NEW HAMPSHIRE SUPREME COURT

No. 2018-0402

THE STATE OF NEW HAMPSHIRE
Appellee,
v.
CHRISTINA FAY
Defendant / Appellant

ON APPEAL FROM JUDGMENT AND SENTENCE
OF THE CARROLL COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT – APPELLANT CHRISTINA FAY

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15 minutes Oral Argument
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QUESTION PRESENTED

The government, after obtaining a warrant to search Ms. Fay's home and seize her dogs and other personal property, allowed the Humane Society of the United States (HSUS) and other civilians to enter Ms. Fay's home, take photographs and videos inside her home, and then conduct a public media and fundraising campaign using that private information. The government did not seek prior judicial authorization for civilians to enter Ms. Fay's home or even advise the issuing magistrate it intended to do so. Nor did the government inform the Court that it had entered into an agreement that allowed HSUS to use evidence gathered during the search of Ms. Fay's home for purposes other than law enforcement.

By these actions, did the government violate Ms. Fay's constitutional rights to privacy, and to be free of unreasonable searches and seizures, under Part I, Articles 2-b and 19 of the State Constitution, and the 4th Amendment to the United States Constitution, such that the trial court erred in denying the motion to suppress?

STATEMENT OF THE CASE

The State charged Christina Fay with Cruelty to Animals in violation of RSA 644:8. App. 87.[1] The complaints that proceeded to trial all alleged that on June 16, 2017, while having 75 Great Dane dogs in her residence in Wolfeboro, Fay committed the crime of cruelty to animals, which has two variants relevant to this case: 1) negligently depriving animals of necessary care, sustenance or shelter, RSA 644:8, III(a), and 2) negligently permitting or causing an animal in her possession or custody to be subjected to cruelty, inhumane treatment, or unnecessary suffering of any kind. RSA 644:8, III(f); *see* Add. 2-3; App. 108-219.

In the Addendum, a Summary of Complaints sets forth the basic allegations, some of which are very lengthy, in each of the 17 complaints that resulted in a conviction. Add. 1. In brief, twelve of the complaints alleged the theory that she deprived a dog or group of dogs of necessary care, sustenance or shelter, by exposing the entire population of dogs to giardia, not making water readily available to the entire

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[1] References to the record are as follow:
"Add. #" refers to the Addendum at the end of this brief;
"App. #" refers to the separately-bound Appendix to this brief;
"T1. [#]" through "T9. [#]" refer to the trial transcript;
"T-MTS. [#]" refers to the transcript of the 01/30/18 suppression hearing.

population, exposing specific groups of dogs housed in the basement or garage to ammonia gas caused by decomposing urine and feces, and with respect to certain specific dogs, failing to treat or inadequately treating medical conditions including papilloma infections, ear infections, conjunctivitis, cherry eye, ectropion, entropion, and diamond eye. Add. 1-3; App. 108-219.

The five remaining complaints alleged that Fay violated the other variant of the statute, by permitting or causing cruelty, inhumane treatment, or unnecessary suffering with respect to five specific dogs. These complaints alleged multiple medical issues and inhumane treatment issues with respect to these individual dogs, as detailed in the Addendum. Add. 1-3, 10; App. 108-219.

Prior to trial, Fay moved to suppress the evidentiary fruits of the June 16, 2017 search of her home and seizure of her dogs. App. 1. She contended that the police allowed employees of the HSUS to enter and search her home, take extensive photographs and video recordings inside her home, seize her dogs, and then use the evidence gathered for purposes of fundraising on websites and social media,

without judicial authorization.[2] App. 2-6. She also litigated a motion to dismiss that claimed the State violated her right to due process by allowing HSUS to engage in these activities, jeopardizing her right to a fair trial. App. 89.

The State objected to Fay's motions to suppress and to dismiss. App. 41, 95. The trial court conducted an evidentiary hearing that covered both motions. T-MTS. 17-135. The court issued written rulings denying the motions and denied Fay's motions to reconsider. App. 59-78, 86, 101-107.

In February, 2018, the case proceeded to a nine-day jury trial. Two complaints were dismissed during trial. T4. 694. The jury convicted Fay of the remaining 17 counts. The court sentenced Fay to concurrent 12 month house of correction sentences, all suspended for five years; imposed a total fine of $34,000.00 plus a total penalty assessment of $16,320.00; and ordered her to pay restitution in the amount of $1,953,606.00 to HSUS, a figure that may be adjusted upward or downward based on certain considerations, plus $18,682.88 to the municipality of Wolfeboro. Add. 8; App. 108-219. The Court granted bail pending appeal. Add. 9.

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[2] Ms. Fay made other arguments in the motion to suppress, such as the argument that it did not establish probable cause to search, App. 6-12, that are not argued on appeal.

STATEMENT OF FACTS

The events of this case unfolded at Christina Fay's home in Wolfeboro, where she moved in 2015 to have more space to raise her European Great Danes. T6. 1299, 1303; T7. 1455. Fay bred and sold some dogs, maintaining a website that called her business "De La Sang Monde Great Danes." T7 1455. When Fay first moved in, she brought three employees with her to help her care for the animals. T6. 1303.

Although Fay's home sat on a 54-acre property, from the time she moved in she was besieged by complaints to her staff, and to town officials, regarding her dogs. App. 19. Many of these complaints originated from a single neighbor, Roberta Boudman. T2. 462. In the two years leading up to the raid in this case, the town brought at least six separate complaints for dogs barking during night hours, nuisance/vicious dog, and in one instance, a dog bite, to court. App. 19. On February 7, 2017, Fay resolved one of these cases by signing an agreement with the town to sell her home and move away within a year. T2. 488; T7. 1406-07.

A. The official investigation

In May of 2017, two individuals who Fay employed for short periods of time to care for dogs brought complaints to humane society officials, the police, or both: Marilyn Kelly, who worked for Fay and resided there for 23 days in April, May and June, 2017, living in an apartment above the

garages, T2. 373-74; and 16-year-old A.N., who worked at Fay's residence for only a single day, May 2, 2017. T2. 309, 494. Both took photographs of conditions inside the house and provided the photos to officials. T-MTS. 23; App. 60; T2. 336, 398, 494.

Broadly speaking, Kelly and A.N. said there were around 84 dogs in the residence, and complained about the conditions; their complaints generally mirrored what investigators found when executing the search warrant, as discussed below. T2. 323, 325, 330, 375, 381, 384, 388. Kelly told Fay she was finding new homes for nine of the dogs, but actually brought some of them to the Conway Area Humane Society, where she was told the dogs had health problems and should not be around other dogs. T2. 390, 412; T3. 541.

On May 8, 2017, Wolfeboro Police Officer Michael Strauch went to the residence to serve a civil nuisance dog forfeiture summons. T-MTS. 21; T2. 434. As he approached an open garage door, he heard the sound of a large number of dogs barking, and became overwhelmed by the smell of urine and feces, and the odor of something rotting. T-MTS. 22; App. 60; T2. 437.

Veterinarians and local humane society officials examined photos taken by Kelly and A.N. and told Strauch that the photos depicted inhumane and unsanitary conditions, and also depicted signs of neglect in the pictures

of the dogs themselves. App. 19, 21. A veterinarian that examined the dogs relinquished by Kelly without Fay's knowledge, told the police that the dogs had been issued health certificates by Fay's regular veterinarian Dr. Kate Battenfelder, but showed signs of neglect and were afflicted by various medical conditions. App. 22, 60; T-MTS. 23-24; T3. 541.

Officer Strauch applied for a search warrant, and an arrest warrant. App. 15, 61; T-MTS. 29. On June 15, 2017, the Ossipee District Court issued the warrants. App. 16. The search warrant authorized the search of all buildings, other structures and vehicles on the property, and the seizure of what were estimated to be 78 dogs. App. 16, 23. The warrant further allowed photographs and videos of the conditions on the living areas of the animals. App. 61.

In terms of the plan for how the warrant would be executed, Strauch testified that the Wolfeboro Police did not have the capability of seizing, handling, and transporting this many large dogs. T-MTS. 27-28, 31, 47. Even if all of the shelters in the State were able to cumulatively take the dogs, the shelters would not accept dogs that carried contagious illnesses. T-MTS. 28, App. 61. Thus, the Wolfeboro Police turned to the HSUS, which had the experience and equipment to handle large scale animal seizures. T-MTS. 28.

In order to enlist their help, the Wolfeboro Police and the Town Manager entered into a written "pre-deployment cooperative agreement" with HSUS. T-MTS. 30-31; T1. 243. In addition to agreeing to assist with the execution of the search warrant, the HSUS agreed to bear the cost of sheltering and caring for the dogs. T-MTS. 81; App. 62. Wolfeboro Police Chief Dean Rondeau testified that his department did not preclude third parties like HSUS from using crime scene evidence for their own purposes. T5. 1040. He testified that the department's agreement with HSUS allowed HSUS to keep any money earned from fundraising as a result of its participation in the investigation. T5. 1036.

The affidavit presented to the court in support of the application for the search warrant did not indicate that any civilians such as humane society employees would participate in the execution of the warrant. App. 61. It did not indicate that the civilians would be authorized to use photos taken as a result of the warrant in support of a fundraising campaign to benefit a private organization. The warrant did not expressly authorize any such assistance or use of the evidence for private gain. App. 16, 19-25, 63; T-MTS. 36, 38.

B. Execution of the search warrant

On June 16, 2017, the search warrant was executed by Officer Strauch and other Wolfeboro Police officers, assisted by multiple HSUS employees and employees of other local

humane societies, veterinarians, and other local law enforcement or fire department employees. T-MTS. 26-27, 29; T2. 493, 538; T4. 696. Prosecution witnesses testified that law enforcement officers and HSUS employees arrived at 8:00 a.m. and did not finish until around 11:00 p.m. T1. 226, 237; T2. 364, 455.

Wolfeboro Police officers went in first, to clear the residence. T1. 125; T2. 498. Subsequently, HSUS employees entered the house, did an initial walkthrough, and labeled all areas to identify where a dog had been found. T2. 126. HSUS employees took pictures and filmed video throughout the house before any dogs were removed. App. 63; T2. 126, 297. HSUS and local humane society employees assisted Wolfeboro officers in the collection of evidence, including 8 fecal samples. App. 63; T2. 498. Veterinarians conducted brief examinations of dogs after they were removed from the residence and before they were transported offsite. App. 63; T3. 542; T4. 701.

Law enforcement and HSUS witnesses testified that the floors in rooms where dogs were kept were slick with a coating of urine and feces, making it difficult to walk. T1. 129, 132; T2. 448, 450-51, 497, 500, T4. 699. Dogs had transferred feces to other surfaces, including walls “up to the height of the dogs,” and furniture. T1. 130; T2. 500. Some surfaces were bloodied from dogs afflicted by “happy tail”, a

common condition for large breed dogs with long tails (the tail is injured by repeated striking against the sides of a kennel, walls or other objects). T2. 283, 453, 497, 500; T4. 716, 845.

Several rooms in a large, poorly ventilated basement housed kennels and dogs in hot and stuffy conditions. T2. 453, T3. 574-75. While some kennels appeared to be clean, the floors and sides of other kennels were wet and matted with a coating of urine, feces, and hair. T2. 299, 453. Prosecution witnesses testified that the smell of feces and ammonia from urine in areas where dogs were kept, especially the garage and basement rooms, caused irritation to the eyes and throat, and made it difficult to breath. T1. 129, 132; T2. 448, 450, 496-97, 573-75,;T4. 699-700. However, many of the HSUS employees did not wear masks inside the house. T1. 257; T2. 274. The prosecution admitted many photographs taken inside the house that documented these conditions. T1. 136, 141-198.

Prosecution witnesses testified they saw no water available for dogs inside the house, and bowls found outside had dirt and sand in them. T1. 128; T2. 452, 496. However, none of the medical examinations of dogs showed signs of dehydration. T3. 628-29; T8. 1576.

The defense elicited evidence to support the argument that the manner in which the search was conducted may have contributed to many of the hygiene concerns and

medical conditions at issue in the case. Prosecution witnesses testified that following a HSUS policy, they provided no water or food or opportunity to go outside and relieve themselves to any of the dogs, until after the dogs were removed from the house. T1. 259; T2. 364. No dogs were removed until around late morning or midday, and some dogs were not removed from the house until as late as 10:00 p.m., possibly even later. T1. 252-53, 258; T2. 275, 507; T4. 706, 713.

Thus, if Fay or her employees had not fed the dogs, watered the dogs, or let them go outside prior to 8:00 a.m. on June 16, 2017, some of the dogs may have gone more than 24 hours without opportunity to access food, water, or go to the bathroom outside their pens. T2. 364, 370. Accordingly, it would be reasonable to expect that the dogs would urinate and defecate inside the house and inside their enclosures. T2. 294, 305. However, prosecution witnesses insisted that the conditions they saw could not have developed in a 24-hour period. T2. 458; T4. 714, 740.

C. Conditions of the dogs

Prosecution witnesses testified that many of the seized dogs were afflicted by medical conditions, some of which required surgery, including canine papilloma virus, giardia, conjunctivitis, cherry eye, diamond eye, happy tail, and ear infections. *E.g.,* T3. 545, 547, 550, 557, 562, 635, 650, 643, 674. Eight stool samples collected inside Fay's residence

tested positive for the giardia virus, with profiles that indicated they came from at least five different dogs. T2. 505, T4. 769.

D. HSUS media and fundraising campaign using photos and evidence from inside a private home

After the search of Fay's home, HSUS used the evidence gathered to conduct a media and fundraising campaign. HSUS posted photographs of the inside of Fay's home, and photographs of her dogs taken inside the home, to social media and on the internet. T-MTS. 54; App. 63; T5. 1072, 1076. Lindsay Hamrick, NH Director of HSUS, testified at trial that HSUS only posted pictures that the Wolfeboro Police, and prosecutors in the case, expressly approved for online posting. T5. 1072. As a direct result of these social media postings, which had fundraising links and tracked financial donations directly to the links, HSUS raised $189,000, plus another $135,000 worth of in-kind donations. T-MTS. 54; T1. 248; T5. 1073, T6. 1127. Hamrick testified that as of the time of trial, it had cost HSUS 1.3 million dollars to shelter, treat and care for Fay's seized dogs. T5. 1070; T6. 1127, 1132.

E. Prosecution expert testimony at trial

The State called veterinarian and retired UNH professor Dr. Jerilee Zezula to provide expert testimony regarding generally-accepted standards and practices for the shelter and care of a large population of dogs. She testified that the

facility, staffing, and alleged daily routines at Fay's residence did not meet these standards for a number of reasons, including insufficient staffing, unsanitary conditions that contributed to the spread of disease including papilloma and giardia; insufficient opportunities for dogs to move away from their primary enclosure so they can urinate and defecate away from the area in which they eat and sleep; and insufficient water. T4. 743, 752, 758-59, 760-62, 764-65, 784, 792. As far as the appropriate treatment of dogs that exhibited medical conditions, Zezula testified that dogs afflicted by oral papilloma, and dogs with giardia, should be isolated from other dogs. T4. 763, 765. On cross-examination, Zezula acknowledged that veterinary records showed that Fay's dogs collectively had 289 visits to the veterinarian in a single year, noting that some of the visits related to breeding as opposed to ordinary preventative care and treatment. T4. 815, 862.

F. The defense case

The defense called nine witnesses, including Roberta Boudman, the disgruntled neighbor who made multiple complaints about the situation on Fay's property. T5. 983-84. She made many complaints to the police, town officials, and Fay's employees about excessive barking, and that Fay was running a business in a residential neighborhood. T5. 985, 991-92; T5. 992, 999. A police officer told her that her own

complaints were the reason the dogs were being kept inside, causing harm to the dogs. T5. 1000, 1002.

The defense also called Julia Lee, who was Fay's employee from November 20, 2016 to June 16, 2017. T6. 1141-42. When she was hired, Fay had four employees. T6. 1142. Lee described a daily routine that included preparing their food, cleaning their enclosures, bringing the dogs outside on a schedule in specific groupings based on which dogs interacted well together, watering the dogs 3-4 times a day, and monitoring dogs for health problems like ear infections every day. T6. 1145-46, 1149, 1151.

Lee testified that Fay brought dogs to the veterinarian Kate Battenfelder at True North almost every day. T6. 1156. She claimed that no dog that needed veterinary care failed to get the required care. T6. 1158. She testified that from November 2016 to June 2017, Fay's dogs produced just two litters. T6. 1156.

According to Lee, two adverse developments impacted the care of the dogs. First, the complaints of neighbors, including Boudman, caused Fay to direct less outdoor time for the dogs. T6. 1147. Second, in March of 2017, three employees terminated their employment. T6. 1153. At this point, according to Lee, they stepped up their efforts both to get dogs adopted out, and to hire more employees. T6. 1153. But these efforts were not successful, as Marilyn Kelly was

"away a lot at the Humane Society" and "didn't pull her weight," and A.N. left after only one day. T6. 1155-56. When the staffing was reduced to just Fay and Lee caring for the dogs, they were only able to bring the dogs out for water once a day. T6. 1183. And on the weekends, the only person caring for the dogs was Fay herself. T6. On cross-examination, Lee acknowledged that during the time period that the staff was shrinking and the dog population was growing, Fay was still sending her to the airport to pick up new dogs being flown in from Europe. T6. 1191.

Defense witness Stephanie Macomber, a veterinarian technologist who worked for Kay's veterinarian Kate Battenfelder at True North, testified that Fay was "an attentive owner, who never skimped on care." T6. 1242. Fay communicated with them by phone every day and brought dogs in for medical care and reproduction work 2-5 times per week throughout 2016 and 2017, up to the time of the raid. T6. 1240, 1279. Macomber testified that True North had treated Fay's dogs for giardia, papilloma, and ear infections in the past. T6. 1265, 1267, 1270. Macomber also testified regarding specific care provided to dogs that were the subject of indictments. T6. 1243, 1253-54, 1255, 1257, 1259, 1263, 1282.

On cross-examination, Macomber testified that she and Battenfelder had recommended Marilyn Kelly as a potential

employee for Fay. T6. 1276. After being hired, Kelly came to True North to express concern about the conditions in Fay's residence, and told Battenfelder and Macomber that if they didn't do something, she would report her concerns to the police. T6. 1276.

Christina Fay testified in her own defense. T6. 1297. She testified that she moved to Wolfeboro with 40 to 50 dogs, got permits from the town to fence in 19 acres of her 54-acre property, and built nine outdoor garden houses with heat and air conditioning for the dogs to reside in. T6. 1301, 1304-1305, 1316. Unfortunately, she ultimately had to move her dogs inside because of Boudman's continuous complaints to her staff and to town officials. T6. 1301, 1304-05, 1316. She testified that her dogs were her pets, breeding them was her hobby, and she had never bred the dogs for profit. T6. 1306, 1309. She discussed the specific medical treatments provided to dogs named in indictments and the advice she received from True North as to how to treat those dogs' conditions. *E.g.,* T7. 1362, 1366, 1373, 1380.

Fay candidly acknowledged that she was "well aware" that she had too many dogs and not enough help. T7. 1433. Caring for the dogs had become more difficult due to the employee departures, T7. 1410, 1417, and due to her own debilitating knee pain in May and June of 2017 for which she sought medical treatment. T7. 1411, 1415. She made diligent

efforts to hire more staff, to "rehome" dogs to reduce the population, and to find a new home away from Wolfeboro in accordance with the agreement to relocate that she entered into with the town. T7. 1408, 1410, 1417, 1433-34. She testified that she had lined up three new or returning employees, although they were coming in late June or July. T7. 1436. Nevertheless, she testified that with only Lee helping her on week-days, and caring for the dogs alone on weekends, she was able to provide for the dogs' needs, including getting them outside for water and exercise no less than three times a day. T7. 1439, 1469-70.

The defense also called Northwood veterinarian Hugh Davis. T7. 1525. He testified that during the jury trial, he examined 18 of the European Great Danes in state custody, and observed that many, after nine months of care by HSUS, had the same types of medical conditions that Fay was being faulted for: happy tail, cherry eye, conjunctivitis. T7. 1430-33. However, the dogs were generally in good health, and the symptoms he saw were commonplace in his veterinary practice. T7. 1527, 1537.

Finally, the defense called Virginia veterinarian Samantha Moffitt as an expert witness. T7. 1556, 1561. She testified that she reviewed the pre-raid veterinary records in the case, and that they showed that Fay obtained more expensive treatments for her dogs when cheaper treatments

were available, used multiple specialists, and got wellness checks for dogs that had no presenting issue. T7. 1637.

Dr. Moffitt concluded that based on her review of the dogs' veterinary records, and because the medical conditions charged in the complaints are common and could be experienced by any pet owner, she believed that Fay was a responsible pet owner. T7. 1636.

Like Davis, she had examined some of the seized dogs months after the raid and found that while in HSUS custody, the dogs exhibited the same sorts of medical conditions: multiple swellings and callouses, entropion, ectropion, cherry eye, conjunctivitis. T7. 1593-99. She testified that most of these issues – happy tail, eye issues – are very common in great danes and other large breeds. T7. 1611-12.

On cross-examination, the State critiqued her opinion on the basis that she reached it without reviewing any of the photographs taken at Fay's house on June 16, 2017. T7. 1662. But even when shown those photographs, Dr. Moffitt did not waver in her opinion. T7. 1678.

SUMMARY OF ARGUMENT

The State violated Ms. Fay's constitutional right to privacy and to be free of unreasonable searches and seizures when it brought civilian representatives of a privacy advocacy organization into a private home during the execution of a search warrant, let them take photographs and record video inside the home, and let them the use the evidence in support of a media and fundraising campaign, all without judicial authorization. Although courts from other jurisdictions have not required judicial authorization for the use of civilian assistants, this Court should hold that it is a requirement under the state constitution for three reasons: 1) Part I, Article 19 provides greater protection for individual privacy, and embodies a constitutional preference for prior judicial authorization; 2) the enactment of Part I, Article 2-b has expanded the scope of individual privacy in our State, and 3) this case illustrates the precise harms that may occur if prior judicial authorization is not required and police do not place appropriate constraints on the conduct of assistants.

Suppression of evidence is the proper remedy for these constitutional violations. Under federal law, some courts have suggested that application of the exclusionary rule may depend on the civilian's extent of involvement in the search process. Under the state constitution, this Court should hold that the exclusionary rule applies under the circumstances of

this case, because the involvement of HSUS and other private parties in the execution of the search warrant was extensive, the post-search conduct of HSUS was expressly authorized and sanctioned by the police and prosecutors in the case, and the state constitution's exclusionary rule serves broader purposes than the exclusionary rule under the 4th Amendment. Accordingly, this Court should reverse the trial court's ruling on Fay's motion to suppress, vacate her convictions, and remand for further proceedings.

THE POLICE VIOLATED MS. FAY'S RIGHTS TO PRIVACY AND TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES BY ALLOWING CIVILIANS TO ENTER AND SEARCH A PRIVATE HOME, AND THEN USE EVIDENCE FROM THE HOME FOR FUNDRAISING ON SOCIAL MEDIA, WITHOUT JUDICIAL AUTHORIZATION.

"'The house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.'"

Wilson v. Layne, 526 U.S. 603, 609-10 (1999)(quoting *Semayne's Case*, 77 Eng. 194 (K.B. 1604).

A. Introduction

Christina Fay, like all residents and guests of our State, has the right to privacy in her home and possessions under the 4th Amendment, and has the significantly more expansive right to privacy under Part I, Article 2-b and Article 19 of the State Constitution. These fundamental rights were violated when the State contracted with private parties to help them execute a search warrant, but did not adhere to the basic safeguards that must accompany a decision to bring civilians into a private home without the homeowner's consent.

Ms. Fay contends that these basic safeguards must include the following: 1) informing the issuing magistrate that civilians will be brought into a citizen's private home against her will; 2) obtaining the magistrate's express authorization for the civilian's involvement in the search; and 3) taking adequate steps to ensure the civilians respect the

homeowner's right to privacy, such as placing them under a non-disclosure agreement, to ensure that the fruits of the search are used only for legitimate investigative, law enforcement purposes.

None of these principles are enshrined in our current law, not because we have rejected these principles, but because we have never considered them. There is a statute, RSA 595-A:8, which states that "[a]n officer executing a search warrant may take with him suitable assistants and suffer no others to be with him." But this law has never been cited in any decision of this Court, and its language begs the basic questions raised by this case: Who decides who is "suitable," the magistrate issuing the warrant, or the police officer executing the warrant? What happens if the officer brings "unsuitable" assistants, whether or not authorized by the warrant? And does the issuing magistrate, or the police officer, or both, have any obligation to ensure that the assistants respect the personal privacy of the homeowner in the aftermath of the execution of the warrant?

Thus, this is a case of first impression. Because there is no precedent for this situation in our State under the State Constitution, this brief, throughout, discusses how the relevant principles of law have developed under the Fourth Amendment. But consistent with the primacy doctrine, and because our state constitution's privacy protections are

textually more expansive and provide greater protection than those in the federal constitution, Ms. Fay first brings her claim under the State Constitution, looking to federal authority for guidance. *State v. Ball*, 124 N.H. 226, 231-33 (1983).

B. Standard of Review

This Court applies a *de novo* standard of review on appeal from a trial court's ruling on a motion to suppress, except as to any controlling facts determined by the superior court in the first instance. *State v. Goss*, 150 N.H. 46, 47 (2003).

C. Preservation

Ms. Fay preserved her claims under N.H. Const., Part I, Article 19, and the 4th Amendment, by filing a motion to suppress that cited to both of these provisions, filing a related motion to dismiss, arguing her case in the suppression hearing, and filing a motion to reconsider. App. 1, 5, 79, 89. The issue of preservation of arguments made under Part I, Article 2-b of the State Constitution is discussed below in section D(2).

D. The police violated Ms. Fay's constitutional rights by bringing civilians into her home without judicial authorization and without taking appropriate steps to ensure the civilians would not use evidence for a non-law-enforcement purpose

Under the state and federal constitutions, there is a two-step analysis for evaluating challenges to searches

conduct pursuant to a warrant: 1) the warrant must be sufficiently particular and establish probable cause, and "the manner of its execution must in other respects be reasonable." *State v. Schultz*, 164 N.H. 217, 221 (2012); *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). Bringing civilians into Ms. Fay's home without judicial authorization, and without taking steps to ensure that they would respect Ms. Fay's right to privacy, violated the requirement that the manner of execution be reasonable.

Preliminarily, Ms. Fay recognizes that involvement of civilian assistants during execution of a search warrant can be reasonable under certain circumstances, and if done differently may have been reasonable in this case. Most if not all jurisdictions recognize that police may use private parties under certain circumstances to help them execute a search warrant. *See Bellville v. Town of Northboro*, 375 F.3d 25, 33 (1st Cir. 2004)(collecting cases); *Wilson*, 526 U.S. 603, 612-13 (1999). Under federal law, the use of private parties to assist in the execution of the warrant is authorized by statute, 18 U.S.C. § 3105, and is governed by the reasonableness requirement of the Fourth Amendment. *Bellville*, 375 F.3d at 32.

For example, a crime victim may be brought into the private home to help the police identify property stolen from the victim, *Wilson*, 526 U.S. 611-12, or technicians with

expert skills may help the police search electronic evidence. *Schalk v. State*, 767 S.W.2d 441, 454 (Tex. Ct. App. 1988), *cert. denied*, 503 U.S. 1006 (1992) (upholding assistance of civilian software expert where police officer lacked expertise to distinguish a trade secret from a legitimate computer software program).

It is equally clear that "it is a violation of the Fourth Amendment for police to bring … third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Wilson*, 526 U.S. at 614. Thus, in *Wilson*, the police violated the Fourth Amendment when they brought Washington Post reporters with cameras for a "media ride-along" into a private home while executing an arrest warrant. 526 U.S. at 614.

Here, the record establishes that the Wolfeboro Police needed assistance to execute the warrant, because of the number of dogs involved, and because of the need to care for this large group of dogs pending trial. T-MTS. 31. However, the police violated the reasonableness requirement of Part I, Article 19, standing alone and as illuminated by Part I, Article 2-b, by not seeking the issuing magistrate's authorization to use civilian assistants, and by not taking reasonable precautions such as a non-disclosure agreement to prevent

the civilian assistants from trampling upon Ms. Fay's right to privacy.

Under federal law, "the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed." *Dalia v. United States*, 441 U.S. 238, 257 (1979). Instead, "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Id.* at 258. Consistent with this principle, courts in other jurisdictions, while sometimes advising that the "better practice" is for police to notify the issuing magistrate and seek judicial authorization before bringing civilians into a private home under cover of law, have not required prior judicial notification and authorization as a constitutional prerequisite to the use of civilian assistants. *Bellville*, 375 F.3d at 33; *Commonwealth v. Sbordone*, 424 Mass. 802, 806 n.9, 678 N.E.2d 1184, 1188 n. 9 (1997)("The better practice is to have the warrant itself indicate that permission has been obtained for a named civilian to be present at the search to assist the police.").

However, this Court should hold that this is a requirement, not a best practice, under the state constitution for three reasons: 1) Because Part I, Article 19 historically provides greater protection for individual privacy, and embodies a constitutional preference for requiring prior judicial authorization rather than relying on the good faith of

police officers, 2) because the enactment of Part I, Article 2-b has expanded the scope of individual privacy in our State, and 3) because this case illustrates the precise harms that may occur if prior judicial authorization is not required.

1. Part I, Article 19 provides greater protection than the federal constitution and heightened protection with respect to searches of a private home

For decades, this Court has held that Part I, Article 19 provides greater protection of individual privacy than the 4th Amendment, and that it provides heightened protections with respect to searches of a private home. *E.g., State v. Schultz*, 164 N.H. 217, 221 (2012); *Goss*, 150 N.H. at 49-50 (citizens have reasonable expectation of privacy in their garbage left for pickup; rejecting contrary holding under federal constitution); *State v. Seavey*, 147 N.H. 304, 308-09 (2001)(under state constitution, rejecting State's claim that exigent circumstances justified warrantless entry into home); *State v. Canelo*, 139 N.H. 376, 386 (1995)(rejecting the federal good faith exception to the exclusionary rule); *State v. Santana*, 133 N.H. 798, 803 (1991); *Ball,* 124 N.H. at 231-32.

Further, decisions under Part I, Article 19 express the state constitutional preference for close judicial supervision of governmental intrusion into individual privacy, and for favoring judicial oversight rather than deferring to the discretion of the police officer. "[P]art I, article 19 safeguards privacy and protection from government intrusion" and

"manifests a preference for privacy over the level of law enforcement efficiency which could be achieved if police were permitted to search without probable cause *or judicial authorization*." *State v. Martin*, 145 N.H. 362, 367 (2000)(*quoting Canelo*, 139 N.H. at 386; emphasis in original *Martin* decision). Thus, in *Martin*, this Court held that police violated Part I, Article 19 by serving an arrest warrant that had been vacated that same day, where the police could not prove that the warrant remained in effect at the time of its execution, rejecting the arguments that the officers acted in good faith and took reasonable steps to ensure the warrant was still in effect. 145 N.H. at 365-67.

Based on the *Schultz* requirement that police execute a warrant in a reasonable manner, the heightened state constitutional protection of privacy in a private home, and the state constitutional preference of express judicial authorization over officer discretion, this Court should hold that police may not allow civilians into a private home without advising the issuing magistrate, obtaining judicial approval, and sufficiently controlling the conduct of the civilians to protect the privacy of the homeowner and limit their involvement to what is permissible, assisting in the execution of the warrant.

Even if this Court views prior judicial authorization to be unnecessary for the mere use of civilian assistants, it

should require it under the state constitution for agreements that allow the private party to exploit the evidence found for private gain. And regardless, this Court should hold that the agreement here violated Ms. Fay's constitutional rights, because it was constitutionally unreasonable for the police to allow HSUS to use evidence seized from a private home to raise hundreds of thousands of dollars and further its own agenda. Rather, to ensure the privacy of the homeowner, the police should have taken reasonable precautions such as a non-disclosure agreement to prevent the sort of exploitation that occurred here.

Absent meaningful constraints, the civilians, who are not sworn law enforcement officers and lack the legal training of law enforcement officers, may impermissibly expand the scope of the warrant and intrude upon the privacy of the homeowner in ways not permitted or even contemplated by the issuing magistrate. That is exactly what happened here. The Wolfeboro Police did not advise the issuing magistrate that it would use HSUS and other civilian assistants, and did not advise that it had entered into an agreement for HSUS to use the evidence for non-law-enforcement purposes. It did not obtain the magistrate's permission for this extraordinary and unforeseeable expansion of how evidence found in a private home would be used in the months leading up to trial.

2. Part I, Article 2-b has expanded the scope of protection of individual privacy, in a manner that leaves no doubt that HSUS involvement in this case violated the State Constitution.

Second, Ms. Fay contends that Part I, Article 2-b has expanded the scope of protection of individual privacy in our State, providing further support for her arguments. Effective December 9, 2018, New Hampshire's citizens overwhelmingly[3] approved a constitutional amendment that dramatically expands the scope of our state constitution's textual protection of individual privacy. N.H. Const., Part I, Article 2-b. This Amendment states: "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."

This Court has not yet construed Article 2-b. It could be viewed as creating a new, free-standing, right to privacy under the state constitution. Alternatively, it could be viewed as an emphatic pronouncement of the scope and breadth of the citizenry's reasonable expectation of privacy, giving meaning and shape to this concept for purpose of interpretation of Part I, Article 19.

Part I, Article 2-b had not yet been enacted as of the relevant time periods in this case: the June 16, 2017 search

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[3] See N.H. Sec. of State, Constitutional Amendment Votes, available at http://sos.nh.gov/18GenResults.aspx (more than 80 percent voted in favor of the privacy amendment).

of Ms. Fay's residence, and the time period of the HSUS media and fundraising campaign using images taken from inside her private home without her consent and against her will. However, Ms. Fay's case was still pending at the time of enactment of this new amendment. Thus, the first question the Court must answer is whether Article 2-b applies to this case.

Three considerations compel the conclusion that Article 2-b applies to this case: 1) The language of the amendment supports a finding of retroactive application, 2) the general principle is that new constitutional rules, even if not fully retroactive, apply to all criminal cases still pending when the rule is adopted, and 3) going forward, including when deciding this case, this Court cannot meaningfully address whether a particular search or seizure violates the "reasonable expectation of privacy" of our citizens without consideration of this amendment enacted by the people of New Hampshire.

First, the language of the amendment supports the finding that it applies retroactively. The starting point for analysis of a provision of the State Constitution is its text. *State v. Roache*, 148 N.H. 45, 49 (2002); *cf. State v. Carpentino*, 166 N.H. 9, 13-14 (2014)(to determine a statute's meaning, this Court first "examine[s] its language, and ascribe[s] the plain and ordinary meaning to the words

used."). Although the amendment does not expressly address the issue of retroactive application, it describes the privacy right as "natural, essential, and inherent."

As the New Hampshire Supreme Court observed when interpreting the "natural, essential, and inherent" language of Part I, Article 2, such rights "are not bestowed by that constitutional provision but rather are recognized to be among the natural and inherent rights of all humankind." *Burrows v. Keene*, 121 N.H. 590, 596 (1981). The choice by the citizens to characterize the right to privacy as pre-existing rather than newly-created manifests their intent to apply the amendment retroactively.

Second, under a long-standing principle recognized under both state and federal constitutional law, new constitutional rules apply retroactively to all case pending and on direct review when the new rule is announced. *State v. Tierney*, 150 N.H. 339, 343 (2003); *Teague v. Lane*, 489 U.S. 288, 310 (1989). This case was on direct review when Article 2-b was enacted.

Third, in its interpretation of Part I, Article 19, this Court will have to determine not merely whether actions of the police, and HSUS actions authorized by the police, intruded upon Ms. Fay's expectation of privacy, but more broadly whether "society is prepared to recognize that expectation as reasonable." *Goss*, 150 N.H. at 98. Practically

speaking, consideration of this new enactment by the people of our State is unavoidable in determining the contours and limits of what places, effects, and personal information the people reasonably expect to remain private. Accordingly, this Court should find that Article 2-b must be considered in deciding this case.

Whether construed as a free-standing right or an expansion of the protections provided by Article 19, Article 2-b significantly expands the scope to which individual privacy is protected from governmental intrusion, based on the following considerations. First, the Court must interpret Article 2-b to have an effect beyond the protections already provided by Article 19. To do otherwise would run against principles that "whenever possible, every word of a statute should be given effect" and that courts must presume that lawmakers do not "enact unnecessary or duplicative provisions." *In re Williams*, 159 N.H. 318, 323 (2009).

Second, the text is the starting point to understand the meaning of Article 2-b. The amendment guards against "governmental intrusion" into "private or personal information." Thus, the amendment textually adds a new conceptual category, "private or personal information," to the traditional constructs - persons, houses, papers, and effects / possessions – protected by Part I, Article 19 and the 4th Amendment. And, the amendment frames its protections

broadly against "governmental intrusions," rather than limiting its scope to "searches and seizures," the activities limited by the 4th Amendment and Part I, Article 19.

Further, the amendment protects private or personal information, without any textual limitation that the information be in the accused's possession at the time of the governmental intrusion. And the phrase "private *or* personal information" manifests that existing concepts of a reasonable expectation of privacy cover only a subset of what is protected by Article 2-b, as it protects "personal" information that is not necessarily "private."

In the historical context in which it was enacted, Article 2-b can only be understood to expand the scope of individual privacy to protect personal and private information wherever it may be found, including in the possession of third parties. It casts doubt on the continuing viability of case decisions that hold that citizens lack a reasonable expectation of privacy in personal and private information that they voluntarily provide to third parties. *E.g., State v. Mello*, 162 N.H. 115, 120 (2011)(internet service provider information); *State v. Gubitosi*, 152 N.H. 673, 677-79 (2005)(cell phone company records); *State v. Valenzuela*, 130 N.H. 175 (1987)(numbers dialed on a telephone).

Article 2-b's definition of the right to privacy as "natural, essential, and inherent" is also instructive. Construing the

same phrase in Article 2, this Court explained that the recognition of "natural, essential, and inherent" rights was not a "rant and declamation, nor advice and exhortation; it is an express declaration of the private right," a declaration that:

> …is attached to the constitutional grant of governmental powers, as a limitation of the grant, a declaration of a right not surrendered to society. Whether it be called a declaration of the reserved right, or a reservation of the right, or a guaranty of it, or a prohibition of the violation of it, is immaterial. It is a reservation that makes the right a constitutional one.

State v. Ramseyer, 73 N.H. 31, 33 (1904) (internal quotation and citation omitted); *see also Dugas v. Conway*, 125 N.H. 175, 181-82 (1984) (Article 2's pronouncement that "all men have certain natural, essential and inherent rights," including "to acquire, possess, and protect property," places "limitations on the so-called police power of the State and subdivisions thereof."). Thus, by its text, Article 2-b goes beyond the existing protections of Part I, Article 19, protecting private or personal information from governmental intrusion regardless of whether in the possession of the citizen or a third party, and regardless of traditional limitations on what types of governmental intrusion constitute a "search" or "seizure."

Applying these concepts to analyze the conduct of the police and HSUS in this case, Part I, Article 2-b, by protecting

"private *or* personal information," should be construed to require the police to take reasonable steps to ensure that civilians that assist in the execution of search warrants are prevented from disclosing the evidence to third parties. It should be construed to prevent the police from entering into agreements with civilians that let them use the accused's personal and private information for non-law-enforcement purposes. Because it protects against "governmental intrusion" rather than "searches or seizures", it should be construed to preclude the officially-sanctioned conduct of HSUS in its using Ms. Fay's personal and private information for a fundraising campaign on social media and the internet, and bar the government from shielding itself from liability by claiming that a post on social media is not a search or seizure.

In the proceedings below, the State argued its position was supported by *State v. Chilinski*, 330 P.3d 1169 (Mont. 2014), App. 47, and the lower court placed reliance on *Chilinski* in denying the motion to suppress, App. 73, but its reliance was misplaced. The basic facts of *Chilinski* are superficially similar to this case – the State obtained a search warrant for a dog breeding operation after reports of neglect, and enlisted the assistance of HSUS and other volunteers. *Id.* at 1172-73. Chilinski challenged the search under the 4th Amendment and under Montana's state constitution, which

like New Hampshire includes a specific constitutional right to privacy as well as a right to be free of unreasonable searches and seizures. *Id.* at 1176. The court rejected these claims, holding that the search was conducted in a constitutionally reasonable manner and did not violate Chilinski's right to privacy. *Id.*

Chilinski is distinguishable, however, because the police took the sorts of reasonable precautions that are glaringly absent in this case. The police obtained prior judicial authorization to use civilian assistants. *Id.* at 1176. The police also undertook reasonable precautions to ensure the privacy of the accused. Although the civilians were not asked to sign confidentiality agreements, they were instructed to "bring all evidence to a law enforcement officer," and "turn over any photographs or videos to the county attorney." *Id.* at 1173. The court rejected Mr. Chilinski's challenge under the Montana constitution's right to privacy, in a section of the opinion that makes clear that no videos of the search were provided to HSUS or other volunteers. *Id.* at 1176. Chilinski made no claim that HSUS used any search warrant evidence for non-law-enforcement purposes such as fundraising, *id.*, presumably because the reasonable safeguards employed by the authorities in his case prevented HSUS from having any evidence to use for its own purposes.

3. This case illustrates the precise harms that may occur if prior judicial authorization is not required

This case illustrates all of the perils of allowing police unfettered discretion to enlist civilian assistants in the execution of a search warrant without advising the issuing magistrate, without obtaining judicial authorization, and without imposing reasonable controls on how the civilians may use the intimately-private information that they gain privileged access to thereby. The police brought representatives of a nationwide advocacy organization, that has its own agenda separate and apart from law enforcement, into a private home without the homeowner's consent and against the homeowner's will. Rather than taking reasonable steps to limit the opportunity for HSUS and other involved civilians to exploit the private information they learned for private gain, such as by non-disclosure agreement or other means, the police made an agreement that HSUS could engage in fundraising on social media and on the internet, using evidence collected and information learned inside Ms. Fays home, and keep the monetary proceeds for themselves. The police defended these actions by claiming that it did not have the resources to conduct the search and seizures, and care for the dogs, on its own. Thus, the police funded its operation by, in effect, licensing Ms. Fay's private information to a private advocacy organization, which then embarked on a

campaign to vilify Ms. Fay on social media in pursuit of its own private interests.

Accordingly, under Part I, Articles 19 and 2-b, this Court must rule that the police cannot bring civilians into a private home to help execute a search warrant without first employing fundamental safeguards to protect the homeowner's privacy. These should include, at minimum, requirements that the police advise the issuing magistrate, that the warrant specifically authorize that private parties may enter the property, and that the police exercise reasonable control over the civilians by subjecting them to a non-disclosure agreement or otherwise safeguarding the privacy of the homeowner from exploitation by the civilian assistants.

E. Suppression of evidence is the appropriate remedy

Finally, Ms. Fay contends that evidence obtained as a result of the unconstitutional practices employed in this case must be suppressed. The lower court, having found that HSUS's participation in the execution of the search warrant was not unlawful, rejected any application of the exclusionary rule with respect to HSUS's fundraising campaign, writing: "The fact that HSUS used photographs taken during the execution of the search warrant for a media campaign after the fact does not mean the evidence collected during the search and seizure should be suppressed." App. 78. It should

be noted that in litigating the motion to suppress, the defense did not have available to it the testimony, developed at trial, that the Wolfeboro Police's agreement with HSUS authorized it to conduct fundraising and keep the proceeds, that the police had no policy on the use of evidence by third parties, and that, most importantly, HSUS obtained the express permission of police and prosecutors for every photo it used in its social media fundraising campaign. T5. 1036, 1040, 1072. Rather, at the suppression hearing the State called a single witness, Officer Strauch, who testified that he was unaware that the photos taken by HSUS in Fay's home were used in a fundraising campaign. T-MTS. 53. In its decision denying the motion to suppress, the court credited this testimony. App. 63.

Below, defense counsel did not renew the motion to suppress after the testimony of defense witnesses Chief Rondeau and HSUS Director Hamrick at trial established not only that the police knew about the fundraising, but expressly sanctioned it and even supervised which photos were used in the campaign. Fay contends this should not result in a finding that Rondeau's testimony and Hamrick's testimony may not be considered in determining whether the exclusionary rule should apply. The trial court found no constitutional violation, so it had no reason to consider employing the exclusionary rule.

As with the other questions raised in this appeal, there is no precedent under the State Constitution for whether the exclusionary rule applies to the circumstances of this case. Under federal law, courts are mixed as to whether or under what circumstances the exclusionary rule would be available if the police unlawfully bring third parties into a private home during the execution of a warrant, and if the third parties then make private use of the information learned. The Court in *Wilson*, which was a civil case, expressly declined to address the issue, stating in a footnote that that the media presence in the home was the constitutional violation, not the police presence. 526 U.S. at 614 n. 2. Some courts have suggested that application of the exclusionary rule may depend on the civilians' level of involvement in the search process. *United States v. Boulanger*, 444 F.3d 76, 86 (1st Cir.), *cert. denied*, 549 U.S. 906 (2006)("In the instant case, in the absence of evidence that a media member discovered or developed any evidence, we see no reason to even consider applying the exclusionary rule to evidence found by the police as a result of a valid search warrant."); *United States v. Hendrixson*, 234 F.3d 494, 496 (11th Cir. 2000), *cert. denied*, *Ledford v. United States,* 534 U.S. 955 (2001) ("*Wilson's* footnote suggests that evidence obtained by the police when the media is just present is not subject to the exclusionary rule, while it may remain an open question about whether

evidence obtained by the media is subject to the exclusionary rule."); *United States v. Waxman*, 572 F. Supp. 1136, 1149-50 (E.D. Pa. 1983), *aff'd*, 745 F.2d 49 (3rd Cir. 1984)(applying exclusionary rule where police brought art expert and art gallery curator into private home to assist with search warrant, but they identified objects not named in the warrant for seizure).

With respect to the post-search disclosure and exploitation of private information by the assisting civilians, one court held that the exclusionary rule is only available if the use and sharing of photos taken inside a private home was "so closely tied to the prior search" that it "tainted the legality of this search," such that it "retroactively transformed the search into an unconstitutional general search." *United States v. Coleman*, 2016 U.S. Dist. LEXIS 114985, Slip Op. at 41 (N.M.D.C. 08/26/2016).

Here, HSUS's involvement in the process of scene documentation, collection of evidence, and removal of dogs was extensive. The record shows that the HSUS dissemination of evidence on social media and the internet in the furtherance of its own interests did not constitute the actions of a rogue private actor, but rather was expressly authorized and sanctioned by the police and prosecutors in the case. The invasion of Ms. Fay's privacy interests in furtherance of private interests other than law enforcement,

and for private gain, was profound. Unlike the 4th Amendment, where the exclusionary rule serves the purpose only of deterring police misconduct and promoting official compliance with the law, the exclusionary rule under the state constitution serves to "'redress the injury to the privacy of the search victim.'" *Martin*, 145 N.H. at 366 (quoting *Canelo*, 139 N.H. at 387). Accordingly, regardless of whether the exclusionary rule must apply in a different case where a civilian is brought along in a passive role and does not redisclose private information for private gain, this Court must apply it here. Ms. Fay notes that some evidence was developed prior to the execution of the search warrant, such as the observations of Strauch, A.N., and Kelly prior to June 16, 2017, and would not be subject to the exclusionary rule.

Accordingly, this Court should reverse the trial court's ruling on the motion to suppress, vacate Ms. Fay's convictions, and remand for further proceedings at which the lower court will determine which evidence must be suppressed should there be a retrial.

CONCLUSION

WHEREFORE, Ms. Fay respectfully requests that this Court:

A) Vacate Ms. Fay's convictions;

B) Reverse the trial court's ruling on the motion to suppress;

C) Remand for further proceedings.

Undersigned counsel requests 15 minutes argument.

The appealed decision is in writing and is appended to the brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2017, I electronically filed Ms. Fay's Brief and Addendum, and separate Appendix, with this Court, and provided copies electronically to Stephen Fuller, Esq., New Hampshire Attorney General's Office, and will distribute paper copies in accordance with this Court's rules.

Theodore Lothstein

NEW HAMPSHIRE SUPREME COURT

No. 2018-0402

THE STATE OF NEW HAMPSHIRE
Appellee

v.

CHRISTINA FAY
Defendant / Appellant

ON APPEAL FROM JUDGMENT AND SENTENCE
OF THE CARROLL COUNTY SUPERIOR COURT

ADDENDUM OF DEFENDANT – APPELLANT CHRISTINA FAY

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Representative Complaint and Sentence ..... Add. 4

Ms. Fay advises the Court that she has included only one representative complaint and sentence in the Addendum, and has placed the remaining complaints and sentences at the end of the Appendix. All of the sentences are substantially identical, and are ordered to run concurrent to each other. Supreme Court Rule 16(i) requires the Addendum to an Appellant's Brief to include a copy of the decision(s) that are being appealed or reviewed and indicates that the decisions appealed from shall not be included in a separate appendix. It was not practical for Ms. Fay to follow this rule, however, because the Addendum would have exceeded 120 pages, which would have resulted in a very unwieldy and difficult to read .pdf document and also would have made printed copies difficult to bind.

SUMMARY OF THE COMPLAINTS

COMPLAINTS ALLEGING NEGLIGENTLY DEPRIVING ANIMALS OF NECESSARY CARE, SUSTENANCE OR SHELTER.

Charge # 1469964C alleged that Christina Fay maintained an environment that exposed the entire population to giardia, a highly contagious protozoan parasite transmitted through exposure to fecal material. T9. 1807.

Charge # 1469965C alleged that she did not make water readily available to the dogs. T9. 1810.

Charge ID #s 1469971C, 1469972C, and 1469973C, alleged that she exposed specific groups of dogs, organized by area of the basement or garage where they were found, to "physically observable elevated levels of ammonia gas," which resulted from "decomposition of urine and feces on the floors and other surfaces …." T9. 1816-20.

Charge ID#s 1469966C, 1469967C and 1469968C alleged that Fay failed to treat or inadequately treated papilloma infections, causing at least 30 papilloma lesions inside of dog C7's mouth, at least 45 lesions inside dog E1-02's mouth, and lesions on dog L1-04's head, body, legs and feet; the latter dog "also suffered from conjunctivis." T9. 1811-1813.

Charge # 1469970C alleged that Fay did not treat or inadequately treated dog K1's ear infections in both ears. T9. 1815. Charge ID # 1469969C alleged that Fay failed to treat or inadequately treated dog B1-05's "severe ear infections inadequately treating severe ear infections in both ears, conjunctivitis in both eyes and cherry eye in the right eye." T9. 1814.

Charge ID #s 1469975C and 1469976C alleged with respect to dogs D4 and A1-06 that she failed to treat or inadequately treated cherry eye and conjunctivitis in the dogs' eyes. T9. 1821-22.

COMPLAINTS ALLEGING NEGLIGENTLY SUBJECTING DOGS TO CRUELTY, INHUMANE TREATMENT, OR UNNECESSARY SUFFERING OF ANY KIND.

Charge ID# 1410553 alleged that Fay dog H2-02 was housed

> in a chain link kennel in the basement of. the residence where there was little lighting or ventilation and a high ammonia level. The kennel floor was covered in a layer of urine and feces, which H2 02 had to lay down, walk through or stand in. She was underweight, suffered from conjunctivitis in both eyes and moist dermatitis on her feet. She was covered in feces and had a tail tip which was ulcerated and thickened. Her tail injury was so severe that it required a partial amputation to alleviate her suffering.

T9. 1823.

Charge ID # 1410554C alleged that dog C6 was housed

> with ten other dogs in the foyer of the residence, which was isolated by gating. The floor of the area was covered by a layer of urine and feces, which the dogs were forced to lay down, walk through or stand in. The ammonia level in the room was high. C6, later identified as Fantasia, was suffering from cherry eye and conjunctivitis in both eyes, which was so severe that she was blind. Fantasia was also suffering from oral papilloma lesions. Surgery and veterinary care was necessary to alleviate her suffering.

T9. 1824.

Charge ID # 1410555C alleged that dog I1-03 was

> forced to live in a chain link kennel in the basement of a residence where the lights were turned off the one small window was closed so that there was no light or ventilation. The floor was covered with a layer of a mix of urine, feces and blood. The room had a high level of ammonia. There was no food or water present. I1 03 had a thickened ulcerated and bleeding tail tip, ear infections in both ears, entropion and conjunctivitis in both eyes, and multiple pressure sores on his feet and a pressure sore on his right hind limb that was ulcerated and had puss. Surgery and veterinary care was necessary to alleviate his suffering.

T9. 1825.

Charge ID # 1410556C alleged that dog G2 was

> was forced to live in a bedroom with a closed door, the floor of which was covered with a thick film like consistency of urine and feces, which she was forced to lie on, walk in. There was no food or water available in the room. A high level of ammonia was present

in the room. G2 was underweight with eye infections in both eyes, ear infections in both ears, suffering from a moderate to severe case of entropion and ectropion, known as diamond eye, and suffering from a severe case of conjunctivitis. These conditions requiring surgery and conjunctivitis. These conditions requiring surgery and veterinary care to alleviate her suffering.

T9. 1826-27.

Charge ID # 1410557C alleged that Fay kept dog I1-05

in a chain link kennel in the basement of the residence where there was little lighting or ventilation and a high level of ammonia. The floor of the kennel was covered with a layer of urine, feces or blood, which is he had to lay down, walk through and stand in. He was thin, had multiple pressure sores on his legs, papilloma lesions and ulcerated thickened and oozing lesions through his body, ear infections, conjunctivitis and entropion. These conditions required substantial veterinary care to alleviate his suffering.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **Carroll Superior Court**

Case Name: **State v Christina P. Fay**

Case Number: **212-2017-CR-00378** (if known) Charge ID Number: **1410553c**

HOUSE OF CORRECTIONS SENTENCE

Plea/Verdict: **Guilty**	Clerk:
Crime: **Cruelty to Animals**	Date of Crime: **06/16/2017**
Monitor: **K. Johnson**	Judge: **Ignatius**

A finding of GUILTY/TRUE is entered.

This conviction is for a ☐ Felony ☑ Misdemeanor ☐ Violation of Probation

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.

☐ The defendant has been convicted of a misdemeanor, other than RSA 631:2-b or an offense recorded as Domestic Violence, which includes as an element of the offense, the use or attempted use of physical force or threatened use of a deadly weapon, and the defendant's relationship to the victim is:
☐ (1) Current or former spouse ☐ (2) Parent ☐ (3) Guardian ☐ (4) Child in common
OR Cohabiting or cohabited with victim as a ☐ (5) spouse ☐ (6) parent ☐ (7) guardian
OR A person similarly situated to ☐ (8) spouse ☐ (9) parent ☐ (10) guardian

☑ 1. The defendant is sentenced to the House of Corrections for a period of **12 Months**

☑ 2. This sentence is to be served as follows:
☑ Stand committed ☐ Commencing _____
☐ Consecutive weekends from _____ PM Friday to _____ PM Sunday beginning _____
☑ **12 months** of the sentence is suspended during good behavior and compliance with all terms and conditions of this order. Any suspended sentence may be imposed after hearing at the request of the State. The suspended sentence begins today and ends **5** years from ☐ today or ☐ release on _____.
(Charge ID Number)

☐ _____ of the sentence is deferred for a period of _____.
The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____.
Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.
☐ Other: _____

☑ 3. The sentence is ☐ consecutive to _____
(Charge ID Number)
☑ concurrent with **1410554c-57c; 1469964c-73c, 75-76c**
(Charge ID Number)

☑ 4. Pretrial confinement credit: **1** days.

☐ 5. The court recommends to the county correctional authority:
☐ Work release consistent with administrative regulations.
☐ Drug and alcohol treatment and counseling.
☐ Sexual offender program.
☐ _____

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

NHJB-2312-S (01/01/2018)

Case Name: State v Christina P. Fay
Case Number: 212-2017-CR-00378 1410553C
HOUSE OF CORRECTIONS SENTENCE

PROBATION

☐ 6. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.
Effective: ☐ Forthwith ☐ Upon Release _____
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 7. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 8 **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☑ 9. Other conditions of this sentence are:

☑ A. The defendant is fined $ 2,000.00, plus statutory penalty assessment of $ 480.00
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☑ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for ___ year(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☑ B. The defendant is ordered to make restitution of $ _____ to see sentencing addendum
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____

☐ C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. The defendant's ☐ license ☐ privilege to operate in New Hampshire is revoked for a period of _____ effective _____

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the ☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service and provide proof to ☐ the State or ☐ probation within _____ of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, e-mail, text message, social networking sites and/or third parties.

☑ H. Law enforcement agencies may ☑ destroy the evidence ☑ return evidence to its rightful owner.

☑ I. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☑ J. Other:

See attached sentencing addendum.

06/14/2018
Date

Amy L. Ignatius
Presiding Justice

Amy L. Ignatius
Presiding Justice

NHJB-2312-S (01/01/2018)

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

State of New Hampshire

v.

Christina Fay

212-2017-CR-378

SENTENCING ADDENDUM

As an explicit condition of the suspended sentence to the House of Correction, the following sentencing terms apply:

1. Disposition of Dogs

Currently there are an estimated 78 European Great Danes being held at the temporary shelter established by the Humane Society of the United States (HSUS). These are the dogs seized from the defendant's home pursuant to search warrant on June 16, 2017, or are the offspring of the dogs seized. All of the dogs, with the exception of the dog to be taken by the defendant, see #3 below, are hereby permanently forfeited to the State of New Hampshire for disposition. "Rehoming" of the dogs to adoptive families shall commence immediately under the following terms:

- HSUS shall manage the adoption process, working with other organizations to investigate potential adopters. HSUS is encouraged to work with Nancy Fantom and her business Saddleback Pet Care as one of the entities to assist in locating acceptable adopters.
- The defendant shall not be involved in solicitation, screening of applications, or decisions regarding adoption placements.

- The defendant shall not directly or indirectly, adopt, receive, or care for any of the dogs forfeited in this case.
- All dogs shall be neutered or spayed prior to adoption.
- There shall be no "wholesale" transfers of dogs; that is, HSUS is prohibited from placing numerous dogs in a trailer for delivery to a different location, unless each adoptive placement has been individually evaluated and approved by HSUS or by an entity with which HSUS is working.
- No dogs shall be euthanized by HSUS or other entity with which it works for failure to locate an adoption placement. If any dog has not been approved for placement within 90 days of this order, the State shall notify the court, with notice to the defendant, and the court shall conduct a hearing on the matter.

2. **Ownership and/or Care of Dogs**

- The defendant shall not own or care for more than one dog at any given time for the 5 year period of the suspended sentence.
- Any dog in the defendant's possession or under her care must be neutered or spayed.

3. **Retention of One Dog**

- The defendant may continue to keep and care for Etta Betta, the dog that was previously returned after sentencing in the Circuit Court. Etta Betta shall not count against the one dog limit authorized in #2 above but if at some point Etta Betta is no longer in her possession, the defendant remains limited to ownership or care of one dog.

4. **Restitution**

- The defendant shall make restitution to the municipality of Wolfeboro in the amount of $18,682.88.
- The defendant shall make restitution to the Humane Society of the United States (HSUS) in the amount of $1,953,606.
- Payment to HSUS is subject to adjustment (a) upward for further costs associated with care of the dogs until they are all placed in adoptive homes and (b) downward if any of the costs submitted are for HSUS personnel who are neither "volunteers" nor "consultants." In order to determine if there are any such charges in the HSUS calculations, counsel shall meet with a HSUS official who has knowledge of the invoices, either in person or by video conference, at a time mutually agreed upon, within the next 60 days.
- There is no offset or credit for value of the dogs or losses from the defendant's breeding operations, and no cap on restitution based on the amount of the bond posted or other facilities' boarding, training or kennel charges.
- The defendant must make substantial progress in restitution payments over time, with payment in full by the end of the 5 year suspension period.

5. **Counseling**

- The defendant shall participate meaningfully in mental health counseling with a provider whose name has already been submitted to the Court.
- The defendant shall participate in at least two sessions per month and shall execute a release to allow the provider to submit to the County Attorney's Office monthly confirmation of her participation in counseling.

6. Bail pending Appeal

The defendant is granted bail at the current level pending appeal of the convictions.

7. Partial Stay of Sentence Pending Appeal

The terms of this sentence are stayed in all respects with the exception of #1 Disposition of Dogs and #2 Retention of One Dog. Permanent forfeiture of the dogs and rehoming process are effective as of the sentencing hearing, June 14, 2018.

So Ordered.

June 14, 2018

Amy L Ignatius
Presiding Justice

The State of New Hampshire
COMPLAINT

Case Number: 17CR777
212-2017-CR-378

Charge ID: 14105536

Case Number:

☐ VIOLATION	MISDEMEANOR ☒ CLASS A ☐ CLASS B ☐ UNCLASSIFIED (non-person)
	FELONY ☐ CLASS A ☐ CLASS B ☐ SPECIAL ☐ UNCLASSIFIED (non-person)

You are to appear at the: **Ossipee Circuit** Court,

Address: **96 WATER VILLAGE RD , OSSIPEE, NH** County: **Carroll**

Time: Date:

Under penalty of law to answer to a complaint charging you with the following offense:

THE UNDERSIGNED COMPLAINS THAT : PLEASE PRINT

FAY			CHRISTINA		
Last Name			First Name		Middle
149 WARREN SANDS RD			WOLFEBORO	NH	
Address			City	State	Zip
F	W	508	250	BLUE	GRAY OR PARTIALLY GRAY
Sex	Race	Height	Weight	Eye Color	Hair Color
03/27/58		8989351		ME	
DOB		License #:		OP License State	

☐ COMM. VEH. ☐ COMM. DR. LIC. ☐ HAZ. MAT. ☐ 16+PASSENGER

AT: FAY RESIDENCE: 149 WARREN SANDS RD, WOLFEBORO NH

On 06/16/2017 at 9:00 AM in Carroll County County NH, did commit the offense of:

RSA Name: ANIMAL CRUELTY

Contrary to RSA: 644:8 III (f)

Inchoate:

(Sentence Enhancer):

UNNECESSARY

And the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did:

otherwise negligently permit or cause an animal in her possession or custody, an adult female of black and white color, known as H2-02, to be subjected to cruelty, inhumane treatment or suffering of any kind, by holding her in a chain link kennel in the basement of the residence,where there was little lighting or ventilation and a high ammonia level. The kennel floor was covered in a layer of urine and feces which H2-02 had to lay down, walk through or stand in. She was underweight, suffered from conjunctivitis in both eyes and had moist dermatitis of her feet. She was covered in feces and had a tail tip which was ulcerated and thickened. Her tail injury was so severe that it required a partial amputation to alleviate her suffering.

against the peace and dignity of the State.

☐ SERVED IN HAND

Complainant Signature	Sr. Patrolman Michael Strauch	Wolfeboro PD
	Complainant Printed Name	Complainant Dept.

Making a false statement on this complaint may result in criminal prosecution.

Oath below not required for police officers unless complaint charges class A misdemeanor or felony (RSA 592-A:7.I).

Personally appeared the above named complainant and made oath that the above complaint by him/her subscribed is, in his/her belief, true.

9/5/17

Date

TIMOTHY R. MORGAN
Justice of the Peace - New Hampshire
My Commission Expires January 15, 2019

Justice of the Peace

NHJB-2962-D (6:27:2016)

Charge ID: