66876-5

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NO. 66876-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARY D. PETERSON,

Appellant.

FILED
COURT OF APPEALS
DIVISION ONE
MAY 25 2012

BRIEF OF *AMICUS CURIAE*
ANIMAL LEGAL DEFENSE FUND

ORIGINAL

FOR THE ANIMAL LEGAL DEFENSE FUND

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I. STATEMENT OF INTEREST

The Animal Legal Defense Fund (ALDF), founded in 1979, is a national, nonprofit organization of attorneys specializing in the protection of animals and working to ensure the enforcement of existing animal protection laws within the United States. ALDF has staff in California, Colorado, Florida, Oregon, Texas, and Wisconsin, with a nationwide membership of over 100,000 contributors and over 1,000 attorney members who provide *pro bono* legal work in animal law cases throughout the nation.

Twenty years ago this Court may not have entertained an *amicus* appearance by an "animal law" organization. However, with the seminal animal law casebook now in its fourth edition (Bruce A. Wagman, Sonia S. Waisman & Pamela D. Frasch, *Animal Law: Cases and Materials* (4th ed. Carolina Academic Pr. 2010)), times have changed. Published in a field that was once considered a novelty, this casebook is (and others[1] are) now used by many of the professors who teach animal law at more than 120 law schools across the country—including Harvard, Northwestern, Columbia, Cornell, Chicago, Stanford, and Georgetown. All three Washington law schools offer at least one animal law course. ALDF, *Animal Law Courses*,

[1] David Favre, *Animal Law: Welfare, Interests and Rights* (Aspen Law & Bus. 2008); *Animal Rights: Current Debates and New Directions* (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford Univ. Pr. 2005); *Animal Law and the Courts: A Reader* (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., Thomson West 2008).

available at http://www.aldf.org/article.php?id=445 (last visited April 25, 2012).[2] Further, animal law is recognized on a national level by the American Bar Association's Animal Law Committee, which was formed as part of the ABA's Tort Trial and Insurance Practice Section (*see*, *e.g.*, Margaret Graham Tebo, *Pet Project: New ABA Committee on Animal Law Focuses on Post Katrina Rescue Efforts,* A.B.A. J. Dec. 2005, at 72), and at the state level where at least 18 states have bar sections or committees devoted to animal law (including Oregon and Washington). ALDF, *Bar Association Animal Law Sections and Committees,* available at http://www.aldf.org/article.php?id=277 (last visited April 25, 2012).

As the legal consciousness of the plight of non-human animals continues to heighten, the law is evolving to afford these silent victims more protections from abuse and neglect. It is against this backdrop that ALDF's Criminal Justice Program operates, providing free prosecution assistance in animal neglect and cruelty cases throughout the nation.

II. INTRODUCTION AND STATEMENT OF THE CASE

Concurrent with the filing of this brief, ALDF also filed its motion to appear as *amicus curiae* in compliance with RAP 10.6. The purpose of ALDF's *amicus curiae* appearance is to support the Respondent's Brief by

[2] The Pacific Northwest is a bit of an animal law Mecca, with the Center for Animal Law Studies (CALS) at Lewis & Clark Law School now offering an LL.M. degree in animal law. CALS, *Animal Law LL.M.*, available at http://law.lclark.edu/centers/animal_law_studies/curriculum/ LLM/ (last visited April 25, 2012).

urging the Court to recognize that RCW 16.52.205(2), specifically the term "unjustifiable physical pain," is not unconstitutionally vague as applied to the Defendant.

The facts and procedural posture of this case are as follows. In April 2009 the Defendant rented a field where she was to pasture no more than four horses. Resp't's Br. 3. However, the Defendant soon kept 12 horses on the property; in June 2009 neighbors called animal control when they became bothered that the horses lacked adequate food and water in the summer heat and showed protruding bones. Resp't's Br. 5. Between June 24, 2009, and September 9, 2009, animal control officers visited the field and noticed that the horses appeared emaciated, with their condition deteriorating over time, and lacked adequate food and water. Resp't's Br. 6–17. Although officers spoke with the Defendant multiple times between June and September, the Defendant failed to improve the horses' condition. Officers arrested the Defendant on September 9, 2009, Resp't's Br. 16–17; the jury convicted on all six counts of first-degree animal cruelty, Resp't's Br. 21.

III. QUESTION OF LAW PRESENTED

The issue before the Court is whether, where the Defendant deprived her horses of food and water over the course of two and a half months, though animal control officers warned her she was in violation of the first-degree animal cruelty statute and attempted to assist her in giving the horses

proper sustenance, the phrase "unjustifiable physical pain" in RCW 16.52.205(2) was so vague as applied to the Defendant as to give her no warning of the conduct that the statute proscribed?

IV. ARGUMENT

A. LEGISLATURES PURPOSELY DRAFT ANTI-CRUELTY STATUTES WITH "UNJUSTIFIABLE" AND LIKE TERMS BECAUSE THE SCOPE OF THE PROHIBITED CONDUCT REQUIRES GENERAL LANGUAGE.

Legislatures have always balanced human interest and animal welfare in drafting anti-cruelty statutes. *See, e.g.*, *People v. O'Rourke*, 83 Misc. 2d 175, 178, 369 N.Y.S.2d 335, 339 (Crim. Ct. 1975) (affirming that "the test of cruelty is the justifiability of the act or omission"). Since the passage of the first anti-cruelty statutes, legislatures have employed the terms "unjustifiable," "proper," "necessary," and "sufficient" to achieve this balance.[3] Courts have long recognized that the question of whether conduct causing an animal pain is "justifiable" is one not "easily answered." *People ex rel. Freel v. Downs*, 136 N.Y.S. 440, 445 (Magis. Ct. 1911). However, this difficulty does not make such terms impermissibly vague and thus unconstitutional. Instead, when challenged for vagueness, courts assess

[3] In other words, courts deem an animal's pain justified if it furthers a legitimate human purpose. *See, e.g.*, *Waters v. People*, 23 Colo. 33, 39, 46 P. 112, 115 (1896) (finding that some affirmative infliction of pain and death upon animals may be justified, but not where that action does not "minister to some of the necessities of man"). For example, the agriculture industry utilizes the practice of "forced molting," in which egg-laying hens are denied food to induce greater egg numbers. Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 J. Animal L. & Eth. 175, 195 (2006). In the instant case, the Defendant's starvation of her horses served no such purpose.

terms similar to "unjustifiable physical pain" based on the viewpoint of a person of ordinary intelligence. In *State v. Andree*, 90 Wash. App. 917, 921, 954 P.2d 346, 348-9 (1998), where the defendant stabbed a kitten nine times with a hunting knife, this Court noted, in determining that the phrase "undue suffering" was not unconstitutionally vague:

> The fact that a statutory term is not defined and requires a subjective evaluation, however, does not automatically mean that the statute is unconstitutionally vague. If persons "of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement,* it is not wanting in certainty." Impossible standards of specificity are not required.

(Emphasis original; footnotes and citations omitted). *See also* *People v. Bunt*, 118 Misc. 2d 904, 907, 462 N.Y.S.2d 142, 144 (Just. Ct. 1983) ("The question of fact as to whether the act of cruelty and infliction of pain was justified . . . is a question to be determined by the trier of facts and based upon the moral standards of the community").

Although various state anti-cruelty statutes containing "unjustified" and similar terms have been challenged for vagueness, such challenges routinely fail, as courts have long recognized the need for general terms in proscribing conduct that constitutes cruelty. Ibrahim, *supra* n. 2, at 196. Indeed, the Model Penal Code drafters acknowledged that the nature of animal cruelty calls for general terms, rather than a definite list of specific prohibited conduct or results. *People v. Allen*, 657 P.2d 447, 451 (Colo.

1983). *Allen*, an appeal of a conviction of animal cruelty by a defendant who was responsible for "eight emaciated horses"[4] is notable for its discussion of the vagueness standard as applied not just to the statute before it but also to animal cruelty statutes generally. The statute at issue provided in relevant part: "A person commits cruelty to animals if, except as authorized by law, he knowingly or with criminal negligence . . . having the charge and custody of any animal, fails to provide it with proper food, drink, or protection from the weather, or abandons it." In upholding the statute, the Colorado Supreme Court noted that the statute:

> is "as explicit as could be in order to accomplish the purposes intended . . . A legislature would find it extremely difficult, if not impossible, to write a statute more specific . . . ." All 50 states and the District of Columbia have enacted statutes outlawing cruelty to animals. Forty-three other jurisdictions have established a standard of care in terms identical to or synonymous with that of Colorado: "proper," "adequate," "sufficient," or "necessary." The remaining seven jurisdictions use a standard that is equally general: "neglect" or "unjustifiable pain, suffering or death." The drafters of the Model Penal Code stated that "the obvious difficulty in defining cruelty cannot be solved by using more words, as the . . . typical legislative provision demonstrates," and solved the dilemma in the Code by the use of "cruel mistreatment" and "cruel neglect."

Id. at 450-1 (citations and footnotes omitted).

The use of terms that, in the abstract, might be viewed as vague is inherent in the nature of the crime being addressed, and such terms, at least as applied to a defendant convicted of starving animals—as was the case in

[4] The facts that gave rise to the conviction are not otherwise stated in the decision.

Allen as well as in the instant case—are readily understandable and not unconstitutionally vague. As a result, cruelty statutes need not exhibit "mathematical exactitude" in the language used. *Id.* at 449. That courts often desire flexibility in language to address "varied circumstances" and "changing times," is demonstrated by *Allen*, where the court found that the terms "reasonable," "competent," "proper," and "fair" were not vague as applied to a defendant who starved eight horses. *Id.* at 449-50.[5]

To require the Legislature to enumerate specific instances illustrating the term "unjustifiable" within a cruelty statute would "place undue burden on the People requiring them to supply trial quality evidence in the body of an accusatory instrument." *People v. Voelker*, 172 Misc. 2d 564, 569, 658 N.Y.S.2d 180, 183 (Crim. Ct. 1997) (where defendant violated statute prohibiting "unjustifiably injur[ing], maim[ing], mutilat[ing], or kill[ing] any animal" by cutting off the heads of three conscious iguanas). In addressing a vagueness challenge, a court need only assess if a statute is vague as applied to a particular defendant's situation, not "whether hypothetical cases are covered by our cruelty to animals statute." *State v. Kaneakua*, 61 Haw. 136, 142, 597 P.2d 590, 594 (1979) (where defendants

[5] RCW 16.52.205(2) uses the phrase "substantial and unjustifiable physical pain," a phrase cited as typical and implicitly approved in *Allen*. Importantly, however, the infliction or causation of such pain is not by itself sufficient to constitute the offense—the pain must occur as a result of starvation, dehydration, or suffocation. Thus the conduct proscribed by 16.52.205(2), considered in totality, is highly specific indeed—a fact ignored by the Defendant. *See infra* Part IVD.

stipulated that they knowingly participated in a cockfight, they lacked standing to challenge the term "cruelty," defined as causing "unjustifiable physical pain," for vagueness).

B. COURTS HAVE LONG CONSTRUED "UNJUSTIFIABLE" AS NOT VAGUE IN THE CONTEXT OF BOTH AFFIRMATIVE ABUSE AND OMISSION.

1. Affirmative Acts

As early as 1938, a defendant challenged the constitutionality of the term "unjustifiable" in the context of affirmative animal abuse. *State v. Eich*, 204 Minn. 134, 282 N.W. 810 (1938). In *Eich*, the Minnesota statute prohibited the poisoning of an animal where a person "*unjustifiably* administers any poisonous, or noxious drug or substance to any animal . . . or *unjustifiably* exposes any such drug or substance . . . [to] any animal." *Id.* at 135 (emphasis added). The Defendant claimed the statute was vague because the term "unjustifiably" "fail[ed] to present a sufficiently definite standard"—but the court disagreed:

> Because of the complexity of our social organization and the attendant difficulty of successfully enumerating each specific forbidden act, *the legislature by necessity has had to enact many criminal statutes[,] which are broad in their scope and character. Otherwise the fertile mind of the criminal could find omissions and loopholes as means of escape . . . The word 'unjustifiable' and its antonym 'justifiable' are far from being unknown in our law.*

Id. at 136 (emphasis added). Furthermore, the *Eich* court noted that Legislatures employ the "fluid" standard of justifiability, grounded in the

reasonable person standard, in a variety of contexts, from child abuse to murder statutes. *Id.*

Similarly, a Georgia court found that where the statute prohibited "caus[ing] death or *unjustifiable* physical pain or suffering" to an animal, and the statute enumerated exceptions such as humanely injuring or killing to defend personal property, the statute was not vague read as a whole. *In re C.B.*, 286 Ga. 173, 174, 686 S.E.2d 124, 126 (2009) (emphasis added) (where a juvenile shot his neighbor's dog because the dog had been defecating in his yard, the shooting was not justifiable).

2. Omission (Failure to Act)

The overwhelming weight of authority is against the Defendant. As Respondent's Brief notes, Resp't's Br. 32-33, a New York court found the phrase "permits any animal to be unjustifiably injured" not vague regarding a dog who exhibited "clear, objective signs" that it needed care: The dog had "significant physical maladies" and an obvious odor due to the owner's severe neglect. *People v. Romano*, 29 Misc. 3d 9, 908 N.Y.S.2d 520 (App. Term 2010) *leave to appeal denied*, 16 N.Y.3d 899, 949 N.E.2d 982 (2011) (finding that "no reasonable pet owner would fail to seek medical care for the animal" in that condition).

In *People v. Untiedt*, 42 Cal. App. 3d 550, 116 Cal. Rptr 899 (Ca. Ct. of Appeal 1974), though the court focused on a different suspect language (i.e., "without proper care and attention") found in Cal. Penal Code § 597f,

the court used the clause "unjustifiable physical pain" found later in that same statute to conclude that § 597f was not unconstitutional. In so ruling, the court noted that the challenged clause "without proper care and attention" could be vague if read in isolation, but observed that the statute further provided that an officer was to take possession of an animal thusly "abandoned or neglected."[6] The court went on to construe the statute, in light of this latter phrase, as applying to animals that were "under circumstances reasonably likely to result in the infliction of unjustifiable pain, or suffering, or cruelty upon them." *Untiedt*, 42 Cal. App. 3d at 552, 554. So construed, the statute was "without constitutional defect." *Id.* at 554. The court was untroubled by the "unjustifiable physical pain" and in fact relied upon it in upholding the statute as a whole. *See also People v. Reed*, 121 Cal. App. 3d Supp. 26, 176 Cal. Rptr. 98 (Ap. Dept., Ca. Super. Ct. 1981) (applying *Untiedt* in a case involving neglect and failure to feed many animals, including five horses).

C. COURTS HAVE FOUND DEFENDANTS' CONDUCT "UNJUSTIFIABLE" WHEN APPLIED TO FACTS SIMILAR TO THE CASE AT HAND, PROVING THAT THE TERM IS RECOGNIZABLE.

As Respondent's Brief notes, Resp't Br. 34-35, the Washington Court of Appeals recently affirmed that, in a case involving malnourished horses, "unnecessary and unjustifiable pain" is recognizable when "merely

[6] The court noted that the defendant had neglected her animals, but did not detail the kind of animals or type of neglect at issue.

providing adequate food would have stopped [the pain]." *State v. Zawistowski*, 119 Wash. App. 730, 737, 82 P.3d 698, 701 (2004) (where horses were "severely underweight" and food provided did not "meet the veterinarian's recommended daily allowances"). Similarly, a defendant's failure to provide starving cattle with proper food and water constituted "*unjustifiable* pain or suffering" and supported a conviction. *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986) (emphasis added). In *Schott*, the cruelty statute defined "cruel mistreatment" as "every act or omission which causes, or unreasonably permits the continuation of, unnecessary or unjustifiable pain or suffering." *Id.* at 457. On facts comparable to the case at hand, a sheriff had contacted the defendant multiple times over the course of a month about the wellbeing of his emaciated cattle, giving the defendant ample notice that he was violating the cruelty law. *Id.* However, the defendant failed to remedy the situation, and the court found that the defendant acted at least recklessly in disregarding a "substantial and unjustifiable risk" that he was causing his cattle unjustifiable pain. *Id.* at 462.

D. COURTS HAVE FOUND TERMS SIMILAR TO "UNJUSTIFIABLE" NOT VAGUE WHEN APPLIED TO FACTS SIMILAR TO THE CASE AT HAND.

Legislatures have couched the justification of animal cruelty in terms similar in specificity to "unjustifiable," such as "necessary," "reasonable," and "proper." These variances have been more widely litigated on the issue

of vagueness than their counterpart "unjustifiable." As with "unjustifiable," these terms routinely survive void-for-vagueness challenges. *See, e.g.*, *Wilkerson v. State*, 401 So. 2d 1110, 1112 (Fla. 1981) (ruling that "'unnecessarily or excessively' are not vague . . . The fact that specific acts of chastisement are not enumerated, an impossible task at best, does not render the statutory standard void for vagueness").

In *Tuck v. U.S.*, the defendant neglected 20 puppies at a pet store, leaving them enclosed in cages with empty water bottles, causing them to be severely emaciated with "protruding hips and ribs." 467 A.2d 727, 728 (D.C. 1983). That defendant claimed that the cruelty statute was vague in proscribing punishment of anyone who "*unnecessarily* fails to provide" an animal "with proper food, drink, shelter, or protection from the weather." *Id.* at 731 (emphasis added). However, the D.C. Court of Appeals emphasized that the vagueness doctrine is one rooted in fairness, and that a "reasonable person under the circumstances" should have known she had "unnecessarily" failed to provide the animals with the care as proscribed by statute. *Id.* at 733. Significantly, crucial to that court's decision was testimony similar to the instant case: The neglected animals had protruding rib and hip bones, their water bowls were barren, they rushed to the bowls when other persons attempted to feed or water them (a sign of malnourishment), and they doubled their weight in the five weeks following their seizure from the defendant's care. *Id.* at 729-730.

In a case of livestock neglect, the Vermont Supreme Court upheld the term "proper" regarding animal care as not unconstitutionally vague, finding that "proper" food and drink for cattle was, as per the ordinary meaning of the word, "food and drink as are required to preserve the health of the animals." *State v. Persons*, 114 Vt. 435, 437, 46 A.2d 854, 856 (1946) (where defendant's cattle appeared thin with protruding hip bones and without hay in their vicinity, "[i]t is common knowledge that lack of proper food will cause animals to lose flesh and strength"). *See also McCall v. State*, 540 S.W.2d 717, 719 (Tex. Crim. App. 1976) (statutory language of "unnecessarily fails to provide it with proper food, drink" was not unconstitutionally vague as applied to owner of 12 emaciated dogs); *Cross v. State*, 646 S.W. 2d 514 (Tx. Ct. of Ap. 1982) (following *McCall*, noting "the quantity and quality of food necessary to sustain a horse is a matter of common knowledge among persons familiar with the care of horses"); *State v. Webb*, 130 S.W.3d 799, 826 (Tenn. Crim. App. 2003) (where the term "necessary" in the phrase "failing to provide necessary food" was not vague as applied to a puppy mill owner whose more than 100 dogs' bowls were caked in old feces); *State v. Hafle*, 52 Ohio App. 2d 9, 367 N.E.2D 1226 (Ohio Ct. of Ap. 1977) (finding the phrase "deprive [an animal] of necessary sustenance" not unconstitutionally vague in case involving emaciated cattle); *State v. Wilson*, 464 So. 2d 667 (Fla. Ct. of Ap. 1985) (where the language "fails to supply an animal . . . with a sufficient quantity of good

and wholesome food and water" not unconstitutionally vague in case involving 77 dogs kept in cages without food, water, and sufficient air; the court noting that the statute was "definite enough to apprise persons of common intelligence of the proscribed activities").

Finally, *People v. Allen*, *supra*, notes that terms like "normal," "usual," and "proper" were not vague as applied to a defendant who failed to provide sufficient care for eight emaciated horses. *Allen*, 657 P.2d at 449. *Allen* noted "the necessity of providing standards flexible enough to ensure the effective application of legislative policy to changing circumstances." *Id.* at 449-50.

As stated above, RCW 16.52.205(2) does not use the phrase "substantial and unjustifiable physical pain" in isolation. *See supra* n. 4. In fact, the infliction or causation of such pain is not by itself sufficient to constitute the offense: The pain must occur as a result of starvation, dehydration, or suffocation. Accordingly, the conduct proscribed by RCW 16.52.205(2), considered in totality, is highly specific and anything but vague—a fact ignored by the Defendant. As the statutes upheld in the foregoing case law have been more general on their face, RCW 16.52.205(2) presents a much easier case for decision, given its greater specificity.

E. DEFENDANT MISINTERPRETS TRIAL COURT OPINION IN *PEOPLE V. ARROYO*, WHICH WOULD FIND "UNJUSTIFIABLE PHYSICAL PAIN" NOT VAGUE AS APPLIED TO THE CASE AT HAND.

The Defendant relies heavily on a trial court opinion in the *Arroyo* case, in which the trial court found that the phrase "unjustifiable physical pain" was vague as applied to a defendant who failed to seek veterinary care for his terminally ill dog. *People v. Arroyo*, 3 Misc. 3d 668, 777 N.Y.S.2d 836 (Crim. Ct. 2004). However, the instant case differs substantially from the facts of *Arroyo*, and Appellant's Brief inaccurately states that court's rationale. Appellant's Br. 25–26. The *Arroyo* defendant believed cancer treatment to be painful, due to a family member who had undergone chemotherapy, and thus made a conscious choice that his dog "live out her life without intervention" from intrusive medical care. *Arroyo*, 3 Misc. 3d at 670. But that defendant never failed to provide the dog with basic food and drink, which the *Arroyo* court found absolutely required under the statute's term "sustenance." *Id.* at 673.

In addition, the *Arroyo* court was careful to distinguish the facts of that case from those involving a pattern of neglect in which mistreated animals "showed signs of malnourishment" and had "emaciated bodies"—situations resembling the case at hand. *Id.* at 679. Furthermore, the *Arroyo* court distinguished itself from *O'Rourke, supra*, which did deem medical care as required under the term "sustenance." *Id.* at 674-675. The

"compelling" difference to the *Arroyo* court was that the *O'Rourke* defendant had received three warnings and two summonses but continued to work a horse without veterinary care. *Id.* at 674.

In sum, the *Arroyo* court would find that, in the instant case, the statute is not vague as applied to the Defendant, because here the Defendant (1) failed to provide basic sustenance, not medical care; (2) demonstrated a pattern of neglect, rather than a conscious decision based on reasonable beliefs; and (3) received more than ample notice, through multiple warnings, that she was violating the statute.[7]

There are two other opinions (uncited by the Defendant), where a court ruled for the defense in declining to apply an animal cruelty statute on vagueness grounds: *People v. Rogers,* 183 Misc. 2d 538, 703 N.Y.S.2d 891 (City Ct of N.Y. 2000) and *Davis v. Mississippi*, 806 So. 2d 1098 (Miss. S. Ct. 2001). Both are distinguishable.

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[7] We note that *Arroyo* has had little or no precedential value even in New York. Its holding that the term "sustenance" does not include medical care has been rejected by the Appellate Term in at least two judicial districts. *People v. Richardson*, 15 Misc. 3d 138(A), 841 N.Y.S. 2d 221 (App. Term 2007); *People v. Mahoney*, 9 Misc. 3d 101, 804 N.Y.S.2d 535 (App. Term 2005). More importantly for our purpose, in motions to dismiss for vagueness a charge under the animal cruelty statute premised on severe medical neglect, the New York trial courts have distinguished *Arroyo* and denied the motion. *State v. Walsh*, 19 Misc.3d 1105(A), 859 N.Y.S.2d 906 (Crim. Ct. of N.Y. 2008) (cat with multiple, obvious medical issues who was never taken to the vet; court holding the allegations "demonstrate that the animal was subjected to unjustifiable physical pain" and distinguishing *Arroyo* on the basis of a pattern of neglect shown.); *People v. Curcio*, 22 Misc. 3d 907, 874 N.Y.S.2d 723 (Crim. Ct. of City of N.Y. 2008) (dog with obvious, treatable medical condition requiring surgery; *Arroyo* holding limited in scope, distinguished on basis of pattern of neglect shown). *See also People v. Romano*, *supra*, a 2010 decision by the Appellate Term on appeal of a conviction, which does not mention *Arroyo*.

In *Rogers*, a dog owner unsuccessfully attempted to dock a puppy's tail by tying a rubber band around it, and the puppy ultimately had to be euthanized. *Rogers*, *supra*. The owner was charged under N.Y. Agric. & Mkts. Law § 353 which made it a misdemeanor to "unjustifiably torture, injure, maim or kill any animal[.]" The term "torture" was defined in § 350(2) as "every act omission or neglect whereby unjustifiable pain, suffering or death is caused or permitted." *Id.* The court held that the term "unjustifiable" was unconstitutionally vague as applied to tail docking—a common practice not specifically proscribed by statute yet similar to the statutorily accepted practice of clipping dogs' ears. *Id.* New York law required both that a veterinarian perform ear clipping procedures and the use of painkillers, but no such requirements existed for tail docking. Thus, in this limited context, the court ruled for the defense.[8]

In the case at hand, the Defendant's conduct—starving multiple horses—does not even remotely resemble an arguably "accepted practice" like in *Rogers*. Instead, any rational animal owner knows that starving animals violates the law. Thus, the *Rogers* holding is irrelevant to the present case.

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[8] The Court concluded: "If the common conduct of docking a dog's tail – justified because it is not prescribed nor proscribed by statute – becomes a criminal act due to some undefined aggravating factor making the conduct 'unjustified,' and, justified tail docking is not prescribed as it is when clipping a dog's ears [citing the relevant statute re ear clipping], the case of the prefix modifier 'un' before the term 'justified' offers no more guidance to a reasonable person because the term 'justified' is left undefined." *Id.* at 543

Davis v. Mississippi, *supra,* is likewise readily distinguishable, not only on the facts of the case but also on the statutory language (or lack thereof) held constitutionally inadequate. In *Davis*, a horse owner treated his colt's broken leg by allowing the break to calcify—one option suggested by a veterinarian—knowing that the colt would develop a permanent limp. *Id.* at 1100. Almost one year later, a humane society seized and euthanized the colt without the owner's knowledge or consent; trial testimony differed as to the abilities of the colt and its level of pain at the time. *Id.* On appeal, a plurality of the Mississippi Supreme Court, over four dissenting judges, went beyond the main issue to find the relevant statute unconstitutionally vague because it lacked an intent element. The court noted:

> The statute, without words of intent and motive, leaves Davis no room for using his own discretion in deciding whether he would be able to heal his own horse without having to destroy it . . . Davis, using his own discretionary judgment, as well as the discretion of others, in deciding to attempt to mend the horse's broken leg without taking the horse to a specialist, had no way of knowing that his motives were not in line with the statute.

Id. at 1102-1103.

Here, the Defendant's case does not involve a discretionary decision as to the treatment of a single animal (predicated on veterinary advice), but rather the starvation of multiple animals. Unlike choosing between veterinarian recommended options in caring for a broken limb, starvation is not within the ambit of

permissible discretion of an animal owner. Quite apart from this fundamental difference in the facts, RCW 16.52.205(2), unlike the Mississippi statute involved in *Davis*, contains the specific culpable mental state requirement of "criminal negligence." Therefore, the Defendant cannot claim, and has not claimed, that RCW 16.52.205(2) is vague as was the statute in *Davis*.

F. DEFENDANT WRONGLY CONCLUDES THAT AFFIRMATIVE ACTS OF CRUELTY ARE MORE EGREGIOUS THAN OMISSIONS.

The Defendant in the instant case contends that the term "unjustified" has been upheld on void-for-vagueness challenges only in cases of "far more egregious conduct." Appellant's Br. 30. However, the cases to which the Defendant refers dealt with acts of affirmative abuse. Appellant's Br. 30–31, *citing Andree, supra* (where defendant deliberately stabbed a kitten with a hunting knife); *State v. Paulson*, 131 Wash. App. 579, 128 P.3d 133 (2006) (where defendants repeatedly shot arrows at a dog tied to a tree). The Defendant wrongly assumes that affirmative acts of abuse toward animals are worse than cases of omission.[9] In the instant case, the horses endured several months of pain and suffering due to starvation—compared to the hours or minutes that animals suffered in the Defendant's

[9] Some scholars attest that situations of neglect (failure to provide basic food and care) are even worse for the animal than affirmative acts, since the pain and suffering is prolonged over lengthy periods, often the animal's entire lifetime. Wagman et al at 123.

examples. Just as Washington has codified in RCW 16.52.205(2), so, too, other jurisdictions have recognized the severity of omissions like animal starvation. For example, a Florida court recognized that an owner continually depriving his dogs of "necessary sustenance" could constitute aggravated animal cruelty, a felony, rather than a misdemeanor. *State v. Morival*, 75 So. 3d 810, 812 (Fla. Dist. Ct. App. 2011).

V. CONCLUSION

The trial court rightfully concluded that the Defendant violated RCW 16.52.205(2). This Court should *affirm* and find that the statute is not unconstitutionally vague as applied to the Defendant, for the foregoing reasons.

Respectfully submitted this May 22, 2012.

ANIMAL LEGAL DEFENSE FUND

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 2012, I caused a true and correct copy of the foregoing, to be served upon the following person(s) in the following manner:

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