IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. LISA DIANE FESSENDEN, Defendant-Appellant, Petitioner on Review	Douglas County Circuit Court Case No. 10CR2252MI Court of Appeals No. A150065 Supreme Court No. S061740 (Control)
STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. TERESA ANN DICKE, Defendant-Appellant, Petitioner on Review	Douglas County Circuit Court Case No. 10CR2251MI Court of Appeals No. A150092 Supreme Court No. S061770

BRIEF OF AMICUS CURIAE
Animal Legal Defense Fund, National District Attorneys Association, and Association of Prosecuting Attorneys

Review of the Decisions of the Court of Appeals on an Appeal
from a Judgment of the Circuit Court for Douglas County,
The Honorable George William Ambrosini, Judge (Fessenden),
and a Judgment of the Circuit Court for Multnomah County,
The Honorable George William Ambrosini, Judge (Dicke)

Opinion Filed: September 25, 2013
Author of Opinion: Hadlock, Judge
Before: Ortega, Presiding Judge, Sercombe, Judge, and Hadlock, Judge (Fessenden)

Per Curiam Opinion Filed: September 25, 2013
Before: Ortega, Presiding Judge, Sercombe, Judge, and Hadlock, Judge (Dicke)

ELLEN F. ROSENBLUM, #753239
Attorney General
ANNA JOYCE, #013112
Solicitor General
PAMELA WALSH, #894034
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
(503) 378-4402
pamela.j.walsh@state.or.us
Attorneys for Respondent on Review

PETER GARTLAN, #870467
Chief Defender
ELIZABETH DAILY, #111758
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
(503) 378-3349
Elizabeth.Daily@opds.state.or.us
Attorneys for Petitioner on Review (Fessenden)

LORA DUNN, OSB #133460
Animal Legal Defense Fund
919 SW Taylor, Suite 401
Portland, OR 97205-2542
(503) 231-1602 ext. 307
ldunn@aldf.org
Attorney for Amicus Curiae Animal Legal Defense Fund National District Attorneys Association Association of Prosecuting Attorneys

RANKIN JOHNSON IV, # 964903
Law Office of Rankin Johnson IV, LLC
208 SW First Ave, Ste 220
Portland, OR 97204
(503) 307-9560
rankin@briefwright.com
Attorney for Petitioner on Review (Dicke)

Filed March 2014

TABLE OF CONTENTS

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 2

QUESTION PRESENTED 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. Oregon has a comprehensive public policy of protecting animals against cruelty and neglect which mandates application of the emergency exception to animals 4

II. Case law in other states has uniformly upheld the application of the Fourth Amendment emergency exception to animals 12

III. Application of the emergency exception to animals is consistent with and will in no way erode Fourth Amendment protections against warrantless search and seizure 15

A. Potential considerations in cases involving the application of the emergency exception to animals 16

IV. Article One, Section Nine of the Oregon Constitution should be construed in the same manner as the Fourth Amendment to the US Constitution in deciding whether the emergency exception applies to animals 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Brigham City v. Stuart,
547 US 398 (2006) 10

Brinkley v. Cnty of Flagler,
769 So 2d 468 (Fla App 2000) 13

Broden v. Marin Humane Soc'y,
70 Cal App 4th 1212, 83 Cal Rptr 2d 235 (1999) 9

Cady v. Dombrowski,
413 US 433 (1973) 16

Commonwealth v. Duncan,
No. SJC-11373 12

Davis v. State,
907 NE 2d 1043 (Ind App 2009) 11, 21

Hegarty v. Addison Cnty Humane Soc'y,
176 Vt 405, 848 A2d 1139 (Vt 2004) 13

Mincey v. Arizona,
437 US 385, 98 S Ct 2408, 57 L Ed2d 290 (1978) 23, 24

Morgan v. State,
285 Ga App 254, 645 SE 2d 745 (2007) 13

Morgan v. State,
289 Ga App 209, 656 SE 2d 857 (2008) 13

People v. Chung,
185 Cal App 4th 247, 110 Cal Rptr 3d 253 (2010) 21

People v. Rogers,
184 Misc 2d 419, 708 NYS 2d 795 (NY App 2000) 11, 14

People v. Thornton,
286 Ill App 3d 624, 676 NE 2d 1024 (1997).....13, 21

Pine v. State,
889 SW 2d 625 (Tex App 1994).....13

Siebert v. Severino,
256 F3d 648 (7th Cir 2001) 13

State ex Re Juvenile Dep't v. Rogers,
314 Or 114, 836 P2d 127 (1992) 23

State v. Baker,
350 Or 641, 260 P3d 476 (2011) 18, 24

State v. Bauer,
127 Wis 2d 401, 379 NW 2d 895 (1985) 11

State v. Berry,
92 SW 3d 823 (Mo App 2003) 13

State v. Bridewell,
306 Or 231, 759 P2d 1054 (1988) 10

State v. Caraher,
293 Or 741, 653 P2d 942 (1982) 23

State v. Davis,
295 Or 227, 666 P2d 802 (1983) 24

State v. Demarco,
SC 18738.....12

State v. Follett,
115 Or App 672, 840 P2d 1298 (1992) 15, 24

State v. Jones,
45 Or App 617, 608 P2d 1220, *rev den*, 289 Or 337 (1980).....24

State v. Martin,
124 Or App 459, 863 P2d 1276 (1993) 24

State v. Miller,
300 Or 203, 709 P2d 225 (1985) 24

State v. Stone,
321 Mont 489, 92 P3d 1178 (2004) 9

State v. Stoudamire,
198 Or App 399, 108 P3d 615 (2005) 23

Suss v. ASPCA,
823 F Supp 181 (SDNY 1993) 16, 17, 18, 21

Tuck v. United States,
477 A2d 1115 (DC 1984) 10

CONSTITUTIONAL AND STATUTORY PROVISIONS

L. 1864, § 643 5

L. 1885, P. 45, §1 5

Colo Rev Stat § 18-9-202 5

Conn Gen Stat § 53-247 5

DC Code § 22-1001 5

Mass Gen Laws ch 272, § 77 5

NY Agric & Mkts Law § 353 5

Or Const Art I, § 9 ..... *passim*

Or Const, Art XV, § 10 8

ORS 87.159 8

ORS 133.377 8

ORS 133.379 8

ORS 161.605 6

ORS 161.625 6

ORS 167.310 ..... 6, 20
ORS 167.315 6
ORS 167.320 6
ORS 167.322 6
ORS 167.325 ..... 6, 7
ORS 167.330 ..... 6, 7
ORS 167.332 7
ORS 167.333 6
ORS 167.337 6
ORS 167.340 6
ORS 167.345 8
ORS 167.347 8
ORS 167.348 8
ORS 167.349 8
ORS 167.350 8
ORS 167.352 6
ORS 167.355 6
ORS 167.365 6
ORS 167.372 6
ORS 167.376 6
ORS 686.445 7
ORS 686.455 7
US Const Amend IV ..... *passim*
42 USC § 1983 ..... 16, 18

OTHER AUTHORITIES

2013 Humane State Rankings,
Humane Society of the United States (Jan 6 2014),
http://www.humanesociety.org/about/state/humane-state-ranking-2013.html 4

2013 US Animal Protection Laws Rankings,
Animal Legal Defense Fund (Dec 16 2013), http://aldf.org/press room/press-releases/annual-study-names-2013s-top-five-states-to be-an-animal-abuser/ 4

SB 6, 77th Leg Assemb, Reg Sess..... 7, 15

Staff Measure Analysis, Senate Judiciary Committee, SB 508,
Mar 14, 1985, 1 5

BRIEF OF AMICUS CURIAE

STATEMENT OF INTEREST

Founded in 1979, the Animal Legal Defense Fund ("ALDF") is a national nonprofit organization of attorneys specializing in the protection of animals and working to ensure the enforcement of animal protection laws throughout the United States. Toward this end the ALDF's Criminal Justice Program, based in Portland, Oregon, provides free prosecution assistance in animal neglect and cruelty cases nationwide, both independently and in partnership with the National District Attorneys Association and the Association of Prosecuting Attorneys. ALDF staff attorneys work out of offices in five states, helped by over 1,000 volunteer attorneys nationwide who are ALDF members and who work on a pro bono basis. Total contributing membership of the ALDF is over 100,000.

The ALDF, with the depth of its expertise on the entire spectrum of Fourth Amendment issues which arise in cases of animal cruelty and neglect, is uniquely able to assist the Court in deciding the issue presented by the instant case.

Founded over sixty years ago, the National District Attorneys Association ("NDAA") boasts approximately 6,000 members and is both the largest and primary association of prosecuting attorneys in the United States. The NDAA's mission is "[t]o be the voice of America's prosecutors and to

support their efforts to protect the rights and safety of the people." In practice, the NDAA provides professional guidance and support to its members, serves as a resource and education center, and follows and addresses public policy issues involving criminal justice and law enforcement, including the protection of animals.

The Association of Prosecuting Attorneys ("APA") was founded as a national organization to represent all prosecutors and to further the prevention of crime and the attainment of equal justice and community safety. The APA's board of directors includes current and former prosecutors from states throughout the nation. As such, the APA acts as a forum for the exchange of ideas, which allows prosecutors to collaborate with each other, along with other criminal justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, including the submission of briefs as *amicus curiae* in appropriate cases.

STATEMENT OF THE CASE

The *amici curiae* ALDF, NDAA, and APA adopt the statement of the case as recited by the Court of Appeals.

QUESTION PRESENTED

Does the emergency exception to the requirement of a warrant under the Fourth Amendment of the United States Constitution and Article I, Section 9 of

the Oregon Constitution permit warrantless entry and seizure to save the life of an animal in distress and on the verge of death?

SUMMARY OF THE ARGUMENT

The Deputy Sheriff in the instant case saw from a common driveway a severely emaciated animal which in his professional opinion, based on 22 years of experience investigating animal complaints, was near death. Had he spotted a similarly situated human being, his warrantless entry onto the premises to save the life thus in jeopardy would have been a textbook example of the "pure emergency" or "emergency" exception to the requirement of a warrant under the Fourth Amendment to the United States Constitution and its counterpart in the Oregon Constitution, Article I, Section 9. The issue presented in this appeal arises only because the life saved was that of a non-human animal, specifically a horse: The Court must decide whether because of this difference a contrary result is required under either the Fourth Amendment or Article I, Section 9.

The strong public policy of animal protection in this State calls for a negative answer to this question: that animals, like humans, should be afforded the protection of the emergency exception in appropriate circumstances and subjected to the same evidentiary requirements that apply to the emergency exception in any other context. This is the position that has been adopted in other states which have decided the issue under the Fourth Amendment, in an evolving body of case law with virtually no contrary authority. Application of

the emergency exception to animals will in no way detract from or erode the strong policy against warrantless searches and seizures embodied in the Fourth Amendment.

ARGUMENT

I. Oregon has a comprehensive public policy of protecting animals against cruelty and neglect which mandates application of the emergency exception to animals.

In recent years Oregon has taken the lead in the prevention of cruelty to animals and ranks among the states affording the highest level of such protections.[1] It would be a tragic aberration, in the face of this manifest sensitivity to and concern for animals, if this Court were not to accord animals in the State the protection of the emergency exception, in essence requiring law enforcement to let an animal suffer and perhaps die rather than intercede without a warrant.

Oregon's first comprehensive animal cruelty legislation, enacted in 1885, penalized (in recognizably nineteenth-century language common to the day) "whoever overdrives, overloads, drives when overloaded, overworks, tortures,

---

[1] In 2013, both the Animal Legal Defense Fund and the Humane Society of the United States ranked Oregon number two for its animal protection laws. *2013 US Animal Protection Laws Rankings*, Animal Legal Defense Fund (Dec 16, 2013), http://aldf.org/press-room/press-releases/annual-study-names-2013s-top-five-states-to-be-an-animal-abuser/; *2013 Humane State Rankings*, Humane Society of the United States (Jan 6, 2014), http://www.humanesociety.org/about/state/humane-state-ranking-2013.html.

torments, deprives of necessary sustenance, cruelly beats, mutilates or cruelly kills, or causes or procures to be so overdriven or overloaded, overworked, tortured, tormented, deprived of necessary sustenance, cruelly beaten, mutilated or killed, any animal." L. 1885, p. 45, §1.[2] Also as was customary in the day, the offense was placed in the chapter entitled "Of Crimes Against Morality and Decency," thus evidencing not so much concern for the animal as for the corrupting influence of animal cruelty on humans.

Much of this language, which now rings archaic in our ears, can still be found in the animal cruelty laws in a number of states, retained even as societal attitudes toward animals have shifted.[3] Oregon law, by contrast, contains no remnant from that era; this State has gone far beyond and developed, since 1985, one of the most comprehensive, sophisticated, and carefully calibrated schemes in the country for the protection of animals from abuse and the punishment of abusers.[4]

---

[2] Twenty-one years earlier, in 1864, the Legislature had enacted a narrower statute which covered only cruelly beating or torturing an animal. L. 1864, § 643.

[3] *See, eg,* Colo Rev Stat § 18-9-202; Conn Gen Stat § 53-247; DC Code § 22-1001; Mass Gen Laws ch 272, § 77; NY Agric & Mkts Law § 353.

[4] In 1985, the Oregon Legislature revised its cruelty code to reflect changing public attitudes that "animals should be given greater protection from cruel treatment and neglect." Staff Measure Analysis, Senate Judiciary Committee, SB 508, Mar 14, 1985, 1.

Chapter 167 of the Revised Statutes, under the subheading "Offenses *Against Animals*" (emphasis added),[5] meticulously defines no fewer than five distinct crimes in the nature of animal cruelty or neglect, ranging from animal neglect in the second degree ("intentionally, knowingly, recklessly or with criminal negligence fail[ing] to provide minimum care for an animal in [a] person's custody or control," with "minimum care" defined in ORS 167.310(7)) to aggravated animal abuse in the first degree ("maliciously" killing or "intentionally or knowingly" torturing an animal, with "maliciously" and "torture" both being defined terms).[6] ORS 167.315 (animal abuse in the second degree), 167.320 (animal abuse in the first degree), 167.322 (aggravated animal abuse), 167.325 (animal neglect in the second degree), 167.330 (animal neglect in the first degree). In certain circumstances any of the five offenses other than animal abuse in the second degree can give rise to a Class C felony, the punishment for which is imprisonment for up to five years, ORS 161.605, and a fine of up to $125,000, ORS 161.625. Tellingly, just this past year the

---

[5] Chapter 167 itself is now titled "Offenses Against Public Health, Decency, *and Animals*" (emphasis added).

[6] Other "offenses against animals" that are separately proscribed include sexual assault of an animal (ORS 167.333), interfering with or assaulting a law enforcement animal (ORS 167.337), interfering with a service animal (ORS 167.352), abandoning an animal (ORS 167.340), involvement in animal fighting other than dogfighting (ORS 167.355), dogfighting (ORS 167.365), possessing dogfighting paraphernalia (ORS 167.372), and failure by a dog breeder to comply with detailed standards of care (ORS 167.376).

Legislature—finding that "[a]nimals are sentient beings capable of experiencing pain, stress and fear … [and] should be cared for in ways that minimize pain, stress, fear and suffering," SB 6, 77th Leg Assemb, Reg Sess (Or. 2013) — elevated the penalty for animal neglect in the first or second degree to a Class C felony where certain aggravating factors are met, such as the offender having a history of prior offenses against animals or a certain number of animals being subjected to the cruelty. ORS 167.325(3); 167.330(3). Upon conviction of an offense against animals, in addition to other applicable punishment, the offender is barred from possessing a domestic animal or an animal of the same genus as the animal subjected to the crime for five years (for a misdemeanor offense) or 15 years (for a felony). ORS 167.332(1). Violation of the possession prohibition is itself a misdemeanor. ORS 167.332(2).[7]

Oregon also has taken multiple steps to ensure that animal cruelty is reported, that the laws criminalizing it are enforced, that the victimized animals are provided promptly with proper care at the cost of the offender, and that neglected or abused animals are not returned to a situation in which they might be mistreated again. *See* ORS 686.455 (veterinarians required to report aggravated animal abuse); ORS 686.445 (veterinarians may report any abandoned, abused, or neglected animal, with immunity from liability for doing

[7] Under certain narrow, carefully delineated circumstances the possession prohibition does not apply if the conviction involved livestock.

so); ORS 133.379 (peace officers required to arrest and prosecute violations of animal protection laws); ORS 133.377 (upon arrest, peace officers required to provide care for cruelly treated animals until owner takes charge, with costs of care becoming a lien on the animal); ORS 167.345 (peace officer may enter premises to provide cruelly treated animal with food, water and emergency care and may impound the animal); ORS 87.159 (agency holding impounded animal has lien on the animal for costs of care); ORS 167.347 (agency holding impounded animal may petition court for pre-conviction forfeiture; if court at hearing finds probable cause of mistreatment, animal shall be forfeited unless owner or other claimant posts bond for costs of care); ORS 167.348 (agency holding forfeited animal may not place animals with family member or friend of offender who aided or abetted in the offense or anyone who lives with the offender; new owner must agree to provide minimum care to the animal); ORS 167.349 (new owner of forfeited animal may not allow prior owner to possess the animal; violation is a misdemeanor); ORS 167.350 (court may order post-conviction forfeiture of mistreated animal and, in addition to any other penalty, may order defendant to repay pre-conviction costs of care of the animal).[8]

[8] That these enactments have the full support of the people of Oregon is demonstrated by their approval in 2008 of a ballot measure amending Or Const, Art XV, § 10 (10) (the Oregon Property Protection Act) to exempt "forfeiture of animals that have been abused, neglected or abandoned," thus ensuring that the pre-conviction forfeiture prescribed by ORS 167.347 could not be challenged constitutionally.

Taken together, these laws demonstrate that it is the public policy of Oregon to recognize that animal life is valuable in and of itself, that it is a proper and indeed fundamental goal of a civilized society to protect and preserve animal life against gratuitous harm, and that the primary victim of the crime of cruelty to animals is not society at large but the animals themselves.

It follows from this strong public policy of animal protection in Oregon that the ambit of the emergency exception must encompass animals as well as humans. This logic has been persuasive to courts in a number of other jurisdictions considering this issue as a matter of first impression, including California, the District of Columbia, Indiana, Montana, New York, and Wisconsin. *See State v. Stone*, 321 Mont 489, 497, 92 P3d 1178 (2004) (dead and dying rabbits in cages on defendant's fenced property—"As evidenced by the various states' statutory language quoted above, the District of Columbia, Wisconsin, Illinois, Texas, and Montana have all enacted laws, evidencing a strong public policy of preventing mistreatment and cruelty to animals . . . . Montana's public policy is the same and is exemplified through the legislative history of [the Montana animal cruelty statute], and the legislature's adoption of increasingly strong protections for animals against the cruelty and mistreatment of those who would abuse them."); [9] *Broden v. Marin Humane Soc'y*, 70 Cal

[9] In *Stone*, the Montana Supreme Court applied not the "pure emergency" exception, on which the Court of Appeals in the instant case relied, but rather

App 4th 1212, 1217, 1222, 83 Cal Rptr 2d 235, 237, 240 (1999) (entry into closed exotic reptile shop where two snakes were dead and the stench was "horrific"—"There is no question that law enforcement officers may make warrantless entry of a building when there are reasonable grounds for believing that persons inside are in need of immediate aid. Section 597.1 [California's anti-cruelty statute] clearly contemplates that animals shall receive a similar solicitude.") (internal citation omitted); *Tuck v. United States*, 477 A2d 1115, 1120 (DC 1984) (rabbit suffering heat stroke in display window of pet store—"Although the exigency in the present case involved the protection of animal life rather than human life, we believe that the 'public interest' in the preservation of life in general and in the prevention of cruelty to animals in particular 'require[s] some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search.' Indeed, given the inherent delay in obtaining a warrant, procurement of one under the 'exigent circumstances' of this case would most likely have frustrated the effective fulfillment of those

---

the "probable cause and exigent circumstances" exception. 321 Mont at 498. The latter exception was an alternative basis for the decision of the Trial Court in the instant case, but it was not mentioned by the Court of Appeals. The distinction between the two exceptions lies in the existence or not of probable cause, with the probable cause and exigent circumstances requiring probable cause and the emergency exception not. *See Brigham City v. Stuart*, 547 US 398, 403 (2006); *State v. Bridewell*, 306 Or 231, 236, 759 P2d 1054, 1058 (1988). On the issue before this Court, however, we submit there is no distinction: If an animal in distress can give rise to an exigent circumstance for purposes of the probable cause and exigent circumstances exception, it can likewise give rise to an emergency for purposes of the emergency exception.

public interests.") (internal citation omitted); *Davis v. State*, 907 NE 2d 1043, 1050 (Ind App 2009) (13 emaciated dogs on defendant's property, living in filth— "[C]ircumstances of animal cruelty may create exigent circumstances to permit a warrantless search of the curtilage. Similar to those states that have determined the threat to animal life to be a basis for exigent circumstances, Indiana's animal cruelty statute evidences a strong public policy against the mistreatment of animals[.]"); *People v. Rogers*, 184 Misc 2d 419, 421, 708 NYS 2d 795, 797 (NY App 2000) (entry into closed pet store with dead animals observable from the front—"To [sustain the motion to suppress] would undermine this state's efforts in regulating the welfare of animals."); *State v. Bauer*, 127 Wis 2d 401, 409, 379 NW 2d 895, 899 (1985) (one horse dead in plain view and others found starving in paddock and barn area—"[A] compelling need was demonstrated in this case. This need was to stop the ongoing suffering of the animals. The exigent standard test applies to situations involving mistreatment of animals. Cruelty to animals is a statutory offense. It is therefore state policy to render aid to relatively vulnerable and helpless animals when faced with people willing or even anxious to mistreat them.").

Notably, the statutes relied on in the above cases were simply the applicable prohibitions against animal cruelty, in some instances unchanged since the nineteenth century. Oregon's comprehensive statutory scheme, discussed above, demonstrates a far greater commitment to animal welfare than

would a simple prohibition of animal cruelty, especially one which the Legislature had not seen fit to revisit for over a century. *A fortiori*, therefore, the logic applied in those cases is equally applicable here.

II. Case law in other states has uniformly upheld the application of the Fourth Amendment emergency exception to animals.

A number of courts in other jurisdictions have confronted this issue on the federal level in recent years as a matter of first impression, as this Court does now. There is an evolving, virtually uniform body of case law, building on prior case law, that the emergency exception to the Fourth Amendment applies to animals.[10] This is not to say that every case has found on the facts presented that the emergency exception applied—that is a fact-based inquiry the result of which of necessity will not be uniform—but the legal principle is increasingly well-established that a warrantless entry and seizure may be effected to save an animal when that animal's life is in jeopardy as a result of human conduct if law enforcement reasonably believes that immediate intervention is required to save the life.

Authority to this effect arising in California, Indiana, Montana, New York, Wisconsin, and the District of Columbia is cited in the preceding section. There is like authority in Florida, Georgia, Illinois, Missouri, Texas, Vermont,

---

[10] Cases presenting this issue are currently pending before the Massachusetts Supreme Judicial Court (*Commonwealth v. Duncan*, No. SJC-11373) and the Connecticut Supreme Court (*State v. Demarco*, SC 18738).

and the United States Court of Appeals for the Seventh Circuit. *See Hegarty v. Addison Cnty Humane Soc'y*, 176 Vt 405, 408-410, 848 A2d 1139, 1142-45 (Vt 2004) (permitting warrantless seizure of emaciated horse); *Brinkley v. Cnty of Flagler*, 769 So 2d 468, 471-72 (Fla App 2000) (allowing warrantless entry to alleviate extreme animal hoarding); *Morgan v. State*, 285 Ga App 254, 256, 645 SE 2d 745, 747 (2007) (allowing warrantless entry onto property on bitterly cold day to save "'starving'" and "'distress[ed]'" dogs and other animals);[11] *People v. Thornton*, 286 Ill App 3d 624, 629, 676 NE 2d 1024, 1028 (1997) (permitting warrantless entry to apartment to rescue emaciated, grossly neglected dog); *State v. Berry*, 92 SW 3d 823, 830 (Mo App 2003) (acknowledging "that exigent circumstances in cases involving animal abuse constitute an exception to the search warrant requirement," but holding emergency not shown on the facts); *Pine v. State*, 889 SW 2d 625, 632 (Tex App 1994) (permitting warrantless entry onto property to save dying colt), *cert den*, 516 US 914 (1995);[12] *accord Siebert v. Severino*, 256 F3d 648, 657 (7th

---

[11] In *Morgan*, the Georgia Court of Appeals remanded the case to the trial court for a determination of whether on the facts exigent circumstances were shown, since the trial court had erroneously upheld the warrantless entry into and seizure from the backyard, as opposed to the front yard, on the basis of the plain view exception. 285 Ga App at 259. On remand, the trial court determined that there were exigent circumstances, and this decision was upheld on appeal. *Morgan v. State*, 289 Ga App 209, 656 SE 2d 857 (2008).

[12] In *Pine*, the "emergency doctrine" as articulated by the Texas Court of Appeals is essentially what we have called the "probable cause and exigent

Cir 2001) ("[e]xigent circumstances may justify a warrantless seizure of animals," but emergency not shown on facts).

The extant authority is also instructive in that it has overwhelmingly described these situations, in which a warrantless entry was made to save an animal in dire straits, as an intervention to save "life." For purposes of the Fourth Amendment the significance of the distinction between intervention to save property and to save life is unclear inasmuch as the emergency exception covers both, and in any event courts applying the Fourth Amendment have not found it necessary to rule on the question as such.[13] The emergency exception under Article I, Section 9, unlike the Fourth Amendment, has not been applied

---

circumstances" exception at note 9, *supra*, requiring probable cause that a crime has been committed. 889 SW 2d at 631. For the reasons stated in note 9, we believe this is a distinction without difference.

[13] The New York Supreme Court, Appellate Term, in *Rogers*, nominally took the position that animals are property for purposes of the emergency exception, stating: "Since the protection of property is encompassed in the [emergency] doctrine, this court finds no reason not to include therein the protection of animals which constitute property (3 NY Jur 2d, Animals, § 3)." 184 Misc 2d at 420. The discussion by that court of the emergency at hand, however, belies this characterization. An ASPCA officer entered a closed pet store because he could observe dead animals inside and heard a dog barking "plaintively." *Id.* at 421. "[I]t was highly probable that there were *living creatures* inside which required emergency medical attention. . . . [E]ntry into the closed store . . . was . . . to rescue the livestock. *The fact that no human life was in danger does not vitiate the urgency of the rescue.*" *Id.* (emphasis added).

as yet to extend to the protection of property as well as life.[14] Warrantless intervention becomes necessary precisely because, as the State of Oregon has recognized, animals suffer: They feel pain, cold, hunger and thirst. SB 6, *supra*. Computers and televisions do not. The scope of the emergency exception to save the life of an animal may not be co-terminous with the scope of the exception to save a human life, but what is at stake is unquestionably a life.

III. Application of the emergency exception to animals is consistent with and will in no way erode Fourth Amendment protections against warrantless search and seizure.

The emergency exception is narrow and carefully delineated. The burden is on the prosecution in every case to show that an emergency existed, and the test is an objective one, premised on how a reasonable person would have viewed the situation and what a reasonable person would have done in response. Application of the emergency exception to animals will in no way alter these fundamental principles. Rather, such application will recognize that it is socially desirable in the twenty-first century not to let an animal suffer and die needlessly, so that *in appropriate circumstances* a warrantless entry may be made to accomplish this result.

The defendant Fessenden's suggestion that extending the emergency exception to animals would open the floodgates to warrantless searches and

---

[14] In *State v. Follett*, the Court of Appeals explicitly declined to rule on this point. 115 Or App 672, 680 n 4, 840 P2d 1298 (1992).

seizures in frivolous circumstances such as "a tadpole adoption gone awry" is specious on its face. In any actual situations in which an overzealous state actor proceeded unreasonably without a warrant on the basis of a purported animal emergency that did not exist, private redress would be available under federal law, as it is in all other cases of illegal search and seizure by a state actor. *See* 42 USC § 1983; *see also Suss v. ASPCA*, 823 F Supp 181, 189-90 (SDNY 1993) (discussed *infra*).

A. Potential considerations in cases involving the application of the emergency exception to animals

Of necessity it is impossible to delineate a set of criteria which must be satisfied before the emergency exception can apply to an emergency involving animals, and the Court of Appeals, like virtually every other court which has decided this issue, wisely did not attempt to do so. As the United States Supreme Court has stated:

> The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide to determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions . . . and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this.

Cady v. Dombrowski, 413 US 433, 448 (1973) (internal citations omitted).

Each case that arises is unique, and a court's decision will turn on the totality of the relevant facts. One can, however, enumerate the considerations

which may play into this decision in any given case in which the emergency exception is claimed as permitting a warrantless entry or seizure to save an animal in distress—some peculiar to the animal context and some not. When applying the Fourth Amendment's rule of reasonableness, on a case-by-case basis, a court may consider the following factors:

- ***Causation of the animal's condition***. In the overwhelming majority of situations, the desperate condition of the animal will be the result of human neglect and/or abuse in violation of one or more of the Oregon animal cruelty statutes. In such circumstances the Oregon public policy discussed above strongly favors application of the emergency exception assuming other relevant factors evidence that an emergency existed. Whether that fact should be a necessary (but not sufficient) predicate for application of the emergency exception, however, is a much more difficult question which has not been decided and which we submit should not be decided in the abstract.

  In the only case to date involving such a situation, *Suss*, the United States District Court for the Southern District of New York wisely made no general pronouncement as to whether the emergency exception could ever apply in situations lacking an element of human-induced cruelty or abuse. 823 F Supp at 187. There a cat was trapped between two buildings, and the wall of one of the buildings was demolished by the

ASPCA and New York City firefighters in an attempt to rescue the cat. *Id.* at 185. No attempt was made to notify the owner of the affected building or to seek a warrant during the six hours that elapsed between the discovery of the cat and the rescue effort. *Id.* On these facts the District Court found, we submit correctly, that the emergency exception did not apply.[15] *Id.* at 186-87. One can imagine a far different set of facts—for instance the rescue of a drowning dog from a backyard pool or of horses trapped in a burning stable—in which application of the emergency exception might well be appropriate, even though the animal's plight has not been caused by human hand.[16]

It goes without saying also, as the Oregon Court of Appeals in the instant case recognized, that if the animal's circumstances, though dire, are the result of legal human behavior that is within accepted norms there would be no cause for application of the emergency exception. Livestock are slaughtered for food; animals are used in medical experiments. Both

---

[15] The issue arose on cross motions for summary judgment in an action for damages brought by the occupant of the building against the ASPCA and New York City under 42 USC § 1983. *Suss*, 823 F.Supp. at 184. In a ruminative and somewhat philosophical opinion, the District Court denied both motions and urged the parties to settle. *Id.* at 184, 193-194.

[16] We note that this Court has held under Article I, Section 9 that the emergency exception would apply to a human in jeopardy regardless of whether "the need to render immediate aid is triggered by a human source or a condition idiopathic to the person needing aid." *State v. Baker*, 350 Or 641, 649 n 5, 260 P3d 476 (2011).

of these activities are highly regulated with a view to minimizing the pain and suffering of the animals involved. So long as the slaughter or protocol is carried out in accordance with applicable laws and regulations, the circumstances of the animals involved should not be considered an emergency for purposes of the emergency exception.

This is not to say that simply because an animal is destined eventually for the slaughter house it could not be subject to treatment that would warrant the application of the emergency exception. Rather the slaughter itself would not create such a situation per se even though by definition it would involve destruction of the animal. The same principle would apply to a laboratory animal.

- ***Domestic or wild animal***. Just as the vast majority of situations will involve an element of human causation, so in the vast majority of situations the animal in distress will be a domestic animal rather than a wild animal. However, again we submit it would be unwise to adopt a bright line rule limiting the application of the exception to domestic animals, for it is easy to imagine a circumstance involving a wild animal in which warrantless intervention would be appropriate. A fox, raccoon, skunk, prairie dog, beaver, rabbit, or any other such wild animal that had been caught alive and was being tortured for the pleasure of its captor

would surely justify warrantless intervention by any peace officer who came upon the activity.

- ***Species of animal***. Cutting off the wings of a bird is torture and in appropriate circumstances warrantless entry should be permitted under the emergency exception to save a bird from being subjected to such treatment. Pulling off the wings of a dragonfly, although likewise disturbing, is a more doubtful predicate for the same conclusion, because at least so far as we humans are aware an insect is not cognizant of its condition in the same way as a bird, not to mention a horse, a dog, a cat, or legions of other animals.[17] Although no clear lines can be drawn as to which species are potentially within or without application of the emergency exception, the lower down the animal is on the scale of sentient versus non-sentient creatures, the less likely that circumstances would arise warranting application of the emergency exception.
- ***Setting***. Under well-established Fourth Amendment jurisprudence, the greater the expectation of privacy in a particular setting the higher the threshold for permitting a warrantless search and seizure. Greatest protection is afforded the home and curtilage. Accordingly, a higher level of scrutiny is warranted where the search and seizure occurs in the

[17] We note also that the Oregon animal cruelty statutes do not apply to insects since insects are excluded from the definition of "animal." ORS 167.310(1).

home than in a less private setting such as a field or a commercial establishment. Having said that, many emergency situations involving animals will occur in the home or curtilage, and courts in other states have not hesitated to allow warrantless entry in these circumstances when an emergency has been shown.[18]

- ***Evidence of the emergency prior to entry***. Most dogs that bark are not in extremis; someone who reports that his neighbor is abusing his pet may have his own agenda and is not necessarily telling the truth. On the other hand, the two together—the neighbor's report buttressed by barks of pain within the premises that are audible from outside—present quite a different picture. In order for the exception to apply there must be evidence that would cause a *reasonable person* to believe that an animal was in grave peril. The stronger that evidence the greater the likelihood that the emergency exception will apply.
- ***Extent of the intrusion***. If the intrusion necessarily involves damage to property, such as breaking down a door or, as in *Suss*, *supra*, demolishing a wall, there is a collateral cost to the action that is not present if the entry can be accomplished without damage. It follows that those situations in which the rescue will involve property damage will attract greater

[18] *See, e.g. People v. Chung*, 185 Cal App 4th 247, 110 Cal Rptr 3d 253 (2010) (private residence); *Davis v. State*, *supra* (curtilage); *People v. Thornton*, *supra* (apartment).

scrutiny than situations in which the warrantless rescue can be done with no collateral damage to the premises.

- ***Time elapsed between perception of the emergency and entry***. The law does not require proof that in the time it would have taken to obtain a warrant the animal would have died. In many cases, such as this one, such a burden would be impossible to carry since the animal involved was not grievously wounded but rather severely emaciated and suffering from starvation. In addition, the suffering of the animal may be sufficient in and of itself to justify the entry. However, if prompt action is not taken after the apparent emergency is discovered, absent good reason for it that fact will cast doubt on the applicability of the emergency exception.
- ***Efforts to reach the owner of the premises and obtain consent***. Consent to the entry will moot any Fourth Amendment issue. Accordingly, whether reasonable efforts were made to reach the owner or other person who could give consent will weigh into the overall reasonableness of the warrantless entry, although reasonable efforts in the circumstances may be none at all.

IV. Article One, Section Nine of the Oregon Constitution should be construed in the same manner as the Fourth Amendment to the US Constitution in deciding whether the emergency exception applies to animals.

All of the case law on this issue that has arisen in other states has involved the emergency exception under the Fourth Amendment; by definition none has purported to opine on the scope of the emergency exception under Article I, Section 9 of the Oregon Constitution. The Fourth Amendment and Article I, Section 9, although similar, are not identical and a construction of the Fourth Amendment is not per se binding as a construction of Article I, Section 9. *State ex Re Juvenile Dep't v. Rogers*, 314 Or 114, 119, 836 P2d 127 (1992); *State v. Caraher*, 293 Or 741, 749-758, 653 P2d 942 (1982). *See State v. Stoudamire*, 198 Or App 399, 403-407, 108 P3d 615 (2005) (Armstrong, J, concurring).

The fact that an independent analysis is required under Article I, Section 9, however, does not mean that a different result is called for from that under the Fourth Amendment. The emergency exception to save life under Article I, Section 9, in particular, has consistently been construed on all fours with the emergency exception to save life under the Fourth Amendment: This Court and the Court of Appeals have regularly cited *Mincey v. Arizona*, 437 US 385, 98 S Ct 2408, 57 L Ed2d 290 (1978), as the origin of the exception, and have discussed Fourth Amendment authority with no suggestion that the contours of

the emergency exception are any different under Article I, Section 9. *See State v. Baker*, 350 Or at 649 n 6; *State v. Davis*, 295 Or 227, 238, 666 P2d 802 (1983);[19] *State v. Miller*, 300 Or 203, 229, 709 P2d 225 (1985); *State v. Jones*, 45 Or App 617, 620, 608 P2d 1220, *rev den*, 289 Or 337 (1980), all citing and quoting from *Mincey*. *See also State v. Martin*, 124 Or App 459, 463, 863 P2d 1276 (1993) (in which the Court of Appeals stated the emergency exception in terms of *both* Article I, Section 9 and the Fourth Amendment: "The four conditions that must exist before a warrantless entry based on an emergency does not violate Article I, Section 9, or the Fourth Amendment are . . .").[20]

A review of the reported cases from this Court and the Court of Appeals applying the emergency exception has failed to find any in which a differentiation has been made between the scope of the emergency exception to save life under the Fourth Amendment and that under Article I, Section 9. On

---

[19] This Court differentiated the purpose of excluding evidence under Article I, Section 9—"to protect a person's home from governmental intrusions"—from that under the Fourth Amendment, which the United States Supreme Court has stated is to deter unlawful officer conduct. 295 Or at 243. However, this distinction is relevant only to the scope of the exclusionary rule (and the exceptions thereto), and not to the scope of exceptions to the warrant requirement such as emergency aid. Thus, the *Davis* distinction has no bearing on the issue presented by the instant case.

[20] The case of *Follett*, *supra*, cited by the Court of Appeals in *Martin* as having introduced these conditions, in fact does not mention the Fourth Amendment. However, *Follett* does rely heavily on a New York Appeals Court decision under the Fourth Amendment, and also cites Fourth Amendment decisions from Alaska, Arizona, Nebraska, North Dakota, and Washington, all of which the court stated were "instructive." 115 Or App at 678.

the issue in the instant case in particular, there is no policy reason for such a differentiation; to the contrary, all the policy reasons which support application of the emergency exception in the Fourth Amendment context are equally applicable in the context of Article I, Section 9. The same result must hold under both.

CONCLUSION

For the foregoing reasons, *amici curiae* ALDF, NDAA, and APA respectfully request that this Court affirm the decisions of the Court of Appeals in *State v. Fessenden* and *State v. Dicke*.

Respectfully submitted,

/s/ Lora Dunn

_____

Lora Dunn, OSB #133460
Animal Legal Defense Fund
Attorney for Amicus Curiae
Animal Legal Defense Fund
National District Attorneys Association
Association of Prosecuting Attorneys

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,239 words. I further 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 on March 21, 2014, I directed the Brief of *Amicus Curiae* to be electronically filed with the Appellate Court Administrator, Appellate Records Section. I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the electronic filing system, this Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Pamela Walsh, #894034, Assistant Attorney General, attorney for Respondent on Review; Elizabeth Daily, #111758, attorney for Petitioner on Review (Fessenden); and Rankin Johnson IV, #964903, attorney for Petitioner on Review (Dicke).

/s/ Lora Dunn

_____

Lora Dunn, OSB #133460
Animal Legal Defense Fund
Attorney for Amicus Curiae
Animal Legal Defense Fund
National District Attorneys Association
Association of Prosecuting Attorneys