SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION
LETTER BRIEF

APPELLATE DIVISION DOCKET NUMBER A – 000689 – 24 T1

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Letter Brief on Behalf of: ***Dayana Abreau (a/k/a Dayana Abreu)***

Thursday, January 2, 2025

State of New Jersey, Plaintiff – Respondent,

VS.,

Dayana Abreau (a/k/a Dayana Abreu), Defendant – Appellant.

Case Type: **Criminal**

County: **Hunterdon**

Trial Court Docket Number: **1021 S 2024 163**

Sat Below: **Hon. Christopher J. Garrenger, J.S.C.**

Damiano Marcello Fracasso, Esq.
On the Brief

Dear Judges:

LETTER BRIEF STATEMENT

Please accept the filing of this letter brief in lieu of a more formal brief.

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TABLE OF JUDGMENT(S), ORDER(S), RULING(S), AND DECISIONS ON APPEAL

COMBINED STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The Appellant named as, **DAYANA ABREAU** ("Defendant") was charged on a Complaint – Summons on June 26, 2024 for allegedly violating N.J.S.A. 4:22 – 24(b) and N.J.S.A. 4:22 – 17(c)(3) on May 11, 2024 in the Township of Raritan **(Da17)**. According to the charging document, both alleged offenses are crimes of the third degree.

On August 7, 2024, Defendant filed a Notice of Motion to Dismiss the State's Complaint on the grounds that N.J.S.A. 4:22 – 24(b) and N.J.S.A. 4:22 – 17(c)(3) are unconstitutionally void for vagueness and overbreadth. **(Da1 – Da24)** The State opposed that motion in writing on August 28, 2024 **(Da25 – Da49)**. The Defendant filed a reply brief on September 8, 2024 **(Da50 – Da57)**. The trial court took no testimony and heard oral argument on September 11, 2024 and then reserved decision.[2]

[1] The procedural history and statement of facts were intentionally combined as they are inextricably intertwined.
[2] This transcript shall be referred to as "1T."

On September 25, 2024, the trial court issued an order denying the Defendant's motion to dismiss indictment [sic] **(Da58)**. That order was "deleted" on September 25, 2024 **(Da59)** and then replaced with an order denying the Defendant's "motion." **(Da60)** A Statement of Reasons then followed **(D – Da65)**. The Defendant has not been and never was indicted. What appears to be a 45 day stay of proceedings was entered by way of email issued by the trial court judge's law clerk **(Da65 – Da66)**. The trial court is not issuing a R. 2:5 – 1(b) statement or opinion **(Da56)**. The Appellant was granted leave by this Court to appeal on an interlocutory basis on November 8, 2024 **(Da67)**.

ARGUMENT

I. STANDARD OF REVIEW (Not Argued Below).

The Appellate Division's standard of review of a trial court's factual findings and conclusions of law is well-settled. This Court is only bound by the findings of the court below when that are supported by adequate, substantial, and credible evidence. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484, (1974). Thus, this Court is empowered to disturb the factual findings and legal conclusions of the trial judge when it is convinced that they are so manifestly unsupported by or inconsistent

with the competent, relevant and reasonably credible evidence as to offend the interests of justice. Rova Farms id. A trial court's interpretation of the law and the legal consequences that flow form established facts are not entitled to any special deference. See Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). An award of counsel fees in a matrimonial action is discretionary. On appeal, a decision regarding counsel fees will be reversed upon a showing of an abuse of discretion involving a clear error in judgment. Tannen v. Tannen, 416 N.J. Super. 248, 285 (App. Div. 2010), aff'd, 208 N.J. 409 (2011). When a court of review address a trial court's construction of a statute, its review is *de novo*. In that inquiry, the court of review looks to the Legislature's intent as expressed in the statute's plain terms. Matter of A.D., 259 N.J. 337, 351 (2024).

In this matter, the factual findings of the court below are entitled to a lower level of deference, if any, because of the Due Process infirmities from which those factual findings are borne. A litigant in civil proceedings is entitled to a fair hearing, imbued with the protections of due process. The due process guarantee expressed in the Fourteenth Amendment to the United States Constitution includes "the requirement

of 'fundamental fairness'" in a legal proceeding. D.N. v. K.M., 429 N.J. Super. 592, 602 (App. Div. 2013). Criminal proceedings such as this are entitled to equal or greater due process protections.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN DETERMINING THAT N.J.S.A. 4:22 – 24(B) AND N.J.S.A. 4:22 – 17(C)(3) DO NOT VIOLATE THE UNITED STATES AND NEW JERSEY CONSTITUTIONS JOINTLY AND SEVERALLY. (Argued Below Da60 – Da64).

N.J.S.A. 4:22 – 24(b) provides as follows:

> a. A person who shall:
>
> > (2) Be present and witness, pay admission to, encourage or assist therein;
>
> ...Shall be guilty of a crime of the third degree.

N.J.S.A. 4:22 – 17(c)(3) provides as follows:

> c. It shall be unlawful to purposely, knowingly, or recklessly:
> > (3) Cause [sic] or procure [sic] an act described in paragraph (1) or (2) of this subsection to be done, by any direct or indirect means, including but not limited to through the use of another living animal or creature; or

"an act described in paragraph (1) or (2) of this subsection" consists of acts which:

> 1) Torment, torture, maim, hang, poison, unnecessarily or cruelly beat, cruelly abuse, or needlessly mutilate a living animal or creature; [or]
>
> (2) Cause bodily injury to a living animal or creature by failing to provide the living animal or creature with necessary care, whether as the owner or as a person otherwise charged with the care of the living animal or creature;

The material term(s) and element(s) "living animal or creature" is not defined anywhere in N.J.S.A. 4:22 – 17.1 (the "Definitions" section) or in the statute itself. In its statement of reasons, the trial court rewrote the statutes on an *ex post facto* basis and used a dictionary of its own choosing to save the both of the statutes from being declared unconstitutional.

For the germane reasons set forth in the Defendant's moving brief below **(Da3 – Da16)** and reply brief below **(Da50 – Da56)**, N.J.S.A. 4:22 – 24(b) and N.J.S.A. 4:22 – 17(c)(3) are unconstitutionally void for vagueness and overbreadth and even as applied. The trial court's conclusions of law are not entitled to any deference by this court and must be reviewed *de novo* on the record.

United State v. Stephens, 559 U.S. 460, 464 – 464 (2010) was not cited by the trial court in its statement of reasons **(Da61 – Da64)**. The holding in Stephens was that 18 U.S.C.A. §48 (the federal "Depiction of Animal Cruelty" statute) was unconstitutional because it was "substantially overbroad." Although subsequently amended by the Congress in the wake of the Stephens decision, the version of "§48" ruled upon by the Supreme Court provided as follows:

> (a) Creation, sale, or possession. Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.
>
> (b) Exception. Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.
>
> (c) Definitions. In this section
>
> (1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

> (2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States. **(Da68)**

The Supreme Court struck §48 down as unconstitutionally overbroad even though it had legislatively crafted definitions, articulated a requisite *mens rea* and was more narrowly crafted and was constructed with complete thoughts.

As a result of the Stephens decision, §48 now provides as follows:

> **(a) Offenses.**
> **(1) Crushing.** It shall be unlawful for any person to purposely engage in animal crushing in or affecting interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States.
> **(2) Creation of animal crush videos.** It shall be unlawful for any person to knowingly create an animal crush video, if
> **(A)** the person intends or has reason to know that the animal crush video will be distributed in, or using a means or facility of, interstate or foreign commerce; or
> **(B)** the animal crush video is distributed in, or using a means or facility of, interstate or foreign commerce.
> **(3) Distribution of animal crush videos.** It shall be unlawful for any person to knowingly sell, market, advertise, exchange, or distribute an animal crush video in, or using a means or facility of, interstate or foreign commerce.

(b) Extraterritorial application. This section applies to the knowing sale, marketing, advertising, exchange, distribution, or creation of an animal crush video outside of the United States, if-

(1) the person engaging in such conduct intends or has reason to know that the animal crush video will be transported into the United States or its territories or possessions; or

(2) the animal crush video is transported into the United States or its territories or possessions.

(c) Penalties. Whoever violates this section shall be fined under this title, imprisoned for not more than 7 years, or both.

(d) Exceptions.

(1) In general. This section does not apply with regard to any conduct, or a visual depiction of that conduct, that is

(A) a customary and normal veterinary, agricultural husbandry, or other animal management practice;

(B) the slaughter of animals for food;

(C) hunting, trapping, fishing, a sporting activity not otherwise prohibited by Federal law, predator control, or pest control;

(D) medical or scientific research;

(E) necessary to protect the life or property of a person; or

(F) performed as part of euthanizing an animal.

(2) Good-faith distribution. This section does not apply to the good-faith distribution of an animal crush video to--

(A) a law enforcement agency; or

(B) a third party for the sole purpose of analysis to determine if referral to a law enforcement agency is appropriate.

(3) Unintentional conduct.--This section does not apply to unintentional conduct that injures or kills an animal.

> **(4) Consistency with RFRA.**--This section shall be enforced in a manner that is consistent with section 3 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-1).
>
> **(e) No preemption.** Nothing in this section shall be construed to preempt the law of any State or local subdivision thereof to protect animals.
>
> **(f) Definitions.** In this section
>
> **(1)** the term "animal crushing" means actual conduct in which one or more living non-human mammals, birds, reptiles, or amphibians is purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242);
>
> **(2)** the term "animal crush video" means any photograph, motion-picture film, video or digital recording, or electronic image that
>
> **(A)** depicts animal crushing; and
>
> **(B)** is obscene; and
>
> **(3)** the term "euthanizing an animal" means the humane destruction of an animal accomplished by a method that
>
> **(A)** produces rapid unconsciousness and subsequent death without evidence of pain or distress; or
>
> **(B)** uses anesthesia produced by an agent that causes painless loss of consciousness and subsequent death.

Not only is there a notable difference between the statutes which form the basis of this interlocutory appeal and the current version of §48, but Congress did not rely on ephemeral internet dictionary definitions of words to criminalize conduct (as opposed to leaving the reader guessing and adding words that aren't there or even part of the legislation) and it

makes appropriate exceptions to narrowly tailor the statute to constitutionally permissible parameters.

On its face, N.J.S.A. 4:22 – 17(c)(3) criminalizes what are otherwise lawful activities in this state such as fishing, using a mousetrap, using flypaper or a flyswatter, spraying insecticide, stepping on a cockroach, declawing a cat, cropping a dog's ears or tail, horseracing cooking a live lobster or crab in boiling water, steaming clams or mussels or fumigating termites. The statutes does not provide fair notice as to when someone is acting "needful" when "mutilating" a "living animal or creature." How exactly does one "needfully mutilate a living animal or creature? On that topic… what is the difference between a living animal and a living creature? Aren't they both organisms within the same taxonomical kingdom? Why is it lawful to "abuse" "a living animal or creature" but not "cruelly abuse" one? When does everyday socially acceptable "abuse" of a "living animal or creature" transgress to "cruel" abuse which is criminal activity? When exactly is the statute violated if a "living animal" such as a human being feels "tormented" by another human being? Application of this statute as written can lead to arbitrary and carious prosecutions instigated by disgruntled family members, co – workers,

neighbors, customers, business proprietors, voters, lottery ticket purchasers and other members of society who experience "anguish" over anything at all. This can criminalize, for example, tendering a tepid cup of coffee when the recipient expected a hot one, making a customer or guest wait on line too long to use a bathroom, requiring an employed to have to work at an office with the thermostat set at 60 degrees or exposing anyone to listening to more than *eight* (8) bars of music by John Tesh or Yanni (or both) against their will. This statute also literally criminalizes having an incessantly barking dog on one's property (*i.e.* through "indirect means," the barking dog… "another living animal or creature" … "torments" a listener (a living animal or creature" with the barking).

As for N.J.S.A. 4:22 – 24a(2), neither the State or the trial court can rewrite this statute to save it from abrogation on the grounds of unconstitutionality **(Da61 – Da64 & Da30)**. Only the legislature can do that and if it were to do so now, it would be an illegal ex post facto law. The Defendant is charged with allegedly violating, N.J.S.A. 4:22 – 24(a)(2). For the sake of structural clarity, N.J.S.A. 4:22 – 24(a) provides as follows:

> a. A person who shall:
> (1) Keep, use, be connected with or interested in the management of, or receive money for the admission of a person to, a place kept or used for the purpose of fighting or baiting a living animal or creature;
> (2) Be present and witness, pay admission to, encourage or assist therein;
> (3) Permit or suffer a place owned or controlled by him to be so used;
> (4) For amusement or gain, cause, allow, or permit the fighting or baiting of a living animal or creature;
> (5) Own, possess, keep, train, promote, purchase, or knowingly sell a living animal or creature for the purpose of fighting or baiting that animal or creature;
> (6) Gamble on the outcome of a fight involving a living animal or creature; or
> (7) Own, possess, buy, sell, transfer, or manufacture animal fighting paraphernalia for the purpose of engaging in or otherwise promoting or facilitating the fighting or baiting of a living animal or creature
>
> Shall be guilty of a crime of the third degree.

On Page 6 of its trial court opposition brief, the State asserted the word "or" after the semicolon between §(a)(1) and §(a)(2) **(Da30)**. Aside from being inappropriate to say the least, the word "or" is not in the legislation until after the semicolon in §(a)(6). The State added the word "or" where it did is a tacit admission that, without it being there, the statute is unconstitutionally vague and overbroad to say the least. This Court must rule based exclusively upon what N.J.S.A. 4:22 – 24(a)(2) actually

consists of in its content. It concisely consists of the following in its entirety:

> a. A person who shall:
>
> > (2) Be present and witness, pay admission to, encourage or assist therein;...
>
> ...Shall be guilty of a crime of the third degree.

The statute, as written, criminalizes being "present and witness[ing]" or "pay[ing] admission to" or "encourage[ing]" or "assist[ing]" in anything… even childbirth!

There is a strong public need and public policy for these statutes to be declared unconstitutional at this time before the anyone else is ensnared with charges of this nature. N.J.S.A. 4:22 – 24(b) and N.J.S.A. 4:22 – 17(c)(3) criminalizes common every day occurrences involving which a prosecutor deems in his or her discretion to constitute "torment, torture, maim[ing], hang[ing], poison[ing], unnecessarily or cruelly beat[ing], cruelly abus[ing], or needlessly mutilate[ing]" any "living animal or creature" and "Be[ing] present and witness[ing], pay[ing] admission to, encourage[ing] or assist[ing]" any activity a prosecutor wants to criminalize.

The Defendant must not have to stand trial and possibly be convicted and sentenced on charges of the 3rd degree which are facially unconstitutional and as applied.

CONCLUSION

In light of the foregoing and the gravamen of the connotational issues presented to the Court, this Court of review must grant the Defendant leave to proceed with interlocutory review.

DATED: January 2, 2025

Respectfully submitted,

By: _____
DAMIANO M. FRACASSO,
Attorney for the Defendant – Appellant

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-000689-24T1

STATE OF NEW JERSEY, Plaintiff-Respondent, v. DAYANA ABREAU, Defendant-Appellant.	CRIMINAL ACTION On Appeal from a Final Order of the Superior Court of New Jersey, Law Division, Hunterdon County Sat Below: Hon. Christopher J. Garrenger, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT THE STATE OF NEW JERSEY

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COUNTER STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

On June 26, 2024, Raritan Township Police Department Detective William McEnroe signed Complaint-Summons S-2024-000163-1021, charging defendant Dayana Abreau with third-degree animal fighting, N.J.S.A. 4:22-24a(2),[2] and third-degree animal cruelty, N.J.S.A. 4:22-17c(3). (Da 43-44).[3] Detective McEnroe alleged:

> On 05/11/24, this agency responded to 30 Hardscrabble Hill Road for a noise complaint. The investigation revealed an illegal cock fighting operation. Def[endant] was observed on scene via body camera review compared against driver's license photograph and was driving NJ registration Y26PNX registered to her. Additionally, def[endant] appeared in a geo fence present at the crime scene during the known period of time that the animal fighting was taking place.
>
> * * *

[1] The State combines its Counter Statement of Procedural History and Statement of Facts for the Court's convenience.

[2] The complaint contains a discrepancy in Count 1 — two different sections of N.J.S.A. 4:22-24 are listed as the provisions defendant is alleged to have violated, i.e., N.J.S.A. 4:22-24a(2) and N.J.S.A. 4:22-24b. (Da 43-46). However, a simple reading of the narrative associated with the first count indicates that defendant is clearly charged with violating N.J.S.A. 4:22-24a(2), "specifically by[] being present for a cock fighting operation[.]" (Id. at 43, 47-48).

[3] "1T" refers to the Transcript of Motion before the Honorable Christopher J. Garrenger, J.S.C. on September 11, 2024.
"Db" refers to defendant's amended brief.
"Da" refers to defendant's amended appendix.
"Pa" refers to the State's appendix.

> Defendant was seen on body camera footage of responding officers on scene and was found on scene via geofence.
>
> [(Id. at 47-48).]

On July 11, 2024, defendant filed a motion to dismiss the complaint with prejudice. (Id. at 1). The State's responded to defendant's motion on August 28, 2024, (id. at 25), to which defendant replied on September 8, 2024, (id. at 50).

On September 11, 2024, the trial court heard the parties' arguments for and against defendant's motion to dismiss the complaint. (1T).

On September 25, 2024, the trial court entered an order and a corresponding memorandum of law denying defendant's motion to dismiss the complaint. (Da 61-67).

On October 8, 2024, defendant moved for leave to appeal from the trial court's order, to which the State responded on October 31, 2024.

On November 7, 2024, this Court granted defendant's motion for leave to appeal.

On January 2, 2025, defendant filed an amended brief and appendix in support of this appeal. The State's response follows.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS THE COMPLAINT.

Defendant argues that the trial court erred by denying her motion to dismiss the complaint. (Id. at 6). She contends that N.J.S.A. 4:22-24a(2) and N.J.S.A. 4:22-17c(3) are "unconstitutionally void for vagueness and overbreadth . . . even as applied." (Id. at 7). Defendant accuses the trial court of rewriting "the statutes on an ex post facto basis and used a dictionary of its own choosing to save . . . both of the statutes from being declared unconstitutional." (Ibid.). Defendant further suggests that public policy demands a court declare the statutes unconstitutional to avoid arbitrary enforcement and prosecution. (Id. at 15).

The State submits that the trial court did not abuse its discretion by denying defendant's meritless motion. The trial court's order and decision reflect a cogent and reasoned consideration of both the record and defendant's arguments, which simply did not favor the relief she requested. For those and the reasons that follow, this Court should not disturb the trial court's order denying defendant's motion to dismiss the complaint.

"A trial court's denial of a motion to dismiss an indictment[4] is reviewed for abuse of discretion." State v. Twiggs, 233 N.J. 513, 544 (2018). An appellate court "will not disturb the denial of such a motion 'unless [the judge's discretionary authority] has been clearly abused.'" State v. Saavedra, 433 N.J. Super. 501, 514 (App. Div. 2013) (second alteration in original) (quoting State v. Warmbrun, 277 N.J. Super. 51, 60 (App. Div. 1994)). "[B]ut '[w]hen the decision to dismiss relies on a purely legal question,' such as the interpretation of a statute, the Court 'review[s] that determination de novo.'" State v. Derry, 250 N.J. 611, 626 (2022) (quoting Twiggs, 233 N.J. at 532).

Here, the trial court found that the ordinary meanings of the numerous undefined terms in N.J.S.A. 4:22-24a(2) and N.J.S.A. 4:22-17c(3), about which defendant complained, "would give a reader of ordinary intelligence" — like defendant — "a clear idea of what conduct is prohibited." (Da 63). It further found that the statutes were not unconstitutionally void for vagueness because they either failed to include, or included too many, levels of scienter, or because they encouraged arbitrary enforcement. (Id. at 63-64). Accordingly, the trial

[4] The State understands that defendant moved to dismiss the criminal complaint against her — not an indictment. To date, an indictment has not been sought by the State and no grand jury has returned one. Regardless, our courts have applied a standard of review similar to that which applies to a motion to dismiss an indictment when addressing a motion to dismiss a complaint. See, e.g., State v. Thompson, 444 N.J. Super. 619, 624-25 (Law Div. 2014).

court rejected defendant's argument that the statutory text failed to provide adequate notice of what conduct was prohibited. (Ibid.). That does not qualify as error, let alone reversible error. Applying this Court's standard of review, the same conclusion is warranted.

The first count in Complaint-Summons S-2024-000163-1021 charges defendant with third-degree animal fighting, N.J.S.A. 4:22-24a(2).[5] In relevant part, N.J.S.A. 4:22-24 provides:

> a. A person who shall:
>
> (1) Keep, use, be connected with or interested in the management of, or receive money for the admission of a person to, a place kept or used for the purpose of fighting or baiting a living animal or creature; [or[6]]
>
> (2) Be present and witness, pay admission to, encourage or assist therein . . .
>
> Shall be guilty of a crime of the third degree.

---

[5] See supra note 2.

[6] Defendant points out that "the State [in]serted the word 'or' after the semicolon between §(a)(1) and §(a)(2)" of N.J.S.A. 4:22-24. (Db 14). She alleges that "[a]side from being inappropriate to say the least, the word 'or' is not in the legislation until after the semicolon in §(a)(6). The State added the word 'or' where it did is a tacit admission that, without it being there, the statute is unconstitutionally vague and overbroad[.]" (Ibid.). The trial court appropriately dismissed that curious argument, finding that defendant "neglect[ed] the use of 'therein' in the statute. The plain meaning of therein is 'in that place, document, or respect[.]' In the context of this statute, being 'present and witness[ing]… therein' means to be present and witness the baiting or otherwise facilitating the fighting of a living animal or creature." (Da 64) (citing N.J.S.A. 4:22-24a).

Although the statutory language does not expressly provide a type of culpability, "[t]he reference in N.J.S.A. 2C:2-2c(3) to N.J.S.A. 2C:2-2b(2) establishes 'knowingly' as the required state of mind if an offense is defined without a specified culpability requirement." State v. Demarest, 252 N.J. Super. 323, 327 (App. Div. 1991) (citing State v. Rovito, 99 N.J. 581, 586 (1985)). See also State v. Sewell, 127 N.J. 133, 139 (1992).

> A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.
>
> [N.J.S.A. 2C:2-2b(2).]

Accordingly, subsection a(2) of N.J.S.A. 4:22-24 prohibits a person from knowingly being present at and witnessing, paying admission to, encouraging, or assisting a place kept or used for the purpose of, fighting or baiting a living animal or creature.

The terms "fight" or "fighting" are not defined in the statute. "In determining a statute's meaning [a court] consider[s] first the statutory language, for if the statute 'is clear and unambiguous on its face and admits of only one interpretation, [it] need delve no deeper than [its] literal terms to divine the

Legislature's intent.'" Ge Solid State v. Director, Division of Taxation, 132 N.J. 298, 307 (1993) (quoting State v. Butler, 89 N.J. 220, 226 (1982)). "Absent a legislative intent to the contrary, such language is to be given its ordinary meaning." Ibid. (citing Mortimer v. Board of Review, 99 N.J. 393, 398 (1985)).

Webster's dictionary defines "fight" as "to contend in battle or physical combat[.]" Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/fight (last visited February 5, 2025). It further defines "fighting" as "designed, intended, or trained to fight in combat[.]" Id. at https://www.merriam-webster.com/dictionary/fighting (last visited February 5, 2025).[7]

[7] Other sections of Title 4, Chapter 22, Article 2B of the New Jersey Statutes lend additional context to the statutory meaning of the terms "fight" or "fighting". For example, N.J.S.A. 4:22-24c defines "animal fighting paraphernalia" as

> equipment, products, implements, and materials of any kind that are used, intended for use, or designed for use in the training, preparation, or conditioning of an animal for fighting, or in furtherance of animal fighting, and includes, but is not limited to, the following: breaking sticks, cat mills, treadmills, fighting pits, springpoles, veterinary medicine without a prescription therefor, treatment supplies, gaffs, slashers, heels, or any other sharp implement designed to be attached in place of the natural spur of a rooster, cock, or game fowl.

Section c. of N.J.S.A. 4:22-24 provides that "'[b]ait' means to attack with violence, to provoke, or to harass an animal with one or more animals for the purpose of training the animal for, or to cause an animal to engage in, a fight with or among other animals." And N.J.S.A. 4:22-15 mentions that "[a]s used in this article . . . '[a]nimal' or 'creature' includes the whole brute creation."[8]

Applying those definitions to the language of the statute — and as the trial court correctly found — a person of common intelligence would reasonably understand what conduct is prohibited by N.J.S.A. 4:22-24a(2). Likewise, the statute defines the offense of third-degree animal fighting with sufficient definiteness in a way that does not encourage arbitrary or discriminatory enforcement. The plain text of the statute does not invite guessing at its meaning

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In a similar vein, N.J.S.A. 4:22-24.1 defines the crime of animal "trunk fighting" as "the practice of enclosing two or more animals in the trunk or any part of a motor vehicle for the purpose of the animals attacking each other, and possibly fighting until one or more of the animals are dead." See also N.J.S.A. 2C:33-31c (defining "dog fighting paraphernalia" and "bait" relative to the crime of dog fighting codified in Title 2C).

[8] "Adopted in 1880, and amended in minor respects in 1915, the [animal cruelty] statute . . . deals, according to its heading, with the prevention of cruelty to animals, and specifies 'animal or creature' as including the whole brute creation (N.J.S.A. 4:22-15). The legislative history of the enactment is meager and unrewarding." N.J.S.P.C.A. v. Bd. of Educ. of East Orange, 91 N.J. Super. 81 (Law Div. 1966). In 2006, the New Jersey Assembly introduced A2649, "[an act] concerning animal cruelty, and supplementing article 2 of chapter 22 of Title 4 of the Revised Statutes, and amending and repealing various sections of statutory law." Among other revisions, the bill sought to redefine "animal" as "any mammal, bird, reptile, amphibian, or fish." The bill did not survive.

or differing as to its application. Defendant is charged with knowingly being present at a location designed for the purpose of cockfighting. New Jersey has proscribed animal fighting for decades. Indeed, cockfighting has been "long considered immoral in much of America." United States v. Stevens, 559 U.S. 460, 477 (2010).[9] The trial court properly found that an ordinary person — like defendant — should be aware that knowingly attending and observing a violent cockfight is criminal. N.J.S.A. 4:22-24a(2) is presumed to be valid, and defendant has not established that it is constitutionally repugnant.

While our courts have not addressed in either a published or unpublished opinion the constitutional challenges to N.J.S.A. 4:22-24a(2) like defendant raises here, this Court may find instructive the decisions of other jurisdictions that have resolved similar questions. Every state in the Union, the District of

[9] Defendant's reliance on Stevens is misplaced. See (Db 8-12). "The statute in Stevens differ[s] sharply from the statute[s] at issue here. Stevens struck down a law that broadly prohibited any person from creating, selling, or possessing depictions of animal cruelty for commercial gain." Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 813-14 (2011) (J. Alito, concurring) (emphasis omitted). Conversely, N.J.S.A. 4:22-24a(2) forbids knowingly being present at and witnessing, paying admission to, encouraging, or assisting a place kept or used for the purpose of, fighting or baiting a living animal or creature, and N.J.S.A. 4:22-17c(3) prohibits a person from purposely, knowingly, or recklessly causing or procuring the torment, torture, maiming, hanging, poisoning, or the unnecessary or cruel beating, cruel abuse, or needless mutilation of a living animal or creature by any direct or indirect means, including, but not limited to, through the use of another living animal or creature.

Columbia, Guam, Puerto Rico, and the federal government prohibit animal fighting generally, or dog or cock fighting specifically; and of those statutes, many of them proscribe conduct substantially akin to that contemplated in N.J.S.A. 4:22-24a(2).[10]

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[10] See, e.g., 7 U.S.C. § 2156(a)(2)(A) ("Animal fighting venture prohibition"); Code of Ala. § 13A-12-4 ("Cock fighting"); Alaska Stat. § 11.61.145(a)(3) ("Promoting an exhibition of fighting animals"); A.R.S. § 13-2910.04 ("Presence at cockfight; classification"); A.C.A. § 5-62-120(b)(1)(B) ("Unlawful animal fighting"); Cal. Pen. Code § 597c. ("Knowing presence as spectator"); C.R.S. 18-9-204(1)(b)(I) ("Animal fighting – penalty"); Conn. Gen. Stat. §53-247(c)(4); 11 Del. C. § 1326(b) ("Animals; fighting and baiting prohibited; class E felony"); D.C. Code § 22-1006.01(a)(6) ("Penalty for engaging in animal fighting"); Fla. Stat. § 828.122(3)(h) ("Fighting or baiting animals; offenses; penalties"); O.C.G.A. § 16-12-37 ("Dogfighting"); 9 G.C.A. § 70.35 ("Animal Fighting"); H.R.S. § 711-1109.3 ("Cruelty to animals by fighting dogs in the first degree"); H.R.S. § 711-1109.35 ("Cruelty to animals by fighting dogs in the second degree"); Idaho Code § 25-3506 ("Exhibition of cockfights"); 510 I.L.C.S. 70/4.01(g) ("Animals in entertainment"); Ind. Code Ann. § 35-46-3-10 ("Attending animal fighting contest prohibited"); Iowa Code § 717D.2(10) ("Prohibitions – contest events"); K.S.A. § 21.6417(c) ("Unlawful conduct of cockfighting; unlawful attendance of cockfighting; unlawful possession of cockfighting paraphernalia"); K.R.S. § 525.125 ("Cruelty to animals in the first degree"); La. R.S. § 14:102.24A. ("Participation in cockfighting"); 17 M.R.S. § 1033(2) ("Animal fighting"); Md. Criminal Law Code Ann. § 10-605(b) ("Attending dogfights or cockfights"); A.L.M. G.L ch. 272, § 95 ("Dog, Bird, Animal Fights – Penalty for Being Present"); M.C.L.S. § 750.49(2)(f) ("Animal . . . fighting, baiting, or shooting . . ."); Minn. Stat. § 343.31(b) ("Animal Fights and Possession of Fighting Animals"); Miss. Code Ann. § 97-41-11 ("Fighting animals or cocks"); R.S.Mo. § 578.173(1.)(6) ("Baiting or fighting animals – penalty"); M.C.A. 45-8-210(d) ("Causing animals to fight – owners, trainers, and spectators – penalties – exception – definition"); R.R.S. Neb. § 28-1005(3) ("Dogfighting, cockfighting, bearbaiting, or pitting an animal against another; prohibited acts; penalty"); Nev. Rev. Stat. Ann. § 574.070(3)(a) ("Instigating or attending fights between birds or other animals unlawful . . ."); N.H. R.S.A. 644:8-aII ("Exhibitions of Fighting

For example, in People v. Cumper, 268 N.W. 2d. 696, 697 (Mich. App. 1978), the Michigan Court of Appeals addressed whether "the portion of [M.C.L.S. § 750.49] which imposes criminal sanction on persons who were spectators was impermissibly vague and unconstitutionally overbroad." In finding the statutory provision neither vague nor overbroad, the court determined that "[i]t is apparent that the statute does not punish the witnessing of a dogfight per se. It punishes attendance as a spectator at an event legitimately prohibited by law." Id. at 698.

Animals"); N.M. Stat. Ann. § 30-18-9A(1) ("Dog fighting and cockfighting; penalty); N.Y. C.L.S. Agr. & M. § 351(4)(b), (5)(b) ("Prohibition of animal fighting"); N.C. Gen. Stat. § 14-362 ("Cockfighting"); N.D. Cent. Code, § 36-21.1-07(2) ("Cockfights, dogfights, and other exhibitions prohibited – Penalties"); O.R.C. Ann. 959.15(C) ("Animal fights"); 21 Okl. St. § 1692.6 ("Spectators"); O.R.S. § 167.431(1)(a) ("Participation in cockfighting"); 18 Pa.C.S. § 5543(6) ("Animal fighting"); 5 L.P.R.A. § 1671(b)(1) ("Fights"); R.I. Gen. Laws § 4-1-11 ("Attendance at bird or animal fight"); S.C. Code Ann. § 16-27-40(b) ("Acts constitution misdemeanors . . . felonies"); S.D. Codified Laws § 40-1-10.1 ("Dog fighting – Penalty"); Tenn. Code Ann. § 39-14-203(a)(4) ("Cock and animal fighting – Cock fighting paraphernalia"); Tex. Penal Code § 42.10 ("Dog Fighting"); Utah Code Ann. § 76-9-301.5 ("Spectator at organized animal fighting exhibitions"); 13 V.S.A. § 364 ("Animal fights"); Va. Code Ann. § 3.2-6571(A)(2) ("Animal fighting; penalty"); Rev. Code Wash. § 16.52.117(1)(b) ("Animal fighting – Prohibited behavior – Penalty – Exemptions"); W. Va. Code § 61-8-19b(a) ("Attendance at animal fighting ventures prohibited; penalty"); Wis. Stat. § 951.08(3) ("Instigating fights between animals"); Wyo. Stat. § 6-3-1003(b) (". . . attending fowl or dog fights . . .").

The Colorado Court of Appeals similarly dismissed a challenge that C.R.S. 18-9-204(1)(b)(I) was "constitutionally overbroad because it criminalizes mere presence at a dogfight." People v. Bergen, 883 P. 2d 532, 545 (Colo. App. 1994). The court noted that the "'knowing presence' requirement of the statute effectively protects those persons who might inadvertently find themselves at a dogfight." Ibid. And as it concerns "any person who attends a dogfight knowingly, . . . the plain language of the statute" reflects a legislative understanding "that the presence of spectators at dogfights encourages dogfighting activity, whether such spectators are enthusiastic, neutral, or disgusted observers." Ibid. (referencing the Webster's Third New International Dictionary's definition of "spectator").

In Harris v. State, 2000 Ariz. App. Unpub. LEXIS 5, *15-*19 (Ariz. App. 2000),[11] the Arizona Court of Appeals rejected a claim that A.R.S. § 13-2910.04 was unconstitutionally vague because the statute "does not create criminal liability for anyone who unwittingly stumbles upon a cockfight. Rather, for criminal liability to attach, it requires that the person be knowingly present at a cockfight." (Emphasis in original). (Pa 9-10).

[11] In keeping with Rule 1:36-3, a copy of this unpublished opinion is included in the State's appendix.

The Florida Court of Appeal likewise dismissed a challenge that Fla. Stat. § 828.122(3)(h) was "overbroad because it might punish innocent bystanders who happen upon two animals fighting, e.g., a person who observes two dogs fighting in the street or a zoo patron who witnesses animals fighting." Gonzalez v. State, 941 So. 2d 1226, 1229 (Fla. App. 2006). Consistent with the foregoing jurisdictions' reasoning, "[t]he requirement that the conduct be done 'knowingly' . . . establishes a level of mens rea required under the statute that would preclude the hapless pedestrian from being caught in such a broad application of the law." Ibid.

Most recently, in Lee v. State, 973 N.E. 2d 1207, 1208 (Ind. App. 2012), the Indiana Court of Appeals addressed whether Ind. Code Ann. § 35-46-3-10 "was unconstitutionally vague because its language fails 'to inform an ordinary person of what conduct is prohibited.'" The court noted that the vagueness challenge amounted to a claim "that the statute's failure to further define 'attend' authorizes the prosecution of anyone who is in the vicinity of an animal fighting contest without regard to their intent."[12] Id. at 1210. However, the court

[12] Particularly applicable to defendant's challenges here, the Lee court mentioned that "in determining whether a statute is unconstitutionally vague, . . . n[o] statute need avoid all vagueness, and because statutes are condemned to the use of words, there will always be uncertainties[.]" Lee, 973 N.E. 2d at 1210. Cf. (Db 13-15).

determined that the statute actually punishes "someone who knowingly and intentionally attends an animal fighting contest." Ibid.

Finally, the Oklahoma Supreme Court ruled against an argument that the term "spectator" in 21 Okl. St. § 1692.6 was "insufficient to put an ordinary person on notice of conduct in which he/she may or may not lawfully engage."[13] Edmondson v. Pearce, 91 P. 3d 605, 637 (Okla. 2004), cert. denied, 543 U.S. 987 (2004). The court defined the term according to its plain meaning: "the person subject to prosecution is one who is purposefully and knowingly present at a cockfight or at a place where preparations are being made for a cockfight." Ibid. To that end, any suggestion that the law

> ensnares within its ambit an innocent passerby who comes upon bird fight preparations and stops to determine what activity is occurring or that a law enforcement officer who is present to arrest others falls within the term "spectator" are unavailing. Neither hypothetical is reasonably within the Act's orbit, and, quite frankly, the law enforcement example is absurd and nonsensical. The term "spectator" as that word is understood in its ordinary sense in context with the statutory terms, is a purposeful, knowing or intentional observer of an event.
>
> [Id. at 637-38.]

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[13] The Edmondson court noted that "[c]ourts in other jurisdictions faced with similar challenges to the term 'spectator' in cockfighting and/or animal fighting legislation have rejected such vagueness challenges." Edmondson, 91 P. 3d at 637 (citing Peck v. Dunn, 574 P. 2d 367, 369 (Utah 1978); State v. Tabor, 678 S.W. 2d 45, 47 (Tenn. 1984); People v. Elder, 201 Cal. App. 3d 1061, 1070, 1073-74 (5th Dist. Cal. App. 1988), cert. denied, 488 U.S. 1030 (1989)).

The opinions of our fellow courts reveal a common theme that guides this Court in analyzing defendant's vagueness argument: a knowing mental state is, at least, embedded in each of those statutes and in the statute at issue here, which prevents a criminal violation by happenstance as defendant seemingly fears.

Moving on, the second count in Complaint-Summons S-2024-000163-1021 charges defendant with third-degree animal cruelty, N.J.S.A. 4:22-17c(3). In pertinent part, N.J.S.A. 4:22-17 states:

> c. It shall be unlawful to purposely, knowingly, or recklessly:
>
> (1) Torment, torture, maim, hang, poison, unnecessarily or cruelly beat, cruelly abuse, or needlessly mutilate a living animal or creature;
>
> (2) Cause bodily injury to a living animal or creature by failing to provide the living animal or creature with necessary care, whether as the owner or as a person otherwise charged with the care of the living animal or creature; [or]
>
> (3) Cause or procure an act described in paragraph (1) or (2) of this subsection to be done, by any direct or indirect means, including but not limited to through the use of another living animal or creature[.]
>
> * * *
>
> d.
>
> (1) A person who violates paragraph (1), (2), (3) or (4) of subsection c. of this section shall be guilty of a crime

> of the fourth degree, except that the person shall be guilty of a crime of the third degree if:
>
> (a) the animal or creature dies as a result of the violation; [or]
>
> (b) the animal or creature suffers serious bodily injury as a result of the violation[.]

As charged against defendant here, (Da 43), the statute prohibits a person from purposely, knowingly, or recklessly causing or procuring the torment, torture, maiming, hanging, poisoning, or the unnecessary or cruel beating, cruel abuse, or needless mutilation of a living animal or creature by any direct or indirect means, including, but not limited to, through the use of another living animal or creature. N.J.S.A. 4:22-17c(3). See also Model Jury Charge (Criminal), "Animal Cruelty – Cause/Procure (N.J.S.A. 4:22-17c(3))" (June 7, 2021). The three types of culpability above — i.e., purposely, knowingly, and recklessly — are defined in N.J.S.A. 2C:22b(1), (2), and (3), respectively, and nothing offends notions of constitutional due process by including all three types in the statute. See N.J.S.A. 2C:2-2c(2) ("When the law provides that a particular kind of culpability suffices to establish an element of an offense such element is also established if a person acts with higher kind of culpability.").[14]

[14] It is not unusual for the Legislature to include three types of culpability in one offense. As an example, the crime of aggravated assault contains the culpability types of purposely, knowingly, and recklessly. See N.J.S.A. 2C:12-1b(1).

The statute does not define the terms "torment", "torture", "maim", "hang", "poison", "unnecessarily or cruelly beat", "cruelly abuse", or "needlessly mutilate". However, absent legislative intent to the contrary, those terms should be given their ordinary meaning. GE Solid State, Inc., 132 N.J. at 307.

Webster's dictionary defines "torment" as "to cause severe usually persistent or recurrent distress of body or mind to[,]" Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/torment (last visited February 5, 2025); "torture" as "to cause intense suffering to[,]" id. at https://www.merriam-webster.com/dictionary/torture (last visited February 5, 2025); "maim" as "to mutilate, disfigure or wound seriously[,]" id. at https://www.merriam-webster.com/dictionary/maim (last visited February 5, 2025); "hang" as "to suspend by the neck until dead[,]" id. at https://www.merriam-webster.com/dictionary/hang (last visited February 5, 2025); "poison" as "to injure or kill with poison[,]" id. at https://www.merriam-webster.com/dictionary/poison (last visited February 5, 2025); "beat" as "to hit repeatedly so as to inflict pain[,]" id. at https://www.merriam-webster.com/dictionary/beat (last visited February 5, 2025); "abuse" as "to use or treat so as to injure or damage[,]" id. at https://www.merriam-webster.com/dictionary/abuse (last visited February 5, 2025); and "mutilate" as

"to cut off or cause severe damage to a limb or essential part of[,]" id. at https://www.merriam-webster.com/dictionary/mutilate (last visited February 5, 2025).

"'Animal' or 'creature' includes the whole brute creation." N.J.S.A. 4:22-15. And "'[s]erious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Ibid.

As the trial court found, applying those definitions to the language of the statute, a person of ordinary intelligence — including defendant — would reasonably know what conduct is prohibited. Similarly, the statute defines the offense of third-degree animal cruelty with sufficient definiteness in a manner that does not encourage arbitrary or discriminatory enforcement. Like N.J.S.A. 4:22-24a(2), the plain text of N.J.S.A. 4:22-17c(3) does not invite guessing at its meaning or differing as to its application. Defendant is charged with purposely, knowingly, or recklessly causing or procuring the torment or cruel abuse of roosters through the use of other roosters during a violent cockfight that left many of the roosters seriously injured or dead. When the statute's terms and their common meanings are read in conjunction with the clear and

unambiguous statutory text, defendant's facial and as-applied void-for-vagueness arguments fail.

Against this backdrop, defendant maintains that the trial court engaged in both impermissible statutory revision and improper reliance on the Merriam-Webster's dictionary in determining that the statutes are not void for vagueness. (Db 7, 11). Defendant's arguments find no support in the trial court's decision as amplified above. Moreover, defendant ignores our courts' common practice of resorting to a dictionary to find an undefined statutory term's plain meaning. See, e.g., Fuster v. Twp. of Chatham, ___ N.J. ___, ___ (2025) (slip op. at 21) (acknowledging the ordinary meaning of the word "only" as defined in Merriam-Webster's New Collegiate Dictionary); State v. Higginbotham, 257 N.J. 260, 284-85 (2024) (referring to Webster's Third New International Dictionary to define the term "otherwise" in N.J.S.A. 2C:24-4b(1)(c)); State v. Olivero, 221 N.J. 632, 643 (2015) (defining the term "adapt" in N.J.S.A. 2C:18-1 by reference to Webster's Second New Riverside University Dictionary); State v. Tate, 220 N.J. 393, 409-11 (2015) (referencing Webster's Third New International Dictionary to define the terms "profane", "indecent", and "obscene" in N.J.S.A. 9:6-1d); State v. Martinez-Mejia, 477 N.J. Super. 325, 336 (App. Div. 2023) (reviewing Merriam-Webster's College Dictionary to find the meaning of "lure" as used in N.J.S.A. 2C:13-6a); State v. Lyons, 417 N.J. Super. 251, 260 (App.

Div. 2010) (finding the commonly understood meanings of the terms "provide" and "offer" in N.J.S.A. 2C:24-4b(5)(a) by reference to Webster's Second New College Dictionary).

Equally persuasive, though not binding, are two unpublished opinions by this Court, which examined the animal cruelty statutes. In State v. Scheld, Nos. A-1815-12T4, A-1816-12T4 (App. Div. November 6, 2015), this Court analyzed a similar facial and as-applied challenge to N.J.S.A. 4:22-17b. (Slip op. at 6); (Pa 16).[15] Resorting to Webster's Second New College Dictionary, this Court afforded the undefined statutory terms "torture" and "torment" their ordinary meanings and determined that because "a person of ordinary intelligence would reasonably know what conduct is prohibited," the "defendants should have known" that their behavior violated the animal cruelty statute. (Slip op. at 8-9); (Pa 17).

Very recently, this Court addressed a defendant's argument that he was denied a fair trial because the terms "unnecessarily" and "cruelly" in N.J.S.A. 4:22-17c(1) were never defined for the trial jury. State v. Hartobey, No. A-3498-22 (App. Div. October 25, 2024) (slip op. at 7); (Pa 21).[16] In finding that the

[15] Pursuant to Rule 1:36-3, a copy of this unpublished opinion is included in the State's appendix.

[16] See supra note 15.

trial court provided adequate instructions to the jury consistent with the applicable model criminal jury charge, this Court noted that not "every word used in a charge must be further defined even when it has a readily and commonly understood meaning." (Slip op. at 12) (quoting State v. N.I., 349 N.J. Super. 299, 308 (App. Div. 2022); (Pa 23). To be sure,

> "[c]ertain words can be understood by 'a person of average intelligence' and 'would not send the average citizen scrambling for a dictionary.'" Id. at 308-09 (quoting State v. Afanador, 134 N.J. 162, 171 (1993)). As such, "[w]ords 'used by ordinary citizens in everyday conversation' need not be defined." Id. at 309 (quoting Afanador, 134 N.J. at 175). . . . "[C]ruelly" and "unnecessarily" required no further definition or clarification for the jury.
>
> [(Slip op. at 12-13); (Pa 23).]

As defendant's constitutional challenges to the face and application of N.J.S.A. 4:22-24a(2) and N.J.S.A. 4:22-17c(3) are without merit, the trial court properly denied defendant's motion to dismiss the complaint.

CONCLUSION

Based on the foregoing reasons and the authorities cited in support thereof, the State respectfully requests that this Court affirm the trial court's order denying defendant's motion to dismiss the complaint.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

Dated: February 6, 2025

c: Damiano M. Fracasso, Esq.

SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION
LETTER BRIEF

APPELLATE DIVISION DOCKET NUMBER A – 000689 – 24 T1

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Letter **Reply Brief** on Behalf of: ***Dayana Abreau (a/k/a Dayana Abreu)***

Sunday, February 16, 2025

State of New Jersey, Plaintiff – Respondent,

VS.,

Dayana Abreau (a/k/a Dayana Abreu), Defendant – Appellant.

Case Type: **Criminal**

County: **Hunterdon**

Trial Court Docket Number: **1021 S 2024 163**

Sat Below: **Hon. Christopher J. Garrenger, J.S.C.**

Damiano Marcello Fracasso, Esq.
On the Brief

TABLE OF BRIEF CONTENTS

Dear Judges:

LETTER BRIEF STATEMENT

Please accept the filing of this letter brief in lieu of a more formal brief.

ARGUMENT

I. THE STATE HAS FAILED TO OVERCOME THE DEFENDANT'S REASONS WHY THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN DETERMINING THAT N.J.S.A. 4:22 – 24(a)(2) AND N.J.S.A. 4:22 – 17(C)(3) DO NOT VIOLATE THE UNITED STATES AND NEW JERSEY CONSTITUTIONS JOINTLY AND SEVERALLY. (Argued Below Da60 – Da64).

a. THE STATE CANNOT RE – WRITE N.J.S.A. 4:22 – 24 ON AN *EX POST FACTO* BASIS.

N.J.S.A. 4:22 – 24(a)(2), is a strict liability offense and, in its entirety, provides as follows:

> a. A person who shall:
>
> (2) Be present and witness, pay admission to, encourage or assist therein;
>
> ...Shall be guilty of a crime of the third degree.

The State (Executive Branch) and the trial court (Judicial Branch) cannot add the word "or" to N.J.S.A. 4:22 – 24(a)(1) on an *ex post facto* basis (or any basis for that matter) to save N.J.S.A. 4:22 – 24(a)(2) from constitutional invalidity **(Pb5)**. Only the Legislature can create or amend legislation (especially criminal legislation) and it cannot do so on an *ex post facto* basis. See United States Constitution, Article I, §9, cl. 3 and New Jersey Constitution 1947, Article IV, §VII, cl. 3.

While the Legislature is free to amend N.J.S.A. 4:22 – 24 in the future, this Defendant must be prosecuted based exclusively upon the way it existed at the time of the alleged offense. As such, N.J.S.A. 4:22 – 24 is unconstitutionally void and / or unconstitutionally vague.

b. A REASONABLE PERSON IS NOT OBLIGATED TO SCOUR THE INTERNET AND 49 OTHER STATE'S STATUTES TO BE PLACED ON NOTICE OF THIS STATE'S CRIMINAL LAWS.

A vagueness challenge may invalidate a criminal statute on two independent grounds: (1) it may fail to provide adequate notice that will enable ordinary people to understand what conduct it prohibits; and (2) it may authorize or encourage arbitrary and discriminatory

enforcement. City of Chicago v. Morales, 527 U.S. 41, 56 (1999). A statute is unconstitutionally vague under the Due Process Clause if it "(1) 'fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits'; or (2) 'authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. 703, 732 (2000)).

The void-for-vagueness doctrine reflects the fundamental principle that, in order to comply with the requirements of due process, a statute must give fair warning of the conduct that it prohibits. See Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law...." See Id.

The State (represented in this proceeding by the Hunterdon County First Assistant Prosecutor) performs a Yeoman's task of scouring the internet for dictionaries and the laws of 49 other states (and Guam and Puerto Rico) to cobble together a menagerie of laws and definitions that

have absolutely nothing to with any of the constitutionally invalid statutes before this Court.

In this State, people of ordinary intelligence (a First Assistant County Prosecutor is not such a person[1]) are entitled to reasonable notice and fair warning of the criminal laws of this state. While a First Assistant County Prosecutor may have the legal acumen to utilize the Idaho "cockfighting" statute **(Pb10)** when trying to interpret and understand N.J.S.A. 4:22 – 24, a person of ordinary intelligence does not. A person of ordinary intelligence would not know how to or be expected to acquire a copy of Idaho Code §25 – 3506 in order to fully understand how to comply with a New Jersey law within the jurisdiction of the State of New Jersey).

N.J.S.A. 4:22 – 24(a)(2) prohibits being present and witnessing, paying admission to, encouraging or assisting anything whatsoever and without one single limitation or exception. It literally criminalizes going to the movies, attending a state sanctioned horse race or boxing match or

[1] They are people of extraordinary intelligence.

assisting or encouraging a child to study or eat broccoli. N.J.S.A. 4:22 – 17(c)(3) literally criminalizes state sanctioned horse races, boxing matches or fishing under the authority of a state issued fishing license. It even criminalizes parental medical judgment for their own child (*i.e.* waiting to take a child with a 100 degree fever at 9:00 pm to the pediatrician at 9:00 am the following morning instead of rushing him or her to the emergency room[2]) or supervisory judgment (*i.e.* removing the training wheels from a bicycle and the child falls off the bike while learning how to ride the 2 wheel bike and scrapes their elbow).

N.J.S.A. 4:22 – 17(c)(3) (and N.J.S.A. 4:22 – 24(a)(2)) do not contain one single exception or exclusion. It punishes and encroaches upon lawful conduct and allows arbitrary and discriminatory enforcement based on the whims of each and every county prosecutor in this State. As such, a "vegetarian" county prosecutor can prosecute veal farmers. A "vegan" county prosecutor can prosecute anyone having a direct or indirect involvement in the creation, transportation or use of leather

[2] In fact, this statute even criminalizes hospital staff for not providing the "necessary care" (whatever that is) to the child immediately upon entering the lobby.

goods. Depending on their constituent's (or their own) religious beliefs, they can prosecute cattle farming, pig farming, shellfish harvesting and any "direct or indirect" involvement in those activities (such as processing or transporting those goods in the course of interstate commerce or, financing these activities or leasing or selling land for those purposes). If the Essex County Prosecutor determines that a "living creature" was tormented, tortured, maimed, hung, poisoned, unnecessarily or cruelly beaten, cruelly abused, or needlessly mutilated or caused bodily injury to a by failing to provide necessary care at the Turtleback Zoo, he or she can (and would be duty bound)[3] to prosecute the entire zoo administration as well as the entire Essex County Board of Commissioners based on their "indirect" involvement in one or more of these acts (or omissions) by a single individual.

Our Legislature is perfectly capable of drafting facially constitutionally valid "animal protection" laws. N.J.S.A. 2C:33 – 31 criminalizes "Dog Fighting" (as opposed to "cock fighting" or any other

[3] N.J.S.A. 2C:30 – 2(b).

non – human animal "fighting").[4] Oddly, this statute did not make its way into any of the State's Briefs (but the Idaho "dog fighting" statute did) **(Pb10)**. In any event, N.J.S.A. 2C:33 – 31 provides as follows:

> a. A person is guilty of dog fighting if that person ***knowingly*** [emphasis added]:[5]
>
> > (1) keeps, uses, is connected with or interested in the management of, or receives money for the admission of a person to, a place kept or used for the purpose of fighting or baiting a dog;
> > (2) owns, possesses, keeps, trains, promotes, purchases, breeds or sells a dog for the purpose of fighting or baiting that dog;
> > (3) for amusement or gain, causes, allows, or permits the fighting or baiting of a dog;
> > (4) permits or suffers a place owned or controlled by that person to be used for the purpose of fighting or baiting a dog;
> > (5) is present and witnesses, pays admission to, encourages or assists ***in the fighting or baiting of a dog*** **[EMPHASIS ADDED]**;
> > (6) gambles on the outcome of a fight involving a dog; or
> > (7) owns, possesses, buys, sells, transfers, or manufactures dog fighting paraphernalia for the

[4] The existence of this statue also gives rise to the application of the construction doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other) as it pertains to the conflicting culpability in N.J.S.A. 4:22 – 17 and N.J.S.A. 4:22 – 24.

[5] According to the State's arguments, N.J.S.A. 4:22 – 24(a)(2) criminalizes the same exact conduct as it pertains to dogs, but contains no *mens rea* and is therefore a strict liability offense.

> purpose of engaging in or otherwise promoting or facilitating the fighting or baiting of a dog.

Dog fighting is a crime of the third degree.

b. (1) In addition to any other penalty imposed, the court shall order:

> (a) the seizure and forfeiture of any dogs or other animals used for fighting or baiting, and may upon request of the prosecutor or on its own motion, order any person convicted of a violation under this section to forfeit possession of: (i) any other dogs or other animals in the person's custody or possession; and (ii) any other property involved in or related to a violation of this section; and
>
> (b) restitution, concerning the dogs or other animals seized and forfeited pursuant to subparagraph (a) of this paragraph, in the form of reimbursing any costs for all the animals' food, drink, shelter, or veterinary care or treatment, or other costs, incurred by any person, agency, entity, or organization, including but not limited to a county society for the prevention of cruelty to animals, any other recognized organization concerned with the prevention of cruelty to animals or the humane treatment and care of animals, a State or local governmental entity, or a kennel, shelter, pound, or other facility.

(2) The court may prohibit any convicted person from having future possession or custody of any animal for any period of time the court deems reasonable, including a permanent prohibition.

c. For the purposes of this section :

"Dog fighting paraphernalia" means equipment, products, implements, and materials of any kind that are used, intended for use, or designed for use in the training, preparation, or conditioning of a dog for fighting, or in furtherance of dog fighting.

"Bait" means to attack with violence, to provoke, or to harass a dog with one or more animals for the purpose of training the dog for, or to cause a dog to engage in, a fight with or among other dogs.

d. In determining whether an object is dog fighting paraphernalia, a tryer of fact may consider:

> (1) the proximity of the object in time and space to any violation of this section;
> (2) direct or circumstantial evidence of the intent of the person to deliver the object to any person whom the person in possession of the object knows, or should reasonably know, intends to use the object to violate this section;
> (3) oral or written instructions concerning its use provided with, or found in the vicinity of, the object;
> (4) descriptive materials accompanying the object which explain or depict its use; and
> (5) any other relevant factors.

N.J.S.A. 2C:33 – 31 is facially constitutionally valid and comprehensible to a person of ordinary intelligence and it does so without

a cherry picked separate "definitions" statute associated with N.J.S.A. 4:22 – 17 and N.J.S.A. 4:22 – 24 (N.J.S.A. 4:22 – 17.1). N.J.S.A. 4:22 – 17.1 is evidence of Legislative intent not rely exclusively on internet dictionaries to define material terms in N.J.S.A. 4:22 – 17, *et seq* such as "tether," "proper shelter," "unattended," etc.. Unfortunately for the State, the Legislature's definition section did not go far enough to save N.J.S.A. 4:22 – 17 and N.J.S.A. 4:22 – 24 from constitutional infirmity.

c. THE BALANCE OF THE STATE'S BRIEF FAILS TO ADDRESS ARGUMENTS RAISED BY THE DEFENDANT OR LACKS SUFFICIENT MERIT TO WARRANT A RESPONSE.

The Defendant need not consume any more of this Court's time than the State has discussing the statutory laws of Guam **(Pb10)**, Colorado, Arizona **(Pb12)**, Indianna **(Pb13)** or Oklahoma **(Pb14)**. That is fodder for the New Jersey Legislature. Not the New Jersey Judiciary. The Defendant is not going to "google" to the ends of world wide web to find a definition of a word that suits her needs. Legislatures define terms in criminal statutes. Not internet content creators.

The State still has failed to provide this Court with an explanation (valid or otherwise) as to what exactly constitutes "cock fighting" for the purposes of N.J.S.A. 4:22 – 17(c)(1) or N.J.S.A. 4:22 – 24. "Dog Fighting" is succinctly defined in 2C:33 – 31(a). Nowhere in the New Jersey Statutes is "cock fighting" defined (or specifically criminalized for that matter).

The State still has failed to provide this Court with an explanation (valid or otherwise) as to what exactly constitutes an "unnecessary" or "cruel" "beat[ing]" "of a living animal or creature" as opposed to a perfectly legal and socially acceptable "necessary" or "un – cruel" "beat[ing]" of a "living animal or creature" for the purposes of N.J.S.A. 4:22 – 17(c)(1). The State was also silent on whether the statute criminalizes "necessary" but "cruel" "beat[ings]" "of a living animal or creature." The statute is unclear in that regard.

The State also still has failed to provide this Court with an explanation (valid or otherwise) as to what exactly constitutes "cruel abuse" "of a living animal or creature" as opposed to a perfectly legal and socially acceptable "un–cruel abuse" of a "living animal or creature" for the purposes of N.J.S.A. 4:22 – 17(c)(1).

The State also still has failed to provide this Court with an explanation (valid or otherwise) as to what exactly constitutes a "needless mutilation" "of a living animal or creature" as opposed to a perfectly legal and socially acceptable "needed mutilation" of a "living animal or creature" for the purposes of N.J.S.A. 4:22 – 17(c)(1).

The State also still has failed to provide this Court with an explanation (valid or otherwise) as to what exactly constitutes an "unnecessary" "torment, torture, maiming, hanging [or] poisoning" "of a living animal or creature" as opposed to a perfectly legal and socially acceptable "necessary" "tormenting, torturing maiming, hanging [or] poisoning" of a "living animal or creature" for the purposes of N.J.S.A. 4:22 – 17(c)(1).

Since a human being is a "living animal or creature," the State also still has failed to provide this Court with an explanation (valid or otherwise) as to what exactly constitutes an "indirect" "torment, torture, maiming, hanging [or] poisoning" "of a living animal or creature" "through the use of another living animal or creature" for the purposes of N.J.S.A. 4:22 – 17(c)(3).

N.J.S.A. 4:22 – 17(c)(3) literally makes every sentient person in this State a criminal as long as any other "living animal or creature" (human or non – human") is being or has been "tormented" or "tortured" or "maimed," "hung" or "poisoned" by "another living animal or creature." during the applicable statute of limitations period. It also criminalizes not paying for (or not providing for free) "necessary care" to any "living animal or creature" if that "living animal or creature" sustained a "bodily injury" as a "direct" or "indirect" result of not receiving that care and the offending part is or was "the owner" or "person otherwise charged with the care of the living animal or creature." This statute literally criminalizes hospice care or electing to euthanize a pet[6] as opposed to performing, authorizing and / or paying for heroic measures to saving a sick pet guinea pig you "own."

Both the Legislature and the Executive Branch failed to provide a valid definition or clarity on what exactly even constitutes "torment" or "torture" or "maiming." Does "declawing" a cat constitute any of those acts? Does "cropping" a Doberman pincher's ears or tail constitute any of

[6] Pentobarbital is a "poison" because "the dictionary" defines "poison" as "a substance with an inherent property that tends to destroy life or impair health." See https://www.dictionary.com/browse/poison#google_vignette

those acts? Does keeping a parakeet in a cage for its life instead of allowing it to fly freely outdoors constitute any of those acts? Does spaying or neutering a cat or dog constitute any of those acts? Does racing horses at the Meadowlands Racetrack constitute any of those acts? Who exactly decides? Should veterinarians in Hudson County be prosecuted for "declawing" cats because that that county prosecutor does not like that concept? Should jockeys in Bergen County be able to repeatedly "lash" a horse for *one* (1) mile without being prosecuted because the Meadowlands Racetrack is located there and the State "directly" and "indirectly" profits from this activity, but a 12 year old at a 4H dressage activity in Sussex County be prosecuted for "lashing" his or her horse *three* (3) times because that county prosecutor is averse to horses doing anything other than roaming the pastoral countryside free of human interaction?

The State also failed to address or present a valid exception to the "turn square corners doctrine[7]" or the rule of lenity.

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[7] The government must 'turn square corners' in its dealings with the public." See State v. Buczkowski, 395 N.J. Super. 40, 45 (App. Div. 2007). One of the hallmarks of the "turn square corners" doctrine is that its application is not dependent upon a finding of bad faith. Instead, it focuses the judicial inquiry upon whether government seeks an unfair "litigational advantage." See CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 586-587 (App. Div. 2010).

The balance of the State's brief is comprised of what it wants the law to be or longs desires it was as opposed to what the law actually is and actually consists of. As such, its lacks sufficient merit to warrant a response beyond what is set forth in this reply brief.

CONCLUSION

In light of the foregoing and the gravamen of the connotational issues presented to the Court, this Court must declare N.J.S.A. 4:22 – 17 and N.J.S.A. 4:22 – 24 unconstitutional on an interlocutory basis.

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Respectfully submitted,

By:_____
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