 210, 237, 634 A.2d 1078, 1092 (1993) (citing Commonwealth v. Pierce, 515 Pa. 153, 158, 527 A.2d 973, 975 (1987))), cert. denied, 117 S.Ct. 967 (1997). As stated in Section III.B, the underlying claim here, that the Commonwealth's evidence was insufficient to establish a taking or substantial interference, is clearly of arguable merit.

Second, the particular course chosen by counsel, i.e., not to raise a sufficiency claim, did not have any reasonable basis designed to effectuate Hartford's interests. A challenge in post-verdict motions and/or on appeal[22] to the sufficiency of the evidence would not have required counsel to forgo any other challenge to Hartford's conviction, nor would it in any way have undermined any of

[22] Such a challenge would have been timely under Commonwealth v. Wertelet, ___ Pa. Super. ___, 696 A.2d 206, 208 n.2 (1997) (challenge to sufficiency of evidence can be raised for the first time on appeal), and under Pa.R.Crim.P. 1124(a)(7) (same).

those challenges. Thus, in failing to raise the sufficiency claim, counsel appears not to have made a tactical decision but rather to have overlooked a viable basis for challenging Hartford's conviction.

Third, prior counsel's ineffectiveness clearly prejudiced Hartford. While counsel generally pursued issues of first impression regarding the unprecedented application of § 2904, counsel failed to include a more straightforward challenge to the sufficiency of the evidence supporting Hartford's conviction. The prejudice to Hartford is evident given the strength of the underlying sufficiency claim discussed above, and given that the sufficiency claim does not require a court to reach issues of first impression regarding the application of § 2904, which by definition had no certain outcome. Indeed, all three members of the Superior Court panel agreed that the evidence was insufficient. Moreover, even though the Superior Court reversed Hartford's conviction on the jury charge issue, prior counsel's ineffectiveness plainly prejudiced Hartford by exposing her to a second, unnecessary trial. If counsel had not failed to raise the sufficiency claim, the Superior Court would likely have vacated the conviction without remanding for a new trial. This Court must reverse the Superior Court's order for a new trial and vacate the conviction.

## IV. Conclusion

WHEREFORE, for the foregoing reasons, this Court must reverse the Superior Court's Order for a new trial and vacate Defendant-Appellant's conviction.

Respectfully submitted,

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Dated: October 5, 1998

## APPENDIX G - PERTINENT LAWS

UNITED STATES CONSTITUTION

AMENDMENT XIV, SECTION 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTERFERENCE WITH THE CUSTODY OF A CHILD

18 PENNSYLVANIA CONSOLIDATED STATUTES § 2904

(a) Offense defined. - A person commits an offense if he knowingly or recklessly takes or entices any child under the age of eighteen years from the custody of its parent, guardian, or other lawful custodian, when he has no privilege to do so.

(b) Defenses. - It is a defense that:

(1) the actor believed that his action was necessary to preserve the child from danger to its welfare; or
(2) the child, being at the time, not less than fourteen years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child; or
(3) the actor is the child's parent or guardian or other lawful custodian and is not acting contrary to an order entered by a court of competent jurisdiction.

ABORTION CONTROL ACT

18 PENNSYLVANIA CONSOLIDATED STATUTES § 3201 et seq.

3202. Legislative Intent - It is the intention of the General Assembly of the Commonweal of Pennsylvania to protect hereby the life and health of the woman subject to abortion and to protect the life and health of the child subject to abortion. It is the further intention of the General Assembly to foster the development of standards of profession conduct in a critical area of medical practice, to provide for the development of statistical data and to protect the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term. The General Assembly finds as fact the rights and interests further by this chapter are not secure in the context in which abortion is presently performed.

3206. Parental Consent -

(a) General rule. -- Except in the case of a medial emergency, or except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incapacitated person under 20 Pa.C.S. § 5511 (relating to petition and hearing; independent evaluation), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the informed consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is an incapacitated person, he first obtains the informed consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In the case of a pregnancy that is the result of incest where the father is a party to the incestuous act, the pregnant woman need only obtain the consent of her mother.

(b) Unavailability of parent or guardian. -- If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.

(c) Petition to court for consent. -- If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion of if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

(d) Court order. -- If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

_____(i) Penalty - Any person who performs an abortion upon a woman who is an unemancipated minor or incapacitated person to whom this section applies either with knowledge that she is a minor or incapacitated person to whom this section applies, or with reckless disregard or negligence as to whether she is a minor or incapacitated person to whom this section applies, and who intentionally, knowingly or recklessly fails to conform to any requirement of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be suspended in accordance with procedures provided under the act of October 5, 1978, known as the Osteopathic Medical Practice Act of 1985, or the successor acts, for a period of at least three months. Failure to comply with the requirements of this section is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this Commonwealth shall not be construed to preclude the award of exemplary damages or damages for

emotional distress even if unaccompanied by physical complications in any appropriate civil action relevant to violations of this section. Nothing in this section shall be construed to limit the common law rights of parents.

## DOMESTIC RELATIONS CODE -- CUSTODY

### 23 PENNSYLVANIA CONSOLIDATED STATUTES §§ 5301-5302

5301. Declaration of Policy

The General Assembly declares that it is the policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights and responsibilities of child rearing by both parents and continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated.

5302. Definitions

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

**"Legal Custody."** The legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions.

**"Physical Custody."** The actual physical possession and control of a child.

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| COMMONWEALTH OF PENNSYLVANIA, | : | SUPREME COURT OF |
| | : | PENNSYLVANIA |
| Plaintiff-Appellant | : | |
| | : | |
| versus | : | Nos. 0113 and 0114 |
| | : | |
| ROSA HARTFORD | : | |
| Defendant-Appellant | : | |

CERTIFICATE OF SERVICE

I hereby certify that I am this day, October 5, 1998, serving copies of the foregoing Brief of Defendant-Appellant and Application for Leave to Continue to Proceed in Forma Pauperis upon the persons and in the manner indicated below, which satisfies the requirements of Pa.R.A.P. 121 and 2187:

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Dated: October 5, 1998