COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT No. _____

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

ANGEL O. PEREZ-NARVAEZ,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF NORTHAMPTON DISTRICT COURT

APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW OF DEFENDANT-APPELLANT ANGEL O. PEREZ-NARVAEZ

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February 4, 2022

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, defendant-appellant Angel O. Perez-Narvaez respectfully requests leave to obtain further appellate review of his judgment. In an unpublished decision, the Appeals Court reversed the trial court's order dismissing the charge against him of Throwing Oil of Vitriol Or Other Substances Into A Building or Vessel, G.L. c. 266 § 103, which Perez-Narvaez was charged with after the jail cell he was held in was found covered in urine and toilet paper. Perez-Narvaez respectfully asks this Court to consider whether urine constitutes a "noxious or filthy" substance as contemplated in the statute and whether the Appeals Court's interpretation of it as covering all intentional applications to property of any substances either harmful to living things or "disgustingly dirty" is correct.

STATEMENT OF PRIOR PROCEEDINGS

On February 10, 2020 a complaint issued in the Northampton District Court charging Perez-Narvaez with one count of Throwing Oil of Vitriol Or Other Substances Into A Building or Vessel, G.L. c. 266, § 103, one count of OUI 2nd, G.L. c. 90 §24(1)(a)(1), and a marked lanes violation under G.L. c. 89 §4A. His motion to dismiss the Throwing charge was allowed on December 18, 2020 (Walsh, J.) following a non-evidentiary hearing. The Commonwealth timely appealed from the decision, and on January 27, 2022 the Appeals Court reversed the trial court's order in an unpublished decision.

STATEMENT OF FACTS

Perez-Narvaez was arrested for OUI at 2am on February 10, 2020. The complaint states that he was placed in a cell after he refused to be fingerprinted. When the state trooper checked on him 5 hours later at 7am, he discovered a mess of wet toilet paper and urine inside and outside the cell and proposed that Perez-Narvaez be charged with Defacing or Damaging Real Property, G.L. c. 266 § 126A. He was instead charged under § 103, which punishes:

> Whoever wilfully, intentionally and without right throws into, against or upon a dwelling house, office, shop or other building, or vessel, or puts or places therein or thereon oil of vitriol, coal tar or other noxious or filthy substance, with intent unlawfully to injure, deface or defile such dwelling house, office, shop, building or vessel, or any property therein, shall be punished by imprisonment in the state prison for not more than five years or in jail for not more than two

and one half years or by a fine of not more than three hundred dollars.

At the motion hearing, the judge asked if the Commonwealth's claim that urine was a noxious substance under the statute meant that a defendant could be charged with the same offense for spitting outside his cell and the Commonwealth said it believed he could not, arguing that the difference lay in the intent to damage the structure of the building. The motion judge granted the motion to dismiss, finding that the set of facts alleged in the complaint did not meet "the standard for a noxious, or filthy substance, including the issue of injuring, defacing, or defiling a building or a vessel."

STATEMENT OF THE ISSUE

The Appeals Court reversed the order dismissing the charge, ruling that there was probable cause to believe that urine qualifies as "either or both" a noxious or filthy substance, which it defines as either "harmful to living things" or "disgustingly dirty." Where their definition gives the statute a broad reach covering nearly any sort of intentionally caused mess or spill, should the Court instead have been guided by the rule of *ejusdem generis* and limited the definition of "other noxious or filthy substance" to those hazardous chemicals comparable to coal tar and oil of vitriol?

ARGUMENT

I. The Throwing Count Was Properly Dismissed.

The Appeals Court relied on the American Heritage College Dictionary 1207 (5th ed. 2016) to define the terms "noxious" and "filthy," reasoning that in the absence of any definition within the statute it must afford the terms their plain and ordinary meaning and citing *Commonwealth v. Keefner*, 461 Mass. 507, 511 (2012). Add. at 3-4. *Keefner*, however, only supports an absence of further analysis when a statute's language is "plain and unambiguous." *Id.* Where the draftsmanship of a statute is faulty or lacks precision, however, it is the Court's duty to apply a construction that is both reasonable and which reflects the purpose for which it was enacted. *Id.*

Because "noxious" and "filthy" are used within the instant statute to denote the boundaries of a category intended to supplement two specific prior examples of substances targeted, the statute's draftsmanship inherently lacks precision and use of the common and ordinary meanings for such broad terms only increases its ambiguity. Nearly any substance requiring cleaning can be considered either harmful (at least to the same extent as urine) or "disgustingly" dirty, allowing near total discretion for the prosecution to charge under the five-year felony. A felony intended to combat terroristic chemical attacks through residents' windows being applied to intentional soiling of any sort clearly

goes beyond the purpose of its framers, and that "noxious" is used to describe urine in other contexts in other jurisdictions should not outweigh these concerns. Add. 4. Instead, Perez-Narvaez proposes that the rule of *ejusdem generis*[1] should limit what is considered an "other noxious or filthy substance" under the statute to those substances not merely capable of *any* harm or requiring a vague threshold of cleaning but those hazardous chemical substances that can be fairly compared to the two preceding examples of coal tar and oil of vitriol.

Similarly, that Perez-Narvaez's urine was found elsewhere even though "a toilet was available" does not show a chargeable intent on the part of the allegedly intoxicated OUI detainee to injure, deface, or defile the police barracks. Add. 5. This holding, and the breadth of the statute's potential reach, is of especial importance to Massachusetts prisoners, who the decision makes clear can be charged virtually at official whim with a serious (and not easily disproven) crime for what would have previously constituted minor punishable infractions.

[1] This rule of statutory construction "indicates a more limited contextual meaning for a word that in isolation might appear general or broad." *Mammoet USA, Inc. v. Entergy Nuclear Generation Co.*, 64 Mass. App. Ct. 37, 41 (2005). "That doctrine provides that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.*, *citing Banushi v. Dorfman*, 438 Mass. 242, 244 (2002).

Because the Appeals Court's decision places a broad and unintended tool in the hands of prosecutors that allows felony charges for otherwise minor offenses to property, Perez-Narvarez's case requires further review for substantial reasons affecting the public interest and the interests of justice.

CONCLUSION

For the reasons set forth above, Angel O. Perez-Narvaez respectfully requests further review.

Respectfully submitted,

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By and through his attorney,

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February 4, 2022

Certificate of Service

I hereby certify that a copy of this application was served on counsel for the Commonwealth on this 4th day of February, 2022 via the Odyssey File and Serve System.

_____
Rachel T. Rose

Certificate of Compliance

I hereby certify that this application complies with the rules of court that pertain to the filing of such as set forth in the Massachusetts Rules of Appellate Procedure because it is 3 pages of argument in Courier New 12pt monospaced font.

_____
Rachel T. Rose

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-342

COMMONWEALTH

vs.

ANGEL O. PEREZ NARVAEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The Commonwealth appeals from an order of a District Court judge allowing the defendant's motion to dismiss one count of a criminal complaint that charged him with throwing a noxious or filthy substance, in violation of G. L. c. 266, § 103.[1] For the reasons that follow, we reverse.

1. Background. In the early morning of February 10, 2020, a State trooper arrested the defendant for operating a motor vehicle while under the influence of alcohol. The defendant was

[1] G. L. c. 266, § 103, provides in pertinent part as follows: "Whoever willfully, intentionally and without right throws into, against or upon a . . . building . . . or puts or places therein or thereon oil of vitriol, coal tar or other noxious or filthy substance, with intent unlawfully to injure, deface or defile such . . . building . . . or any property therein, shall be punished by imprisonment in the state prison for not more than five years or in jail for not more than two and one half years or by a fine of not more than three hundred dollars."

transported to the State police barracks where he refused to cooperate with the booking process and, as a result, he was placed in a holding cell. Thereafter, as alleged in the application for the criminal complaint, the defendant urinated on the floor inside the cell and through the cell bars onto the floor of the hallway. The defendant also threw wet toilet paper inside and outside the cell into the hallway. The urine seeped into the cracks between the floor tiles and required the services of a company specializing in cleaning hazardous fluids and spills to decontaminate the area.

The defendant was charged in a three-count complaint with throwing a noxious or filthy substance,[2] operating a vehicle under the influence of alcohol, second offense, and a marked lanes violation. Following his arraignment, the defendant moved to dismiss the charge of throwing a noxious or filthy substance on the ground that the charge was not supported by probable cause. After a nonevidentiary hearing, the motion judge agreed with the defendant and concluded that the facts as set forth in the application did not establish probable cause for two reasons. First, the judge noted that urine did not qualify as a

[2] We note that the application for the criminal complaint states there was probable cause to charge the defendant with defacing or damaging real property, in violation of G. L. c. 266, § 126A. The record does not disclose the reason why the defendant was instead charged with throwing a noxious substance.

noxious or filthy substance; and second, she ruled that the facts did not sufficiently demonstrate that the defendant intentionally "injur[ed], defac[ed] or defil[ed] a building or a vessel."

"[W]e review the . . . judge's probable cause determination de novo." Commonwealth v. Geordi G., 94 Mass. App. Ct. 82, 84 (2018), quoting Commonwealth v. Humberto H., 466 Mass. 562, 566 (2013). "To satisfy the probable cause standard, 'more than mere suspicion' is required, but the evidence need not be sufficient to warrant a conviction." Geordi G., supra at 84-85, quoting Commonwealth v. Cartright, 478 Mass. 273, 283 (2017). In conducting our review, we consider only the evidence presented to the clerk-magistrate, which is "viewed in the light most favorable to the Commonwealth." Commonwealth v. Levesque, 436 Mass. 443, 444 (2002). Applying these principles in this case, we reach a different conclusion than the motion judge.

Although the statute does not define the words "noxious" or "filthy," and we are not aware of any case in Massachusetts that has described urine as a noxious or filthy substance, we conclude that there is probable cause to believe that urine qualifies as either or both.[3] In reaching our conclusion, we are

[3] We are not persuaded by the defendant's argument that the rule of statutory construction, ejusdem generis, requires a different result.

guided by the ordinary usage of the words at issue. See Commonwealth v. Keefner, 461 Mass. 507, 511 (2012) (if words used in statute are not otherwise defined within it, we afford words their plain and ordinary meaning). According to the American Heritage College Dictionary 1207 (5th ed. 2016), "noxious" means "harmful to living things," as in "noxious chemical wastes." Filthy is defined as "covered or smeared with filth," as in "disgustingly dirty." Id. at 659. In our view, urine is a substance that it plainly "harmful" or "disgustingly dirty." We are also persuaded by the reasoning in cases from other jurisdictions that have held that urine is a noxious substance. See, e.g., People v. Aponte (Herbert), 994 N.Y.S. 2d 496, 497 (N.Y. App. Div. 2014) (pleading sufficient to establish reasonable cause to believe that defendant was guilty of public urination in violation of antilittering provision prohibiting throwing, putting, or allowing noxious liquid to run or fall into any street or public place); State in the Interest of J.J., 125 So. 3d 1248, 1251 (La. Ct. App. 2013) (juvenile adjudicated delinquent for simple battery for throwing urine on victim because urine was noxious substance); State v. Narmore, 107 Haw. 94 (Haw. Ct. App. 2005) (defendant convicted of criminal use of noxious substance for throwing urine onto victims' property).

In addition, the facts as set forth in the application, including the fact that the defendant urinated inside and

outside his cell when a toilet was available, were sufficient to establish that the defendant's acts were willful and intentional. In sum, "[t]he probable cause requirement, which is not particularly burdensome, was satisfied in this case. Commonwealth v. Coggeshall, 473 Mass. 665, 671 (2016).

Order allowing motion to dismiss count one of complaint reversed.

By the Court (Vuono, Sullivan & Kinder, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: January 27, 2022.

[4] The panelists are listed in order of seniority.