

66876-5

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No. 66876-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARY DAWN PETERSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

Mary Peterson was convicted of six counts of first degree animal cruelty based on evidence that some of her horses were malnourished. The State was required to prove that, with criminal negligence, Ms. Peterson starved the horses causing "unjustifiable physical pain." But the statute does not define the term "unjustifiable physical pain" or clearly delineate between innocent and unlawful conduct. The evidence did not show Ms. Peterson deliberately starved the horses or intended to cause them physical pain. Because the statute did not provide clear notice of what was proscribed, it is unconstitutionally vague as applied to this case.

In addition, the jury was instructed on an alternative means of committing the crime that was not supported by substantial evidence. Therefore, the alternative means doctrine was violated and the convictions must be reversed.

Finally, the restitution order covering the county's costs in investigating the crime and caring for the horses that were seized was unlawful because the county was not a "victim" of the crime.

## B. ASSIGNMENTS OF ERROR

1. The first degree animal cruelty statute is vague in violation of the State and Federal Due Process Clauses as applied to Ms. Peterson's conduct.

2. The conviction for first degree animal cruelty violated the statute constitutional right to a unanimous jury verdict because the jury was instructed on a statutory means of committing the crime that was not supported by substantial evidence.

3. The restitution order was unlawful because the county was not a "victim" of the crime within the meaning of the Sentencing Reform Act (SRA).

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional right to notice is protected by the due process vagueness doctrine, which requires a criminal statute to provide ascertainable standards for delineating between innocent and unlawful behavior. The first degree animal cruelty statute required the State to prove Ms. Peterson's conduct caused her horses "unjustifiable physical pain." But the statute does not define "unjustifiable" or provide standards for determining the scope of the term. Is the statute impermissibly vague as applied to Ms. Peterson's conduct?

2. The constitutional right to a unanimous jury verdict on all the elements of the crime requires the jury be instructed only on those alternative means of committing the crime that are supported by substantial evidence. Was Ms. Peterson's constitutional right to jury unanimity violated where the jury was instructed on an alternative means of committing the crime of first degree animal cruelty that was not supported by substantial evidence?

3. A court may award restitution only for damages suffered by a "victim" of the crime. A "victim" must be a "person"; there is no authority for finding a horse is a "victim." The court may award restitution to a third party, but only to reimburse the third party for amounts spent on behalf of the direct victim of the crime. Did the court err in awarding restitution for the county's expenses where the county was not a "victim" of the crime?

#### D. STATEMENT OF THE CASE

1. Ms. Peterson's horse-breeding business. Mary Peterson has owned several horses over the years, beginning when she was five years old. RP 776, 781. She has taken courses in horsemanship and horse care. RP 776-79. In 2000, she started a horse-breeding business in Canada and acquired her first brood

mare. RP 781. She had to give up the business, however, when her husband Ryan had a car accident. RP 784.

Ms. Peterson moved from Canada to the United States in 2005. RP 782. In early 2009, she decided to resume breeding horses and build a reputable business. RP 785, 866. Mr. Peterson was not supportive of the business and the two fought about the finances.<sup>1</sup> RP 786, 865.

In March 2009, Ms. Peterson bought two brood mares.<sup>2</sup> RP 787-90. One of the horses (#3) was pregnant and underweight when Ms. Peterson got her. RP 788. She gave birth on June 1. RP 788. The other horse (#8) was in "horrible" shape and Ms. Peterson bought her because she thought she could improve her condition. RP 790, 854.

In May 2009, Ms. Peterson acquired another mare (horse #6) and her foal (horse #4) who was still nursing.<sup>3</sup> RP 810-11. The two horses were healthy but underweight. RP 811. In June, she acquired another foal (horse #1).<sup>4</sup> RP 791. By September 2009,

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<sup>1</sup> The couple divorced in 2010. RP 784.

<sup>2</sup> The two brood mares acquired in March 2009 are horses 3 and 8, charged in counts three and six of the information. RP 787-90; CP 310-11.

<sup>3</sup> The mare and her foal acquired in May 2009 are horses 4 and 6, charged in counts four and five of the information. RP 810-11; CP 310-11.

<sup>4</sup> The foal acquired in June 2009 is horse 1, charged in count two of the information. RP 791; CP 310-11.

Ms. Peterson had 18 horses on her farm; some she owned and some she was breeding or leasing.<sup>5</sup> RP 861-62.

2. Tyme and Ms. Peterson's reliance on her "farrier." In April 2009, Ms. Peterson acquired a thoroughbred mare named "Tyme."<sup>6</sup> RP 795. Tyme was in very bad condition and Ms. Peterson paid nothing for her. RP 795-96. Tyme was very thin, had severe chronic "laminitis,"<sup>7</sup> and was lethargic and lay on the ground most of the time. RP 105, 796. Because Tyme spent so much time on the ground, she had sores on every joint of her body. RP 739.

Animal Control officers told Tyme's previous owners they must euthanize her. RP 836. But the owners fought the decision and eventually obtained the permission of an administrative hearing officer to keep Tyme alive. RP 836; Exhibit 186. Ms. Peterson believed that, as a result, she also had permission to keep Tyme alive. RP 836.

Ms. Peterson consulted her "farrier" Paul Serjeant about Tyme. RP 797. Mr. Serjeant has been a farrier for over 30 years and has written a book called "Complete Horse Sense." RP 737,

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<sup>5</sup> Most of the horses were not the subject of criminal charges.

<sup>6</sup> "Tyme" is charged in count one of the information. CP 310.

<sup>7</sup> "Laminitis" is a painful foot condition common among horses. RP 105, 655-56, 739.

758. He explained a farrier "take[s] care of the horse's feet and tell[s] the health of the animal." RP 35. In the old days, a farrier "also acted as a vet." RP 737. That is because "[w]hen the horse was getting sick or something was going on with it, the feet tell you how sick the animal is and when it's getting sick. And that's what . . . the business is." RP 737.

Mr. Serjeant's training was based on the "whole horse" concept. RP 742. Sometimes his views of how to take care of a horse differ from those of the veterinary profession. RP 757-58. His theories are "all old school," based on the view that "[t]he bodies never change." RP 758. In some cases, "[p]eople seek help for animals to [sic] the professionals," but the animals "are not getting any better." RP 759. He provides an alternative answer and can fix horses "that everybody else can't fix." RP 759-60. His practice is based on the general notion that "[t]he animal can take care of itself"—a notion that the veterinary profession has forgotten. RP 758. Thus, sometimes a veterinarian will say that a horse must be euthanized when it is simply not true. RP 760.

Mr. Serjeant examined Tyme soon after Ms. Peterson acquired her. RP 740, 797. He told Ms. Peterson he thought they could restore the mare to health. RP 741, 797. They changed her

feed, giving her hay, barley and corn, trimmed her feet, and gave her sea salt. RP 741-42, 798-99. Sea salt is almost identical to the plasma in a horse's body and therefore can aid in healing. RP 742. They also took her off "bute" because she was urinating blood. RP 798. "Bute" is a pain reliever that is commonly given to horses but can also cause liver and kidney problems and so must be used sparingly. RP 669.

Mr. Serjeant examined Tyme again about five to six weeks later. RP 741. He was "amazed" at the progress she had made. RP 745. The horse had gained 50 to 75 pounds, was standing and walking, and her sores had closed up. RP 605, 741, 744, 802-03. Her feet were still a problem but had greatly improved. RP 605, 835.

Ms. Peterson routinely consulted Mr. Serjeant about the care of all of her horses. RP 772. He would trim the horses' hooves every six to seven weeks and would sometimes visit the farm more often. RP 737, 767, 770, 794. He helped with many aspects of the horses' care and breeding. RP 772, 794. Ms. Peterson trusted him and followed his advice. RP 794-95.

Mr. Serjeant was never concerned about Ms. Peterson's care of the horses. RP 746, 753. He never thought the horses

were starving or dehydrated, except for Tyme, when Ms. Peterson first acquired her. RP 750-51, 755. Tyme's dehydration was alleviated six weeks later. RP 751. Mr. Serjeant thought Ms. Peterson's horses had adequate hay and he never saw moldy hay on the property. RP 746-47.

3. Ms Peterson's feeding and care of the horses. Ms.

Peterson also employed the services of Nicholas Osborne, who helped her feed and water the horses and did odd jobs around the farm. RP 591-92. Mr. Osborne has lived around farm animals and horses most of his life and has owned horses himself. RP 591.

Ms. Peterson and Mr. Osborne would feed the horses two to three flakes<sup>8</sup> of hay two times per day.<sup>9</sup> RP 593, 605, 824-25. The sick and nursing horses would get more hay or some alfalfa; Tyme also got more hay than the others. RP 619-20. The horses never went without a meal. RP 597. Mr. Osborne, Ms. Peterson and Mr. Peterson would all buy the hay, usually with cash, from several different suppliers. RP 594, 824-25. They would buy hay two to three times a week and sometimes alfalfa; they never ran out of hay. RP 596-97, 625, 824-25. They stored the hay on a trailer covered by a tarp or under a tarp by the shed. RP 596, 824.

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<sup>8</sup> A "flake" of hay is about four to five pounds. RP 109.

<sup>9</sup> At first, the horses were able to graze on grass on the ground but the grass ran out in about mid-July. RP 599-600, 801.

Mr. Osborne and Ms. Peterson usually bought local grass hay. RP 595, 824. Even the State's witnesses agreed that, although grass hay has less protein than alfalfa, it is suitable to feed to horses. RP 77. Ms. Peterson bought local grass hay because it was inexpensive. RP 80. Once or twice, Mr. Osborne bought 550-pound round bales of local grass hay and put them in the pens. RP 613-15, 637. Large round bales of hay are generally less expensive than hay in other forms. RP 356.

The quality of the hay would depend on the supplier. RP 595. But the horses always had clean hay and neither Mr. Osborne nor Ms. Peterson noticed mold in the hay; the hay never lasted long enough to get moldy. RP 600, 605, 824.

The horses were watered regularly. RP 840. Mr. Osborne watered the horses every time he went to the farm, by filling the water troughs with a hose. RP 598.

Mr. Osborne had no concerns about Ms. Peterson's care of the horses. RP 610-11. She interacted with them every day and was very affectionate. RP 610-11. He did not think the horses were underweight; they might have lost "water weight" due to the heat in the summer but it did not concern him. RP 610. It is normal for a horse's weight to fluctuate. RP 622, 630.

Nonetheless, in July 2009, Ms. Peterson believed that some of the horses needed to put on weight. RP 628, 826, 856. She consulted Mr. Serjeant as well as her veterinarian Dr. Hansen. RP 752, 826. Mr. Serjeant told her the horses lost weight due to bacteria in their blood and told her to give them more salt. RP 752. Dr. Hansen said the horses looked alright and recommended increasing their hay and giving some of them nutritional supplements. RP 829-30. Therefore, Ms. Peterson and Mr. Osborne started to feed the horses more and gave some of them nutritional supplements. RP 628, 631-32, 636, 826, 829.

Ms. Peterson did not believe she was starving or dehydrating the horses; she provided for them as well as she could. RP 850. No one expressed concern about the horses until an animal control officer told her in June 2009 that some neighbors had complained about Tyme. RP 805.

4. The county's investigation. Snohomish County Animal Control Officer Paul Delgado received several complaints in June 2009 from neighbors and an animal welfare organization about the horses on Ms. Peterson's farm. RP 55. He went to the property on June 24. RP 56. There were 11 horses there at the time but only

three caught his attention. RP 57. He especially noticed Tyme, who was limping and had protruding bones. RP 57.

Officer Delgado spoke to Ms. Peterson the next day. RP 64. She told him she was working with her farrier to try to heal Tyme. RP 66-67. She said she did not always agree with veterinarians and that they can be very expensive. RP 68. Officer Delgado told her she must have a veterinarian look at the horse and must follow the veterinarian's recommendations. RP 68, 70.

Ms. Peterson contacted her veterinarian, Jennifer Miller, to look at Tyme. RP 93, 98-99. Dr. Miller had been Ms. Peterson's veterinarian since 2006. RP 97-98. According to Dr. Miller, Ms. Peterson's horses were always in good shape and had decent care. RP 97-98.

Dr. Miller examined Tyme on July 14, 2009, using the "Henneke Scale." RP 100. The Henneke Scale measures the amount of body fat on a horse, on a scale of one to nine. RP 100-02. A score of four to six indicates a healthy horse. RP 100-02. Dr. Miller scored Tyme as a 1.5—severely underweight. RP 103-04. She also diagnosed Tyme with severe chronic laminitis. RP 106. Dr. Miller recommended euthanasia. RP 106.

The next day, July 15, Officer Delgado went to the property with another animal control officer, Angela Davis, and their supervisor, Gordon Abbott. RP 223. Veterinarian Brandi Holohan soon arrived. RP 153-54. Dr. Holohan examined Tyme, again using the "Henneke Scale." RP 159-64. Like Dr. Miller, she scored Tyme as a 1.5 on the scale. RP 164.

The animal control officers insisted Ms. Peterson relinquish Tyme for euthanasia. RP 230-32, 475-76. Ms. Peterson explained she had a "court order" permitting her to keep Tyme alive.<sup>10</sup> RP 224-25; Exhibit 186. Officer Delgado never investigated Ms. Peterson's claim but insisted she release Tyme. RP 224-25. Although Ms. Peterson was reluctant, she finally agreed and the horse was euthanized. RP 230-32.

Animal control officers continued to monitor Ms. Peterson's farm. The amount of feed and water available for the horses fluctuated each time the officers visited. On June 8, 2009, when Officer Delgado went to the property, there were eight bales of good quality alfalfa and the water troughs were full. RP 72. On July 6, there were 26 bales of hay and two bales of alfalfa. RP 77. The next day, July 7, the alfalfa was gone and only local grass hay

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<sup>10</sup> Ms. Peterson was referring to the administrative officer's decision obtained by Tyme's previous owners. See RP 836; Exhibit 186.

bales were left. RP 80. On July 10, when it was around 80 degrees outside, two stalls had about four inches of water in the troughs but the paddock with Tyme and other horses was dry. RP 86. Apparently, the water pump had broken and a man was there fixing it. RP 85. The horses were watered with a hose extending from a neighbor's property. RP 86. There were bales of local grass hay present. RP 88. On July 15, the water pump was working and water was present in the paddocks. RP 262.

Officer Davis, who took over the investigation from Officer Delgado, went to the farm on July 20 and saw one bale of alfalfa there. RP 479. On July 22, there were 20 bales of local grass hay. RP 483. On July 27, there were two bales of local grass hay. RP 484. It was 100 degrees outside and the horses had no shade. RP 485. Several horses had full water troughs but some had only about one inch of water. RP 485. On July 28, there were 20 bales of local hay that appeared moldy to Officer Davis. RP 488-89. One of the horses was eating manure.<sup>11</sup> RP 489. On August 4, there were 20 bales of hay. RP 491. On August 6, there were 15 bales of hay. RP 492. On August 10, there were five bales of local hay. RP 492. On August 11, there were two large round bales of hay in

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<sup>11</sup> A horse eating manure can be a sign of malnutrition. RP 187

one of the paddocks, which appeared of poor quality. RP 493. On August 19, there was other hay in the paddocks and the round bales were gone. RP 495. On August 25, there was one large round bale and 10 bales of local hay. RP 495. The horses were walking and urinating on the hay and not readily consuming it. RP 496. On August 27, a hot day, the horses in one of the paddocks did not have water. RP 516, 519. On August 31, there was a new round bale of hay. RP 523. On September 2, there were 20 bales of alfalfa hay. RP 524.

By late August, many of the horses still appeared to be losing weight. RP 496. Officer Davis decided the horses had not sufficiently improved. On September 9, 2009, she and several other animal control officers and sheriff's deputies went to the property and arrested Ms. Peterson for animal cruelty. RP 526-29. Ms. Peterson was confused and surprised; she disagreed that the horses were in critical condition. RP 529-30.

On that day, there was a round bale of hay in paddock "C," and mud, manure, and hay strewn on the ground. RP 531-33. The quality of the hay appeared poor with mold in places. RP 320, 350-51. The horses in that pen had no water. RP 314.

Another veterinarian, Daniel Haskins, examined the horses. RP 268-70. He gave five of the horses in paddock C low Henneke scores, ranging from two to three. RP 287-307. Those horses were seized and became the subjects of counts two to six in the information. RP 324; CP 310-11. Other horses had higher body scores and were not seized. RP 323.

By October 14, the horses that were seized had put on weight and were progressing well. RP 555. They were eventually adopted. RP 556.

5. The charges and trial. Ms. Peterson was charged with six counts of first degree animal cruelty, RCW 16.52.205(2). CP 310-11.

The State's witnesses disagreed about the amount and type of feed the horses should have been given. Dr. Miller testified Tyme should have been fed about 22 to 33 pounds of hay per day. RP 109. Local grass hay from Western Washington generally has a lower protein content than hay from Eastern Washington and therefore horses should be fed more of it. RP 110, 132. If a horse is eating only local grass hay, she should be fed about 44 to 66 pounds per day. RP 110. Dr. Holohan testified a thoroughbred horse needs 6 to 10 flakes of hay per day if it is good quality hay

(i.e., about 24 to 50 pounds of hay). RP 166-67. If the horse is receiving only local hay, she needs "free choice"<sup>12</sup> hay plus supplements. RP 168. Dr. Haskins testified the horses should have been fed about 22 pounds of hay per day. RP 326. Officer Davis testified a horse should be fed about four flakes of hay per day, which is equivalent to about one-third of a bale (i.e., about 16 pounds of hay). RP 480-81.

None of the hay on Ms. Peterson's property was ever tested to determine its nutritional content or whether it was moldy. RP 133, 253, 352, 561, 577.

The State's veterinarian witnesses generally agreed the horses were probably in pain and suffering from hunger, but none of the witnesses said the horses were in pain due to dehydration.<sup>13</sup> Dr. Miller testified Tyme was in pain caused by laminitis; that is the principal reason she recommended euthanasia. RP 105, 117. The most she could say about starvation, however, was that it is probably "uncomfortable" for the horse. RP 111, 136. She could not say Tyme was in pain from dehydration. RP 136.

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<sup>12</sup> "Free choice" hay means the hay is freely accessible to the horse so she can feed on it throughout the day. RP 108.

<sup>13</sup> The State was required to prove the horses were in "substantial and unjustifiable physical pain" caused by starvation or dehydration. CP 213-18, 310-11.

Dr. Holohan similarly testified Tyme was in pain from laminitis. RP 169, 172-73, 175-76. Although Dr. Holohan testified Tyme's laminitis was probably exacerbated by malnutrition, she did not testify Tyme was in pain caused by starvation. RP 177, 194. A lack of food can cause abdominal cramps, but that is difficult to ascertain. RP 203-04. Dr. Holohan did not believe Tyme was in pain caused by dehydration. RP 204.

Dr. Haskins testified a horse eating poor-quality food intermittently or deprived of water can get colic, which is very painful. RP 309, 315-16. But none of the horses he examined had colic. RP 358. Nonetheless, he believed the horses were probably in pain and suffering due to a lack of nutrition. RP 344-35, 388, 390-91. He believed they were suffering due to their poor head carriage and demeanor. RP 310, 373. But he did not say they were in pain or suffering from dehydration.

The jury found Ms. Peterson guilty of all six counts of first degree animal cruelty as charged. CP 199-204.

6. Sentencing. A sentencing hearing was held March 1, 2011. The Honorable Larry McKeeman concluded Ms. Peterson deserved leniency because her treatment of the horses was due to "an overextension of her business which she was hoping to

establish of raising horses." RP 959. This overextension was due to financial and marital difficulties. RP 959-60. She did not intend to harm or neglect the horses. RP 960. In addition, Ms. Peterson was relying on the advice of her farrier, "someone with many years experience in horses, involved in the care of horses and treatment of horses," and who "not only had the experience but has apparently enough of a reputation in the horse community that he's a published author on it." RP 959-60. The court found it "significant that the defendant sought that advice and believed it." RP 960. Therefore, the court rejected the State's sentencing recommendation and imposed a more lenient sentence. CP 178; RP 941, 960.

On June 8, 2011, the court entered a restitution order awarding a total of \$48,108.23 to cover the costs incurred by the county in investigating the crime and caring for the seized horses that were the subjects of the criminal charges. Sub #106.<sup>14</sup>

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<sup>14</sup> A supplemental designation of clerk's papers has been filed for this document.

## E. ARGUMENT

1. PROSECUTING AND CONVICTING MS. PETERSON OF ANIMAL CRUELTY VIOLATED DUE PROCESS BECAUSE THE STATUTE DOES NOT PROVIDE ASCERTAINABLE STANDARDS FOR LOCATING THE LINE BETWEEN INNOCENT AND UNLAWFUL CONDUCT

The first degree animal cruelty statute criminalizes only criminally negligent conduct that causes "substantial and unjustifiable physical pain." RCW 16.52.205(2). But the statute does not define "unjustifiable" pain or clearly delineate between innocent and unlawful behavior. It is therefore unconstitutionally vague as applied in this case.

a. Criminal statutes must clearly define the line between innocent and unlawful conduct. The Due Process Clauses of the Fourteenth Amendment and the Washington Constitution<sup>15</sup> require that a penal statute (1) define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; and (2) provide ascertainable standards of guilt to protect against arbitrary and subjective enforcement. City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000);

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<sup>15</sup> The Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Article I, section 3 of the Washington Constitution provides, "No person shall be deprived of life, liberty, or property, without due process of law."

Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); Const. art. I, § 3; U.S. Const. amend. XIV. Under this vagueness doctrine, "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." American Legion Post #149 v. Dept. of Health, 164 Wn.2d 570, 612, 192 P.3d 306 (2008) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 629, 104 S. Ct. 3244, 82 L. Ed. 462 (1984), quoting Connally v. Gen. Constr. Co., 269 U.S. 386, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

A vagueness challenge to a statute that does not implicate First Amendment rights must be considered in light of the facts of the specific case before the Court. American Legion Post #149, 164 Wn.2d at 612. The statute must be tested by inspecting the actual conduct of the party who challenges the statute. Id. In determining whether the statute is sufficiently definite, "the provision in question must be considered within the context of the entire enactment and the language used must be 'afforded a sensible, meaningful, and practical interpretation.'" Id. at 613

(quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)).

A statute is presumed constitutional and the party challenging the statute has the burden of proving it is unconstitutional beyond a reasonable doubt. City of Seattle v. Montana, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996). Ms. Peterson will meet that burden if she can show the statute "is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." Giaccio v. Pennsylvania, 382 U.S. 399, 402, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). The statute must define legal boundaries of conduct "sufficiently distinct for citizens, policemen, juries, and appellate judges." Grayned, 408 U.S. at 114 (citation omitted).

A statute containing a vague term will survive a vagueness challenge only if other terms in the statute define, qualify, or limit application of the term so that the reader can ascertain the standard of enforcement. See, e.g., Grayned, 408 U.S. at 113-14 ("noise or diversion" not vague when qualified by requirements that noise or diversion be actually incompatible with school activities, that there be causality between noise and disruption, and that the act be willful); City of Tacoma v. Luvone, 118 Wn.2d 826, 848, 827

P.2d 1374 (1992) (loitering ordinance not vague where it prohibited specific activities related to the sale and use of illegal drugs); City of Seattle v. Jones, 3 Wn. App. 431, 436, 475 P.2d 790 (1970), aff'd, 79 Wn.2d 626, 488 P.2d 750 (1971) (anti-loitering statute not vague when guidelines included prostitution among prohibited activities); In re D., 27 Or. App. 861, 557 P.2d 687, 690 (1976) (a list of qualifying guidelines will save an otherwise vague statute).

A statute lacks adequate standards when the "vague contours" of its terms "are nowhere delineated." See Thornhill v. Alabama, 310 U.S. 88, 100-01, 60 S. Ct. 736, 84 L. Ed. 1093 (1940) (statute unconstitutionally vague because the term "picket" encompasses every conceivable act of publicizing labor dispute in the vicinity of the scene of the dispute); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1250 (M.D. Pa. 1975) (provisions in curfew ordinance unconstitutionally vague because undefined terms "normal" and "well along the road to maturity" failed to provide enforcement guidelines).

Washington courts generally hold a statute lacks ascertainable standards of guilt if it fails to describe the prohibited conduct with sufficient particularity. State v. Hilt, 99 Wn.2d 452, 455, 662 P.2d 52 (1983) (bail jumping statute unconstitutionally

vague because no definition of "without lawful excuse"; thus, "predicting its potential application would be a guess, at best"); State v. White, 97 Wn.2d 92, 100, 640 P.2d 1061 (1982) ("lawfully required," "lawful excuse," and "public servant" too vague to provide fair notice and prevent arbitrary or erratic arrests); City of Seattle v. Rice, 93 Wn.2d 728, 732, 612 P.2d 792 (1980) ("lawful order" not sufficiently specific to avoid the possibility of arbitrary enforcement); City of Bellevue v. Miller, 85 Wn.2d 539, 545-47, 536 P.2d 603 (1975) (lack of terms defining "unlawful activity" renders ordinance void for lack of notice and standards); City of Seattle v. Pullman, 82 Wn.2d 794, 799, 514 P.2d 1059 (1973) ("to loiter, idle, wander or play' do not provide ascertainable standards for locating the line between innocent and unlawful behavior").

b. Washington's animal cruelty statute must be interpreted in light of society's sense of morality and an owner's right to possess, use and enjoy her animals. The first degree animal cruelty statute provides:

A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence,<sup>[16]</sup> starves, dehydrates, or

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<sup>16</sup> 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 his or her 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." RCW 9A.08.010(1)(d); CP 219 (jury instruction).

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.

RCW 16.52.205(2); CP 213-18 (to-convict instructions). Animal cruelty in the first degree is a class C felony. RCW 16.52.205(4).

Washington's statute is part of a nation-wide trend. Stephan K. Otto, State Animal Protection Laws: The Next Generation, 11 Animal L. 131 (2005). Since 1990, 35 states and the District of Columbia have enacted, for the first time, felony-level laws for certain types of animal abuse.<sup>17</sup> Id. at 134. These laws reflect "society's growing uneasiness with the maltreatment of animals." Id. at 141. But with few exceptions, states generally reserve felony status for the most egregious, affirmative acts of abuse, and require a high degree of criminal culpability. Id. at 137. Some states also restrict felonies to include only those crimes committed against certain species of animals, typically those considered to be companion animals. Id. In addition, most statutes contain specific exemptions for veterinary practices, agriculture, hunting, or research. Id. at 145.

Like the statutes in most states, Washington's animal cruelty statute contains an exemption for agricultural practices. RCW

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<sup>17</sup> Previously in Washington, animal cruelty was either a misdemeanor or a gross misdemeanor. See Former RCW 16.52.090-.300 (1990).

16.52.185 provides: "Nothing in this chapter applies to accepted husbandry practices used in the commercial raising or slaughtering of livestock or poultry, or products thereof . . . ." "Livestock" includes "horses." RCW 16.52.011(2)(o) ("Livestock' includes, but is not limited to, horses, mules, cattle, sheep, swine, goats, and bison."). "Husbandry" means "the cultivation or production of plants and animals: AGRICULTURE, FARMING." Webster's Third New International Dictionary 1104 (1993).

Thus, Washington's animal cruelty statute does not apply to conduct consistent with "accepted" horse-raising practices, even if that conduct causes an animal avoidable pain and suffering. RCW 16.52.185. In addition, the statute should be interpreted to apply only to the most egregious acts entailing a high degree of criminal culpability. See Otto, State Animal Protection Laws, supra, at 137.

Washington's animal cruelty statute must also be interpreted in light of historical practice and society's sense of morality. See People v. Arroyo, 3 Misc.3d 668, 675-76, 777 N.Y.S.2d 836 (2004). As the New York court noted in Arroyo, "[s]ince at least biblical times, humans have considered animals as chattel." Id. at 676. Thus, "even though anticruelty laws are meant to protect animals, the statutes are not intended to interfere with the owners'

possession, use and enjoyment of their animals." Id. at 676 (citing 4 Am. Jur. 2d, Animals § 29, at 370; Gary L. Francione, Animals, Property and Legal Welfarism: "Unnecessary" Suffering and The "Humane" Treatment of Animals, 46 Rutgers L. Rev. 721, 757-65 (1994)).

In Arroyo, the court examined a statute that, like Washington's, proscribes conduct that causes an animal "unjustifiable physical pain." Arroyo, 3 Misc.3d at 670 (citing N.Y. Agric. & Mkts. Law §§ 350(2), 353). The defendant was convicted of animal cruelty for not providing his terminally ill dog with medical care. Id. at 669. The court explained, "what is 'unjustifiable' in the context of anticruelty statutes is what is not reasonable, defensible, right, unavoidable or excusable." Id. at 678. Merely adding the term "unjustifiable" to the word "pain" is not sufficient to transform conduct that is inherently innocent into a crime. Id. What is "justifiable" must be determined in light of an owner's financial limitations and society's standards of morality. Id. at 679. The court concluded the term "unjustifiable physical pain" was too vague to warn pet owners that not providing medical care for their pets, regardless of their ability to afford it, was a crime. Id.

c. The first degree animal cruelty statute is unconstitutionally vague as applied to Ms. Peterson's conduct. Ms. Peterson's conduct was inherently innocent. She did not intend to cause her horses pain and suffering. Her treatment of the horses was consistent with her farrier's advice. Her choice of feed was limited by financial constraints and her struggles to establish her horse-breeding business. Even the State's witnesses could not agree on how much or what kind of feed was appropriate. Under these circumstances, the statute did not provide an unequivocal warning that Ms. Peterson's conduct was criminal.

The first degree animal cruelty statute required the State to prove Ms. Peterson, with criminal negligence, starved or dehydrated the horses and as a result caused "substantial and unjustifiable physical pain" that extended for a period sufficient to cause considerable suffering or death. RCW 16.52.205(2); CP 213-18. The statute does not define "unjustifiable physical pain." The question is whether the statute nonetheless provides "ascertainable standards for locating the line between innocent and unlawful behavior." Pullman, 82 Wn.2d at 799.

What is "unjustifiable" must be determined in light of an animal owner's financial constraints. Arroyo, 3 Misc.3d at 679.

Here, Ms. Peterson was struggling to establish a horse-breeding business. RP 785-86, 865-66. In order to save money, she acquired some horses that were already underweight. RP 788, 790, 795-96, 811, 854. Tyme, in particular, was so thin when Ms. Peterson acquired her that she paid nothing for her. RP 795-96. Tyme gained a significant amount of weight while in Ms. Peterson's care. RP 605, 741, 744, 802-03.

Ms. Peterson's choice of feed was also limited by financial considerations. She occasionally bought large round bales of hay because they are generally less expensive than hay in other forms. RP 356. She bought local grass hay because it is less expensive than other kinds. RP 80.

What is "unjustifiable" must also be determined in light of accepted husbandry practices. RCW 16.52.185. Ms. Peterson worked closely with her farrier and followed his advice regarding the care of the horses. RP 741-42, 772, 794-99. Even Dr. Miller, the State's witness, acknowledged that farriers provide essential services to horse owners. RP 129. Mr. Serjeant testified a farrier's knowledge extends beyond the horse's feet, as a horse's feet "tell the health of the animal." RP 35. In the old days, a farrier "also

acted as a vet."<sup>18</sup> RP 737. Some of Mr. Serjeant's advice conflicted with the opinions of the State's veterinarian witnesses. RP 742, 757-60. But the statute does not provide clear notice that an animal owner *must* follow the advice of a veterinarian when it conflicts with the advice of other animal-care providers. The statutory term "accepted husbandry practices," RCW 16.52.185, should not be interpreted to apply only to practices approved by veterinarians—there is not a single "accepted husbandry practice."

Horse owners have traditionally consulted farriers for horse-care advice. Mr. Serjeant had decades of experience and was a published author on the topic of general horse care. RP 737, 758. Ms. Peterson should not be held criminally liable for following his advice, without clear warning from the Legislature.

The vagueness of the statutory term "unjustifiable physical pain" is further highlighted by the differences of opinion among the State's witnesses about how much and what type of hay the horses should have been fed. RP 109-10, 132, 166-68, 326, 480-81. The witnesses testified local grass hay generally has less nutritional value than Eastern Washington hay. RP 110, 132, 168. But the

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<sup>18</sup> The dictionary definition of "farrier" includes "*chiefly Brit* : one that attends a sick horse; *broadly* : a veterinarian esp. when practicing without full qualification." Webster's Third New International Dictionary 824 (1993).

statute does not provide sufficient notice to horse owners that they will be held criminally liable if they feed their horses local hay or fail to provide their horses nutritional supplements.

Ms. Peterson's conduct was not sufficiently egregious to fall clearly under the scope of the felony statute. She believed she had official permission to keep Tyme alive. RP 836; Exhibit 186. She consulted her farrier as well as her veterinarian about the care of the horses. RP 737, 752, 767, 770-72, 794-97, 826, 829-30. When she noted the horses needed to put on weight, she fed them more and gave some of them weight-gain supplements. RP 628, 631-32, 636, 826, 829. Neither Mr. Serjeant nor Mr. Osborne, who observed her care of the horses closely, believed she was mistreating them. RP 746, 750-55, 610-11. Under these circumstances, the statute did not provide sufficient notice that Ms. Peterson's conduct was criminal.

Previous Washington cases have held the first degree animal cruelty statute is not unconstitutionally vague, but those cases addressed far more egregious conduct. In State v. Andree, 90 Wn. App. 917, 920, 954 P.2d 346 (1998), review denied, 137 Wn.2d 1014, 978 P.2d 1097 (1999), the defendant deliberately stabbed a kitten with a hunting knife. The Court held "a person of

ordinary intelligence would understand that killing a kitten by stabbing it nine times with a hunting knife would cause undue suffering." Id. at 921. Similarly, in State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006), the Court held a person of ordinary intelligence would understand that "tying an animal to a tree and repeatedly shooting arrows into it" would cause the requisite degree of suffering. Ms. Peterson's conduct is in sharp contrast to the defendants in those cases.

Courts in other jurisdictions have explicitly held the terms "unjustifiable" or "unnecessary" in animal and child cruelty statutes were unconstitutionally vague. See, e.g., Arroyo, 3 Misc.3d at 679; State v. Ballard, 341 So.2d 957, 960 (Ala. Crim. App. 1976) (language in child abuse statute, "inflicts unjustifiable physical pain or mental suffering . . . in a manner which is not ordinary and reasonable discipline and punishment," was unconstitutionally vague); State v. Meinert, 225 Kan. 816, 594 P.2d 232 (1979) (term "unjustifiable physical pain" in child abuse statute was unconstitutionally vague); Cinadr v. State, 108 Tex. Crim. 147, 149-50, 300 S.W. 64 (Tex. Crim. App. 1927) (animal cruelty statute that declares "whoever needlessly kills an animal is guilty of an offense" impermissibly vague).

As in those cases, the term "unjustifiable physical pain" in Washington's first degree animal cruelty statute does not provide "ascertainable standards for locating the line between innocent and unlawful behavior." Pullman, 82 Wn.2d at 799. The statute is therefore unconstitutionally vague as applied in this case.

d. The convictions must be reversed and the charges dismissed. When a penal statute is unconstitutionally vague as applied to the defendant's conduct, the remedy is reversal of the conviction and dismissal of the charge. See, e.g., Hilt, 99 Wn.2d at 455-56. Thus, Ms. Peterson's convictions must be reversed and the charges dismissed.

2. THE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED BECAUSE THE JURY WAS INSTRUCTED ON A MEANS OF COMMITTING THE CRIME THAT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

a. Where a statute provides for alternative means of committing a crime, the jury may be instructed on only those means supported by substantial evidence. Criminal defendants in Washington have a fundamental constitutional right to a unanimous jury verdict. Const. art. I, §§ 21, 22; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). When the crime charged can be committed by more than one means, jury unanimity is not required

as to the means by which the crime was committed only if substantial evidence supports each of the relied-upon alternatives. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). Thus, the jury should be instructed on only those means for which there is substantial evidence. State v. Franco, 96 Wn.2d 816, 824, 639 P.2d 1320 (1982) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)).

Two purposes of this alternative means doctrine are to prevent jury confusion about what criminal conduct must be proved beyond a reasonable doubt, and to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict. State v. Smith, 159 Wn.2d 778, 789, 154 P.3d 873 (2007).

b. This was an alternative means case. Alternative means crimes are those that provide the proscribed criminal conduct may be proved in a variety of ways. Smith, 159 Wn.2d at 784 (citing State v. Arndt, 87 Wn.2d 374, 384, 553 P.2d 1328 (1976)). "As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." Smith, 159 Wn.2d

at 784. Alternative means crimes generally "describe *distinct acts* that amount to the same crime." State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). Where the various methods of committing a crime "are not merely descriptive or definitional of essential terms," but "are themselves essential terms," they are statutory alternative means subject to the alternative means doctrine. State v. Nonog, 145 Wn. App. 802, 812, 187 P.3d 335 (2008), aff'd, 169 Wn.2d 220, 237 P.3d 250 (2010).

Here, the statute sets forth at least three distinct alternative means of committing the crime. RCW 16.52.205(2) provides:

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.

Three distinct means of committing the crime are by (1) starving, (2) dehydrating, or (3) suffocating an animal and as a result causing substantial and unjustifiable physical pain. Id. These means "describe *distinct acts* that amount to the same crime." Peterson, 168 Wn.2d at 770. They are not merely descriptive or definitional but are themselves essential terms. See Nonog, 145 Wn. App. at 812. Thus, the crime is an alternative means crime.

c. The jury was instructed on an alternative means of committing the crime that was not supported by substantial evidence. The question on review of an alternative means case is whether substantial evidence supports each of the means presented to the jury. State v. Randhawa, 133 Wn.2d 67, 74, 941 P.2d 661 (1997). The substantial evidence test is satisfied only if the reviewing court is convinced that a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 410-11.

Here, the jury was instructed on two alternative means of committing the crime. The to-convict instructions provided the jury must find "the defendant, acting with criminal negligence, starved or dehydrated" each horse and "[a]s a result, the horse suffered substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering or death." CP 213-18.

But the State did not present substantial evidence that Ms. Peterson dehydrated the horses causing them to suffer substantial and unjustifiable pain. Several witnesses testified the horses did not have adequate water. RP 85-86, 242, 260, 314, 406, 485, 516, 519, 521. But none of the witnesses testified the horses were in

pain caused by dehydration. Dr. Miller testified Tyme was probably "uncomfortable" due to hunger but she could not say whether Tyme was in pain from dehydration. RP 136. Dr. Holohan testified Tyme was not in pain due to dehydration. RP 204-05. Dr. Haskins testified dehydration can cause colic, but none of the horses had colic. RP 315-16, 358. He did not testify any of the horses were in pain due to dehydration.

Thus, because the jury was instructed on the alternative means of dehydration, but the State did not present substantial evidence the horses were in pain due to dehydration, the alternative means doctrine was violated.

d. The error requires reversal. If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if the Court can determine the verdict was based on an alternative that was supported by substantial evidence. State v. Fleming, 140 Wn. App. 132, 136, 170 P.3d 50 (2007), overruled on other grounds by State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). Thus, if the State presented evidence of only one means, and the State's closing argument focused on only that means, the error is harmless. Nonog, 145 Wn. App. at 813. But if the State presented some evidence of each

alternative, and the deputy prosecutor argued the jury may convict the defendant under each alternative, the error is not harmless and the conviction must be reversed. E.g., State v. Allen, 127 Wn. App. 125, 135-37, 110 P.3d 849 (2005).

Here, as stated, the State presented some evidence of the dehydration alternative. Several witnesses testified the horses did not have adequate water. RP 85-86, 242, 260, 314, 406, 485, 516, 519, 521. In addition, the deputy prosecutor argued in closing that the jury could convict Ms. Peterson if it found the horses were in substantial pain from *either* starvation *or* dehydration. RP 888. The prosecutor argued the horses were both starving *and* dehydrated. RP 885-87, 889.

Thus, because the State presented some evidence of both alternatives, and the deputy prosecutor argued the jury could convict under either alternative, the error is not harmless and the convictions must be reversed. Allen, 127 Wn. App. at 135-37.

3. THE RESTITUTION ORDER IS UNLAWFUL  
BECAUSE THE COUNTY WAS NOT A  
"VICTIM" OF THE CRIME WITHIN THE  
MEANING OF THE SRA

The State requested restitution in the amount of \$49,926.92 to cover costs incurred by the county in investigating the crime and caring for the seized horses that were the subject of the criminal

charges. CP 47-171. Defense counsel objected, arguing the county was not a "victim." RP 970. The court overruled the objection. RP 980. The court awarded a total of \$48,108.23 in restitution to cover the county's costs. Sub #106.

The restitution order was unlawful because the County was not a "victim" of the crime within the meaning of the SRA.

a. Restitution may be awarded only to cover damages incurred by a "victim" of a crime. A trial court's authority to order restitution is derived solely from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010). Whether the court exceeded its statutory authority in imposing restitution is an issue of law reviewed de novo. State v. Burns, 159 Wn. App. 74, 78, 244 P.3d 988 (2010).

"When a person is convicted of a felony, the court shall impose punishment" only as provided in the SRA. RCW 9.94A.505(1). If a felony sentence includes restitution<sup>19</sup>, "[t]he court shall order restitution as provided in RCW 9.94A.750 [for offenses committed on or before July 1, 1985] and 9.94A.753 [for offenses committed after July 1, 1985]." RCW 9.94A.505(7). RCW

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<sup>19</sup> "'Restitution' means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs." RCW 9.94A.030(42).

9.94A.753(5) provides: "Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property . . . ."

"A restitution recipient must be a 'victim'" of the crime. State v. Kisor, 82 Wn. App. 175, 183, 916 P.2d 978 (1996), abrogated on other grounds by State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999). A "victim" is "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(53).

b. The county was not a "victim" of the crime. As stated, the SRA defines a "victim" as a "person." RCW 9.94A.030(53). Ms. Peterson is aware of no Washington case holding that an animal is a "person" which can be a "victim" of a crime for purposes of restitution. When a crime is committed against an animal and the animal is injured as a result, the animal's owner is the "victim." Kisor, 82 Wn. App. at 183 (where police dog was shot and killed, dog's owner suffered direct property loss that was potentially compensable by means of restitution). The animal itself is not a victim.

Courts in other jurisdictions have explicitly held that an animal cannot be a "victim" for purposes of restitution. See, e.g.,

People v. Brunette, 194 Cal. App. 4th 268, 278, 124 Cal. Rptr. 3d 521 (2011) (in prosecution for animal cruelty, animal welfare agency that had to arrange care for dogs it rescued was not "victim" for purposes of restitution, as restitution statute applied only to persons, not dogs); People v. Thornton, 286 Ill. App.3d 624, 676 N.E.2d 1024, 222 Ill.Dec. 60 (1997) (restitution statute did not authorize restitution for costs related to impoundment of dog, as animals are not "persons" for purposes of restitution); State v. Garrett, 29 Or. App. 505, 564 P.2d 726 (1977), rev'd on other grounds, 281 Or. 281, 574 P.2d 639 (1978) (in prosecution for animal cruelty, order awarding restitution to Humane Society for care and feeding of dogs was unlawful, as Humane Society was not victim of crime).

In Washington, a third-party entity or agency may qualify for restitution, but only to cover costs incurred on behalf of the direct (human) victim of the crime. E.g., State v. Davison, 116 Wn.2d 917, 921, 809 P.2d 1374 (1991) (restitution was authorized to cover wages paid by City of Seattle to direct "victim" for amount of time that victim was unable to work as fire fighter while recovering from injuries resulting from assault); State v. Hahn, 100 Wn. App. 391, 398, 996 P.2d 1125 (2000) (Department of Social and Health

Services qualified as "victim" for purposes of restitution because agency paid for direct victim's medical treatment and property loss); State v. Jeffries, 42 Wn. App. 142, 144-45, 709 P.2d 819 (1985) (reimbursement to Labor and Industries for disability and medical expenses of assault victim); State v. Barnett, 36 Wn. App. 560, 562, 675 P.2d 626 (1984) (reimbursement to insurance company which paid for losses sustained by insured because of burglary).

Here, the State sought and the court awarded restitution under a specific provision of the animal cruelty statute, RCW 16.52.200. RP 972, 979. That statute provides:

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.

16.52.200(6).

But as discussed, restitution may be awarded in a felony criminal case only as authorized by the SRA. RCW 9.94A.505(1), (7). The SRA authorizes restitution only to cover costs incurred by a "victim" of the crime, who must be a person, or by a third party for costs incurred on behalf of the direct victim. Davison, 116 Wn.2d at

921; Kisor, 82 Wn. App. at, 183; RCW 9.94A.030(53). Thus, the restitution award in this case was not authorized by the SRA, notwithstanding RCW 16.52.200(6).

This conclusion does not render RCW 16.52.200(6) without effect, however. The statute provides that a person convicted of animal cruelty "shall be *liable* for reasonable costs incurred pursuant to this chapter by law enforcement agencies, animal care and control agencies." RCW 16.52.200(6) (emphasis added). The County may seek damages in civil court.

Nothing in the SRA limits or replaces civil remedies. RCW 9.94A.753(9) ("This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or offender . . ."). It is not unfair to require the County to seek reimbursement for its losses in a civil proceeding. "[C]ompensation is not the primary purpose of restitution and the "criminal process should not be used as a means to enforce civil claims.'" State v. Moen, 129 Wn.2d 535, 542, 919 P.2d 69 (1996) (quoting State v. Martinez, 78 Wn. App. 870, 881, 899 P.2d 1302 (1995)). Unlike restitution in criminal cases, the primary purpose of civil awards is to compensate for loss. State v. Ewing, 102 Wn. App. 349, 352, 7 P.3d 835 (2000).

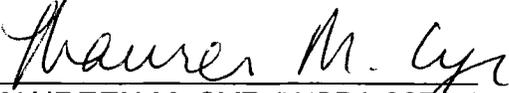
In sum, the restitution award was not statutorily authorized because the County is not a "victim" of the crime.

c. The restitution order is void. An order imposing restitution is void if statutory provisions are not followed. State v. Lewis, 57 Wn. App. 921, 924, 791 P.2d 250 (1990). Because the court was not authorized to award restitution to cover the costs incurred by the County, the restitution order is void.

#### F. CONCLUSION

The first degree animal cruelty statute is vague as applied to Ms. Peterson's conduct and therefore the convictions must be reversed and the charges dismissed. Alternatively, because Ms. Peterson's constitutional right to jury unanimity was violated, the convictions must be reversed and remanded. In addition, the restitution order is void because the County was not a "victim" of the crime.

Respectfully submitted this 28th day of October 2011.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 66876-51-I
	)	
	)	
MARY PETERSON,	)	
	)	
Appellant.	)	

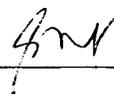
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] | MARY PETERSON<br>5904 W CONKLING RD<br>WORLEY, ID 83876   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 28<sup>TH</sup> DAY OF OCTOBER, 2011.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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☎ (206) 587-2711

No. 66876-5-1

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

---

STATE OF WASHINGTON,

Respondent,

v.

MARY DAWN PETERSON,

Appellant.

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

OCT 28 2011

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

---

APPELLANT'S OPENING BRIEF

---

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## A. SUMMARY OF ARGUMENT

Mary Peterson was convicted of six counts of first degree animal cruelty based on evidence that some of her horses were malnourished. The State was required to prove that, with criminal negligence, Ms. Peterson starved the horses causing "unjustifiable physical pain." But the statute does not define the term "unjustifiable physical pain" or clearly delineate between innocent and unlawful conduct. The evidence did not show Ms. Peterson deliberately starved the horses or intended to cause them physical pain. Because the statute did not provide clear notice of what was proscribed, it is unconstitutionally vague as applied to this case.

In addition, the jury was instructed on an alternative means of committing the crime that was not supported by substantial evidence. Therefore, the alternative means doctrine was violated and the convictions must be reversed.

Finally, the restitution order covering the county's costs in investigating the crime and caring for the horses that were seized was unlawful because the county was not a "victim" of the crime.

## B. ASSIGNMENTS OF ERROR

1. The first degree animal cruelty statute is vague in violation of the State and Federal Due Process Clauses as applied to Ms. Peterson's conduct.

2. The conviction for first degree animal cruelty violated the statute constitutional right to a unanimous jury verdict because the jury was instructed on a statutory means of committing the crime that was not supported by substantial evidence.

3. The restitution order was unlawful because the county was not a "victim" of the crime within the meaning of the Sentencing Reform Act (SRA).

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional right to notice is protected by the due process vagueness doctrine, which requires a criminal statute to provide ascertainable standards for delineating between innocent and unlawful behavior. The first degree animal cruelty statute required the State to prove Ms. Peterson's conduct caused her horses "unjustifiable physical pain." But the statute does not define "unjustifiable" or provide standards for determining the scope of the term. Is the statute impermissibly vague as applied to Ms. Peterson's conduct?

2. The constitutional right to a unanimous jury verdict on all the elements of the crime requires the jury be instructed only on those alternative means of committing the crime that are supported by substantial evidence. Was Ms. Peterson's constitutional right to jury unanimity violated where the jury was instructed on an alternative means of committing the crime of first degree animal cruelty that was not supported by substantial evidence?

3. A court may award restitution only for damages suffered by a "victim" of the crime. A "victim" must be a "person"; there is no authority for finding a horse is a "victim." The court may award restitution to a third party, but only to reimburse the third party for amounts spent on behalf of the direct victim of the crime. Did the court err in awarding restitution for the county's expenses where the county was not a "victim" of the crime?

#### D. STATEMENT OF THE CASE

1. Ms. Peterson's horse-breeding business. Mary Peterson has owned several horses over the years, beginning when she was five years old. RP 776, 781. She has taken courses in horsemanship and horse care. RP 776-79. In 2000, she started a horse-breeding business in Canada and acquired her first brood

mare. RP 781. She had to give up the business, however, when her husband Ryan had a car accident. RP 784.

Ms. Peterson moved from Canada to the United States in 2005. RP 782. In early 2009, she decided to resume breeding horses and build a reputable business. RP 785, 866. Mr. Peterson was not supportive of the business and the two fought about the finances.<sup>1</sup> RP 786, 865.

In March 2009, Ms. Peterson bought two brood mares.<sup>2</sup> RP 787-90. One of the horses (#3) was pregnant and underweight when Ms. Peterson got her. RP 788. She gave birth on June 1. RP 788. The other horse (#8) was in "horrible" shape and Ms. Peterson bought her because she thought she could improve her condition. RP 790, 854.

In May 2009, Ms. Peterson acquired another mare (horse #6) and her foal (horse #4) who was still nursing.<sup>3</sup> RP 810-11. The two horses were healthy but underweight. RP 811. In June, she acquired another foal (horse #1).<sup>4</sup> RP 791. By September 2009,

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<sup>1</sup> The couple divorced in 2010. RP 784.

<sup>2</sup> The two brood mares acquired in March 2009 are horses 3 and 8, charged in counts three and six of the information. RP 787-90; CP 310-11.

<sup>3</sup> The mare and her foal acquired in May 2009 are horses 4 and 6, charged in counts four and five of the information. RP 810-11; CP 310-11.

<sup>4</sup> The foal acquired in June 2009 is horse 1, charged in count two of the information. RP 791; CP 310-11.

Ms. Peterson had 18 horses on her farm; some she owned and some she was breeding or leasing.<sup>5</sup> RP 861-62.

2. Tyme and Ms. Peterson's reliance on her "farrier." In April 2009, Ms. Peterson acquired a thoroughbred mare named "Tyme."<sup>6</sup> RP 795. Tyme was in very bad condition and Ms. Peterson paid nothing for her. RP 795-96. Tyme was very thin, had severe chronic "laminitis,"<sup>7</sup> and was lethargic and lay on the ground most of the time. RP 105, 796. Because Tyme spent so much time on the ground, she had sores on every joint of her body. RP 739.

Animal Control officers told Tyme's previous owners they must euthanize her. RP 836. But the owners fought the decision and eventually obtained the permission of an administrative hearing officer to keep Tyme alive. RP 836; Exhibit 186. Ms. Peterson believed that, as a result, she also had permission to keep Tyme alive. RP 836.

Ms. Peterson consulted her "farrier" Paul Serjeant about Tyme. RP 797. Mr. Serjeant has been a farrier for over 30 years and has written a book called "Complete Horse Sense." RP 737,

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<sup>5</sup> Most of the horses were not the subject of criminal charges.

<sup>6</sup> "Tyme" is charged in count one of the information. CP 310.

<sup>7</sup> "Laminitis" is a painful foot condition common among horses. RP 105, 655-56, 739.

758. He explained a farrier "take[s] care of the horse's feet and tell[s] the health of the animal." RP 35. In the old days, a farrier "also acted as a vet." RP 737. That is because "[w]hen the horse was getting sick or something was going on with it, the feet tell you how sick the animal is and when it's getting sick. And that's what . . . the business is." RP 737.

Mr. Serjeant's training was based on the "whole horse" concept. RP 742. Sometimes his views of how to take care of a horse differ from those of the veterinary profession. RP 757-58. His theories are "all old school," based on the view that "[t]he bodies never change." RP 758. In some cases, "[p]eople seek help for animals to [sic] the professionals," but the animals "are not getting any better." RP 759. He provides an alternative answer and can fix horses "that everybody else can't fix." RP 759-60. His practice is based on the general notion that "[t]he animal can take care of itself"—a notion that the veterinary profession has forgotten. RP 758. Thus, sometimes a veterinarian will say that a horse must be euthanized when it is simply not true. RP 760.

Mr. Serjeant examined Tyme soon after Ms. Peterson acquired her. RP 740, 797. He told Ms. Peterson he thought they could restore the mare to health. RP 741, 797. They changed her

feed, giving her hay, barley and corn, trimmed her feet, and gave her sea salt. RP 741-42, 798-99. Sea salt is almost identical to the plasma in a horse's body and therefore can aid in healing. RP 742. They also took her off "bute" because she was urinating blood. RP 798. "Bute" is a pain reliever that is commonly given to horses but can also cause liver and kidney problems and so must be used sparingly. RP 669.

Mr. Serjeant examined Tyme again about five to six weeks later. RP 741. He was "amazed" at the progress she had made. RP 745. The horse had gained 50 to 75 pounds, was standing and walking, and her sores had closed up. RP 605, 741, 744, 802-03. Her feet were still a problem but had greatly improved. RP 605, 835.

Ms. Peterson routinely consulted Mr. Serjeant about the care of all of her horses. RP 772. He would trim the horses' hooves every six to seven weeks and would sometimes visit the farm more often. RP 737, 767, 770, 794. He helped with many aspects of the horses' care and breeding. RP 772, 794. Ms. Peterson trusted him and followed his advice. RP 794-95.

Mr. Serjeant was never concerned about Ms. Peterson's care of the horses. RP 746, 753. He never thought the horses

were starving or dehydrated, except for Tyme, when Ms. Peterson first acquired her. RP 750-51, 755. Tyme's dehydration was alleviated six weeks later. RP 751. Mr. Serjeant thought Ms. Peterson's horses had adequate hay and he never saw moldy hay on the property. RP 746-47.

3. Ms Peterson's feeding and care of the horses. Ms.

Peterson also employed the services of Nicholas Osborne, who helped her feed and water the horses and did odd jobs around the farm. RP 591-92. Mr. Osborne has lived around farm animals and horses most of his life and has owned horses himself. RP 591.

Ms. Peterson and Mr. Osborne would feed the horses two to three flakes<sup>8</sup> of hay two times per day.<sup>9</sup> RP 593, 605, 824-25. The sick and nursing horses would get more hay or some alfalfa; Tyme also got more hay than the others. RP 619-20. The horses never went without a meal. RP 597. Mr. Osborne, Ms. Peterson and Mr. Peterson would all buy the hay, usually with cash, from several different suppliers. RP 594, 824-25. They would buy hay two to three times a week and sometimes alfalfa; they never ran out of hay. RP 596-97, 625, 824-25. They stored the hay on a trailer covered by a tarp or under a tarp by the shed. RP 596, 824.

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<sup>8</sup> A "flake" of hay is about four to five pounds. RP 109.

<sup>9</sup> At first, the horses were able to graze on grass on the ground but the grass ran out in about mid-July. RP 599-600, 801.

Mr. Osborne and Ms. Peterson usually bought local grass hay. RP 595, 824. Even the State's witnesses agreed that, although grass hay has less protein than alfalfa, it is suitable to feed to horses. RP 77. Ms. Peterson bought local grass hay because it was inexpensive. RP 80. Once or twice, Mr. Osborne bought 550-pound round bales of local grass hay and put them in the pens. RP 613-15, 637. Large round bales of hay are generally less expensive than hay in other forms. RP 356.

The quality of the hay would depend on the supplier. RP 595. But the horses always had clean hay and neither Mr. Osborne nor Ms. Peterson noticed mold in the hay; the hay never lasted long enough to get moldy. RP 600, 605, 824.

The horses were watered regularly. RP 840. Mr. Osborne watered the horses every time he went to the farm, by filling the water troughs with a hose. RP 598.

Mr. Osborne had no concerns about Ms. Peterson's care of the horses. RP 610-11. She interacted with them every day and was very affectionate. RP 610-11. He did not think the horses were underweight; they might have lost "water weight" due to the heat in the summer but it did not concern him. RP 610. It is normal for a horse's weight to fluctuate. RP 622, 630.

Nonetheless, in July 2009, Ms. Peterson believed that some of the horses needed to put on weight. RP 628, 826, 856. She consulted Mr. Serjeant as well as her veterinarian Dr. Hansen. RP 752, 826. Mr. Serjeant told her the horses lost weight due to bacteria in their blood and told her to give them more salt. RP 752. Dr. Hansen said the horses looked alright and recommended increasing their hay and giving some of them nutritional supplements. RP 829-30. Therefore, Ms. Peterson and Mr. Osborne started to feed the horses more and gave some of them nutritional supplements. RP 628, 631-32, 636, 826, 829.

Ms. Peterson did not believe she was starving or dehydrating the horses; she provided for them as well as she could. RP 850. No one expressed concern about the horses until an animal control officer told her in June 2009 that some neighbors had complained about Tyme. RP 805.

4. The county's investigation. Snohomish County Animal Control Officer Paul Delgado received several complaints in June 2009 from neighbors and an animal welfare organization about the horses on Ms. Peterson's farm. RP 55. He went to the property on June 24. RP 56. There were 11 horses there at the time but only

three caught his attention. RP 57. He especially noticed Tyme, who was limping and had protruding bones. RP 57.

Officer Delgado spoke to Ms. Peterson the next day. RP 64. She told him she was working with her farrier to try to heal Tyme. RP 66-67. She said she did not always agree with veterinarians and that they can be very expensive. RP 68. Officer Delgado told her she must have a veterinarian look at the horse and must follow the veterinarian's recommendations. RP 68, 70.

Ms. Peterson contacted her veterinarian, Jennifer Miller, to look at Tyme. RP 93, 98-99. Dr. Miller had been Ms. Peterson's veterinarian since 2006. RP 97-98. According to Dr. Miller, Ms. Peterson's horses were always in good shape and had decent care. RP 97-98.

Dr. Miller examined Tyme on July 14, 2009, using the "Henneke Scale." RP 100. The Henneke Scale measures the amount of body fat on a horse, on a scale of one to nine. RP 100-02. A score of four to six indicates a healthy horse. RP 100-02. Dr. Miller scored Tyme as a 1.5—severely underweight. RP 103-04. She also diagnosed Tyme with severe chronic laminitis. RP 106. Dr. Miller recommended euthanasia. RP 106.

The next day, July 15, Officer Delgado went to the property with another animal control officer, Angela Davis, and their supervisor, Gordon Abbott. RP 223. Veterinarian Brandi Holohan soon arrived. RP 153-54. Dr. Holohan examined Tyme, again using the "Henneke Scale." RP 159-64. Like Dr. Miller, she scored Tyme as a 1.5 on the scale. RP 164.

The animal control officers insisted Ms. Peterson relinquish Tyme for euthanasia. RP 230-32, 475-76. Ms. Peterson explained she had a "court order" permitting her to keep Tyme alive.<sup>10</sup> RP 224-25; Exhibit 186. Officer Delgado never investigated Ms. Peterson's claim but insisted she release Tyme. RP 224-25. Although Ms. Peterson was reluctant, she finally agreed and the horse was euthanized. RP 230-32.

Animal control officers continued to monitor Ms. Peterson's farm. The amount of feed and water available for the horses fluctuated each time the officers visited. On June 8, 2009, when Officer Delgado went to the property, there were eight bales of good quality alfalfa and the water troughs were full. RP 72. On July 6, there were 26 bales of hay and two bales of alfalfa. RP 77. The next day, July 7, the alfalfa was gone and only local grass hay

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<sup>10</sup> Ms. Peterson was referring to the administrative officer's decision obtained by Tyme's previous owners. See RP 836; Exhibit 186.

bales were left. RP 80. On July 10, when it was around 80 degrees outside, two stalls had about four inches of water in the troughs but the paddock with Tyme and other horses was dry. RP 86. Apparently, the water pump had broken and a man was there fixing it. RP 85. The horses were watered with a hose extending from a neighbor's property. RP 86. There were bales of local grass hay present. RP 88. On July 15, the water pump was working and water was present in the paddocks. RP 262.

Officer Davis, who took over the investigation from Officer Delgado, went to the farm on July 20 and saw one bale of alfalfa there. RP 479. On July 22, there were 20 bales of local grass hay. RP 483. On July 27, there were two bales of local grass hay. RP 484. It was 100 degrees outside and the horses had no shade. RP 485. Several horses had full water troughs but some had only about one inch of water. RP 485. On July 28, there were 20 bales of local hay that appeared moldy to Officer Davis. RP 488-89. One of the horses was eating manure.<sup>11</sup> RP 489. On August 4, there were 20 bales of hay. RP 491. On August 6, there were 15 bales of hay. RP 492. On August 10, there were five bales of local hay. RP 492. On August 11, there were two large round bales of hay in

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<sup>11</sup> A horse eating manure can be a sign of malnutrition. RP 187

one of the paddocks, which appeared of poor quality. RP 493. On August 19, there was other hay in the paddocks and the round bales were gone. RP 495. On August 25, there was one large round bale and 10 bales of local hay. RP 495. The horses were walking and urinating on the hay and not readily consuming it. RP 496. On August 27, a hot day, the horses in one of the paddocks did not have water. RP 516, 519. On August 31, there was a new round bale of hay. RP 523. On September 2, there were 20 bales of alfalfa hay. RP 524.

By late August, many of the horses still appeared to be losing weight. RP 496. Officer Davis decided the horses had not sufficiently improved. On September 9, 2009, she and several other animal control officers and sheriff's deputies went to the property and arrested Ms. Peterson for animal cruelty. RP 526-29. Ms. Peterson was confused and surprised; she disagreed that the horses were in critical condition. RP 529-30.

On that day, there was a round bale of hay in paddock "C," and mud, manure, and hay strewn on the ground. RP 531-33. The quality of the hay appeared poor with mold in places. RP 320, 350-51. The horses in that pen had no water. RP 314.

Another veterinarian, Daniel Haskins, examined the horses. RP 268-70. He gave five of the horses in paddock C low Henneke scores, ranging from two to three. RP 287-307. Those horses were seized and became the subjects of counts two to six in the information. RP 324; CP 310-11. Other horses had higher body scores and were not seized. RP 323.

By October 14, the horses that were seized had put on weight and were progressing well. RP 555. They were eventually adopted. RP 556.

5. The charges and trial. Ms. Peterson was charged with six counts of first degree animal cruelty, RCW 16.52.205(2). CP 310-11.

The State's witnesses disagreed about the amount and type of feed the horses should have been given. Dr. Miller testified Tyme should have been fed about 22 to 33 pounds of hay per day. RP 109. Local grass hay from Western Washington generally has a lower protein content than hay from Eastern Washington and therefore horses should be fed more of it. RP 110, 132. If a horse is eating only local grass hay, she should be fed about 44 to 66 pounds per day. RP 110. Dr. Holohan testified a thoroughbred horse needs 6 to 10 flakes of hay per day if it is good quality hay

(i.e., about 24 to 50 pounds of hay). RP 166-67. If the horse is receiving only local hay, she needs "free choice"<sup>12</sup> hay plus supplements. RP 168. Dr. Haskins testified the horses should have been fed about 22 pounds of hay per day. RP 326. Officer Davis testified a horse should be fed about four flakes of hay per day, which is equivalent to about one-third of a bale (i.e., about 16 pounds of hay). RP 480-81.

None of the hay on Ms. Peterson's property was ever tested to determine its nutritional content or whether it was moldy. RP 133, 253, 352, 561, 577.

The State's veterinarian witnesses generally agreed the horses were probably in pain and suffering from hunger, but none of the witnesses said the horses were in pain due to dehydration.<sup>13</sup> Dr. Miller testified Tyme was in pain caused by laminitis; that is the principal reason she recommended euthanasia. RP 105, 117. The most she could say about starvation, however, was that it is probably "uncomfortable" for the horse. RP 111, 136. She could not say Tyme was in pain from dehydration. RP 136.

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<sup>12</sup> "Free choice" hay means the hay is freely accessible to the horse so she can feed on it throughout the day. RP 108.

<sup>13</sup> The State was required to prove the horses were in "substantial and unjustifiable physical pain" caused by starvation or dehydration. CP 213-18, 310-11.

Dr. Holohan similarly testified Tyme was in pain from laminitis. RP 169, 172-73, 175-76. Although Dr. Holohan testified Tyme's laminitis was probably exacerbated by malnutrition, she did not testify Tyme was in pain caused by starvation. RP 177, 194. A lack of food can cause abdominal cramps, but that is difficult to ascertain. RP 203-04. Dr. Holohan did not believe Tyme was in pain caused by dehydration. RP 204.

Dr. Haskins testified a horse eating poor-quality food intermittently or deprived of water can get colic, which is very painful. RP 309, 315-16. But none of the horses he examined had colic. RP 358. Nonetheless, he believed the horses were probably in pain and suffering due to a lack of nutrition. RP 344-35, 388, 390-91. He believed they were suffering due to their poor head carriage and demeanor. RP 310, 373. But he did not say they were in pain or suffering from dehydration.

The jury found Ms. Peterson guilty of all six counts of first degree animal cruelty as charged. CP 199-204.

6. Sentencing. A sentencing hearing was held March 1, 2011. The Honorable Larry McKeeman concluded Ms. Peterson deserved leniency because her treatment of the horses was due to "an overextension of her business which she was hoping to

establish of raising horses." RP 959. This overextension was due to financial and marital difficulties. RP 959-60. She did not intend to harm or neglect the horses. RP 960. In addition, Ms. Peterson was relying on the advice of her farrier, "someone with many years experience in horses, involved in the care of horses and treatment of horses," and who "not only had the experience but has apparently enough of a reputation in the horse community that he's a published author on it." RP 959-60. The court found it "significant that the defendant sought that advice and believed it." RP 960. Therefore, the court rejected the State's sentencing recommendation and imposed a more lenient sentence. CP 178; RP 941, 960.

On June 8, 2011, the court entered a restitution order awarding a total of \$48,108.23 to cover the costs incurred by the county in investigating the crime and caring for the seized horses that were the subjects of the criminal charges. Sub #106.<sup>14</sup>

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<sup>14</sup> A supplemental designation of clerk's papers has been filed for this document.

## E. ARGUMENT

1. PROSECUTING AND CONVICTING MS. PETERSON OF ANIMAL CRUELTY VIOLATED DUE PROCESS BECAUSE THE STATUTE DOES NOT PROVIDE ASCERTAINABLE STANDARDS FOR LOCATING THE LINE BETWEEN INNOCENT AND UNLAWFUL CONDUCT

The first degree animal cruelty statute criminalizes only criminally negligent conduct that causes "substantial and unjustifiable physical pain." RCW 16.52.205(2). But the statute does not define "unjustifiable" pain or clearly delineate between innocent and unlawful behavior. It is therefore unconstitutionally vague as applied in this case.

a. Criminal statutes must clearly define the line between innocent and unlawful conduct. The Due Process Clauses of the Fourteenth Amendment and the Washington Constitution<sup>15</sup> require that a penal statute (1) define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; and (2) provide ascertainable standards of guilt to protect against arbitrary and subjective enforcement. City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000);

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<sup>15</sup> The Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Article I, section 3 of the Washington Constitution provides, "No person shall be deprived of life, liberty, or property, without due process of law."

Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); Const. art. I, § 3; U.S. Const. amend. XIV. Under this vagueness doctrine, "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." American Legion Post #149 v. Dept. of Health, 164 Wn.2d 570, 612, 192 P.3d 306 (2008) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 629, 104 S. Ct. 3244, 82 L. Ed. 462 (1984), quoting Connally v. Gen. Constr. Co., 269 U.S. 386, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

A vagueness challenge to a statute that does not implicate First Amendment rights must be considered in light of the facts of the specific case before the Court. American Legion Post #149, 164 Wn.2d at 612. The statute must be tested by inspecting the actual conduct of the party who challenges the statute. Id. In determining whether the statute is sufficiently definite, "the provision in question must be considered within the context of the entire enactment and the language used must be 'afforded a sensible, meaningful, and practical interpretation.'" Id. at 613

(quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)).

A statute is presumed constitutional and the party challenging the statute has the burden of proving it is unconstitutional beyond a reasonable doubt. City of Seattle v. Montana, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996). Ms. Peterson will meet that burden if she can show the statute "is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." Giaccio v. Pennsylvania, 382 U.S. 399, 402, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). The statute must define legal boundaries of conduct "sufficiently distinct for citizens, policemen, juries, and appellate judges." Grayned, 408 U.S. at 114 (citation omitted).

A statute containing a vague term will survive a vagueness challenge only if other terms in the statute define, qualify, or limit application of the term so that the reader can ascertain the standard of enforcement. See, e.g., Grayned, 408 U.S. at 113-14 ("noise or diversion" not vague when qualified by requirements that noise or diversion be actually incompatible with school activities, that there be causality between noise and disruption, and that the act be willful); City of Tacoma v. Luvene, 118 Wn.2d 826, 848, 827

P.2d 1374 (1992) (loitering ordinance not vague where it prohibited specific activities related to the sale and use of illegal drugs); City of Seattle v. Jones, 3 Wn. App. 431, 436, 475 P.2d 790 (1970), aff'd, 79 Wn.2d 626, 488 P.2d 750 (1971) (anti-loitering statute not vague when guidelines included prostitution among prohibited activities); In re D., 27 Or. App. 861, 557 P.2d 687, 690 (1976) (a list of qualifying guidelines will save an otherwise vague statute).

A statute lacks adequate standards when the "vague contours" of its terms "are nowhere delineated." See Thornhill v. Alabama, 310 U.S. 88, 100-01, 60 S. Ct. 736, 84 L. Ed. 1093 (1940) (statute unconstitutionally vague because the term "picket" encompasses every conceivable act of publicizing labor dispute in the vicinity of the scene of the dispute); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1250 (M.D. Pa. 1975) (provisions in curfew ordinance unconstitutionally vague because undefined terms "normal" and "well along the road to maturity" failed to provide enforcement guidelines).

Washington courts generally hold a statute lacks ascertainable standards of guilt if it fails to describe the prohibited conduct with sufficient particularity. State v. Hilt, 99 Wn.2d 452, 455, 662 P.2d 52 (1983) (bail jumping statute unconstitutionally

vague because no definition of "without lawful excuse"; thus, "predicting its potential application would be a guess, at best"); State v. White, 97 Wn.2d 92, 100, 640 P.2d 1061 (1982) ("lawfully required," "lawful excuse," and "public servant" too vague to provide fair notice and prevent arbitrary or erratic arrests); City of Seattle v. Rice, 93 Wn.2d 728, 732, 612 P.2d 792 (1980) ("lawful order" not sufficiently specific to avoid the possibility of arbitrary enforcement); City of Bellevue v. Miller, 85 Wn.2d 539, 545-47, 536 P.2d 603 (1975) (lack of terms defining "unlawful activity" renders ordinance void for lack of notice and standards); City of Seattle v. Pullman, 82 Wn.2d 794, 799, 514 P.2d 1059 (1973) ("'to loiter, idle, wander or play' do not provide ascertainable standards for locating the line between innocent and unlawful behavior").

b. Washington's animal cruelty statute must be interpreted in light of society's sense of morality and an owner's right to possess, use and enjoy her animals. The first degree animal cruelty statute provides:

A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence,<sup>[16]</sup> starves, dehydrates, or

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<sup>16</sup> 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 his or her 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." RCW 9A.08.010(1)(d); CP 219 (jury instruction).

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.

RCW 16.52.205(2); CP 213-18 (to-convict instructions). Animal cruelty in the first degree is a class C felony. RCW 16.52.205(4).

Washington's statute is part of a nation-wide trend. Stephan K. Otto, State Animal Protection Laws: The Next Generation, 11 Animal L. 131 (2005). Since 1990, 35 states and the District of Columbia have enacted, for the first time, felony-level laws for certain types of animal abuse.<sup>17</sup> Id. at 134. These laws reflect "society's growing uneasiness with the maltreatment of animals." Id. at 141. But with few exceptions, states generally reserve felony status for the most egregious, affirmative acts of abuse, and require a high degree of criminal culpability. Id. at 137. Some states also restrict felonies to include only those crimes committed against certain species of animals, typically those considered to be companion animals. Id. In addition, most statutes contain specific exemptions for veterinary practices, agriculture, hunting, or research. Id. at 145.

Like the statutes in most states, Washington's animal cruelty statute contains an exemption for agricultural practices. RCW

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<sup>17</sup> Previously in Washington, animal cruelty was either a misdemeanor or a gross misdemeanor. See Former RCW 16.52.090-.300 (1990).

16.52.185 provides: "Nothing in this chapter applies to accepted husbandry practices used in the commercial raising or slaughtering of livestock or poultry, or products thereof . . . ." "Livestock" includes "horses." RCW 16.52.011(2)(o) ("Livestock' includes, but is not limited to, horses, mules, cattle, sheep, swine, goats, and bison."). "Husbandry" means "the cultivation or production of plants and animals: AGRICULTURE, FARMING." Webster's Third New International Dictionary 1104 (1993).

Thus, Washington's animal cruelty statute does not apply to conduct consistent with "accepted" horse-raising practices, even if that conduct causes an animal avoidable pain and suffering. RCW 16.52.185. In addition, the statute should be interpreted to apply only to the most egregious acts entailing a high degree of criminal culpability. See Otto, State Animal Protection Laws, supra, at 137.

Washington's animal cruelty statute must also be interpreted in light of historical practice and society's sense of morality. See People v. Arroyo, 3 Misc.3d 668, 675-76, 777 N.Y.S.2d 836 (2004). As the New York court noted in Arroyo, "[s]ince at least biblical times, humans have considered animals as chattel." Id. at 676. Thus, "even though anticruelty laws are meant to protect animals, the statutes are not intended to interfere with the owners'

possession, use and enjoyment of their animals." Id. at 676 (citing 4 Am. Jur. 2d, Animals § 29, at 370; Gary L. Francione, Animals, Property and Legal Welfarism: "Unnecessary" Suffering and The "Humane" Treatment of Animals, 46 Rutgers L. Rev. 721, 757-65 (1994)).

In Arroyo, the court examined a statute that, like Washington's, proscribes conduct that causes an animal "unjustifiable physical pain." Arroyo, 3 Misc.3d at 670 (citing N.Y. Agric. & Mkts. Law §§ 350(2), 353). The defendant was convicted of animal cruelty for not providing his terminally ill dog with medical care. Id. at 669. The court explained, "what is 'unjustifiable' in the context of anticruelty statutes is what is not reasonable, defensible, right, unavoidable or excusable." Id. at 678. Merely adding the term "unjustifiable" to the word "pain" is not sufficient to transform conduct that is inherently innocent into a crime. Id. What is "justifiable" must be determined in light of an owner's financial limitations and society's standards of morality. Id. at 679. The court concluded the term "unjustifiable physical pain" was too vague to warn pet owners that not providing medical care for their pets, regardless of their ability to afford it, was a crime. Id.

c. The first degree animal cruelty statute is unconstitutionally vague as applied to Ms. Peterson's conduct. Ms. Peterson's conduct was inherently innocent. She did not intend to cause her horses pain and suffering. Her treatment of the horses was consistent with her farrier's advice. Her choice of feed was limited by financial constraints and her struggles to establish her horse-breeding business. Even the State's witnesses could not agree on how much or what kind of feed was appropriate. Under these circumstances, the statute did not provide an unequivocal warning that Ms. Peterson's conduct was criminal.

The first degree animal cruelty statute required the State to prove Ms. Peterson, with criminal negligence, starved or dehydrated the horses and as a result caused "substantial and unjustifiable physical pain" that extended for a period sufficient to cause considerable suffering or death. RCW 16.52.205(2); CP 213-18. The statute does not define "unjustifiable physical pain." The question is whether the statute nonetheless provides "ascertainable standards for locating the line between innocent and unlawful behavior." Pullman, 82 Wn.2d at 799.

What is "unjustifiable" must be determined in light of an animal owner's financial constraints. Arroyo, 3 Misc.3d at 679.

Here, Ms. Peterson was struggling to establish a horse-breeding business. RP 785-86, 865-66. In order to save money, she acquired some horses that were already underweight. RP 788, 790, 795-96, 811, 854. Tyme, in particular, was so thin when Ms. Peterson acquired her that she paid nothing for her. RP 795-96. Tyme gained a significant amount of weight while in Ms. Peterson's care. RP 605, 741, 744, 802-03.

Ms. Peterson's choice of feed was also limited by financial considerations. She occasionally bought large round bales of hay because they are generally less expensive than hay in other forms. RP 356. She bought local grass hay because it is less expensive than other kinds. RP 80.

What is "unjustifiable" must also be determined in light of accepted husbandry practices. RCW 16.52.185. Ms. Peterson worked closely with her farrier and followed his advice regarding the care of the horses. RP 741-42, 772, 794-99. Even Dr. Miller, the State's witness, acknowledged that farriers provide essential services to horse owners. RP 129. Mr. Serjeant testified a farrier's knowledge extends beyond the horse's feet, as a horse's feet "tell the health of the animal." RP 35. In the old days, a farrier "also

acted as a vet."<sup>18</sup> RP 737. Some of Mr. Serjeant's advice conflicted with the opinions of the State's veterinarian witnesses. RP 742, 757-60. But the statute does not provide clear notice that an animal owner *must* follow the advice of a veterinarian when it conflicts with the advice of other animal-care providers. The statutory term "accepted husbandry practices," RCW 16.52.185, should not be interpreted to apply only to practices approved by veterinarians—there is not a single "accepted husbandry practice."

Horse owners have traditionally consulted farriers for horse-care advice. Mr. Serjeant had decades of experience and was a published author on the topic of general horse care. RP 737, 758. Ms. Peterson should not be held criminally liable for following his advice, without clear warning from the Legislature.

The vagueness of the statutory term "unjustifiable physical pain" is further highlighted by the differences of opinion among the State's witnesses about how much and what type of hay the horses should have been fed. RP 109-10, 132, 166-68, 326, 480-81. The witnesses testified local grass hay generally has less nutritional value than Eastern Washington hay. RP 110, 132, 168. But the

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<sup>18</sup> The dictionary definition of "farrier" includes "*chiefly Brit* : one that attends a sick horse; *broadly* : a veterinarian esp. when practicing without full qualification." Webster's Third New International Dictionary 824 (1993).

statute does not provide sufficient notice to horse owners that they will be held criminally liable if they feed their horses local hay or fail to provide their horses nutritional supplements.

Ms. Peterson's conduct was not sufficiently egregious to fall clearly under the scope of the felony statute. She believed she had official permission to keep Tyme alive. RP 836; Exhibit 186. She consulted her farrier as well as her veterinarian about the care of the horses. RP 737, 752, 767, 770-72, 794-97, 826, 829-30. When she noted the horses needed to put on weight, she fed them more and gave some of them weight-gain supplements. RP 628, 631-32, 636, 826, 829. Neither Mr. Serjeant nor Mr. Osborne, who observed her care of the horses closely, believed she was mistreating them. RP 746, 750-55, 610-11. Under these circumstances, the statute did not provide sufficient notice that Ms. Peterson's conduct was criminal.

Previous Washington cases have held the first degree animal cruelty statute is not unconstitutionally vague, but those cases addressed far more egregious conduct. In State v. Andree, 90 Wn. App. 917, 920, 954 P.2d 346 (1998), review denied, 137 Wn.2d 1014, 978 P.2d 1097 (1999), the defendant deliberately stabbed a kitten with a hunting knife. The Court held "a person of

ordinary intelligence would understand that killing a kitten by stabbing it nine times with a hunting knife would cause undue suffering." Id. at 921. Similarly, in State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006), the Court held a person of ordinary intelligence would understand that "tying an animal to a tree and repeatedly shooting arrows into it" would cause the requisite degree of suffering. Ms. Peterson's conduct is in sharp contrast to the defendants in those cases.

Courts in other jurisdictions have explicitly held the terms "unjustifiable" or "unnecessary" in animal and child cruelty statutes were unconstitutionally vague. See, e.g., Arroyo, 3 Misc.3d at 679; State v. Ballard, 341 So.2d 957, 960 (Ala. Crim. App. 1976) (language in child abuse statute, "inflicts unjustifiable physical pain or mental suffering . . . in a manner which is not ordinary and reasonable discipline and punishment," was unconstitutionally vague); State v. Meinert, 225 Kan. 816, 594 P.2d 232 (1979) (term "unjustifiable physical pain" in child abuse statute was unconstitutionally vague); Cinadr v. State, 108 Tex. Crim. 147, 149-50, 300 S.W. 64 (Tex. Crim. App. 1927) (animal cruelty statute that declares "whoever needlessly kills an animal is guilty of an offense" impermissibly vague).

As in those cases, the term "unjustifiable physical pain" in Washington's first degree animal cruelty statute does not provide "ascertainable standards for locating the line between innocent and unlawful behavior." Pullman, 82 Wn.2d at 799. The statute is therefore unconstitutionally vague as applied in this case.

d. The convictions must be reversed and the charges dismissed. When a penal statute is unconstitutionally vague as applied to the defendant's conduct, the remedy is reversal of the conviction and dismissal of the charge. See, e.g., Hilt, 99 Wn.2d at 455-56. Thus, Ms. Peterson's convictions must be reversed and the charges dismissed.

2. THE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED BECAUSE THE JURY WAS INSTRUCTED ON A MEANS OF COMMITTING THE CRIME THAT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

a. Where a statute provides for alternative means of committing a crime, the jury may be instructed on only those means supported by substantial evidence. Criminal defendants in Washington have a fundamental constitutional right to a unanimous jury verdict. Const. art. I, §§ 21, 22; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). When the crime charged can be committed by more than one means, jury unanimity is not required

as to the means by which the crime was committed only if substantial evidence supports each of the relied-upon alternatives. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). Thus, the jury should be instructed on only those means for which there is substantial evidence. State v. Franco, 96 Wn.2d 816, 824, 639 P.2d 1320 (1982) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)).

Two purposes of this alternative means doctrine are to prevent jury confusion about what criminal conduct must be proved beyond a reasonable doubt, and to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict. State v. Smith, 159 Wn.2d 778, 789, 154 P.3d 873 (2007).

b. This was an alternative means case. Alternative means crimes are those that provide the proscribed criminal conduct may be proved in a variety of ways. Smith, 159 Wn.2d at 784 (citing State v. Arndt, 87 Wn.2d 374, 384, 553 P.2d 1328 (1976)). "As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." Smith, 159 Wn.2d

at 784. Alternative means crimes generally "describe *distinct acts* that amount to the same crime." State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). Where the various methods of committing a crime "are not merely descriptive or definitional of essential terms," but "are themselves essential terms," they are statutory alternative means subject to the alternative means doctrine. State v. Nonog, 145 Wn. App. 802, 812, 187 P.3d 335 (2008), aff'd, 169 Wn.2d 220, 237 P.3d 250 (2010).

Here, the statute sets forth at least three distinct alternative means of committing the crime. RCW 16.52.205(2) provides:

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.

Three distinct means of committing the crime are by (1) starving, (2) dehydrating, or (3) suffocating an animal and as a result causing substantial and unjustifiable physical pain. Id. These means "describe *distinct acts* that amount to the same crime." Peterson, 168 Wn.2d at 770. They are not merely descriptive or definitional but are themselves essential terms. See Nonog, 145 Wn. App. at 812. Thus, the crime is an alternative means crime.

c. The jury was instructed on an alternative means of committing the crime that was not supported by substantial evidence. The question on review of an alternative means case is whether substantial evidence supports each of the means presented to the jury. State v. Randhawa, 133 Wn.2d 67, 74, 941 P.2d 661 (1997). The substantial evidence test is satisfied only if the reviewing court is convinced that a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 410-11.

Here, the jury was instructed on two alternative means of committing the crime. The to-convict instructions provided the jury must find "the defendant, acting with criminal negligence, starved or dehydrated" each horse and "[a]s a result, the horse suffered substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering or death." CP 213-18.

But the State did not present substantial evidence that Ms. Peterson dehydrated the horses causing them to suffer substantial and unjustifiable pain. Several witnesses testified the horses did not have adequate water. RP 85-86, 242, 260, 314, 406, 485, 516, 519, 521. But none of the witnesses testified the horses were in

pain caused by dehydration. Dr. Miller testified Tyme was probably "uncomfortable" due to hunger but she could not say whether Tyme was in pain from dehydration. RP 136. Dr. Holohan testified Tyme was not in pain due to dehydration. RP 204-05. Dr. Haskins testified dehydration can cause colic, but none of the horses had colic. RP 315-16, 358. He did not testify any of the horses were in pain due to dehydration.

Thus, because the jury was instructed on the alternative means of dehydration, but the State did not present substantial evidence the horses were in pain due to dehydration, the alternative means doctrine was violated.

d. The error requires reversal. If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if the Court can determine the verdict was based on an alternative that was supported by substantial evidence. State v. Fleming, 140 Wn. App. 132, 136, 170 P.3d 50 (2007), overruled on other grounds by State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). Thus, if the State presented evidence of only one means, and the State's closing argument focused on only that means, the error is harmless. Nonog, 145 Wn. App. at 813. But if the State presented some evidence of each

alternative, and the deputy prosecutor argued the jury may convict the defendant under each alternative, the error is not harmless and the conviction must be reversed. E.g., State v. Allen, 127 Wn. App. 125, 135-37, 110 P.3d 849 (2005).

Here, as stated, the State presented some evidence of the dehydration alternative. Several witnesses testified the horses did not have adequate water. RP 85-86, 242, 260, 314, 406, 485, 516, 519, 521. In addition, the deputy prosecutor argued in closing that the jury could convict Ms. Peterson if it found the horses were in substantial pain from *either* starvation *or* dehydration. RP 888. The prosecutor argued the horses were both starving *and* dehydrated. RP 885-87, 889.

Thus, because the State presented some evidence of both alternatives, and the deputy prosecutor argued the jury could convict under either alternative, the error is not harmless and the convictions must be reversed. Allen, 127 Wn. App. at 135-37.

3. THE RESTITUTION ORDER IS UNLAWFUL  
BECAUSE THE COUNTY WAS NOT A  
"VICTIM" OF THE CRIME WITHIN THE  
MEANING OF THE SRA

The State requested restitution in the amount of \$49,926.92 to cover costs incurred by the county in investigating the crime and caring for the seized horses that were the subject of the criminal

charges. CP 47-171. Defense counsel objected, arguing the county was not a "victim." RP 970. The court overruled the objection. RP 980. The court awarded a total of \$48,108.23 in restitution to cover the county's costs. Sub #106.

The restitution order was unlawful because the County was not a "victim" of the crime within the meaning of the SRA.

a. Restitution may be awarded only to cover damages incurred by a "victim" of a crime. A trial court's authority to order restitution is derived solely from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010). Whether the court exceeded its statutory authority in imposing restitution is an issue of law reviewed de novo. State v. Burns, 159 Wn. App. 74, 78, 244 P.3d 988 (2010).

"When a person is convicted of a felony, the court shall impose punishment" only as provided in the SRA. RCW 9.94A.505(1). If a felony sentence includes restitution<sup>19</sup>, "[t]he court shall order restitution as provided in RCW 9.94A.750 [for offenses committed on or before July 1, 1985] and 9.94A.753 [for offenses committed after July 1, 1985]." RCW 9.94A.505(7). RCW

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<sup>19</sup> "'Restitution' means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs." RCW 9.94A.030(42).

9.94A.753(5) provides: "Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property . . . ."

"A restitution recipient must be a 'victim'" of the crime. State v. Kisor, 82 Wn. App. 175, 183, 916 P.2d 978 (1996), abrogated on other grounds by State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999). A "victim" is "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(53).

b. The county was not a "victim" of the crime. As stated, the SRA defines a "victim" as a "person." RCW 9.94A.030(53). Ms. Peterson is aware of no Washington case holding that an animal is a "person" which can be a "victim" of a crime for purposes of restitution. When a crime is committed against an animal and the animal is injured as a result, the animal's owner is the "victim." Kisor, 82 Wn. App. at 183 (where police dog was shot and killed, dog's owner suffered direct property loss that was potentially compensable by means of restitution). The animal itself is not a victim.

Courts in other jurisdictions have explicitly held that an animal cannot be a "victim" for purposes of restitution. See, e.g.,

People v. Brunette, 194 Cal. App. 4th 268, 278, 124 Cal. Rptr. 3d 521 (2011) (in prosecution for animal cruelty, animal welfare agency that had to arrange care for dogs it rescued was not "victim" for purposes of restitution, as restitution statute applied only to persons, not dogs); People v. Thornton, 286 Ill. App.3d 624, 676 N.E.2d 1024, 222 Ill.Dec. 60 (1997) (restitution statute did not authorize restitution for costs related to impoundment of dog, as animals are not "persons" for purposes of restitution); State v. Garrett, 29 Or. App. 505, 564 P.2d 726 (1977), rev'd on other grounds, 281 Or. 281, 574 P.2d 639 (1978) (in prosecution for animal cruelty, order awarding restitution to Humane Society for care and feeding of dogs was unlawful, as Humane Society was not victim of crime).

In Washington, a third-party entity or agency may qualify for restitution, but only to cover costs incurred on behalf of the direct (human) victim of the crime. E.g., State v. Davison, 116 Wn.2d 917, 921, 809 P.2d 1374 (1991) (restitution was authorized to cover wages paid by City of Seattle to direct "victim" for amount of time that victim was unable to work as fire fighter while recovering from injuries resulting from assault); State v. Hahn, 100 Wn. App. 391, 398, 996 P.2d 1125 (2000) (Department of Social and Health

Services qualified as "victim" for purposes of restitution because agency paid for direct victim's medical treatment and property loss); State v. Jeffries, 42 Wn. App. 142, 144-45, 709 P.2d 819 (1985) (reimbursement to Labor and Industries for disability and medical expenses of assault victim); State v. Barnett, 36 Wn. App. 560, 562, 675 P.2d 626 (1984) (reimbursement to insurance company which paid for losses sustained by insured because of burglary).

Here, the State sought and the court awarded restitution under a specific provision of the animal cruelty statute, RCW 16.52.200. RP 972, 979. That statute provides:

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.

16.52.200(6).

But as discussed, restitution may be awarded in a felony criminal case only as authorized by the SRA. RCW 9.94A.505(1), (7). The SRA authorizes restitution only to cover costs incurred by a "victim" of the crime, who must be a person, or by a third party for costs incurred on behalf of the direct victim. Davison, 116 Wn.2d at

921; Kisor, 82 Wn. App. at, 183; RCW 9.94A.030(53). Thus, the restitution award in this case was not authorized by the SRA, notwithstanding RCW 16.52.200(6).

This conclusion does not render RCW 16.52.200(6) without effect, however. The statute provides that a person convicted of animal cruelty "shall be *liable* for reasonable costs incurred pursuant to this chapter by law enforcement agencies, animal care and control agencies." RCW 16.52.200(6) (emphasis added). The County may seek damages in civil court.

Nothing in the SRA limits or replaces civil remedies. RCW 9.94A.753(9) ("This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or offender . . ."). It is not unfair to require the County to seek reimbursement for its losses in a civil proceeding. "[C]ompensation is not the primary purpose of restitution and the "criminal process should not be used as a means to enforce civil claims.'" State v. Moen, 129 Wn.2d 535, 542, 919 P.2d 69 (1996) (quoting State v. Martinez, 78 Wn. App. 870, 881, 899 P.2d 1302 (1995)). Unlike restitution in criminal cases, the primary purpose of civil awards is to compensate for loss. State v. Ewing, 102 Wn. App. 349, 352, 7 P.3d 835 (2000).

In sum, the restitution award was not statutorily authorized because the County is not a "victim" of the crime.

c. The restitution order is void. An order imposing restitution is void if statutory provisions are not followed. State v. Lewis, 57 Wn. App. 921, 924, 791 P.2d 250 (1990). Because the court was not authorized to award restitution to cover the costs incurred by the County, the restitution order is void.

#### F. CONCLUSION

The first degree animal cruelty statute is vague as applied to Ms. Peterson's conduct and therefore the convictions must be reversed and the charges dismissed. Alternatively, because Ms. Peterson's constitutional right to jury unanimity was violated, the convictions must be reversed and remanded. In addition, the restitution order is void because the County was not a "victim" of the crime.

Respectfully submitted this 28th day of October 2011.

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Washington Appellate Project - 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 66876-51-I
	)	
MARY PETERSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |   |                   |                                     |
|-----|---|-------------------|-------------------------------------|
| [X] | SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | MARY PETERSON<br>5904 W CONKLING RD<br>WORLEY, ID 83876   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 28<sup>TH</sup> DAY OF OCTOBER, 2011.

X \_\_\_\_\_ 

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