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IN THE SUPREME COURT OF THE STATE OF OREGON

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STATE OF OREGON,

Plaintiff-Respondent,  
Respondent on Review,

v.

LINDA DIANE FESSENDEN,

Defendant-Appellant  
Petitioner on Review.

Douglas County Circuit Court  
Case No. 10CR2252MI

S061740 (Control)

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STATE OF OREGON,

Plaintiff-Respondent,  
Respondent on Review,

v.

TERESA ANN DICKE,

Defendant-Appellant  
Petitioner on Review.

Douglas County Circuit Court  
Case No. 10CR2252MI

S061770

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REPLY BRIEF OF PETITIONER ON REVIEW,  
LINDA DIANE FESSENDEN

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Review of the Decision of the Court of Appeals  
On appeal from a Judgment  
Of the Circuit Court for Douglas County  
Honorable GEORGE W. AMBROSINI, Judge

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Opinion Filed: September 25, 2013  
Author of Opinion: Hadlock, J.  
Before: Ortega, P.J., and Sercombe, J., and Hadlock, J.

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*Continued ... ..*

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## REPLY BRIEF OF PETITIONER ON REVIEW

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### SUMMARY OF ARGUMENT

A trial court's state constitutional error is harmful and requires reversal unless there is "little likelihood" that the error affected the verdict. A federal constitutional error requires reversal unless the record establishes that the error was "harmless beyond a reasonable doubt." In this case, the erroneously admitted evidence established that the horse had not become malnourished because of an illness, old age, or other medical problem and that the horse gained weight easily when it received proper care. The trial court's error in admitting that evidence was harmful and requires reversal, because the evidence (1) supported the state's theory that lack of proper feeding caused the horse's emaciated condition, (2) contradicted defense evidence that the horse had, in fact, received proper care, and (3) was not merely cumulative of other evidence.

### ARGUMENT IN REPLY

- I. The harmless error analysis requires this court to consider whether the erroneously admitted evidence was relevant to either the prosecution or defense theory of the case and whether the jury likely viewed the evidence as merely cumulative.**

A ruling by the trial court must be both erroneous and prejudicial to merit reversal. OEC 103(1); Or Const, Art VII (Amended), § 3. An error is harmless if there is "little likelihood that the error affected the verdict." *State v. Davis*,

336 Or 19, 30, 77 P3d 1111 (2003). This court will not “weigh the evidence and seek to determine whether, disregarding the error, the defendant nevertheless probably would have been found guilty.” *State v. Miskell*, 351 Or 680, 699, 277 P3d 522 (2012). Thus, in the case of erroneously admitted evidence, the standard is not whether the properly admitted evidence was sufficient to convict. Instead, the court will consider the relevance of the evidence to the state’s case or to the defense and whether the jury would have viewed the evidence as merely cumulative. *Id.* at 701-02 (finding evidentiary error harmful under that standard).

A federal constitutional error is harmless “‘if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.’” *State v. Cook*, 340 Or 530, 544, 135 P3d 260 (2006) (quoting *Delaware v. Van Arsdall*, 475 US 673, 681, 106 S Ct 1431, 89 L Ed 2d 674 (1986)); *see also Chapman v. California*, 386 US 18, 21, 87 S Ct 824, 17 L Ed 2d 705 (1967) (holding that state courts must apply the federal harmless error standard to violations of federal constitutional rights).

**II. The trial court’s error was not harmless, because evidence derived from the illegal search established that the horse’s emaciated condition was caused by defendant’s failure to provide minimum care.**

Here, the trial court’s error resulted in the improper admission of evidence derived from the officer’s warrantless entry onto codefendant’s

property and seizure of the horse. The warrantless entry uncovered, among other things, three categories of evidence, which comprised the bulk of the state's case: (1) the testimony of the veterinarian, Dr. Giri, who determined that the horse was not ill and had no underlying medical problems; (2) the testimony of Darla Clark, who testified that the horse regained a healthy weight after being fed a special diet; and (3) defendant's post-seizure statements that she owned the horse and was responsible for its care.

The state argues that if the trial court erred in admitting that evidence, the error was harmless, because the state presented "ample" untainted evidence from which the jury could have convicted defendant. Brief on the Merits of Respondent on Review at 46-48. Specifically, the state relies on the officer's testimony about the horse's malnourished appearance combined with defendant's and Dicke's testimony that they knew the horse required a special diet. *Id.* at 47-48. The state's argument fails to apply the correct harmless error standard, because it does not identify and consider the potential impact of the erroneously admitted evidence.

The state's theory of the case was that the horse's emaciated condition resulted from both defendants' knowing failure to provide the horse with the special diet that it required. However, codefendant Dicke testified that she had been feeding the horse the special diet as she understood it, including additional supplements, and that she believed the horse was emaciated because it was

“dying from old age.” Tr 785, 795, 803-06, 815-16. Because defendant had moved away from the property, Dicke was the only witness who could have known whether the horse was receiving that special diet during the period of time that the horse became emaciated. *See* Tr 745-46 (defendant testifying that she did not know why the horse was losing weight and that Dicke had told her that she was feeding the horse regularly).

The erroneously admitted evidence was not harmless because it directly supported the state’s theory, contradicted Dicke’s testimony regarding the care that the horse received, and was not cumulative of other evidence. The testimony of Giri and Clark established that the horse’s emaciated condition was not caused by any underlying illness, old age, or other medical problem, and that its emaciation was cured solely by providing it with the specialized diet. That evidence was qualitatively different from the officer’s testimony about his visual observations of the horse’s condition, because the latter would not have ruled out other potential causes of the horse’s emaciation. And it was not merely cumulative of the defendants’ testimony that they were aware of the horse’s special feeding requirements, because it supported the conclusion that the horse was not actually receiving that care.

Applying the correct harmless error standard, this court on review cannot say that the erroneously admitted evidence had little likelihood of affecting the verdict or that it was harmless beyond a reasonable doubt.



## CONCLUSION

This court should reverse the decision of the Court of Appeals and remand the case to the trial court for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

### Petition length

I certify that (1) this petition complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 978 words.

### Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Reply Brief of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on April 7, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Reply Brief of Petitioner on Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent, and served on Rankin Johnson IV #964903, Attorney at Law, Law Offices of Rankin Johnson IV, LLC, 714 SW 20<sup>th</sup> Place, Portland OR 97205, attorney for Petitioner on Review, Teresa Ann Dicke.

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