

66876-5

66876-5

NO. 66876-5-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MARY D. PETERSON,

Appellant.

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. A defendant deprived her horses of food and water over the course of two and a half months. While the animals starved, animal control officers repeatedly contacted the defendant and urged her to get her horses up to an acceptable weight with good quality hay. The animals continued to decline, becoming more emaciated. Officers seized the horses. Once adequately fed and watered, the horses recovered.

The defendant was arrested and charged with first-degree animal cruelty. A person commits this crime if he or she, with criminal negligence, starves or dehydrates an animal that as a result causes "substantial and unjustifiable physical pain" for a period to cause considerable suffering or death. Was the phrase "unjustifiable" so vague as to give the defendant no warning of what conduct was proscribed, given the advice she was receiving from animal control officers?

2. Was the defendant deprived of a unanimous verdict, when the State charged the defendant under only one alternate means of committing first-degree animal cruelty?

3. Was restitution lawfully imposed per RCW 16.52.200?

## **II. STATEMENT OF THE CASE**

### **A. DEFENDANT'S CRIMINAL NEGLIGENCE IN PASTURING TOO MANY HORSES ON A SMALL PROPERTY AND LETTING THEM STARVE.**

An adult horse typically weighs 500 kg – 1,100 to 1,200 lbs. – and needs to consume 2% of its body weight daily, or 22–24 lbs. This comes to about four “flakes” of hay a day. (A flake averages 5 lbs., and is about as much as one can grab in one’s fingers and hold.) A hay bale weighs 60–80 lbs., so if the hay is good quality, a bale can feed up to three horses for one day. 1 TRP 69, 81-82; 2 TRP 108, 166, 188; 3 TRP 277-78, 325-26, 356; 4 TRP 480-81.

The breed can make a difference, however. Thoroughbreds will need more, up to six to ten flakes a day. 2 TRP 166. Also affecting this calculation is the type and quality of hay. Ideally hay should be softer and green, rather than coarse, stemmy, sun-bleached, or moldy. Alfalfa grown in eastern Washington is best. Local grass hay from western Washington is less expensive but of poorer quality, so double the amount will be required to get the same nutritional value. “Feeder alfalfa hay” is cattle feed, of “hit or miss” quality. Worst of all (but least expensive) are large 500-pound-plus round bales wrapped in plastic, typically fed to cattle. These round bales, if left outside for an extended period, tend to

develop high levels of mold. 1 TRP 77, 80; 2 TRP 110, 167, 278; 4 TRP 467-68, 489, 493, 524.

As for water, a horse typically drinks 6 to 10 gallons a day. 3 TRP 315.

Rock Borchardt rented a field to the defendant, Mary Peterson, for 2-1/2 months from April to June of 2009. His understanding was she would pasture no more than four horses on it. Borchardt, who lived nearby, was to have no responsibility for their care. 3 TRP 403-405. When the defendant first moved horses onto the property, the horses ate the field grass pretty quickly. It got down to dirt in just a couple of weeks. And there ended up being twelve horses in the field. 3 TRP 405.

Once the field grass was gone, there was no hay to eat. Borchardt became concerned and called the defendant. He saw her come by two or three times and feed the horses small portions of hay. Borchardt became more upset, especially when he looked out and saw ten horses around the watering trough. 3 TRP 405.

He recalled one hot day, with up to 100° weather, when he walked over and discovered the watering trough was bone dry. He filled it, then called the defendant and demanded she feed and water her horses regularly. 3 TRP 406. The defendant told him the

horses did not need that much water because they would get it from grass. Id.

Borchardt began calling her three or four times a week to water and feed the horses and pay his rent. 3 TRP 406, 408. He recalled filling the watering troughs more than once. An intern living at his house (Borchardt is a plumber) got upset and started filling up the water troughs on his own. 3 TRP 403, 408. In the end Borchardt told the defendant to come take care of her horses or get them off his property. For the last two weeks, the defendant didn't answer her phone. She didn't pay him either. Id.

In June 2009 the defendant moved the horses to a 2.3 – 2.5 acre field on Trout Farm Road in Sultan. 6 TRP 816. The field was kitty-corner to Janet Auckland's back property, clearly visible from Auckland's deck or back porch. 3 TRP 411-413. Auckland initially saw two horses on the field; then all of a sudden there was a colt, too. But both the mare and colt were thin. Four or five days later, there were a couple more horses. When Auckland got back from vacation on July 5, there were twelve horses on the property. Quite a few of them had ribs and bones showing. 3 TRP 413-414.

One area had had a lot of tall grass. But within a week of the horses being put there the grass was all gone. There was

nothing left but dirt, dust, and manure. And there was no shelter. 3 TRP 416-17.

One mare (later identified as Tyme) was barely moving. She lay down for four days during which Auckland didn't see her get up. And there were occasions when she would lie down at night and, the next morning, be in the same spot. Auckland did see Tyme get up and go over to a bucket and look for water, but she did not see her drink. 3 TRP 414-15, 424.

Auckland recalled times that summer that the temperature was over 100°. 3 TRP 415. Someone would come out every two days and pour about 30 seconds worth of water in the horses' water buckets. There was one horse, a stallion, separated from the others, which seemed to get better care. It looked to Auckland like the rest of the horses were being fed only a flake or two of hay a day. 3 TRP 415-17. In August, someone came by after three days with "big round grass hay" bales. 3 TRP 417, 425.

It bothered Auckland to see that many horses with ribs and bones showing on such a small piece of property. 3 TRP 414, 426. Three neighbors of the defendant, including Auckland, called Animal Control to complain. 1 TRP 55; 3 TRP 418.

Animal Control Officer Paul Delgado responded and went out to the property on June 24, 2009. He found eleven horses. One mare, Tyme, was limping badly and extremely emaciated. Delgado was concerned about two other horses, but not to the same degree. He left a note for the defendant to call him. 1 TRP 57-63; see Ex. 1 (Tyme). The following day over the phone he told her she needed to have Tyme checked out by a veterinarian. 1 TRP 64-70; 5 TRP 804. The defendant said Tyme was a thoroughbred racehorse of outstanding pedigree that she was treating with sea salt. 1 TRP 66-67. When told by Delgado that Animal Control relies on veterinarians, the defendant was resistant, saying she did not always agree with veterinarians: they can misdiagnose things, she felt, and “suck the financial life” out of horse owners. 1 TRP 68.

On June 30 Delgado saw 13 horses on the property, and eight bales of alfalfa. On July 6 Delgado counted twenty-six bales of local grass hay on a flatbed trailer and two bales of alfalfa on the ground next to it. 1 TRP 72-77.

On July 7 Delgado went out to the property with his colleague, Animal Control Officer Angela Davis, who was taking over his caseload. The alfalfa was gone and just local grass hay

was remaining. The defendant met them on the property. She still had not made an appointment for a vet to see Tyme. The officers stressed how important this was. They gave the defendant a deadline of July 10. They also expressed concern for some of the other animals on the property. 1 TRP 77-83; 4 TRP 468-72.

Officer Davis testified that she had seen a lot of horses but would never forget Tyme. Virtually every bone – the ribs, vertebrae, and hip bones – was visible. Tyme had no fat. She also had multiple sores. She carried her head low, her eyes were dull, and she did not interact with people or other horses. 4 TRP 470-72; Ex. 1. She also had a swollen mass between her front legs, covered with flies. 4 TRP 472.

Officer Delgado stopped by the property on July 10 in response to a neighbor's complaint that the horses had no water, because the water pump was broken. When he arrived he found someone working on the pump but several troughs were bone dry. (Two stallions, in separate corrals, had water.) It was over 80°. As Delgado filled the troughs with a hose, several mares came running up, trying to drink as he filled their troughs. 1 TRP 84-90; 2 TRP 213-14. Meanwhile the defendant still had not made an appointment for Tyme to be seen. After visiting the property,

Delgado told her that she had to have Tyme seen by July 14 or run the risk of criminal charges. 2 TRP 214-19.

Dr. Jennifer Miller had worked with the defendant in 2006, and had found her horses then to be in decent shape and appropriately cared for. 2 RP 98, 142-43. She came out to the Trout Farm Road property on July 14, 2009 to examine Tyme. On a score of 1 to 9 (the "Henneke scale"), with 1 being a walking skeleton and 9 being morbidly obese, Dr. Miller scored Tyme as "1-1/2." 2 TRP 100 –105. (Using the same scale, Officer Davis had scored Tyme as "1." 4 TRP 470.) Dr. Miller found Tyme to be severely underweight, and explained three things can cause this: Simply not being fed; organ failure; or getting run off food by other horses in a big herd. But most of the animals on the property were underweight, with Tyme simply in the worst condition. This was not a case of only one horse in the herd being thin, and the rest not. The common denominator among them all was not enough food. 2 TRP 100-105.

Tyme in addition suffered from founder or laminitis, a very painful hoof condition. 2 TRP 105-06. Tyme also had a sac with a draining wound on her chest, and sores on her hip. Id. The defendant explained that she had gotten Tyme in that condition

(that is, with founder) but she thought she was getting better. 2 TRP 107. She told Dr. Miller she hoped to breed her. 2 TRP 131; see 2 TRP 184, 230-32; 4 TRP 474.

Dr. Miller noted that Tyme exhibited the behaviors one would expect to see in a horse suffering from starvation: being inward-looking, subdued, and uninterested in the outside world. 2 TRP 110-12. She added that while one can attribute pain to starvation, 2 TRP 117, she did not feel she could say so to a reasonable degree of medical certainty. 2 TRP 136-37. (She did feel she could for founder. Id.) She diagnosed Tyme as emaciated with severe chronic founder. Her prognosis was that the horse could not be rehabilitated and recommended euthanasia. 2 TRP 106. The defendant disagreed and asked Dr. Miller not to inform Animal Control. Dr. Miller responded that she was recommending euthanasia and would tell Animal Control so. 2 TRP 107.

Since the defendant would not agree to euthanize Tyme, Officers Delgado and Davis met with Lt. Gordon Abbott to discuss what to do next. 2 TRP 222. It seemed that the horses were getting worse. 4 TRP 447. They decided to all go out to the property the next day, July 15, along with their own veterinarian, Dr.

Brandi Holohan. They also brought a horse trailer in the hopes that the defendant would release Tyme. 2 TRP 222; 4 TRP 447-48.

When they got there, the defendant was argumentative. She said that she had had an “off the record” conversation with Dr. Miller that the animal could be rehabilitated after all. That was not what Animal Control had been told. 2 TRP 222-26; 4 TRP 448-50, 472-74. Told that Tyme was in pain, the defendant responded, “We all live in pain.” 2 TRP 230; 4 TRP 474.

Dr. Holohan examined Tyme. The mare had a “dull presentation,” was unwilling to look around, was uninterested in sounds, other horses, and people, and instead seemed to be focusing inward. 2 TRP 156-58. Her ears were flopped out to the side and her head was down. 2 TRP 173. Pain can cause this. 2 TRP 159. Tyme’s physical body condition was very poor. Bony prominences were very obvious. She had sores where bony prominences would press against the ground. One could see all of her ribs, the points of her hips, and the spine. There was neither muscle nor fat. Tyme had a very large drainage wound on the bottom of her chest, with flies climbing in and out of the drainage hole. 2 TRP 159-60. On the “Henneke scale,” Dr. Holohan scored

Tyme at 1-1/2. 1 TRP 164. Dr. Holohan concluded, "This is a horse that's miserable." 2 TRP 172; see Ex. 1.

Dr. Holohan did not see any grass in the paddock: just dirt and a few coarse stems. 1 TRP 164-65, 187. Dr. Holohan concluded Tyme was in severe pain. 2 TRP 173, 175. While Tyme's chronic laminitis was the primary contributing factor, her poor level of nutrition made it harder for Tyme to cope with it, and made her more uncomfortable. 2 TRP 176-77, 194. Tyme's laminitis probably increased her caloric needs, too; thus, underfeeding only exacerbated her discomfort. 2 TRP 169-70.

Dr. Holohan gave Tyme a poor to grave prognosis for survival. 2 TRP 170-71. When the defendant said she wanted to breed Tyme, Dr. Holohan said there was no way the animal could carry a foal to term. 2 TRP 184, 230. Tyme was having a hard enough time just carrying her own weight. 2 TRP 184. The defendant vehemently disagreed, and called Dr. Holohan a bitch. 2 TRP 185. Nick Osborne, the defendant's friend and handyman, took her aside. Ultimately the defendant agreed to relinquish Tyme to the officers. 2 TRP 222-30, 4 TRP 472-78.

Before she was euthanized, Tyme weighed 870 lbs. 4 TRP 454; see Ex. 1; compare 2 TRP 108-09, 3 TRP 326, and 5 TRP 724 (typical adult horse weighs 500 kg. – 1,100 to 1,200 lbs.).

Dr. Holohan noted that the remaining eleven horses on the defendant's property were all in some state of poor body condition. Some were exhibiting the hunger-driven behavior of eating manure. 2 TRP 186-87. The hay bales Dr. Holohan saw on the property were "stemmy" and sun-faded. 2 TRP 187.

Officer Davis told the defendant she was taking over the investigation, and echoed Dr. Holohan's concerns about the remaining horses, noting most were thin and several were emaciated. She told the defendant to get the horses' weight up to an acceptable level using good quality hay. Davis said she would be checking up on them. The defendant was cooperative, and seemed to understand what she needed to do. 4 TRP 478.

When Officer Davis returned to the property on July 20, she found 16 horses on the property and one bale of alfalfa. 4 TRP 478-81. On July 22 – still with 16 horses on the property – Davis saw 20 bales of low quality local grass hay. The defendant and her husband were there. 4 TRP 482-83.

Davis went out again on July 27. She testified she was visiting often because she was concerned about the number of animals; the lack of sufficient feed for that number; and the overall poor condition of several horses. There were now 18 horses on the property. No one was there caring for them. There were two bales of local grass hay on the flatbed trailer – thus not available to the horses. 4 TRP 484-85. The temperature was around 100°. While some water troughs were full, a few had only an inch or so of water. Davis was concerned that several horses were now in extremely poor condition. Id.

The next day, July 28, Davis counted 20 bales of local grass hay. But it was moldy and smelled. There were still 18 horses, and none of them had hay in their paddocks. One horse was eating manure. 4 TRP 488-89.

Davis did an “area check” (driving by) on August 4. She saw no one on the property. There were 20 bales of local grass hay on the flatbed. The condition of the horses did not seem to be improving. 4 TRP 490-91. On an area check on August 6 Davis counted 15 bales; on August 10 she saw five bales of local grass hay. 4 TRP 491-92.

On August 11 Davis went onto the property and talked to the defendant again. There were two large round bales of hay for the "brood mares" (horses described more fully below). The round bales were of poor quality, brown and "stemmy." 4 TRP 492-94. Davis told the defendant (on this and other occasions) that the horses were still thin and that she needed to see improvement in their overall condition. The defendant still appeared cooperative and seemed to agree. 4 TRP 494. An area check on August 19 revealed the round bales gone and hay now in the paddocks. It appeared the horses had been fed. 4 TRP 494.

Davis walked onto the property on August 25. There was one large round bale and 10 bales of local grass hay. Any hay in the paddocks the horses had walked and urinated on: They were not consuming it readily. 4 TRP 495-96. Davis thought the horses were getting worse: several of the brood mares in particular had lost substantial weight. 4 TRP 495-96. The mares did have access to about half of a round bale. Davis saw the defendant's handyman, Nick Osborne, and told him of her concern that several horses were becoming "critical." She asked that he tell the defendant so. 4 TRP 503-05.

When Davis drove by on the morning of August 27, she saw one of the horses, identified as an orphan filly (horse #1), had gotten loose. There was nothing to stop her from running out onto the road. She had helped herself to hay that was stacked on the flatbed trailer in the yard (that was otherwise unavailable to the horses). Nobody was around. Davis stopped and got the filly back into its paddock with the brood mares by bribing it with hay. Davis did not see any hay in the paddocks. 4 TRP 514-16, 518.

The horses in paddock or pasture "C" (see Ex. 132, sketch of the property) – the brood mares, the orphan filly, and the colt of one of the mares – had no water. Davis found a hose and filled up the trough. As she did so, the horses came running over and fought over the water trough, drinking three at a time. They drank the trough dry, so Davis filled it up again. 4 TRP 516, 518, 520-21.

Increasingly concerned, Davis took pictures of several emaciated mares and the colt on August 25 and 27. 4 TRP 496-503, 517-19 (describing visible skeletal structures); e.g., Ex. 64 (horse #3, a bay mare), Exs. 80 and 81 (horse # 4, its colt), Ex. 93 (horse #6, a light bay mare) and Ex. 109 (horse #8, a bay mare).

Later that same day Davis got a call that the filly had gotten loose again. Davis got her back in her paddock. But by now the

other horses were without water, and the mares had drunk their trough dry again. Davis filled all the troughs on the property. As she was doing so, Nick Osborne showed up. Davis told him of her concerns. He promised he would feed the animals. 3 TRP 417; 4 TRP 521-23.

Area checks on August 31 and September 2 revealed hay in the paddocks and 20 bales of feeder alfalfa hay, a "hit-or-miss," lower-quality, generally coarser hay usually used for cattle feed. Even this was of better quality than what Davis had seen being given to the horses earlier in August (i.e., the round bales). But there were still 18 horses on the property. 4 TRP 523-24.

Davis met with her colleagues on September 3 to assess what to do. The horses' condition had deteriorated, in some cases rapidly, since July 15. Several horses were now extremely emaciated. They were being fed insufficiently and only on an irregular basis and continued to decline. Several times they had been without water. Animal Control officers decided to seek a search warrant to seize the horses that were in the worst shape, and to arrest the defendant. 4 TRP 525, 527. Davis swore out a search warrant. It was a "big ordeal," coordinating with the sheriff's office and arranging transport for the horses. They picked Sept. 9.

4 TRP 525-30. A different veterinarian, Dr. Daniel Haskins, would accompany them and decide which horses were in the worst shape and to be seized. 4 TRP 531.

When Delgado, Davis, Dr. Haskins, and others got there, they found a partial bale of feeder alfalfa hay and 2-3 bales of local grass hay sitting on the flatbed trailer. Part of a round bale was in paddock C with the brood mares. It was “loaded with mold” and smelled. There was manure buildup in all the paddocks. 2 TRP 241, 244; 3 TRP 271, 319; 4 TRP 530-31, 533. Paddock C was all mud. 3 TRP 299. None of the horses had access to salt blocks (an average 1,000-lb horse needs 1 oz. of salt a day). 3 TRP 317-19.

Dr. Haskins and officer Delgado threw some of the local grass hay to the horses, so they’d at least have something to eat. 2 TRP 243; 23 TRP 271, 319. They also saw that one of the water troughs – the one for paddock C – was empty again. 2 TRP 242; 3 TRP 314. It was dry, so it had been empty for awhile. 3 TRP 314-15. Dr. Haskins got a hose and started filling it. Immediately 3-4 of the horses ran over to get some, a “pretty serious indicator” of their low level of hydration. 3 TRP 328. He noted that the group of five horses – the three mares, the colt, and the orphan filly – needed 30 gallons of water a day. 3 TRP 315.

The defendant was on the property on September 9. She did not agree the horses were in dire physical condition and argued about it. Officers arrested her. 4 TRP 528-30. She seemed surprised when they did so. Id.

The five horses in paddock C were in the worst shape. The paddock was small for five horses, and without any shelter or shade. All five horses were seized. 2 TRP 245; 4 TRP 531-33. Officer Delgado took photographs. 2 TRP 238-41; e.g., Ex. 49 (horse #1, the orphan filly), Ex. 68 (horse #3), Ex. 97 (horse #6), Ex. 112 (horse #8).

Dr. Haskins scored the horses in paddock C as follows:

a) Horse #1, the orphan filly, undersized for her age of six months, and with a lot of lice in her coat, as "2." 3 TRP 288-90; see Ex. 49.

b) Horse #3, the bay mare with foal, exhibiting the potbellied appearance of a malnourished horse, as "2." 3 TRP 292-96; see Exs. 64, 68.

c) Horse #4, its foal, a colt, as "2.5." 3 TRP 300-302; see Exs. 80, 81.

d) Horse #6, a light bay more, as "2.5." 3 TRP 303-305; see Exs. 93, 97.

e) Horse #8, a bay mare with a “star” on its forehead, as “2.5.” 3 TRP 305-306; see Exs. 109, 112.

Several of these horses exhibited the dull, depressed, uninterested look and “sad aspect” of an animal suffering from starvation. 3 TRP 310-11, 340-42. Such a “dull presentation” is medically significant. 2 TRP 156-57. Dr. Haskins noted that the horses’ low scores were due to poor quality of hay and a lack of hay. 3 TRP 322. About the quality of the feed, he had this to say:

The feed quality was absolutely the poorest I have ever seen on any of these cases I’ve been involved with or other farms that I visit on a regular basis.

3 TRP 319. Dr. Haskins noted that being fed intermittently can cause discomfort in a horse: they have a digestive system designed to be filled daily, and if it is not, acid levels in the stomach will rise. 3 TRP 310, 343-44, 369. He concluded these horses were suffering and in pain. 3 TRP 310, 344, 391.

I was asked to do an assessment, based on my evaluation back on September 9<sup>th</sup>, as to their pain and suffering. And my conclusion was and is that these horses were suffering and were in actual physical pain due to the extreme conditions that they were subjected to.

3 TRP 344.

Nor was the condition of the horses caused by systemic disease.<sup>1</sup> Properly fed and watered, four of the five horses<sup>2</sup> improved dramatically within five weeks. 3 TRP 328-29, compare Ex. 60 (on Oct. 14, horse #1 now a "4"); 3 TRP 334-35, compare Ex. 108 (horse #6 now a "4"); 3 TRP 335-36, compare Ex. 116 (horse #8 now a "5").

It does not take long for a malnourished horse to become emaciated. A horse scored as a healthy "5" or "6" could go down to a "2" in just two months if not adequately fed. 2 TRP 177; 3 TRP 308.

Vanessa Smith "care-leased" her thoroughbred mare Kiera to the defendant in April 2009. The arrangement was the defendant would care for and breed her, keep the foal, and return the mare. The horse was healthy in April. In August 2009 the defendant returned her, saying the mare had lost its foal due to a virus going through the herd, and now it was too late to re-breed her. When returned, Kiera was extremely thin: one could see her backbone; one could count her ribs; and her hips protruded. And

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<sup>1</sup> Blood work on Tyme was normal; 2 TRP 138-40; other than indicating anemia, blood work on 3 other horses was normal. 3 TRP 377-78. This was not unexpected: 99% of chronically starved animals will have normal blood work. 2 TRP 166.

<sup>2</sup> Horse #3, the nursing mare with foal, took longer to recover, but by December 1 was a "3." 3 TRP 331-34, 339.

she was a lot more anxious. Formerly calm around other horses, Kiera was now more food-aggressive and unwilling to share. Ms. Smith was concerned and had a vet come out, who simply prescribed lots of food and lots of water. This worked, but it took six months to get Kiera back to a normal weight. 4 TRP 505-513.

**B. CHARGES, VERDICTS, AND SENTENCE.**

The defendant was charged by amended information with six counts of first-degree animal cruelty: Count I for Tyme; Count II for horse #1, the orphan filly; Count III for horse #3, the bay mare with foal; Count IV for horse # 4, its foal, the colt; Count V for horse #6, the light bay mare; and Count VI for horse #8, the bay mare with star. 2 CP 310-12. The jury convicted on all counts. 2 CP 199-204; 6 TRP 931-34. The defendant was sentenced to 90 days concurrent on each count, with 30 days converted to community service, 55 days on electronic home monitoring, and 5 days incarceration. 1 CP 175-85; 6 TRP 960-61.

### **III. ARGUMENT**

#### **A. THE FIRST-DEGREE CRUELTY STATUTE IS NOT UNCONSTITUTIONALLY VAGUE WHEN APPLIED TO THE DEFENDANT'S CONDUCT IN STARVING HER HORSES.**

##### **1. Animal Cruelty Statutes In Washington Have Long Criminalized Negligent Care.**

It has long been at least a misdemeanor in Washington for a person having charge or custody of an animal to fail to provide "proper food [or] drink." Laws 1893, p. 41, ch. 27, § 2, codified as Hill Penal Code § 2321 (compiled 1893); Pierce's Code § 9131-12 (compiled 1939); Rem. Rev. Stat. § 3187; State v. St. Clair, 21 Wn.2d 407, 408-09, 151 P.2d 181 (1944) (quoting former statute); former RCW 16.52.070 ("unnecessarily fails to provide proper food [or] drink").

RCW 16.52.070 was repealed in 1994 and two new crimes created: first- and second-degree animal cruelty. Laws 1994 ch. 261 §§ 8, 23. The current version of first-degree animal cruelty (and the version in force at the time of these crimes) includes as one alternate means the following:

(2) A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death.

Laws 2005 ch. 481 § 1; RCW 16.52.205. An amendment to the first degree animal cruelty statute in 2006 added:

Nothing in this section may be considered to prohibit accepted animal husbandry practices or accepted veterinary medical practices by a licensed veterinarian or certified veterinary technician.

RCW 16.52.205(6); Laws 2006 ch. 191 § 1.

The defendant was convicted of six counts of first-degree animal cruelty under its criminal negligence alternate means, set forth above. 2 CP 199-204; 6 TRP 931-34; RCW 16.52.205(2). She complains, for the first time on appeal, that the phrase “unjustifiable physical pain” in the statute is so vague as to fail to have given her notice of what conduct is forbidden, and the statute is therefore unconstitutional. As applied to the facts of her case, she is wrong.

**2. Standard For Examining Claim that Statute Is Void for Vagueness; Presumption Of Constitutionality; Burden On Challenger.**

Due process requires that citizens be afforded fair warning of proscribed conduct. Rose v. Locke, 423 U.S. 48, 49, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). This requirement "protects individuals from being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably understand to be prohibited." Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d

693 (1990). A statute will be declared unconstitutional on this ground only if it "forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application." Douglass, Id. At 179 115 Wn.2d at 179.

A challenged statute is presumed to be constitutional. State v. Heckel, 143 Wn.2d 824, 832, 24 P.3d 404 (2001). The party challenging a legislative act bears the heavy burden of proving it unconstitutional beyond a reasonable doubt. Id. at 832. This includes void-for-vagueness challenges. Douglass, 115 Wn.2d at 178. The party asserting a vagueness challenge must prove, beyond a reasonable doubt, that the statute does not make plain the conduct that is proscribed. State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993). A defendant is not entitled to relief unless he can establish a constitutional impediment to the law's application. State v. Heiskell, 129 Wn.2d. 113, 122, 916 P.2d 366 (1996).

A vagueness claim is analyzed under the Fourteenth Amendment due process test, which requires the challenger to demonstrate beyond a reasonable doubt that the statute either (1) fails to sufficiently define the offense so that ordinary people can understand what conduct is proscribed, or (2) fails to provide

ascertainable standards of guilt to protect against arbitrary enforcement. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992); Douglass, 115 Wn.2d at 178.

This test, however, does not demand impossible standards of specificity or absolute agreement. Coria, 120 Wn.2d at 163. Some amount of imprecision in the language of the statute will be tolerated. Robinson v. United States, 324 U.S. 282, 286, 65 S. Ct. 666, 89 L. Ed. 2d 944 (1945) (because we are "condemned to the use of words, we can never expect mathematical certainty from our language"); State v. Smith, 111 Wn.2d 1, 10, 759 P.2d 372 (1988). Moreover, if a statute is susceptible to several different interpretations, the court will construe the statute so as to be constitutional. Dep't of Natural Resources v. Littlejohn Logging, Inc., 60 Wn. App. 671, 677, 806 P.2d 779 (1991).

Statutes are not void for vagueness merely because all of their possible applications cannot be specifically anticipated.

[A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. As this court has previously stated, "[I]f men of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting in certainty."

Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988) (citations omitted; quoting State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984)). Similarly, if a particular term in an ordinance is undefined and requires a subjective evaluation, that does not automatically mean the enactment is unconstitutionally vague. Douglass, 115 Wn.2d at 180. In determining whether the statute gives fair warning of the proscribed conduct, the reviewing court must give the language a “sensible, meaningful, and practical interpretation.” Id.

A criminal statute need not set forth with absolute certainty every act or omission which is prohibited if the general provisions of the statute convey an understandable meaning to the average person. This is especially true where the subject matter does not admit of precision.

City of Spokane v. Vaux, 83 Wn.2d 126, 130, 516 P.2d 209 (1973).

As to the second prong of the due process analysis, a legislative enactment provides adequate standards to protect against arbitrary enforcement unless the statute proscribes conduct by resorting to “inherently subjective terms” or invites an inordinate amount of police discretion. Douglass, 115 Wn.2d at 180. However, “[t]he mere fact that a person's conduct must be subjectively

evaluated by a police officer” does not mean the statute is unconstitutional. Maciolek, 101 Wn.2d at 267.

“If the statute does not involve First Amendment rights, then the vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case.” Coria, 120 Wn.2d at 163; accord, Douglass, 115 Wn.2d at 181-82. That is the case here. The defendant does not argue otherwise. Accordingly, the animal cruelty statute is tested for unconstitutional vagueness by inspecting the actual conduct of the party challenging the statute and not by examining hypothetical situations at the periphery of the statute's scope. Weden v. San Juan County, 135 Wn.2d 678, 708, 958 P.2d 678 (1998); Douglass, 115 Wn.2d at 182-83. A party cannot challenge a statute on the grounds it is vague as applied to others, if the statute clearly applies to the party's conduct. Id. at 182-83. Here, it does.

**3. The First-Degree Animal Cruelty Statute's Prohibition On Infliction Of “Unjustifiable Physical Pain” Was Not Unconstitutionally Vague As Applied To The Defendant, Who Had the Benefit Of Repeated Contacts With, And Guidance From, Veterinarians And Animal Control Officers Over The Course Of Two And One-Half Months As Her Horses Starved.**

For the first time on appeal, the defendant argues that the word “unjustifiable,” in the phrase “substantial and unjustifiable

physical pain” defines conduct that a person of ordinary intelligence could not reasonably understand to be prohibited, or forbids conduct in terms so vague that one must guess at its meaning and differ as to its application. The core of her argument is that she intended no harm; experienced financial difficulties; and relied on her farrier<sup>3</sup> for advice. Consequently, she argues, she did not know what “unjustifiable” meant.

Arguing a lack of intent to commit harm carries little weight when the mental state required for proving animal cruelty in the first degree is criminal negligence. A person acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation. See State v. Coates, 107 Wn.2d 882, 892, 735 P.2d 64 (1987) (because criminal negligence is based on a reasonable person standard, a defendant may act without knowledge or intention without negating the requisite mental state). There is nothing vague about how the mental state is defined.

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<sup>3</sup> A farrier is a smith who shoes horses and trims hooves.

A claim of financial hardship – to explain, for example, why she bought low-quality, cheap hay – does not address the defendant's putting first two, then four, then twelve, then sixteen, and then eighteen horses on the Trout Farm Road property. As the State argued below, it was criminally negligent for the defendant to increase her herd when she was having a hard time caring for the horses she already had. See 6 TRP 885, 913-14 (argument); see 3 TRP 413-414 (Auckland recalling horses thin even when only three on the property).

Moreover, the defendant is essentially arguing an affirmative defense that the Legislature eliminated in 2005. There remains an affirmative defense to *second-degree* cruelty if the negligent deprivation of shelter, rest, sanitation, space, or medical attention was due to “economic distress beyond the defendant’s control.” RCW 16.52.207. However, there is no longer such an affirmative defense when the negligent deprivation leads to starvation, dehydration, or suffocation, as now charged in first-degree animal cruelty. Compare RCW 16.52.205 with RCW 16.52.207; Laws 2005 ch. 481 §§ 1-2.

Her supposed reliance on three letters sent to Tyme’s prior owners a year earlier, in 2008, hardly addressed Tyme’s current

care and needs in the summer of 2009. See Exs. 186, 187, 188. Moreover, one letter cited the need for continued “pain management” of Tyme’s founder or laminitis. Ex. 186. Yet the defendant had taken the mare off all painkillers. 1 TRP 67, 4 TRP 439-40. She can hardly maintain she was relying on and following what the 2008 letters said.

She says that a different veterinarian, Dr. Hansen, told her everything seemed “okay” but maybe “up their hay.” 6 TRP 830-31. But we have only the defendant’s brief word on this, for Dr. Hansen was never called to testify.

Next she argues the statute is vague applied to her because she relied on her farrier, Douglas Serjeant. He described laminitis as being caused by bacteria seeping out of the foot, when it could not escape through sweat, urine, or feces. 5 TRP 760-62. He felt Tyme had improved a great deal since the defendant had gotten her: he was “amazed she looked that good,” and with her hooves trimmed “she was perfect.” 5 TRP 744-45; compare Ex. 1. He thought Tyme’s problem had come from eating too much oats. 5 TRP 764. He thought veterinarians could say “a lot of misleading things,” and believed local grass hay from western Washington was

“misunderstood.” 5 TRP 747, 757-58. He has written a book which he sells on the Internet. 5 TRP 758-59.

None of this undercuts the objective “reasonable person” standard of criminal negligence. Nor was there any testimony that any of this comprised “accepted animal husbandry practices.” And despite his saying he visited and cared for the horses frequently, neither Delgado nor Davis, in their many visits, ever reported seeing Serjeant on the property. 5 TRP 736-37, 770; 3 TRP 431. And Dr. Haskins noted that on Sept. 9, several of the horses needed trimming. 3 TRP 298, 366.

In any case, the defendant was not listening to Serjeant in isolation. It is rare that a defendant, while in the course of committing or potentially committing a crime, has the benefit of advice on how to cease doing so. She had contact with two veterinarians, Dr. Miller (on July 14) and Dr. Holohan (on July 15). 2 TRP 100-107 (Dr. Miller); 2 TRP 170-71, 184-85 (Dr. Holohan). Both Davis and Delgado expressed concerns to the defendant about the condition of her horses as early as July 7. 1 TRP 77-83; 4 TRP 468-72. She was informed of the risk of criminal charges on July 10. 2 TRP 214-19. On July 15 Davis told her to get the horses up to an acceptable weight with good quality hay. 4 TRP 478.

Davis repeated these concerns, and advice, to the defendant on August 11. 4 TRP 494.

Lastly, it is difficult to imagine how one could look at the appearance of these horses and not conclude they were in substantial and unjustifiable physical pain, especially when coupled with the ongoing advice given to the defendant by Delgado and Davis. See, e.g., Exs. 1, 49, 64, 80, 93, 112.

“Unjustified” is defined as “not demonstrably correct or judicious; unwarranted in the light of surrounding circumstances.” Webster’s 3d New Int’l Dictionary 2502 (2002). There was nothing that justified the animals’ pain. The criminal-negligence prong of the animal cruelty statute was not unconstitutionally vague when applied to the facts of the defendant’s conduct.

In Romano, a defendant neglected her dog’s grooming to the point where it obviously required medical attention, which the defendant then failed to seek. Convicted under New York’s animal cruelty law, she appealed, alleging that “unjustifiably injures” was unconstitutionally vague. Given the dog’s obvious and “significant physical maladies,” and the odor the dog emitted as a result, the appellate court found that the statutory language was not vague as applied to the defendant. People v. Romano, 29 Misc.3d 9, 11-12,

908 N.Y.S.2d 520, 522-23 (2010). The facts in Romano had a visual component, like the facts of the crimes here; but, unlike Romano, this defendant *also* had ample notice and guidance from animal control officers over the course of two months, which she disregarded.

In Speegle, a defendant kept some 200 poodles in filthy conditions without adequate food or water. They were underweight and also suffered from such conditions as matted fur, parasites, fleas, and rotted teeth. Convicted under California's animal cruelty statute, the defendant appealed, arguing that "needless suffering" was unconstitutionally vague. The appellate court disagreed, finding the terms "necessary," "needless," and "proper" all "give fair notice of an objective standard of reasonableness in the provision of sustenance, drink, and shelter, and in the avoidance of infliction of suffering. . . . The fact a defendant must assess 'the point at which [a] course of conduct becomes criminally negligent' does not violate due process." People v. Speegle, 53 Cal.App.4<sup>th</sup> 1405, 1411, 62 Cal.Rptr.2d 384, 388 (1997), citing People v. Curtiss, 116 Cal.App.Supp. 771, 779, 300 P. 801, 803-05 (1931) (statute banning teacher's infliction of "unjustifiable" pain upon student constitutional).

In Webb, the owner of a “puppy mill” was convicted of multiple counts of Tennessee’s animal cruelty statute after officers found scores of dogs without food and water and caged in their own urine and feces. On appeal the defendant argued that “fail[ing] to provide necessary food” was unconstitutionally vague, as providing no guidance as to what is “necessary.” The appellate disagreed, finding nothing vague when applying the statutory language to the defendant’s actual conduct. State v. Webb, 130 S.W.3d 799, 826-27 (2003) (citing among other examples Washington’s second-degree cruelty statute and the phrase “unjustifiable pain”). “The fact that a statute applies in a wide variety of situations and must necessarily use words of general meaning does not render it unconstitutionally vague.” Id.

Zawistowski, a case applying the pre-2005 version of second-degree animal cruelty, involved a claim of insufficient evidence of pain on very similar facts (malnourished horses). The defendants there claimed there was insufficient evidence both of pain and their having caused it. This Court disagreed, concluding extreme hunger and resulting pain were reasonable inferences to draw from the facts. It held sufficient evidence supported the two charged horses there as having suffered unnecessary and

unjustifiable pain. State v. Zawistrowski, 119 Wn. App. 730, 734-35, 83 P.3d 698 (2004). It concluded:

The pain was unnecessary and unjustifiable because merely providing adequate food would have stopped it.

Id. at 737 n.3. The same straightforward reasoning applies here. Because simply providing adequate food and water stopped the animals' suffering and pain, that pain was "unjustifiable." 3 TRP 328-36; 4 TRP 505-13; Exs. 60, 108, 116.

**B. THIS CASE WAS CHARGED UNDER ONLY ONE ALTERNATE MEANS. IF MORE THAN ONE ALTERNATE WAS PRESENTED, THERE WAS SUFFICIENT EVIDENCE TO CONCLUDE THE HORSES SUFFERED PAIN FROM DEHYDRATION.**

Jury verdicts in criminal cases must be unanimous as to the defendant's guilt of the crime charged. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); Const. art. 1, § 4. In a "multiple acts" case, a unanimity instruction is required when there is evidence of separate criminal acts, each of which could support a conviction, but only one crime is charged. State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984); see Comment to WPIC 4.25. When evidence shows several incidents which could form the basis of the single crime charged, either the State must elect which act it relies upon for conviction or the jury must be instructed that all

jurors must agree that the same act has been proven. Petrich, 101 Wn.2d at 570, 572.

On the other hand, when a single offense may be committed in more than one way (an “alternate means” case), a jury still must unanimously agree on guilt, but not the means by which the crime was committed, as long as there is sufficient evidence to support each alternate means. Ortega–Martinez, 124 Wn.2d at 707–08.

RCW 16.52.205 has three alternate means of committing the crime of first-degree animal cruelty: the intentional infliction of pain or injury, or causing death by undue suffering (RCW 16.52.205(1)); negligently starving, dehydrating, or suffocating an animal, to cause substantial and unjustifiable pain leading to considerable suffering (RCW 16.52.205(2)); and engaging in sexual conduct or sexual contact with an animal (RCW 16.52.205(3)).

The State charged the defendant under the second alternate means of criminal negligence. Because there was no evidence of suffocation, the State charged, and the jury was instructed, that the defendant was alleged to have starved or dehydrated Tyme and horses #1, #3, #4, #6, and #8. 2 CP 213-18 (“to convict instructions); 2 CP 310-12 (amended information). Under the single means charged, and as the jury was instructed, the State

was required to prove *either* starvation *or* dehydration. It did so. The mere use of the disjunctive “or” did not break out additional alternate crimes. See In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988); State v. Laico, 97 Wn. App. 759, 762, 987 P.2d 638 (1999).

That only one alternate means had been charged and presented to the jury was certainly how the parties argued it at the close of the State’s case, when the defense brought a “Green motion”<sup>4</sup> to dismiss for lack of evidence. 4 TRP 580-87. And that is how the court interpreted the evidence when it resolved the motion. 4 TRP 587-89.

Examples of other crimes with alternate means are instructive. These include: vehicular homicide and vehicular assault, RCW 46.61.520, -.522 (under the influence, reckless driving, or disregard for safety); forgery, RCW 9A.60.020 (falsely altering a document, or possessing an altered document with knowledge it was altered); stalking, RCW 9A.46.110 (intentionally frighten, intimidate, or harass another, or knowing or should have known the other person is frightened, intimidated, or harassed); witness tampering, RCW 9A.72.120 (inducing false testimony,

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<sup>4</sup> State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

absence from official proceeding, or withholding information from a law enforcement agency); and DUI, RCW 46.61.502 (affected by alcohol, or over .08 within 2 hours of driving). And certainly first-degree animal cruelty, RCW 16.52.205, has the three alternate means (intentional infliction, negligent care, and sex with animals) described above.

What all these examples have in common is that the alternative means are broken out in separate subsections, and frequently involve different mental states, like the crime at issue here. “Typically, an alternative means statute will state a single offense, using subsections to set forth more than one means by which the offense may be committed.” State v. Nonog, 145 Wn. App. 802, 812, 187 P.3d 335 (2008), (citing State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007) (three common law definitions of assault do not constitute alternate means of committing the crime)), aff’d, 169 Wn.2d 220, 237 P.3d 250 (2010).

This is not an “alternate means” case, since only one alternate – the criminal negligence prong of RCW 16.52.205(2) – was charged. The jury was unanimous on that charge. That can end the inquiry.

The defendant disagrees, arguing for the first time on appeal that there are, in effect, alternate means within the alternate means. No case has found this to be true of first-degree animal cruelty. Peterson, cited by defendant, simply holds that failure to register is not an alternate means crime. State v. Peterson, 168 Wn.2d 763, 230 P.3d 588 (2010). Nonog did find alternative means within a subsection of a crime, but in a unique context. Since RCW 9A.36.150, interfering with reporting of domestic violence, does not criminalize all obstructing acts that might appear to constitute interfering, but only those when a victim or witness specifically tries to report to a 911 operator, seeks to obtain medical assistance, or makes a report to law enforcement, it was found to have three alternate means. Nonog, 145 Wn. App. at 812-13. Nonog is an exception, as the examples cited above show (and as the Nonog court itself recognized). It does not stand for the broad proposition for which defendant presents it.

Even if subsection 2 of the animal cruelty statute, the criminal negligence means, has within it three more alternate means, the inquiry is whether sufficient evidence, viewed in the light most favorable to the State, supports each of the alternate

means charged. State v. Koch, 157 Wn. App. 20, 29, 31, 237 P.3d 287 (2010).

This is a deferential standard. There will be sufficient evidence if, viewing the evidence and drawing all inferences in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. Ortega-Martinez, 124 Wn.2d at 708; State v. Pettus, 89 Wn. App. 688, 694-95, 951 P.2d 284 (1998); State v. Donald, 68 Wn. App. 543, 549, 844 P.2d 447 (1993). The inquiry is the same as for any claim of insufficient evidence. Id. Thus, the inquiry admits the truth of the State's evidence; inferences are drawn strongly against the defendant, and evidence favoring the defendant is not considered. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971); State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Borchardt recalled he and his intern repeatedly having to fill the horses' bone-dry water troughs. He complained to the defendant about the lack of water. He watched the horses cluster around the water trough. 3 TRP 405-08. Auckland observed how the horses got only about 30 seconds' worth of water at a time. 3

TRP 415-17. Both recalled this happening in very hot weather. 3 TRP 406, 415-17.

Witnesses recalled on three separate occasions the horses being so parched that they ran to, and jostled and fought at, the water troughs when they were filled. 1 TRP 89 (Delgado, on 7/10/09); 4 TRP 516, 518, 520 (Davis, on 8/27/09), and 3 TRP 328 (Dr. Haskins, on 9/9/09). Dr. Haskins commented that this was a “pretty serious indicator” of their level of dehydration. 3 TRP 328. And he was concerned that the horses had not had water for some time. 3 TRP 327.

Dr. Holohan testified that she could not definitively say that the lack of water (as distinguished from starvation) caused pain. 2 TRP 204-05. (She did not testify that it did not, only that she could not say.) Dr. Haskins testified it was difficult to test for dehydration when the blood work on two of the horses showed anemia as well. 3 TRP 377-78. Dr. Haskins did note that the five horses (three mares, the filly, and the colt) in paddock C needed 30 gallons of water a day. 3 TRP 315. And he was concerned about how little water they were getting. 3 TRP 327. The jury could infer from the evidence that the horses, over the summer, were getting nowhere near 30 gallons a day, and were suffering accordingly. Moreover,

the horses were rehabilitated both with food *and water*. 4 TRP 505-513 (Ms. Smith's horse Kiera); 3 TRP 328-36 (the seized horses). The jury could reasonably infer that since water contributed to the horses' recovery, its lack had contributed to their suffering and pain. Lastly, suffering from lack of water is not an arcane topic. And jurors are expected to bring their common sense and everyday life experiences into deliberations. State v. Carlson, 61 Wn. App. 865, 878, 812 P .2d 536 (1991). Dehydration lies within the ken of human experience. Viewed in the light most favorable to the State, and drawing all reasonable inferences therefrom, a rational jury could reasonably infer that these chronically dehydrated horses suffered substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering. See Zawistowski, 119 Wn. App. at 734-35 (drawing reasonable inferences on similar facts).

### **C. RESTITUTION WAS AUTHORIZED BY LAW.**

In its sentencing memorandum, the State sought restitution under RCW 16.52.200. 1 CP 186-87. (It did not seek restitution under RCW 9.94A.) At a post-sentence restitution hearing, the court awarded restitution pursuant to the statute. 6 TRP 980. A restitution order awarded \$48,108.23 to cover Snohomish County's

costs for the horses' care and rehabilitation. 3 CP 320-322. (Large restitution amounts are not uncommon in animal cruelty cases, e.g., Webb, 130 S.W.3d at 835-38 (\$39,978.85, finding county humane society was "victim" within meaning of statutes); Speegle, 53 Cal.App.4<sup>th</sup> at 1409, 62 Cal.Rptr.2d at 387 (\$265,000).)

RCW 16.52.200 provides in relevant part:

(6) In addition to fines and court costs, the defendant, only if convicted or in agreement, shall be liable for reasonable costs incurred pursuant to this chapter by law enforcement agencies, animal care and control agencies, or authorized private or public entities involved with the care of the animals. Reasonable costs include expenses of the investigation, and the animal's care, euthanization, or adoption.

The defendant argues that this provision only applies to misdemeanor and gross misdemeanor convictions (that is, for second-degree animal cruelty, RCW 16.52.207); that RCW 9.94A.505(1) prohibits the award of restitution for a felony offense except under the terms of the Sentencing Reform Act, (SRA) and further, that the county is not a "victim" as contemplated in the SRA.

Defendants made the same argument (that the statute only applies to misdemeanors and gross misdemeanors) in Paulson, a prosecution for first-degree animal cruelty under its intentional-infliction prong. This Court rejected the argument, finding the

statute applied to felony violations as well. State v. Paulson, 131 Wn. App. 579, 590-91, 128 P.3d 133 (2006). And while the provision of RCW 16.52.200 challenged there dealt with the court's power to order participation in an available animal cruelty prevention program, not restitution, the challenge was to the statute's application generically. In rejecting it, the Paulson agreed with the State that the statute applied to misdemeanors, gross misdemeanors, or class C felonies brought under chapter 16.52. Id. The defendant omits Paulson in her analysis. But it governs the outcome here.

To construe it otherwise would mean the statute provides a ready avenue to compensate a public agency, or private animal care agency, for costs connected to a misdemeanor or gross misdemeanor animal-cruelty violation, but require such an agency to incur the time and expense of bringing a civil lawsuit for the costs incurred from a more serious felony violation. This cannot have been the Legislature's intent. "The primary duty of the court in interpreting the statute is to ascertain and give effect to the intent and purpose of the Legislature." State v. Hennings, 129 Wn.2d 512, 522, 919 P.2d 580 (1996). Nor does the Legislature "engage in unnecessary or meaningless acts." Sellen Constr. Co. v. Dep't of

Revenue, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976). The construing court should avoid unlikely, absurd, or strained results. State v. Bourgeois, 72 Wn. App. 650, 657, 866 P.2d 43 (1994) citing State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992).

Moreover, while RCW 9.94A.505(1) requires that punishment for a felony be imposed within the confines of the Sentencing Reform Act, restitution is a hybrid, with both remedial and punitive components. State v. Kinneman, 155 Wn.2d 272, 280, 119 P.3d 350 (2005) (restitution does not require jury fact-finding per Blakely). Thus, it is not subject, or should not be subject, to the same blanket limitation and prohibition to which the defendant assigns it. The restitution order was authorized by RCW 16.52.200.

#### **IV. CONCLUSION**

The judgment and sentence should be *affirmed*.

Respectfully submitted on March 9, 2012.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By: Charles Franklin Blackman #10937   
CHARLES FRANKLIN BLACKMAN, # 19354  
Deputy Prosecuting Attorney  
Attorney for Respondent

NO. 66876-5-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

MARY DAWN PETERSON,

Appellant.

---

ATTACHMENTS TO RESPONDENT'S BRIEF  
(COPIES OF EXHIBITS)

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MARK K. ROE  
Prosecuting Attorney

CHARLES F. BLACKMAN  
Deputy Prosecuting Attorney  
Attorney for Respondent

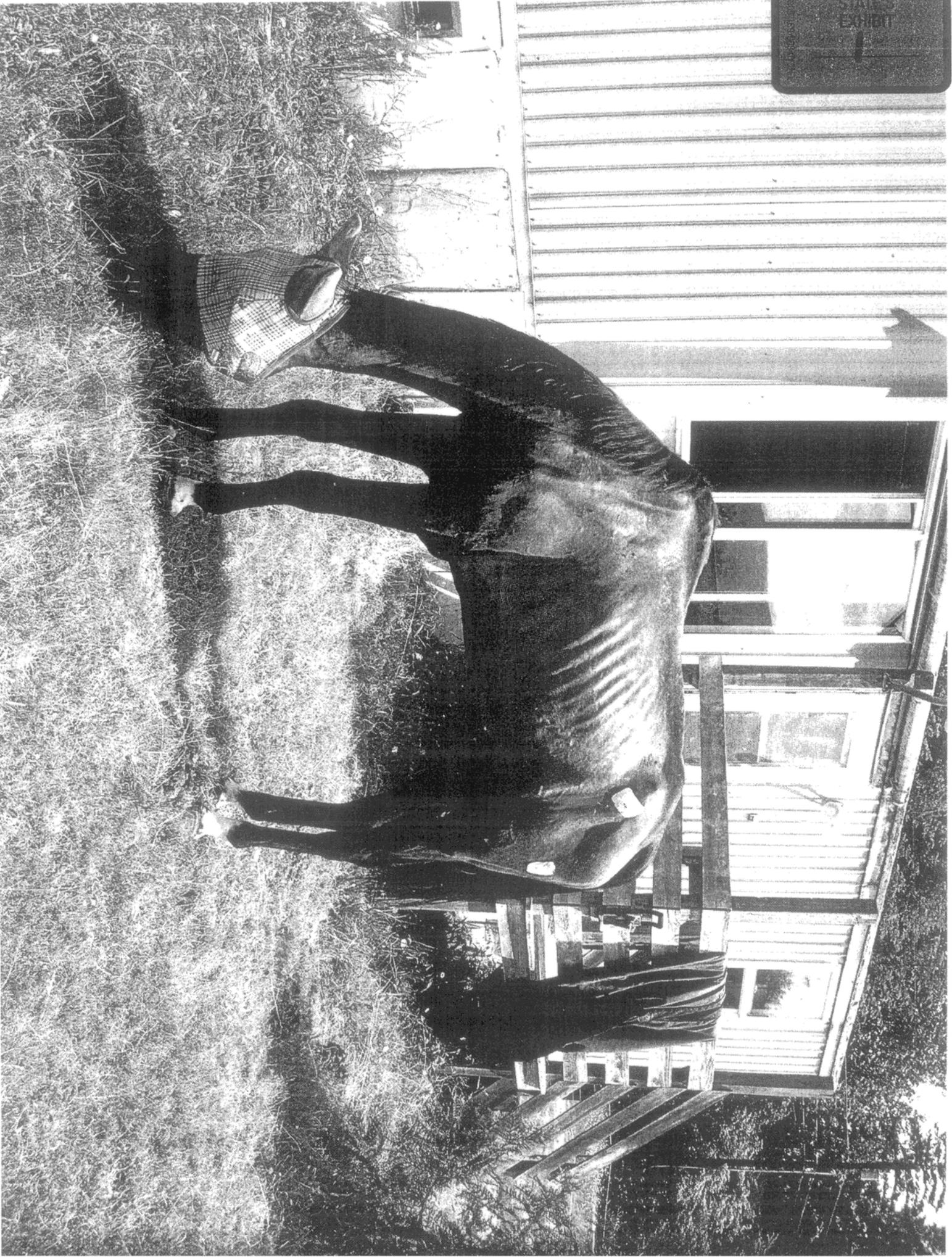
Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 MAR 23 AM 11:01

**EXHIBIT 1**

**“Tyme”**

STATE EXHIBIT  
1



**EXHIBIT 49**

**“Horse #1”**

**(“orphaned filly”)**

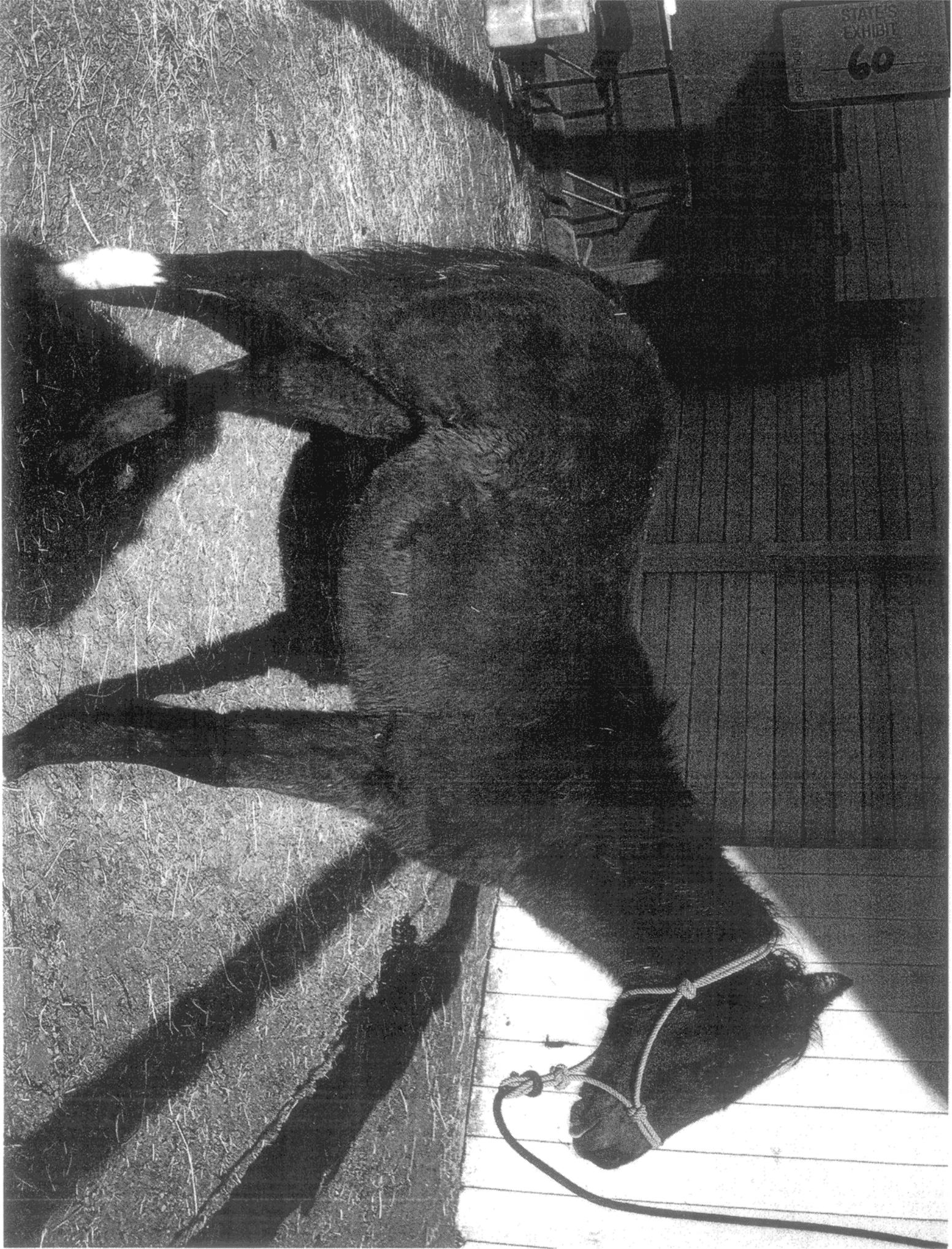


**EXHIBIT 60**

**“Horse #1”**

**(“orphaned filly”)**

**(rehabilitated, five weeks after seizure)**



**EXHIBIT 64**

**“Horse #3”**

**(“nursing mare”)**

STATE'S EXHIBIT  
64



**EXHIBIT 68**

**“Horse #3”**

**(“nursing mare”)**

STATE'S EXHIBIT  
68



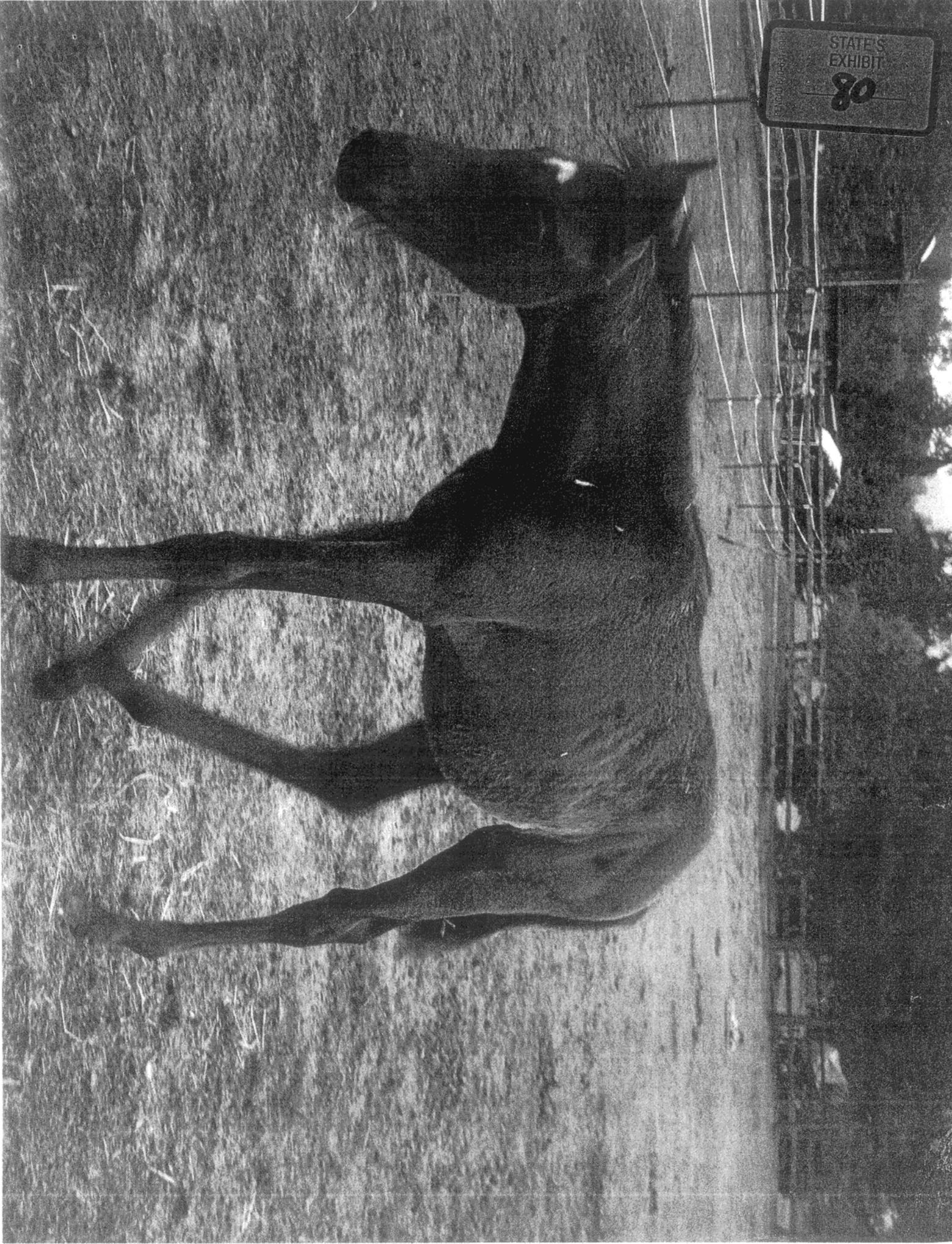
09.09.2009

**EXHIBIT 80**

**“Horse #4”**

**(“horse #3’s colt”)**

STATE'S EXHIBIT  
80

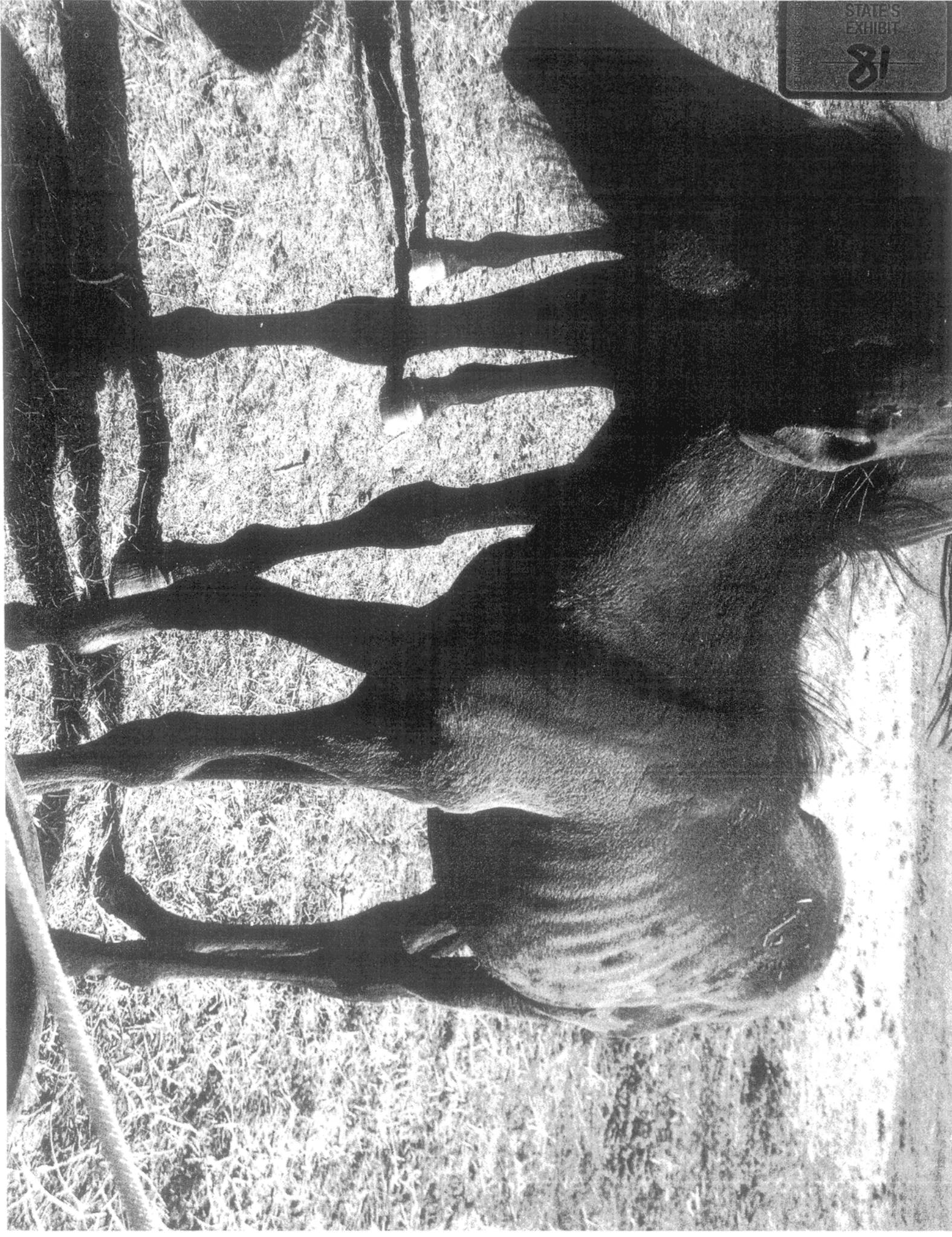


**EXHIBIT 81**

**“Horse #4”**

**(“horse #3’s colt”)**

STATE'S EXHIBIT  
81



**EXHIBIT 93**

**“Horse #6”**

STATE'S EXHIBIT  
93



**EXHIBIT 108**

**“Horse #6”**

**(rehabilitated, five weeks after seizure)**

STATE'S EXHIBIT  
**108**



**EXHIBIT 109**

**“Horse #8”**

STATE'S EXHIBIT  
109



**EXHIBIT 112**

**“Horse #8”**

STATE'S EXHIBIT  
112

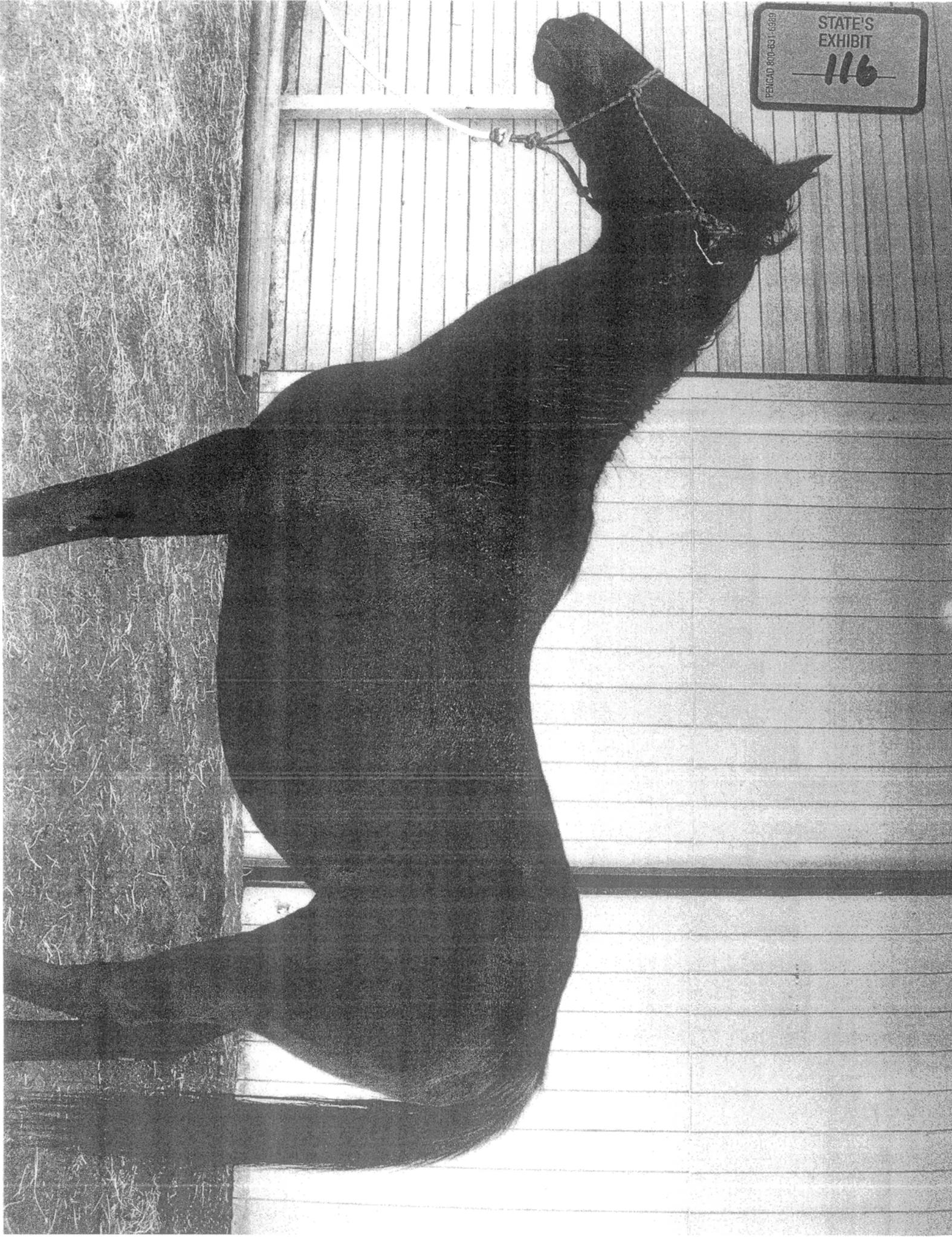


09:09:2009

**EXHIBIT 116**

**“Horse #8”**

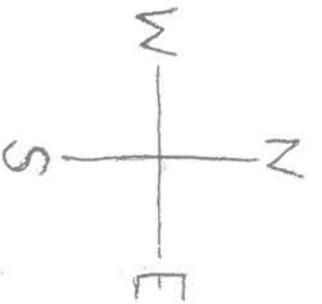
**(rehabilitated, five weeks after seizure)**



PENGAD 800-831-6389  
STATE'S  
EXHIBIT  
**116**

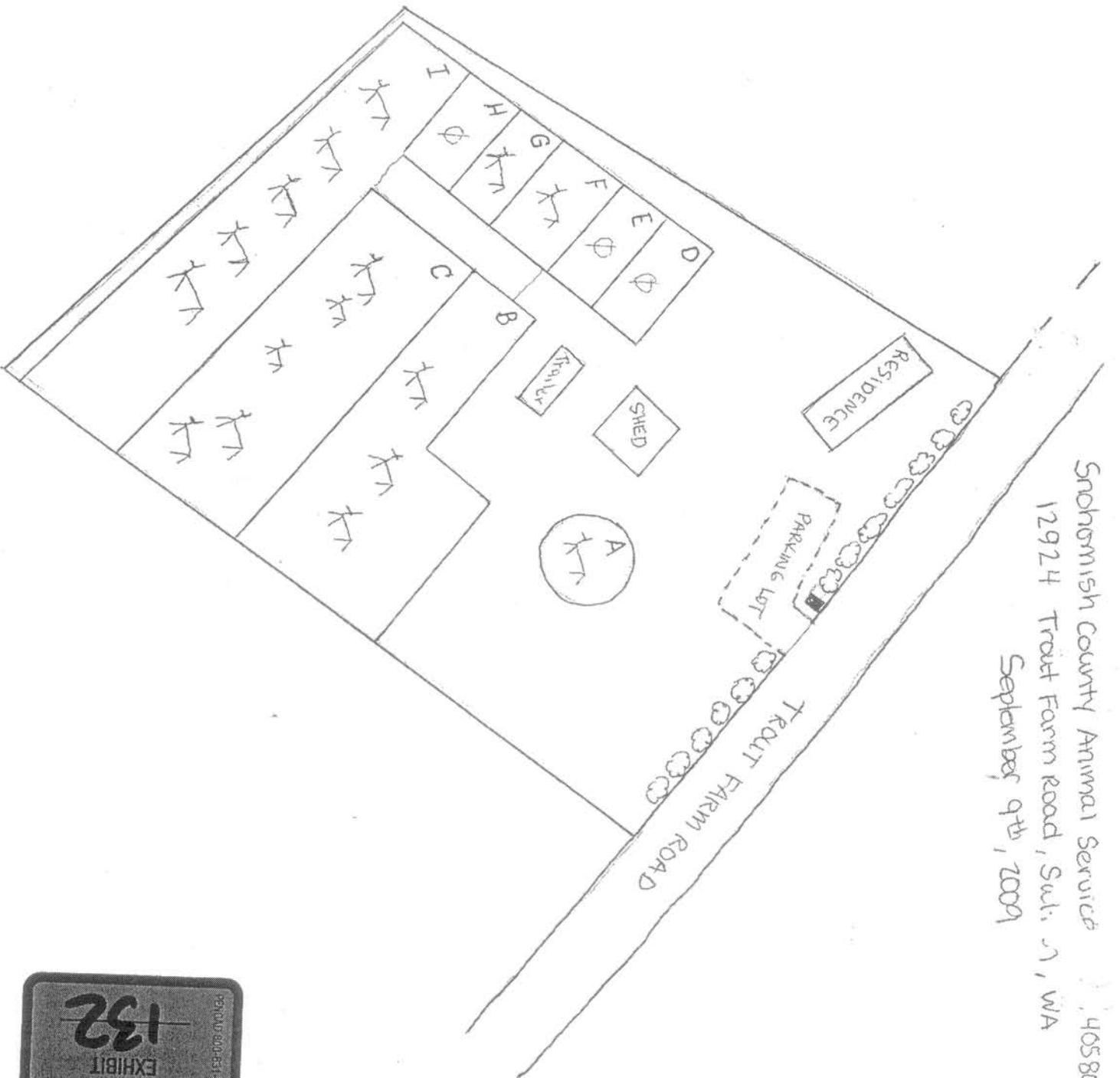
**EXHIBIT 132**

**DIAGRAM OF DEFENDANT'S PROPERTY**



ENCLOSURES

- A - Horse #5
- B - Horses #15, 16, 17
- C - Horses #1, 3, 4, 6, 8
- D - Empty
- E - Empty
- F - Horse #2
- G - Horse #14
- H - Empty
- I - Horses # 9, 10, 11, 12, 13



Snohomish County Animal Services 405804  
 12924 Trout Farm Road, Sul. 7, WA  
 September 9th, 2009

**NOT A COPY**  
 Horse #7 - gone on arrival

09 of 283  
 \* include also

Prepared by Officer Paul Delgado #4304  
 Paul Delgado

