SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3498-22

	: CRIMINAL ACTION
STATE OF NEW JERSEY,	:
	: On Appeal from a Judgment of
Plaintiff-Respondent,	: Conviction of the Superior
	: Court, Law Division,
	: Somerset County
v.	:
	: Indictment No. 21-04-0268-I
ROBERT J. HARTOBEY,	:
	:
Defendant-Appellant.	: Sat Below:
	: Hon. Jonathan W. Romankow, J.S.C.,
	: and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: February 1, 2024

DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

Robert Hartobey was convicted and sentenced for fourth-degree animal cruelty, resulting from an incident in which he allegedly kicked and punched a dog. The statutory provision under which he was convicted makes it unlawful to torment, torture, maim, hang, poison, unnecessarily or cruelly beat, cruelly abuse, or needlessly mutilate an animal. The State indicated it was proceeding under the theory that Mr. Hartobey's actions constituted "unnecessarily or cruelly beating" or "cruelly abusing" the animal.

The Legislature's insertion of the qualifiers "unnecessarily" and "cruelly" indicates that simply striking an animal, or subjecting it to treatment that is merely harsh or unkind, is not criminalized by that provision of the law. Although these words were central to the elements of the offense submitted to the jury, the terms were never defined for the jurors. Because "cruelty" in other legal contexts, including child cruelty cases, requires something beyond harsh or unkind treatment – in particular, the infliction of pain and suffering – the jury instructions in this case, which omitted any attempt to define "cruelty," were so deficient as to require reversal of Mr. Hartobey's conviction. The failure to instruct jurors that they must find pain and suffering was particularly likely to produce an unjust result in light of the State's veterinarian's testimony that the dog was healthy and free from any signs of bruising, trauma, or

fractures, and the State's remarks in summation that the jury need not find injury in order to convict. And, given the lack of evidence that Mr. Hartobey acted "cruelly" or "unnecessarily," the offense of fourth-degree animal cruelty should never have been submitted for the jury's consideration.

Were Mr. Hartobey's conviction nonetheless allowed to stand, the illegal components of his sentence must be vacated. The sentencing court imposed three special conditions on Mr. Hartobey's parole supervision for life, a status he held as a result of a wholly unrelated charge from over a decade ago. Because sentencing courts may not impose parole conditions, a power exclusively reserved to the executive branch and exercised by the Parole Board, this portion of Mr. Hartobey's judgment of conviction must be vacated.

Furthermore, the conditions themselves – a prohibition on contact with the subject dog, a prohibition on owning other animals in the future, and anger management counseling – had no basis in the Code of Criminal Justice. Because all sentences must be authorized by law, the substance of each condition was unlawful, and each must be vacated.

PROCEDURAL HISTORY

On May 8, 2020, a Somerset County grand jury returned Indictment No. 21-04-00268-I, charging the defendant, Robert Hartobey, with one count of fourth-degree animal cruelty, contrary to N.J.S.A. 4:22-17(c)(1). (Da1)[1]

Mr. Hartobey was found guilty by a jury after a two-day trial before the Honorable Jonathan W. Romankow, J.S.C., on May 9 and 10, 2023. (3T 103-24 to 104-3; Da22-23)

On June 23, 2023, Judge Romankow sentenced Mr. Hartobey to 180 days in Somerset County Jail. (4T 29-4 to 6) In addition to the custodial sentence, Judge Romankow ordered that Mr. Hartobey have no contact with the subject of the indictment, a dog, that he be prohibited from owning or exercising care or control over any other animals, and that he attend anger management counseling. (4T 29-6 to 14) The judge ordered that these conditions be added to the terms of Mr. Hartobey's existing parole supervision for life. (4T 29-10 to 14)

A Notice of Appeal was filed on July 19, 2023. (Da27-29)

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[1] Da – defendant's appendix
1T – May 8, 2023 – trial
2T – May 9, 2023 – trial
3T – May 10, 2023 – trial
4T – June 23, 2023 – sentencing

STATEMENT OF FACTS

A. Trial

1. Testimony

On May 8, 2020, Heather Dougherty called 911 to report that she had seen a man beating a dog outside her home. (2T 51-16 to 18; 52-11 to 16) She testified that she saw the man kicking and dragging the dog. (2T 52-14 to 16)

Officers Michael Zangrillo and David Somonski of the Manville Police Department responded to the scene. (2T 60-2 to 12; 62-8 to 9; 3T 6-19 to 7-2) Both officers testified that they witnessed a man punch a dog twice and prepare to hit the dog a third time before they intervened. (2T 62-2 to 7; 3T 7-24 to 25) They identified the man as Mr. Hartobey. (2T 61-6 to 16; 3T 8-1 to 11) Officer Somonski took the dog to police headquarters and later turned her over to Animal Control. (3T 9-12 to 16)

The State called a veterinarian who examined the dog the day after the incident, Dr. Brett Newton. Dr. Newton testified that the dog had "a scab on the right side of her head with surrounding hair loss and redness," which he explained could have been caused by "demodectic mange." (2T 87-13 to 14; 92-8 to 11) Dr. Newton also noted that the dog had no bruising to the lungs or ribs, no "free fluid in areas of the body, . . . which occurs commonly with a trauma," no rib fractures, and normal bloodwork. (2T 86-8 to 24; 97-11 to 17)

At the close of the State's case, the defense moved for a judgment of acquittal under Rule 3:18-1, arguing that the State had failed to present evidence that Mr. Hartobey "unnecessarily or cruelly beat or cruelly abused" his dog. (3T 13-23 to 14-17) The court denied the motion. (3T 15-22 to 18-4)

The defense called the family's veterinarian, Dr. Beth Sulner. Dr. Sulner explained that the area of hair loss on the dog's head was tested in August 2020 and confirmed to be caused by "demodex," or skin mites. (3T 40-11 to 25) Dr. Sulner described demodex as a "very common" condition. (3T 40-21 to 22)

2. Jury Instructions and Verdict

The jury was instructed that Mr. Hartobey was charged under a statute that makes it unlawful to "purposely, knowingly, or recklessly torment, torture, maim, hang, poison, unnecessarily or cruelly beat, cruelly abuse or needlessly mutilate a living animal or creature." (3T 84-4 to 10)

The court defined the elements of the offense for the jury as follows: first, that he acted purposely, knowingly, or recklessly; second, that he "tormented, tortured, maimed, hung, poisoned, unnecessarily or cruelly beat, cruelly abused or needlessly mutilated," and third, that he did so against a living animal or creature. (84-22 to 85-2) The court informed the jury that "the

State alleges here that Robert Hartobey unnecessarily or cruelly beat or cruelly abused" the dog. (3T 87-9 to 11)

The jury was also instructed on a lesser-included offense, "animal cruelty, inflicting unnecessary cruelty," contrary to N.J.S.A. 4:22-17(a)(3). (3T 87-21 to 88-14) The court explained that the State must prove "that the defendant inflicted unnecessary cruelty, specifically the State alleges that Robert Hartobey inflicted unnecessary cruelty by beating" the dog. (3T 89-22 to 25)

The court also discussed the verdict sheet, and explained that "it says animal cruelty, torment, torture, et cetera," and incorporated the language from the indictment, that is, "tormented, tortured, maimed, hanged, poisoned, unnecessarily or cruelly beat, cruelly abused or needlessly mutilated." (3T 93-8 to 9; 93-13 to 15)

The jury returned a guilty verdict on "animal cruelty, torment, torture, et cetera" and did not reach the lesser-included offense. (3T 103-24 to 104-3; Da22-23)

B. Sentence

Judge Romankow sentenced Mr. Hartobey to 180 days in Somerset County Jail with no probation to follow. (4T 29-4 to 6) Judge Romankow additionally ordered Mr. Hartobey to have no contact with the dog in question,

prohibited him from "owning, possessing, exercising control over or caring for any animals . . . includ[ing] a goldfish," and ordered anger management. (4T 29-6 to 14) The judge ordered that these conditions be added to the terms of Mr. Hartobey's existing parole supervision for life, which he was serving in connection with unrelated previous charges. (4T 29-10 to 14)

LEGAL ARGUMENT

POINT I

DEFENDANT'S ANIMAL CRUELTY CONVICTION MUST BE REVERSED BECAUSE THE JURY INSTRUCTIONS FAILED TO DEFINE THE CENTRAL ELEMENT OF THE OFFENSE. (Not Raised Below)

Mr. Hartobey was denied a fair trial because the critical element of the animal cruelty charge was never defined for the jury. The prosecution charged Mr. Hartobey under a statutory provision that makes it unlawful to "purposely, knowingly, or recklessly . . . [t]orment, torture, maim, hang, poison, unnecessarily or cruelly beat, cruelly abuse, or needlessly mutilate a living animal or creature." N.J.S.A. 4:22-17(c)(1). The State indicated it was proceeding under the theory that Mr. Hartobey "unnecessarily or cruelly beat" or "cruelly abuse[d]" the dog. (1T 4-6 to 13; 2T 25-5 to 8) Yet the jury instructions failed to define these crucial terms, namely, "unnecessarily" and "cruelly." These charging errors were "clearly capable of producing an unjust

result." R. 2:10-2. Because Mr. Hartobey was denied his right to a fair trial, U.S. Const., amends. VI & XIV; N.J. Const., art. I, ¶¶ 1 & 10, his conviction must be reversed, and the matter must be remanded for a new trial.

Our courts have long recognized that "appropriate and proper jury charges are essential to a fair trial." State v. Savage, 172 N.J. 374, 387 (2002). In criminal cases, failure to provide clear and correct jury instructions on material issues – such as the elements of the crime – is presumed to be reversible error. State v. Jordan, 147 N.J. 409, 422 (1997).

Adherence to the applicable model jury charge is not always enough, and the sufficiency of the model charge for animal cruelty appears to be a matter of first impression for this Court.[2] In this instance, although the trial court followed the language of the model charge for animal cruelty (3T 84-11 to 87-20), the model charge adds nothing to the statutory terms of the offense. See Model Jury Charges (Criminal), "Animal Cruelty – Torment/Torture (N.J.S.A. 4:22-17(c)(1)" (approved June 7, 2021) (Da30-32). Rather than define the acts that constitute the crime, the instruction merely regurgitates the statutory language:

[2] The model charge was first approved on June 7, 2021 and has not been revised. See Notice to the Bar, Updates to Model Criminal Jury Charges, Judge Glenn A. Grant, Aug. 24, 2021; Model Jury Charges (Criminal), "Animal Cruelty – Torment/Torture (N.J.S.A. 4:22-17(c)(1)" (approved June 7, 2021).

> The second element that the State must prove beyond a reasonable doubt is that the defendant committed one or more of the following acts: tormented the animal; tortured the animal; maimed the animal; hung the animal; poisoned the animal; unnecessarily or cruelly beat the animal; cruelly abused the animal; or needlessly mutilated the animal.
>
> [Ibid.]

Following the model charge for animal cruelty thus leaves a trial court's "obligation to define critical terms" unfulfilled. State v. N.I., 349 N.J. Super. 299, 308 (App. Div. 2002). That obligation "follows from the fundamental proposition that '[t]he criminal law cannot be administered justly or efficiently if the jury is allowed to speculate as to what conduct the law intended to proscribe by a specified crime.'" Ibid. (quoting State v. Alexander, 136 N.J. 563, 572 (1994)). This is the trial court's duty "even when statutory terms have common or well-understood meanings," because "words whose meanings are ordinary and understandable often require a judicial determination with respect to their intended scope of application." Alexander, 136 N.J. at 572-73.

Each word in a statute is presumed to have meaning. In re N.B., 222 N.J. 87, 101 (2015); see also In re Commitment of J.M.B., 197 N.J. 563, 573 (2009) ("Interpretations that render the Legislature's words mere surplusage are disfavored."). The statute under which Mr. Hartobey was convicted, N.J.S.A. 4:22-17(c)(1), must be "[c]onstrued in a manner that gives meaning to all of the words chosen by the Legislature." In re N.B., 222 N.J. at 90. Here, where

the statute does not prohibit beating or abusing, but unnecessarily or cruelly beating and cruelly abusing, the critical words are "cruelly" and "unnecessarily."

Our courts do not appear to have explored the meaning of these terms in this context, but child cruelty cases provide a useful analog. In child cruelty cases, the jury is instructed that "cruelty" involves inflicting unnecessary pain and suffering, severe punishment, or ongoing torment upon a child. Model Jury Charges (Criminal), "Abuse/Cruelty to Child (N.J.S.A. 9:6-1; N.J.S.A. 9:6-3)" (approved Apr. 16, 2012) (Da33-35). The model charge identifies five possible definitions for the element of acting cruelly toward a child:

> (a) inflicting on (him/her) unnecessarily severe corporal punishment.
>
> (b) inflicting on (him/her) unnecessary suffering or pain, either mental or physical.
>
> (c) habitually tormenting, vexing, or afflicting (him/her).
>
> (d) committing any act of omission or commission whereby unnecessary pain and suffering, whether mental or physical, was caused or permitted to be inflicted on (him/her).
>
> (e) exposing (him/her) to unnecessary hardship, fatigue or mental or physical strains that might tend to injure (his/her) health or physical or moral well being.
>
> [Ibid.]

There is no indication the Legislature intended a broader definition for cruelty toward animals than to children. Tellingly, the phrases "unnecessarily

or cruelly beat" and "cruelly abuse" in the animal cruelty statute are bookended by words that evoke extreme violence and depravity: torment, torture, maim, hang, poison, and mutilate. See N.J.S.A. 4:22-17(c)(1). The qualifiers the Legislature added before "beat" and "abuse" thus reflect that a higher degree of brutality is required for conviction. See In re Proposed Construction of Compressor Station, 476 N.J. Super. 556, 570-71 (App. Div. 2023) ("[T]he meaning of words may be indicated and controlled by those with which they are associated." (quoting Germann v. Matriss, 55 N.J. 193, 220 (1970))).

Our Supreme Court has embraced essentially the same interpretation of the word "cruel" in the context of aggravating factors at sentencing. State v. O'Donnell, 117 N.J. 210, 217-18 (1989) (interpreting the first aggravating factor under N.J.S.A. 2C:44-1(a), which asks whether an offense "was committed in an especially heinous, cruel, or depraved manner"). In that circumstance, too, the Court construed "cruelty" to require the infliction of pain and suffering on a victim. Ibid.

Each of these definitions requires something more than an act that is merely harsh or unkind. In the absence of any such definition, it is possible the jury convicted Mr. Hartobey based on its understanding of "cruel" as it is colloquially used. But finding that Mr. Hartobey's alleged actions were harsh

or unkind is insufficient to sustain a conviction for fourth-degree animal cruelty, just as it would be insufficient in a child cruelty case or to support a finding that a crime was committed in a cruel manner under N.J.S.A. 2C:44-1(a)(1).

The trial court further erred by failing to explain the term "unnecessarily." Child abuse cases are instructive here too. As noted in State v. A.L.A., "the law does not prohibit reasonable corporal punishment by a parent or guardian," rather, it makes unlawful the infliction of excessive corporal punishment. 251 N.J. 580, 583 (2022). The A.L.A. Court recognized that Title Nine, which governs child abuse and neglect, does not define "excessive corporal punishment" and approved of the language this Court endorsed in DYFS v. K.A., 413 N.J. Super. 504 (App. Div. 2010):

> The law does not prohibit the use of corporal punishment. The statute prohibits the infliction of excessive corporal punishment. The general proposition is that a parent may inflict moderate correction such as is reasonable under the circumstances of a case.
>
> [Id. at 510.]

Although the jury in this case received no instruction regarding the circumstances under which hitting a dog may legally be deemed "necessary," such circumstances would surely include reasonable discipline, just as reasonable corporal punishment to correct a child's behavior is lawful.

The court's duty to define "unnecessarily" was especially crucial because the term carries with it a substantial risk of unconstitutionally shifting the burden of proof to the defendant. "The defendant is not obligated to present any witnesses or to testify himself to establish his defense." State v. Francisco, 471 N.J. Super. 386, 421 (App. Div. 2022). The omission of an explanation for the term was clearly capable of leading jurors to conclude Mr. Hartobey acted "unnecessarily," even though he was not required to testify to the contrary.

Likewise, the lesser-included offense required jurors to find unnecessary cruelty. N.J.S.A. 4:22-17(a)(3), (b)(1) (making it a disorderly-persons offense to "[i]nflict unnecessary cruelty upon a living animal or creature, by any direct or indirect means"). Yet the instructions on the lesser-included offense also omitted any explanation or definition of those terms. Moreover, the court's instruction seemed to equate "unnecessary cruelty" with simply beating: "the State must prove beyond a reasonable doubt . . . that the defendant inflicted unnecessary cruelty, specifically the State alleges that Robert Hartobey inflicted unnecessary cruelty by beating" the dog. (3T 89-21 to 24) Given that the terms of the greater offense – "unnecessarily or cruelly beat" – are virtually identical to those of the lesser offense, this confusing instruction may have led the jury to convict Mr. Hartobey of the greater offense merely by finding that he beat the dog.

In sum, Mr. Hartobey may have been convicted purely on testimony that the dog was struck, an act which is not a criminal offense under N.J.S.A. 4:22-17(c)(1) unless it was unnecessary or cruel. If the Legislature intended the statute to cover all instances of striking an animal, it would not have inserted the qualifiers "unnecessarily" or "cruelly." The jury had to determine not just whether Mr. Hartobey in fact struck or dragged a dog, but whether he did so cruelly or unnecessarily. Jurors were unable to make that determination without guidance on whether a particular act was legally unnecessary or cruel. These charging errors were "clearly capable of producing an unjust result." R. 2:10-2.

At trial, the State's veterinarian and Mr. Hartobey's family veterinarian both testified that the dog was healthy, save for a patch of hair loss. (2T 86-8 to 87-1; 3T 38-24 to 39-1; 40-11 to 13) The State's veterinarian, who examined the dog the day after the incident, explained that the dog showed no signs of bruising, no signs of trauma, no fractures, and had normal bloodwork. (2T 86-8 to 87-1) Had the jury been informed that to act "cruelly" involves the infliction of pain and suffering, prolonged torment or vexation, and so on, the lack of injuries or signs of trauma testified to by the veterinarians could have led the jurors to a different conclusion. Worse, the State told the jury in summation that it did not have to find any injury to the dog to convict Mr. Hartobey of

animal cruelty. (3T 65-15 to 22) While a discernible injury is not an explicit statutory element of the charged offense, N.J.S.A. 4:22-17(c)(1), the State's remarks undermined the requirement that a finding of "cruelty," for the reasons already explained, requires finding something more than that an act of punching, kicking, or dragging took place.

The court's failure to define the central elements of the offense with which Mr. Hartobey was charged denied him a fair trial. See Jordan, 147 N.J. at 422-23 ("Some jury instructions . . . are so crucial to the jury's deliberations on the guilt of a criminal defendant that errors in those instructions are presumed to be reversible. . . . [T]he court must always charge on the elements of the crime."). His convictions must be reversed and the matter remanded for a new trial.

POINT II

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PRESENT EVIDENCE THAT DEFENDANT ACTED UNNECESSARILY OR CRUELLY. (3T 15-22 to 18-4)

Mr. Hartobey moved at the end of the State's case for a judgment of acquittal under Rule 3:18-1 on the ground that the "State [had]n't shown that he unnecessarily or cruelly beat or cruelly abused" the animal. (3T 14-6 to 8) The court denied the motion, concluding that the jury could find that "[s]omebody pulling a dog's head up by a leash and punching it for really no apparent reason and also kicking it prior to that" could constitute the offense. (3T 17-22 to 18-4) However, an individual can only be convicted of the fourth-degree offense if the jury finds evidence that he tormented, tortured, maimed, hung, poisoned, unnecessarily or cruelly beat, cruelly abused, or needlessly mutilated an animal. See N.J.S.A. 4:22-17(c)(1). As explained in Point I, without evidence that he acted unnecessarily or cruelly, Mr. Hartobey could not be convicted of fourth-degree animal cruelty. Because the State did not present sufficient evidence that Mr. Hartobey acted unnecessarily or cruelly, the offense should not have been submitted for the jury's consideration.

A criminal defendant's conviction cannot stand "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged." In re Winship, 397 U.S. 358, 364 (1970). An offense should not be submitted for the jury's consideration unless the State has presented evidence "sufficient to warrant a conviction of the charge involved." State v. Reyes, 50 N.J. 454, 458-59 (1967). A court must "giv[e] the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom," and determine whether "a reasonable jury could find guilt of the charge beyond a reasonable doubt." Ibid.

As discussed in detail in Point I, to constitute cruelty, the State was required to prove that Mr. Hartobey inflicted unnecessary pain or suffering, or prolonged torment, upon the animal. The State failed to carry that burden. On the contrary, the testimony of the State's own veterinarian who examined the dog the day after the events in question established that the dog had no signs of bruising, no signs of trauma, and no fractures. (2T 86-8 to 87-1) Alternatively, the State could have met its burden by adducing evidence that Mr. Hartobey's actions were legally "unnecessary," but none of its witnesses testified about events preceding the alleged punching or kicking. Giving all favorable inferences to the State, its presentation at trial was limited to evidence that Mr. Hartobey was seen to strike and drag the dog. That is insufficient for conviction under N.J.S.A. 4:22-17(c)(1).

Therefore, fourth-degree animal cruelty should not have been submitted to the jury in the absence of evidence that Mr. Hartobey tormented, tortured, maimed, hung, poisoned, unnecessarily or cruelly beat, cruelly abused, or needlessly mutilated the dog. N.J.S.A. 4:22-17(c)(1). The erroneous denial of his Reyes motion deprived Mr. Hartobey of his right to due process and a fair trial under the State and Federal Constitutions. U.S. Const., amends. VI & XIV; N.J. Const., art. I, ¶¶ 1 & 10. Mr. Hartobey's conviction must be reversed.

POINT III

THE NON-CUSTODIAL PORTION OF DEFENDANT'S SENTENCE IS ILLEGAL AND MUST BE VACATED BECAUSE THE COURT HAD NO AUTHORITY TO IMPOSE CONDITIONS ON DEFENDANT'S PAROLE SUPERVISION FOR LIFE, AND BECAUSE ALL SENTENCES MUST BE AUTHORIZED BY LAW. (4T 29-4 to 14)

Mr. Hartobey was sentenced to 180 days of imprisonment, which he does not contest was a legal custodial term for the fourth-degree offense. At the time he was sentenced for this offense in 2023, however, Mr. Hartobey was under parole supervision for life (PSL) resulting from an unrelated 2006 offense. Mr. Hartobey's sentence for animal cruelty did not include a term of probation (4T 29-4 to 6), and animal cruelty is not a PSL-eligible offense, see

N.J.S.A. 2C:43-6.4(a). Nonetheless, the sentencing court ordered that three conditions "be added to [Mr. Hartobey's] conditions of parole supervision." (4T 29-10 to 12) Those conditions were: (1) "Defendant is to have no contact with [the dog] Nessa"; (2) "defendant is prohibited from owning, possessing, exercising control over or caring for any animals"; and (3) "anger management." (4T 29-6 to 14)

Because a sentencing court has no authority to impose conditions of parole, and because all sentences must be authorized by law, this part of Mr. Hartobey's sentence was unlawful. See State v. Schubert, 212 N.J. 295, 308 (2012) ("There are two categories of illegal sentences: (1) those that exceed the penalties authorized by statute for a particular offense and (2) . . . those that include a disposition that is not authorized by our criminal code.") The illegal components of his sentence must be vacated.

1. Sentencing courts lack jurisdiction to impose conditions of parole.

For animal cruelty, Mr. Hartobey was sentenced to 180 days in county jail with "no probation to follow." (4T 29-4 to 6) He was subject to PSL for a 2006 offense, and the trial court used that status to impose restrictions on Mr. Hartobey's post-release conduct. Specifically, the court ordered that he have no contact with the dog in question, never own or care for any other animals, and attend anger management counseling, and that these conditions be incorporated

into his existing PSL. (4T 29-6 to 14) Because a sentencing court lacks jurisdiction to impose parole conditions, a power allocated to the executive branch, these parole conditions are invalid.

A "trial court ha[s] no authority to impose conditions of parole." State v. Beauchamp, 262 N.J. Super. 532, 536 (App. Div. 1993). Conditions entered on a judgment of conviction "insofar as they were designed to govern and control the decisions whether, when, and under what conditions parole would be granted to defendant," are a "nullity." Id. at 538. When a criminal defendant is sentenced and a judgment of conviction has been entered, jurisdiction over that defendant is "relinquishe[d] . . . to the executive branch, except for the appellate process." Id. at 536.

The inability of a court to impose conditions of parole stands in contrast to its authority to set conditions of probation. Whereas parole places a defendant under the supervision of the executive branch, a defendant who has been placed on probation, or who has had his sentence suspended, remains under the authority of the courts. See In re P.L. 2001, Chapter 362, 186 N.J. 368, 372 (2006) ("Probation officers are part of the judicial branch of government and perform many duties that are essential to the mission of our courts, including supervising probationers . . . ."). Sentencing courts are, therefore, empowered to formulate "reasonable" conditions of probation or a

suspended sentence. N.J.S.A. 2C:45-1. A defendant on parole, by contrast, is "in the legal custody of the Commissioner of Corrections and under the supervision of the State Parole Board." N.J.S.A. 30:4-123.59(a). "[S]pecific conditions of parole" are "established by the appropriate board panel," id. at (b)(1)(a), not the judicial branch.

The statutory scheme governing PSL reflects this division of power. See N.J.S.A. 2C:43-6.4. The PSL statute permits a court to impose "conditions . . . pursuant to N.J.S.A. 2C:45-1" – the suspension and probation statute – "[w]hen the court suspends the imposition of a sentence on a defendant who has been convicted of" a PSL-triggering offense. N.J.S.A. 2C:43-6.4(b). In other words, when a court suspends the custodial sentence for an offense that additionally triggers PSL, and imposes probationary terms as a condition of sentence, then PSL shall nonetheless "commence immediately," and "the Division of Parole of the State Parole Board" will supervise the defendant's compliance with those court-imposed probationary terms. Ibid.; see also N.J.A.C. 10A:71-6.12(k) ("If the sentencing court suspends the imposition of sentence and the offender immediately commences [PSL], the certificate [provided to the parolee with conditions of parole] shall also include, as a special condition, any condition(s) established by the sentencing court."). But the statute does not concomitantly permit a sentencing court to set specific

conditions of PSL when the court imposes a term of incarceration instead of probation or a suspended sentence.

Mr. Hartobey was not placed on probation. He was not given a suspended sentence. He was sentenced to a custodial term of 180 days with no probation. The sentencing court had thus "relinquishe[d] jurisdiction" over him after it "pronounced sentence and entered a judgment of conviction." Beauchamp, 262 N.J. Super. at 537. Had he not been on PSL for an unrelated offense from over a decade ago, the court would have had no mechanism by which to enforce compliance with lifelong, post-release restraints on his freedom. The court could not lawfully circumvent that restriction on its power by arrogating to itself the power to set conditions that are only within the jurisdiction of the Parole Board.

Because the sentencing court had no jurisdiction to impose parole conditions, this part of Mr. Hartobey's sentence must be vacated.

2. Sentencing courts may only impose sentences authorized by statute.

The components of Mr. Hartobey's sentence that prohibited him from having contact with the dog, prohibited him from "owning, possessing, exercising control over or caring for" any other animals, and required him to complete anger management counseling were furthermore not authorized by any statute. Should this Court properly find that the sentencing court was

without authority to fashion conditions of Mr. Hartobey's PSL, it should not permit the parole conditions to be recast as valid parts of his sentence for animal cruelty. These components of his sentence, whether characterized as parole conditions or something else, lack statutory support and must be vacated.

"A sentencing court may impose only those sentences authorized by statute." State v. Newman, 132 N.J. 159, 164 (1993); see also State v. Masce, 452 N.J. Super. 347, 351 (App. Div. 2017) ("[A]ll sentences imposed by a court for any offense must comport with Chapter 43 of the Code [of Criminal Justice], N.J.S.A. 2C:43-1 to -22."). A sentence is accordingly illegal if it "exceed[s] the penalties authorized for a particular offense," or if it is "not authorized by law." State v. Hyland, 238 N.J. 135, 145 (2019).

While a sentencing court is accorded considerable discretion to set the sentence for an offender, that discretion is not unbounded. It is carefully limited by a detailed statutory scheme. See State v. Case, 220 N.J. 49, 63 (2014) ("[T]he Code has established a framework of structured discretion within which judges exercise their sentencing authority."). In addition to setting custodial terms for first- through fourth-degree crimes and disorderly persons offenses, the Code specifies other authorized dispositions that a court may impose, such as fines, community service, and probation. N.J.S.A. 2C:43-

2(b). The Code also permits sentencing courts to order the forfeiture of property, suspension of a license, removal from office, or "any other civil penalty." N.J.S.A. 2C:43-2(d).

As noted in Masce, however, "any other civil penalty" encompasses only "those civil penalties specified in a statute." 452 N.J. Super. at 357. The forfeiture of public office, for example, is a penalty authorized by N.J.S.A. 2C:51-2 for certain crimes. By contrast, where there is no law that authorizes a particular civil penalty, the catchall language of N.J.S.A. 2C:43-2(d) does not empower courts to impose that penalty. Id. at 358 (concluding that because "there is no law that allows the entry of a civil consent judgment as a penalty," courts have no authority under N.J.S.A. 2C:43-2(d) to enter civil consent judgments at sentencing); see also State v. Gross, 225 N.J. Super. 28, 29-30 (App. Div. 1988) (finding that while Chapter 43 authorizes a court to suspend a defendant's driver's license under some circumstances, the court has no authority to do so where the defendant's offense is "not within the purview" of N.J.S.A. 2C:43-2(c)).

On the date of the offense, and at the time of his sentencing, the conditions imposed on Mr. Hartobey by the court lacked any statutory basis. Notably, new legislation authorizing a sentencing court to "order that the person convicted of an animal cruelty violation shall not own, harbor, reside

with, or have custody or control of any other animals for a period of time that the court deems appropriate" was enacted on July 26, 2023 – more than three years after Mr. Hartobey's offense and over a month after he was sentenced. See L. 2023, c. 129, § 5, codified at N.J.S.A. 4:22-26.2(b)(2). The legislation provided that it would "take effect immediately." L. 2023, c. 129, § 6. Because the Legislature did not intend this statute to apply retroactively, and because retroactive application would violate the Ex Post Facto Clauses of the Federal and State Constitutions, the passage of this legislation does not convert the illegal lifetime ban on owning animals imposed on Mr. Hartobey to a legal sentence.

New legislation is presumed to apply prospectively. State v. Lane, 251 N.J. 84, 94 (2022). Exceptions to this general rule apply "only in instances 'where there is no clear expression of intent by the Legislature that the statute is to be prospectively applied only.'" State v. J.V., 242 N.J. 432, 444 (2020) (quoting Gibbons v. Gibbons, 86 N.J. 515, 522 (1981)).

Not only is the new legislation "devoid of the slightest hint that the Legislature intended" it "to apply retroactively," but courts in this state have also "repeatedly construed language stating that a provision is to be effective immediately . . . to signal prospective application." Lane, 251 N.J. at 96. When it adopted the new law, the Legislature used that very phrase – "This act shall

take effect immediately" – foreclosing the suggestion that it be given retroactive effect. See L. 2023, c. 129, §6.

To find otherwise in this case would amount to a textbook violation of the prohibitions on ex post facto laws in both the Federal and State Constitutions. U.S. Const. art. I, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3.[3] An ex post facto law is one which increases, or "makes more burdensome," the punishment for a crime after it has been committed. Riley v. State Parole Bd., 219 N.J. 270, 284-85 (2014) (quoting Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)). Ex post facto laws have two elements: they are retrospective, and "they 'disadvantage the offender affected by' the law." State v. O'Donnell, 255 N.J. 60, 83 (2023) (quoting State v. Bailey, 251 N.J. 101, 122 (2022)).

The new law elevates the possible punishment for a fourth-degree animal cruelty conviction above the ordinary penalties defined in Chapter 43 for fourth-degree offenses. Because it adds a new and unique restraint on a defendant's freedom to own, live with, or "have custody or control" over animals in the future, N.J.S.A. 4:22-26.2(b)(2), application of this statute to events occurring before its enactment is barred by the Ex Post Facto Clause.

[3] Our courts have treated the New Jersey Ex Post Facto Clause as coextensive with its federal counterpart. Doe v. Poritz, 142 N.J. 1, 42 (1995).

In sum, to permit sentencing courts to ban defendants from owning animals for offenses committed prior to the law's enactment would flout the Legislature's clearly stated intent that N.J.S.A. 4:22-26.2 apply prospectively. It would also violate constitutional protections against ex post facto laws. The no-animals condition imposed on Mr. Hartobey therefore cannot find the statutory support it needs in N.J.S.A. 4:22-26.2(b).

Nor has the Legislature authorized no-contact orders in animal cruelty cases, even though it has shown that it knows how to do so in other contexts. In domestic violence cases, for instance, a provision of the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-27, grants sentencing courts the authority to "impose restrictions on the defendant's ability to contact the victim as 'a condition of sentence.'" DCPP v. K.N., 435 N.J. Super. 16, 35 (App. Div. 2014). Under the same domestic violence provision, a court also may "restrict[] the defendant's ability to have contact with . . . an animal owned . . . by either party." N.J.S.A. 2C:25-27. Similarly, N.J.S.A. 2C:44-8 authorizes a court to "restrict[] the defendant's contact with the victim" of a sex offense. But there is no statutory authority for no-contact orders in animal cruelty cases.

Court-ordered anger management counseling may be imposed as a condition of a defendant's probation or suspended sentence, pursuant to

N.J.S.A. 2C:45-1. But as noted before, Mr. Hartobey was not sentenced to a term of probation. And anger management programming is not an authorized disposition under N.J.S.A. 2C:43-2, nor is it authorized by the provisions specific to animal cruelty offenses. See N.J.S.A. 4:22-17, -26. Like the other two conditions, anger management counseling therefore cannot stand as an independent component of Mr. Hartobey's sentence.

Because all sentencing dispositions must be authorized by law, the components of Mr. Hartobey's sentence that prohibit him from having contact with the dog in question, prohibit him from "owning, possessing, exercising control over or caring for" other animals, and require him to complete anger management counseling are unlawful. They must be vacated.

CONCLUSION

Because the central element of the offense with which he was charged was not defined for the jury, this Court should reverse Mr. Hartobey's conviction. In the alternative, this Court should reverse the conviction because Mr. Hartobey's motion for a judgment of acquittal was erroneously denied.

If his conviction is allowed to stand, this Court should vacate the portion of the judgment of conviction that imposed new conditions on Mr. Hartobey's existing parole supervision for life, because the trial court was without jurisdiction to impose parole conditions, and because only sentences authorized by statute may be imposed.

Respectfully submitted,

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Dated: February 1, 2024

THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-3498-22

STATE OF NEW JERSEY,	:	
	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	
	:	One Appeal from a Final Judgement
v.	:	of Conviction of the Superior
	:	Court, Law Division,
ROBERT J. HARTOBEY,	:	Somerset County
	:	
	:	Sat Below:
Defendant-Appellant	:	Hon. Jonathan W. Romankow, J.S.C and
	:	A jury

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

The State adopts Defendant's recitation of this case's procedural history. (Db3).[1]

COUNTER-STATEMENT OF FACTS

On May 8, 2020, Heather Dougherty was at home when she heard a loud thud against her house. (2T:50-2 to 8). She heard a second thud a few seconds later and went outside to see what was going on. (2T:50-8 to 12). When Ms. Dougherty turned to the left of her house, she saw a man kicking what looked like a book bag. (2T:50-13 to 15). It was not until she heard whimpering that she realized it was a dog. (2T:50-15 to 16). She yelled at him to "get off that dog or [she] was going to call the cops." (2T:50-17 to 18). The man told her to "get her fat ass back in the house where it belongs." (2T:50-18 to 19). Ms. Dougherty then called the police to report the incident. (2T:51-18). In her call to dispatch she reported that a man was "beating the hell out of that dog." (2T:52-11 to 12). She further testified that the man was kicking and dragging the puppy all while the puppy was whimpering. (2T:52-14 to 16). Officer Zangrillo testified that when he arrived at the scene, he observed a male striking a dog with a closed fist twice in the head. (2T:60-23 to 61-5). The officer also observed the Defendant yanking on the puppy's leash to raise its head in order to make striking the puppy easier. (2T:61-22 to 24). Officer

[1] The State adopts Defendant's citation conventions. (Db 1, n. 3).

Zangrillo further testified he observed the male begin to strike the puppy a third time but intervened before the male could do so. (2T:62-2 to 7).

When Officer Zangrillo approached the male, later identified as Robert Hartobey ("Defendant"), he observed that Defendant was intoxicated. (2T:62-20 to 22). The Officer testified that the puppy, whose name is Nessa, appeared to be frightened of the Defendant. (2T:65-4). Nessa had her ears tucked back, was whimpering, shaking, and appeared to have blood on the top of her head. (2T:65-4 to 6). Based on the officer's observations, the Defendant was taken into custody and Nessa was taken to the police department. (2T:65-18 to 66-1). While Nessa was at the station, officers reported she appeared shaken up, nervous, and scared. (2T:68-19 to 20). Nessa was later turned over to a local animal shelter. (2T: 66-1). The Defendant was charged with animal cruelty. (2T:21-1).

LEGAL ARGUMENT

POINT I

> Defendant's animal cruelty conviction should not be reversed because the jury instruction did not fail to define the central element of the offense.

Defense argues that the Court's failure to define the words "unnecessarily" and "cruelly" to the jury denied the Defendant a fair trial. (Db7). Defendant contends that because the statute under which he was

indicted does not prohibit beating or abusing, but only "unnecessarily" or "cruelly" beating and abusing, the trial judge was required to define "unnecessary" and "cruelly." Defendant claims that the jurors were unable to make the determination of whether the Defendant unnecessarily or cruelly beat Nessa, because the jury was given no guidance as to whether a particular act was legally unnecessary or cruel.

Defendant is clearly mistaken. The model jury charge for N.J.S.A. 4:22-17(c)(1), does not require the trial judge to define the words "unnecessarily" or "cruelly." It also does not require the trial judge to give guidance as to what particular acts are legally unnecessary or cruel, because these are typical colloquial terms that are commonly understood, not legal terms of art. Thus, the Defendant's right to a fair trial has not been violated and his conviction should be upheld.

"Pursuant to Rule 1:7–2, a defendant is required to challenge instructions at the time of trial or else waives the right to contest the instructions on appeal." State v. Belliard, 415 N.J. Super 51, 66 (App. Div. 2010) (citing State v. Adams, 194 N.J. 186, 206–07 (2008)). Where there is a failure to object, reviewing courts presume the instruction was "not error" and "unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012); see R. 1:7–2; State v. Wakefield, 190 N.J. 397, 473 (2007) ("[T]he

failure to object to a jury instruction requires review under the plain error standard.").

When there is failure to object, a reviewing court presumes that the instructions were adequate. State v. Macon, 57 N.J. 325, 333 (1971). Failing to object to a charge is also indicative that trial counsel perceived no prejudice would result. State v. Wilbely, 63 N.J. 420, 422 (1973). Consequently, this Court can reverse only if it finds plain error. State v. Afanador, 151 N.J. 41, 54 (1997); R. 2:10-2.

"Plain error is an error that is 'clearly capable of producing an unjust result.'" Afanador, 151 N.J. at 54. (quoting Adams, 194 N.J. at 207). In terms of a jury charge, meeting the plain error standard requires "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing [c]ourt and to convince the [c]ourt that of itself the error possessed a clear capacity to bring about an unjust result." State v. Nero, 195 N.J. 397, 406 (2008) (quoting State v. Hock, 54 N.J. 526, 538 (1969)).

This burden rests on the defendant's shoulders. State v. Koskovich, 168 N.J. 448, 529 (2001). Jury "charges must be read as a whole in determining whether there was any error." State v. Torres, 183 N.J. 554, 564 (2005). The effect of any error must be considered "in light 'of the overall strength of the

States case.'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). Any unchallenged issue with the jury charge is considered "in light of 'the totality of the entire charge, not in isolation.'" State v. Burns, 192 N.J. 312, 341 (2007) (quoting Chapland, 187 N.J. at 289).

In the instant case, the trial judge read almost word for word the model jury instructions written by the New Jersey Supreme Court. Model jury instructions are often helpful to trial judges in performing the important function of instructing a jury. State v. Cotto, 471 N.J. Super. 489, 650 (App. Div. 2022) (citing State v. Concepcion, 111 N.J. 373, 379 (1988). A jury instruction is presumed to be proper when it tracks the model jury instructions because the process to adopt model jury instructions is "comprehensive and thorough." Ibid.

Defendant points the second element of the jury charge for N.J.S.A. 4:22-17(c)(1) which states: "the Defendant committed one or more of the following acts: tormented; tortured; maimed; hung; poisoned; unnecessarily or cruelly beat; cruelly abused; or needlessly mutilated." Defendant argues that his conviction should be overturned due to the trial judge did not define the words "unnecessarily" and "cruelly" to the jury. Defendant contends that the trial judge simply regurgitated the statutory language and added nothing to

make the jury charge "less confusing."

Within the model jury instructions, the New Jersey Supreme Court detailed many words for the trial judge to define. Significantly, N.J.S.A. 4:22-17(c)(1), the instruction directs the trial judge to define the words "purposely, knowingly and recklessly." These words are defined because they have legal significance, and a jury cannot rely on their plain meaning.

For someone to act purposely with respect to the nature of their conduct or a result thereof, it must be their conscious object to engage in conduct of that nature or to cause such a result. N.J.S.A. 4:22-17(c)(1). Someone acts knowingly with respect to the nature of their conduct if they are aware that their conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. N.J.S.A. 4:22-17(c)(1). Lastly, an act is reckless when the actor is aware of and consciously disregards a substantial and unjustifiable risk. N.J.S.A. 4:22-17(c)(1).

The model jury charge for N.J.S.A. 4:22-17(c)(1) does not require the trial judge to define the words "unnecessarily" or "cruelly"; it does not require the trial judge to define any words within the second element. This is because there is no legal significance attached to those words. In contrast, the model jury charge very specifically instructs the trial court to define "purposely, knowingly, or recklessly." Defendant argues that the New Jersey Supreme

Court has defined the words "cruel" in other instances, such as in child abuse cases prosecuted under N.J.S.A. 9:6-1. Under N.J.S.A. 9:6-1, the model jury charge defines cruel several different ways. Most notably it defines "cruel" as "inflicting on (him/her) unnecessarily severe corporal punishment or inflicting on him/her unnecessary suffering or pain either mental or physical."

As this is not a child abuse case, the definition for cruel under N.J.S.A. 9:6-1 is not relevant to the present case. The word "cruel" in child abuse cases has legal significance as corporal punishment is not a violation under N.J.S.A. 9:6-1 (and because it is specifically defined in the statue). Corporal punishment becomes "cruel" and thus a violation when it is unnecessarily severe. Defining "cruel" in that instance is imperative because the jury cannot rely on its plain meaning.

Even if the definition of cruelty to a child were relevant, defendant seems to be suggesting that closed fist punching a child two times, kicking a child, and then dragging a child by their neck does not equate to cruelty, which is remarkable. The Defendant's actions go beyond "harsh" or "unkind," as defense counsel suggests. According to the defendant's own evidence, Nessa is a "couch potato" and very calm. The State cannot think of one scenario in which the Defendant would have to kick, drag, and closed fist punch a dog that is so calm she is characterized as a "couch potato." This goes well beyond the

bounds of needing to correct a dog's behavior.

Defendant also argues that the trial judge did not give the jury examples of what acts are and are not cruel. (Db8). Defendant further contend that the State failed to show injury to the dog, or that the defendant acted cruelly, suggesting the State needs to show something more than that the act of punching, kicking, or dragging took place. This is incorrect. The court is not required to give examples to the jury of what is cruel and what is not. Defendant has cited to no case law or statute that requires a judge to do so. Additionally, the statute and the model jury charge for N.J.S.A. 4:22-17(c)(1) do not require the State to show injury, nor do they require the State to show that there was more than kicking, punching and or dragging. The State showed sufficient evidence to the jury to convict the Defendant of animal cruelty based on common sense and legal doctrine.

Based on the above, Defendant's jury charge as sound, his conviction is valid, and this Court should affirm.

POINT II

> The Court did not err in denying Defendant's motion for acquittal because the State presented sufficient evidence to defeat an acquittal motion.

Defendant argues that he could not have been convicted of fourth-degree animal cruelty because the State did not present sufficient evidence that the he

acted unnecessarily or cruelly. (Db16). Defendant contends that the State was required to prove that he inflicted unnecessary pain or suffering, or prolonged torment, upon the animal. That is not correct.

The State presented evidence that the defendant kicked, dragged and punched Nessa multiple times. This caused Nessa to whimper, cry, and become very skittish. The State was also not required to present evidence that the Defendant inflicted unnecessary pain or suffering; or prolonged torment, upon the animal, as per the statute, this is not a requirement. It is only a requirement for the State to present evidence that the defendant unnecessarily or cruelly beat Nessa. As discussed ante, the New Jersey Supreme Court has not defined unnecessarily or cruelly in the model jury charges. Therefore, Defense's argument is without merit.

On a motion for acquittal the State is required to present sufficient evidence to defeat an acquittal motion. State v. Dekowski, 218 N.J. 596, 608 (2014). Appellate review of the denial of a motion for acquittal is de novo. Dekowski, 218 N.J. 596, 608 (2014)' State v. Cruz-Pena, 459 N.J. Super. 513, 520 (App. Div. 2019). In so doing, the Appellate Division uses "the same standard as the trial court in determining whether a judgment of acquittal was warranted." State v. Ellis, 424 N.J. Super. 267, 273 (App. Div. 2012). That standard assesses "whether the State presented sufficient evidence to defeat an

acquittal motion." Dekowski, 218 N.J. at 608; Cruz-Pena, 459 N.J. Super. at 520.

Like the trial court, this Court must determine whether the State's evidence, both direct and circumstantial, "viewed in its entirety, and giving the State the benefit of all of its favorable testimony and all of the favorable inferences which can reasonably be drawn therefrom, is such that a jury could properly find beyond a reasonable doubt that the defendant was guilty of the crime charged." State v. D.A., 191 N.J. 158, 163 (2007) (citing State v. Reyes, 50 N.J. 454, 458–59 (1967)); State v. Horne, 376 N.J. Super. 201, 208 (App. Div.), certif. denied, 185 N.J. 264 (2005).

The court should not be concerned with the "worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." State v. DeRoxtro, 327 N.J. Super. 212, 224 (App. Div. 2000) (quoting State v. Kluber, 130 N.J. Super. 336, 342 (App. Div. 1974), certif. denied, 67 N.J. 72 (1975)). If the evidence satisfies that standard, the motion was properly denied. State v. Spivey, 179 N.J. 229, 236 (2004).

Defendant was charged with Animal Cruelty in violation of N.J.S.A. 4:22-17(c)(1). In order to find the Defendant guilty, the state must prove that (1) the Defendant acted purposely, knowingly, or recklessly; (2) he committed one or more of the following acts: tormented; tortured; maimed; hung;

poisoned; unnecessarily or cruelly beat; cruelly abused; or needlessly mutilated; and (3) he committed this conduct against a living animal or creature. N.J.S.A. 4:22-17(c)(1).

During trial the State elicited testimony from multiple witnesses. One of which being Ms. Heather Dougherty who testified she personally saw the Defendant kicking Nessa to the point where Nessa was crying out in pain. (2T:50-13 to 16). Officer Zangrillo testified that when he arrived at the scene, he also witnessed the Defendant dragging and punching Nessa in the head twice. (2T:60-23 to 61-1 to 5). He further testified that the Defendant was about to strike Nessa a third time, but thankfully, Officer Zangrillo intervened before the Defendant could do so. (2T:62-2 to 7). The jury also heard the 9-1-1 call made by Ms. Dougherty in which she stated that the Defendant was "beating the hell out of that dog." (2T:52-11 to 12).

Defendant again argues that the State did not show Nessa was injured. Once again, the State is not required to show that the animal was physically injured. Defendant also argues that the State did not present evidence to show the events leading up to Ms. Dougherty's observations, therefore the State cannot prove the Defendant "unnecessarily" beat the dog. Again, the State cannot think of one scenario that would justifiably allow the Defendant to closed fist punch, kick, and drag a puppy which had been described as calm

and sweet. Nessa was a 6-month-old puppy. She was never defined as disobedient, mean, or even ill trained. There is absolutely no reason for someone to kick, punch, and drag a 6-month-old puppy to the point where the puppy is crying, whimpering, and shaking in fear.

Based on the above the State showed the jury much more than a scintilla of evidence that the Defendant knew by kicking dragging, and punching Nessa he was unnecessarily or cruelly beating her. Given that, the State presented sufficient evidence to quash a motion for acquittal and this Court should affirm.

POINT III

The sentence given to the Defendant was not illegal.

Defendant argues that the sentencing court lacked jurisdiction to impose conditions of parole and that the sentencing court did not impose a sentence authorized by law. (Db18). Defense first contends that the sentencing judge has no authority to impose conditions of parole. Further, the defense argues that the sentencing court has no mechanism by which to enforce compliance with a lifelong, post-release restraints on Defendant's freedom. Secondly, Defense contends that prohibiting the Defendant from having contact with Nessa, owning, possessing, exercising control over, or caring for any other

animal, and ordering defendant to complete anger management was not authorized by any statute.

Appellate review of a sentence encompasses three distinct inquires. State v. Hudson, 209 N.J. 513, 528 (2012); see also State v. Roth, 95 N.J. 334, 363-66 (1984). It requires: (1) the determination that the sentence imposed does not violate legislative policies, i.e., there must be compliance with statutory sentencing authority and stated parameters for a sentence to be lawful; (2) appellate review includes an examination into whether the aggravating and mitigating factors found by the sentencing court were based upon complete credible evidence in the record; and (3) appellate courts are empowered to determine whether, even though the court sentenced in accordance with the guidelines, nevertheless the application of the guidelines to the facts of the case makes the sentence clearly unreasonable so as to "shock the judicial conscience." Ibid.

Generally, the abuse-of-discretion standard applies in appellate sentencing review. Hudson, 209 N.J. at 529; see also State v. Blackmon, 202 N.J. 283, 297 (2010). Defendant was sentenced to a term of 180 days in the Somerset County Jail, with no probation to follow, no contact with Nessa (the puppy), and he was prohibited from owning, possessing, exercising control over or caring for any animals, including a goldfish. (4T:29-4 to 10). The

sentencing judge ordered these conditions be added to Defendant's parole supervision for life. (4T:29-10 to 12).

A. The sentencing court did not lack jurisdiction to impose conditions of parole

Defendant was sentenced to parole supervision for life in 2010 for first degree aggravated sexual assault. During sentencing for the present charge, Defendants trial counsel told the sentencing judge that he could add certain conditions to Defendant's parole: "And if your Honor is inclined, Mr. Hartobey is willing to submit to anger management counseling, which can be added as a condition of his parole supervision for life." (4T:8-20 to 23).

The sentencing court did not lack jurisdiction to impose conditions onto defendant's parole. The instant case, and the case defense counsel cites below, are distinguished from each other and should be treated differently. Moreover, if the court did lack jurisdiction, it was trial counsel who suggested adding anger management to defendant's parole, which the judge did. By stating this, it induced the judge to add conditions to defendant's parole. As for the substance of the sentence, Defense counsel is very much mistaken as this sentence was authorized by statute. The new legislation defense speaks of was not published until well over a month after Defendant was sentenced. In fact, the new legislature agrees with the trial court's sentence, making the defendant's argument fail.

Trial errors that "were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal...." State v. A.R., 213 N.J. 542, 561 (2013) (citation omitted). The doctrine "is grounded in considerations of fairness and is meant to prevent defendants from manipulating the system." Id. at 561-62 (internal markings and citations omitted). The doctrine is implicated "when a defendant in some way has led the court into error...." Id. at 562 (internal markings and citations omitted). When the doctrine applies, reversal is only appropriate where the error "cut mortally into the substantive rights of the defendant [causing] a fundamental miscarriage of justice...." Ibid. (internal markings and citations omitted).

Defense counsel induced the sentencing judge to add certain conditions of Defendant's sentence to his parole. Trial counsel asked specifically for his anger management requirement to be added to his parole. This induced the judge to not only add Defendant's anger management requirement to parole but all other conditions. Defendant cannot request a certain sentence, obtain that sentence, and then argue that the sentencing judge could not impose such a sentence. Even after the judge sentenced the Defendant, counsel did not object creating the presumption that trial counsel perceived no prejudice. State v. Wilbely, 63 N.J. 420, 422 (1973).

Defense cites to State v. Beauchamp, 262 N.J. Super. 532 (App. Div. 1993), stating a sentencing judge has no authority to impose conditions of parole. Beauchamp, unlike the case at bar, contemplates a Defendant who is not yet on parole. It does not discuss what is to happen to someone who is already actively on parole. Defendant, as stated ante, is subject to parole supervision for life for an unrelated case. For the present case, parole was never contemplated because he was sentenced to 180 days county jail with no probation or parole to follow.

The instant case and Beauchamp differ from each other and should be treated differently. In Beauchamp, the Defendant was convicted of burglary and contempt, he was not on parole at the time of his sentencing. Id. at 534. At the time of sentencing the Judge ordered that upon Beauchamp's release from custody "defendant to have no victim contact and no contact with the victim's mother…Defendant not to come within five miles radius of the victim's house." Ibid. Defendant appealed and the Appellate court found that the "sentencing judge had no authority to impose conditions of parole." Id. at 535-536.

In the instant case, the Defendant was already placed on parole supervision for life for an unrelated case. Beauchamp does not contemplate defendants that are already on parole. The Court in Beauchamp states: "Our

reservations about a sentencings court's prescience to divine future needs do not in any way bear upon its authority or discretion to articulate…by way of providing full background for the Parole Board, all the factual concerns, judgements, and insights it has developed." Id. at 537. Beauchamp specifically talks about future needs, but that is not the issue in the instant case. The Defendant was sentenced to 180 in days jail with no probation or parole to follow. Imposing the conditions of Parole at the time of sentencing was not a future need. Therefore, it was proper for the sentencing judge to add conditions to Defendant's parole.

B. The sentencing court imposed a sentence that was authorized by statute.

The sentence imposed by the sentencing judge was authorized by statute. Under N.J.S.A. 2C:43-2(d) sentencing courts may order the forfeiture of property…or "any other civil penalty." At the time of Defendant's sentencing there was not a specific statute that said a sentencing judge could impose the Defendant not to own or have custody or control over any other animals. Nevertheless, there was also no statute banning such a sentence.

"[I]t is well settled that when reviewing a trial court's sentencing decision, '[a]n appellate court may not substitute its judgement for that of the trial courts.'" State v. Evers, 175 N.J. 355, 386 (2003) (citing State v. Johnson,

118 N.J. 10, 15 (1990)). Appellant courts may only review and modify a sentence when the trial court's discretion was "clearly mistaken." Ibid.

The sentencing judge was permitted to impose a sentence of disallowing the Defendant to ever own or have control over any animal ever. This falls under the catch all language in N.J.S.A. 2C:43-2(d). Defendant was found guilty of beating a 6-month-old puppy by kicking, dragging, and punching her. It is not unreasonable for the judge to disallow the Defendant from ever owning or caring for any animal ever again.

1. **Ex Post Facto**

Defense lastly argues that Defendant's sentence should be overturned because it falls under ex post facto. N.J.S.A. 4:22-26.2 was enacted on July 26, 2023, a month after the Defendant was sentenced. This statute, which went into effect immediately, allows a judge to sentence a defendant, who was convicted of animal cruelty, to "not harbor, reside with, or have custody or control of any other animals for a period of time that the court deems appropriate." N.J.S.A. 4:22-26.2(b)(2). Defense contends that because the Legislature did not intend N.J.S.A. 4:22-26.2(b)(2) to apply retroactively, the sentence imposed on the Defendant is illegal and should be overturned.

Ex Post Facto states that any statute which makes more burdensome the punishment for a crime, after its commission, is prohibited as ex post facto.

Riley v. New Jersey State Parole Bd. 219 N.J. 270, 284 (2014) (citing U.S. Const. Art. 1 § 10, cl. 1). The Ex Post Facto Clause bars a legislature from retroactively altering the definition of crimes or increasing the punishment for the criminal acts after commission of a crime. Ibid.

Two findings must be made for a law to violate the ex post facto prohibition. Id. at 285. A court must first determine that the law is "retrospective." Ibid. (citing Miller v. Florida, 482 U.S. 423, 430 (1987)). A law is retrospective if it "appl[ies] to events occurring before its enactment" or "if it 'changes the legal consequences of acts completed before its effective date.'" Ibid. Second, the Court must determine whether the law, as retrospectively applied, imposes additional punishment for an already completed crime. Ibid. (citing Kansas v. Hendricks, 521 U.S. 346, 370 (1997)).

The State does not dispute that this statute was enacted after the Defendant was sentenced, but to say the sentence violates ex post facto laws is incredibly false. Defendant was sentenced well before the new statute went into effect. This new statute was not contemplated by the sentencing judge, nor was the defendant affected at all by its enactment. The new statute is not retrospective as it does not apply to events occurring before its enactment nor does it impose additional punishments to already completed crimes because, once again, the Defendant was not sentenced under this statute.

This Statute had absolutely no effect on the Defendant at the time of sentencing. This is not a situation where the week before Defendant was sentenced, this new statute was published, and he was sentenced in accordance with it. This new statute went into effect well after the Defendant had been sentenced and well into his sentence of 180 days in Somerset County Jail.

Defense counsel seems to be arguing that all sentences previously imposed become illegal once new legislation is enacted that alters the pervious sentencing guidelines, which is nonsensical. Further, the new legislation makes banning a defendant from ever owning, possession, or having control over an animal again permissible. This goes to show that the sentencing judge was not off base when he imposed such a sentence as just a month later, the legislature clearly approved such a result. Based on the above, the sentencing judge did not impose an illegal sentence, therefore Defendant's sentence and conviction should be affirmed.

CONCLUSION

For the above reasons and authorities cited in support thereof, the State respectfully urges this Court to affirm the conviction and sentence entered below.

Respectfully submitted,

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May 22, 2024

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3498-22
INDICTMENT NO. 21-04-0268-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from an Order of the Superior Court of New Jersey,
v.	:	Law Division, Somerset County.
ROBERT J. HARTOBEY,	:	Sat Below:
Defendant-Appellant.	:	Hon. Jonathan W. Romankow, J.S.C.,
	:	and a Jury.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

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REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

Following a jury trial in 2023, defendant-appellant Robert J. Hartobey was convicted of one count of fourth-degree animal cruelty, contrary to N.J.S.A. 4:22-17(c)(1). Mr. Hartobey filed his plenary brief on February 2, 2024, in which he raised two points challenging the conviction and one point challenging the sentence. (Db)[1] The State filed its responding brief on May 17, 2024.

Mr. Hartobey now files this reply brief in which he responds to the State's sentencing argument. (Sb 17 to 25) Mr. Hartobey additionally relies on the detailed procedural history and statement of facts in his opening brief. (Db 3 to 7)

[1] Sb – State's response brief
Db – Defendant's opening brief
Da – Defendant's appendix to his opening brief
1T – May 8, 2023 – trial
2T – May 9, 2023 – trial
3T – May 10, 2023 – trial
4T – June 23, 2023 – sentencing

LEGAL ARGUMENT

Mr. Hartobey relies on the legal argument from his initial brief. (Db 7 to 28)

REPLY POINT[2]

THE NON-CUSTODIAL PORTIONS OF MR. HARTOBEY'S SENTENCE ARE ILLEGAL.

In his plenary brief, Mr. Hartobey explained that the non-custodial portions of his sentence are illegal because the court lacked jurisdiction to impose conditions on his existing parole supervision for life, and because no law authorized the imposition of the specific conditions: (1) no contact with the dog; (2) no future ownership, care, or control over other animals; and (3) anger management counseling. (Db 18 to 28) The State responds that the three conditions added to Mr. Hartobey's preexisting parole supervision were legally imposed for three primary reasons: (1) Mr. Hartobey induced the court to impose parole conditions; (2) this Court's holding in State v. Beauchamp, 262 N.J. Super. 532 (App. Div. 1993), that courts cannot impose parole conditions does not apply to Mr. Hartobey; and (3) the no-animals condition was authorized by law. Each of these arguments is fundamentally flawed.

[2] This Point replies to Point III of the State's responding brief. (Sb 17 to 25)

1. A defendant can neither acquiesce to nor "induce" a court to impose an illegal sentence.

According to the State, Mr. Hartobey's statement to the trial court that he would be willing to have anger management counseling added as a condition of his preexisting parole supervision for life, even though the sentence for the instant offense did not include a parole term, "induced the judge to not only add [d]efendant's anger management requirement to parole but all other conditions." (Sb 20) The conclusion the State urges this Court to draw is that Mr. Hartobey "cannot request a certain sentence, obtain that sentence, and then argue that the sentencing judge could not impose such a sentence." (Sb 20)

The State's view is legally incorrect. A defendant cannot "induce" or invite a sentencing court to impose a sentence it is without legal authority to impose. In State v. Smith, the defendant entered into a plea agreement with a parole disqualifier that exceeded the maximum allowed by law. 372 N.J. Super. 539, 542 (App. Div. 2004). "The State argue[d] that defendant 'invited' the error and 'should be bound to his negotiated bargain.'" Ibid. This Court rejected the State's argument and explained that "parties cannot negotiate an illegal sentence." Ibid.

Likewise, in State v. Patterson, the sentencing court imposed a mandatory extended term on an offense that was not eligible for the extended

term. 435 N.J. Super. 498, 515-17 (App. Div. 2014). Although at sentencing, the defendant "agreed it was appropriate to grant the prosecutor's motion [for the extended term]," this Court explained that "a defendant may not acquiesce in the imposition of an illegal sentence." Id. at 515. This Court vacated the sentence and remanded for the trial court to "resentence without imposing a mandatory extended term." Id. at 518.

The non-custodial portions of Mr. Hartobey's sentence are illegal for the reasons explained in his opening brief. (Db 18 to 28) The representation made by Mr. Hartobey's trial attorney that the court could add a condition to his preexisting parole supervision for life cannot convert an illegal sentence to a legal one.

2. State v. Beauchamp does not permit sentencing courts to fashion parole conditions for defendants who are already on parole.

To avoid caselaw that explicitly proscribes the imposition of parole conditions by a sentencing court, the State attempts to limit this Court's ruling in Beauchamp, 262 N.J. Super. 532, to defendants who are not already under some form of parole supervision. (Sb 21 to 22) But that interpretation is belied by Beauchamp's text and fails to contend with the fact that Beauchamp is, at its core, addressed to separation of powers principles.

The separation of powers is "a bedrock principle of our federal and state constitutional forms of government." In re P.L. 2001, Chapter 362, 186 N.J.

368, 378 (2006). This distribution of powers between the three branches "is premised on the theory that government works best when each branch of government acts independently and within its designated sphere." Ibid.

Beauchamp is a separation of powers case. As this Court explained, "once a trial court has pronounced sentence and entered a judgment of conviction, it relinquishes jurisdiction over the matter to the executive branch." Beauchamp, 262 N.J. Super. at 537. "Just as the executive branch of government may not intrude unduly on the judiciary's discharge of its responsibilities in the sentencing process, . . . so is the judicial branch limited in its role thereafter as the sentence is executed." Ibid.

As explained in Mr. Hartobey's initial brief, the Legislature has made no provision for a sentencing court to directly impose conditions on a defendant's parole, whether that defendant had been on parole for an unrelated prior offense, or whether the defendant would enter parole supervision for the first time after serving a custodial sentence for the instant matter. (Db 20 to 22) In either case, a sentencing court would impermissibly "intrude" on the executive branch's jurisdiction over parole conditions by attempting to "divine future needs." Beauchamp, 262 N.J. Super. at 537. And, at any rate, Mr. Hartobey's sentence for animal cruelty did not include any period of parole supervision. If they are not vacated, however, the illegal parole conditions imposed on Mr.

Hartobey by the sentencing court will take effect in the future – when Mr. Hartobey is released from his term of imprisonment.

3. The non-custodial components of Mr. Hartobey's sentence were not authorized by any law.

The State concedes that "[a]t the time of Defendant's sentencing there was not a specific statute that said a sentencing judge could impose [sic] the Defendant not to own or have custody or control over any other animals." (Sb 22). But the State subsequently inverts the proposition that all sentences must be authorized by law and points out that "there was also no statute banning such a sentence." (Sb 22)

The question is not whether a particular sentence is banned by statute, but whether the sentence is "an authorized disposition under the Code." State v. Hyland, 452 N.J. Super. 372, 381-82 (App. Div. 2017); see also State v. Murray, 162 N.J. 240, 246 (2000) ("[T]he Code . . . specif[ies] the sentence or penalty for each offense and the authorized dispositions."). None of the three restrictions imposed on Mr. Hartobey were authorized dispositions for his offense.

The only statutory provision the State points to in support of the non-custodial terms imposed by the court is N.J.S.A. 2C:43-2(d), which authorizes sentencing courts to order "any other civil penalty." (Sb 22) But the State entirely ignores State v. Masce, 452 N.J. Super. 347 (App. Div. 2017),

discussed in Mr. Hartobey's opening brief. (Db 22-23) Masce expressly limits the catchall phrase in N.J.S.A. 2C:43-2(d) to those civil penalties already authorized under a separate statute. Id. at 356-57. "We construe N.J.S.A. 2C:43-2(d) to mean that the court may impose those civil penalties specified in a statute." Ibid. As the State correctly observed, no statute specifically authorized the penalties imposed on Mr. Hartobey. (Sb 22) Thus, N.J.S.A. 2C:43-2(d) cannot provide statutory support for the conditions imposed on Mr. Hartobey.

Finally, the State appears to agree with Mr. Hartobey that a subsequently enacted statute authorizing courts to prohibit violators of animal cruelty laws from owning other animals, N.J.S.A. 4:22-26.2, cannot provide statutory support for the no-pets condition imposed on him, because he "was sentenced well before the new statute went into effect." (Sb 24) The State does not address Mr. Hartobey's argument that the other two conditions of his sentence – no contact with the specific dog and anger management counseling – were also not authorized dispositions under the Code. (See Db 27 to 28)

Sentencing courts may not fashion parole conditions, a power exclusively reserved to the executive branch. Mr. Hartobey could not induce the court to impose a sentence it was without jurisdiction to impose. And no law authorized the court to order Mr. Hartobey to have no contact with the

dog, to refrain from all future custody or control over other animals, and to complete anger management counseling as part of his sentence for animal cruelty. These components of his sentence are illegal and must be vacated.

CONCLUSION

For the reasons in this reply and in Mr. Hartobey's initial brief, the non-custodial portions of his sentence must be vacated.

Respectfully submitted,

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Dated: May 22, 2024