

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT

IN AND FOR MONROE COUNTY, FLORIDA

STATE OF FLORIDA,

Case Number: 11-CF-287-P

Plaintiff,

vs

ARNOLD CHRISTOPHER LAGERGREN,

Defendant.

MOTION TO DISMISS PURSUANT TO FLORIDA CRIMINAL PROCEDURAL RULES, RULE 3.190

COMES NOW Defendant ARNOLD CHRISTOPHER LAGERGREN, by and through his undersigned attorney, and pursuant to Florida Rules of Criminal Procedure 3.190(c)(4), respectfully moves this Court for an entry of an order dismissing the criminal charges involving the Florida Animal Enterprise Protection Act (§§828.40 et. seq. Fla. Stat.) (“FAEPA”) filed against the Defendant in this cause, and as grounds therefore, the Defendant would show that even assuming, *arguendo*, each of the alleged material facts were true, the FAEPA does not apply to this case and therefore the alleged facts do not establish a prima facie case of guilt against the Defendant based on the FAEPA. The facts and law upon which this motion is based are as follows:

**I. FACTS**

1. On August 21, 2011, the Monroe County Sheriff’s Office responded to the Marine Mammal Conservancy (hereinafter referred to as MMC) in Key Largo, FL.
2. Robert Lingenfelter, a Director of the MMC at the time, reported to James Warino, of the Monroe County Sheriff’s Office, that he observed two males taking apart a fence in the water where a canal was separated from Florida Bay.
3. Mr. Lingenfelter believed that the goal of the males in taking the fence apart was to release a whale from the area.
4. Mr. Lingenfelter believed he recognized one of the males as Christopher Lagergren.
5. On September 10, 2011 Defendant Arnold Christopher Lagergren (“Defendant Lagergren”) was arrested at the Hampton Inn in Key Largo, Florida on two outstanding warrants: one for trespassing, and one for criminal mischief.
6. Defendant formerly worked at MMC.
7. Defendant made complaints to Monroe County Code Division regarding the MMC.

8. The Monroe County Code Division issued code violations to the MMC.
9. The MMC believed that the Defendant, along with other individuals, was responsible for numerous complaints made to the Monroe County Code Division:
  - a. A. Well, here's what happens with people like your client, okay, and he's not the only one. They file...thousands of complaints. We're not just talking about a few dollars of rebar... Depo. Lingenfelter 100:23-25; 101:1-2;19-22; For little guys like me, I've probably spent in the last five years maybe 25 percent of my time, my valuable time, answering some of these stupid-ass complaints...So, and believe me, is this economically affecting MMC? Absolutely, because when you have this kind of controversy in the press...it costs you in grants, it costs you in donations, it costs you in reputation. Okay? ... So, is there enterprise terrorism going on by people like your client? Absolutely. Okay? And it's costing us, the American taxpayer, it's costing little nonprofits like the Marine Mammal Conservancy thousands and thousands and thousands of dollars. And do they need to be put a stop to? Yeah." 102:12-20; 103:1-6;
10. A few weeks after the September 10, 2011 charges of misdemeanor trespass and criminal mischief were filed, the State of Florida added the charge of violation of the Florida Animal Enterprise Protection Act ( §§828.40 *et. seq.*, Fla. Stat.) ("FAEPA"), a felony of the third degree. As a result, the penalty Defendant Lagergren now faces for allegedly entering the unmarked property of MMC and tampering with rebar, has been escalated from one year in county jail, to up to five years in state prison.

## II. ARGUMENT

### SUMMARY OF ARGUMENT

The FAEPA cannot be used to prosecute the Defendant for allegedly tampering with MMC's rebar. The FAEPA, by its very terms, has a very limited application, and addresses individuals who "intentionally [engages in] stealing, damaging, or causing the loss of, any property,...***used by the animal enterprise.***" §828.42(1), Fla. Stat. (emphasis added)

The charge under the FAEPA must be dismissed because the FAEPA applies, according to its express terms, to an "animal enterprise". The MMC, as documented below, simply does not fall within the statutory definition of "animal enterprise". The question presented is one of statutory interpretation, accordingly, it is a question of law to be determined solely by the Court. As detailed herein, this Court should grant the instant motion to dismiss.

**A. The Instant Motion to Dismiss Should Be Granted Because the Undisputed Facts Show that the MMC Is Not an “Animal Enterprise” and therefore Defendant Cannot Be Convicted Under the FAEPA.**

Defendant moves pursuant to F.S.A. RCrP 3.190(c)4 to dismiss the FAEPA charges against him. The facts on which this motion is based are the following. Defendant is charged with violating the FAEPA by damaging property belonging to the MMC. However, the FAEPA, by its express terms, applies to damage done to an “animal enterprise”. “Animal enterprise” in turn, is defined by the FAEPA to be a “commercial enterprise”, “academic enterprise,” or zoo, aquarium, circus, rodeo, or fair. Since the MMC is none of these, as documented by the MMC’s own sworn statements in federal tax records, state corporate records and the deposition testimony of MMC’s current and immediate past presidents, the Defendant cannot be found guilty of violating the FAEPA; therefore, the charges against him based on the FAEPA must be dismissed. Specifically, the FAEPA does not apply because:

- MCC cannot be a “commercial enterprise” based on its status as a not for profit corporation, and the sworn deposition testimony of both the present and immediate past presidents of MMC who testified, *verbatim* that the MMC is not a “commercial enterprise.”
- MMC cannot be an “academic enterprise” because it is not an academy, school or institution of higher learning; has no regular scheduled course of study or academic program; [per depo -- Stevens, 20:1,2,3,4; and depo – Lingenfelsor, 46:18-19] has no regular teaching staff or student body; awards no credits and is not affiliated with and does not receive any funds from a college or university or elsewhere in any educational or academic capacity. The MMC has categorically denied in its federal Form 990 returns filed with the Internal Revenue Service (“IRS”) that it is “an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on...” Also, in providing required information on its Form 990 return for 2010, signed under penalty of perjury, the MMC identifies no regular course of study or academic program it provides of any sort. The only “program services” the MMC identifies on its Form 990s for 2008, 2009 and 2010 are: (1) improvement to SEUS MMSN stranding network capabilities and (2) stranding funds, both activities being totally unrelated to an academic enterprise. Thus, by its actual operations, as well as by its own admission and self-reporting to the IRS, the MMC is clearly not an “academic enterprise”.
- Both the present and immediate past Presidents of MMC have categorically denied, under sworn deposition testimony, that the MMC is a zoo, aquarium, circus, rodeo, or fair.

Given the absence of any facts to traverse the factual showing and legal conclusion that the MMC does not qualify as an “animal enterprise,” the instant motion to dismiss must be granted and the charges based on the FAEPA must be dismissed.

**B. The State’s Traverse Cannot Be Filed as Required With Good Faith, Without Conjecture or Speculation, and Based on Specific Facts, Because Facts Do Not Exist to Dispute the Conclusion that MMC Is Not an “Animal Enterprise” Under the FAEPA.**

In a motion to dismiss, “the defendant... has [an] initial burden of demonstrating that there were no genuine issues of material fact and the undisputed material facts failed to establish a prima facie case of guilt.” *State v. Gutierrez*, 649 So. 2d 926,927 (Fla. 3<sup>rd</sup> DCA 1995)

Pursuant to Fla. R. Crim. Pro. Rule 3.190(d), the state may traverse a motion to dismiss that alleges factual matters. Under the rule, "factual matters alleged in a motion to dismiss shall be deemed admitted unless specifically denied by the state in the traverse." The rule also provides: "[a] motion to dismiss under subdivision (c)(4) ... shall be denied if the state files a traverse that with specificity denied under oath the material fact or facts alleged in the motion to dismiss." Fla. R. Crim. P. 3.190(d).

The language of Florida Rule of Criminal Procedure 3.190(d) requires specificity in a traverse or demurrer to a motion to dismiss. The lack of specificity sounds the death knell to the State’s traverse. Indeed, a traverse that merely alleges that additional facts exist, or engages in a “he said, she said” swearing contest is legally insufficient. According to *State v. Kalogeropoulos*, 735 So. 2d 507,508 (Fla. 4<sup>th</sup> DCA 1999),

The rule's requirement of specificity precludes the state from avoiding dismissal by generally alleging that there are "additional facts omitted by the defendant." ... The rule requires a prosecutor to place material facts before the court if she wants the court to consider them in ruling on the motion...

In like fashion, in *State v. Morales*, 693 So.2d 1063, 1064 (Fla.4<sup>th</sup> DCA 1997) the Court of Appeals affirmed the trial court’s granting of the defendant’s motion to dismiss on the ground that,

[T]he instant traverse did not generally allege the existence of material facts contrary to those contained in Morales' motion. In reviewing Morales' motion, the trial court had before it all of the material undisputed facts, and was able to determine the state failed to establish a prima facie case of guilt against Morales.

A traverse that engages in a swearing contest does not pass muster under Florida law.

It is the position of the State that so long as it merely disputes at the allegations of a Defendant's Sworn Motion to Dismiss, that this (c)(4) motion must be denied. We disagree. A Traverse requires more than a "did not, did so" swearing match. [citation omitted]. The State is required to specifically dispute the material facts alleged by defendant or add additional material facts that meet the minimal requirements of a prima facie case of guilt. *State v. Nunez*, 881 So. 2d 658,660-61 (3<sup>rd</sup> DCA 2004)

See also *State v. Kemp*, 305 So.2d 833,834 (Fla. 3<sup>rd</sup> DCA 1974) “The mere act of filing a sworn document entitled "traverse" is insufficient under the Rule as a matter of law.”

In addition, any traverse must be based on good faith or it is legally insufficient. “[I]t should go without saying that any denial by the State must be in good faith, and not be based upon speculation, conjecture, presumption or assumption. *Ellis v. State*, 346 So. 2d 1044, 1046 (Fla. 1st DCA), cert. denied, 352 So. 2d 175 (Fla. 1977).” *State v. Gutierrez*, 649 So. 2d 926,927

(Fla. 3<sup>rd</sup> DCA 1995) As seen immediately below, the State's traverse will be legally insufficient, should one be filed, as it will lack the requisite specificity to contest the fact that the MMC is not an "animal enterprise." In the absence of such *sin qua non* facts, which do not exist, the instant motion must be granted.

### **C. Mandatory Principles of Statutory Construction**

Criminal statutes, such as the FAEPA, are subject to a number of fundamental rules of statutory construction that apply in this case that favor the defendant and support his motion to dismiss.

#### **1. The Interpretation of a Statute is a Question of Law for the Court to Decide.**

"[T]he interpretation of a statute is a question of law to be determined solely by the court..." *T.J.R. Holding Co. v. Alachua County*, 617 So. 2d 798, 800 (Fla. 1st DCA 1993) "Statutory construction is a question of law. *Bellsouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003)." *Therrien v. State*, 914 So. 2d 942,945 (2005)

#### **2. Penal Statutes Are Strictly Construed.**

"[P]enal and highly regulatory statutes such as these are strictly construed 'so that those covered by the statute have clear notice of what conduct the statute proscribes.'" *5 City of Miami Beach v. Galbut*, 626 So. 2d 192, 194 (Fla. 1993) (citing *State v. Llopis*, 257 So. 2d 17, 18 (Fla. 1971)) *Equity Corp. Holdings, Inc. v. Dep't of Banking & Fin., Div. of Fin.*, 772 So. 2d 588, 590 (Fla. 1st DCA 2000); "[S]tatutes which authorize the deprivation of an individual's liberty must be strictly construed." *Lee v. State*, 546 So. 2d 436, 437 (Fla. 5th DCA 1989)

#### **3. Any Ambiguity Must Be Construed in Favor of the Accused and Against the State.**

Based on both statutory law and the doctrine of lenity, any ambiguity in a penal statute must be construed in favored of the accused and against the State. According to §775.021,(Fla. Stat.(1989),

(1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.(2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.

"[W]here a statute of this kind [penal statute] contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred. "*Rodriguez v. State*, 773 So. 2d 1222,1223 (Fla. 3<sup>rd</sup> DCA, 2000)

#### **4. Felonies Are Subject to Greater Scrutiny than Misdemeanors.**

Under the doctrine of lenity, the prevailing view is that felonies are subject to great scrutiny than misdemeanors.

It is a well-established principle of statutory construction that penal statutes must be strictly construed in determining the liability of the person upon whom the penalty is imposed, and that the more severe the penalty, and the more disastrous the consequence to the person subjected to the provisions of the statute, the more rigid will be the construction of its provisions in favor of such person and against the enforcement of such law. *Missouri, K. & T. Ry. Co. of Texas v. State*, 100 Tex. 420, 100 S.W. 766,767 (1907)

**5. Undefined Terms Must Be Given Their Plain and Ordinary Meaning As Defined By a Dictionary.**

Where terms are undefined in a statute, the Court looks to dictionary definitions in construing the statute. "It is a rule of statutory construction that where the Legislature has chosen not to define a term, "the plain and ordinary meaning of [the] word [] can be ascertained by reference to a dictionary". *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 205 (Fla. 2003) (quoting *Seagrave v. State*, 802 So. 2d 281, 286 (Fla. 2001))." *Zold v. Zold*, 911 So. 2d 1222,1229 (Fla. 2005) "It is appropriate to refer to dictionary definitions when construing statutes or rules. See *Reform Party of Fla. v. Black*, 885 So. 2d 303, 312 (Fla. 2004) (citing *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 204-05 (Fla. 2003))." *Barco v. Sch. Bd.*, 975 So. 2d 1116 ,1122 (2008); See *Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc.*, 982 So. 2d 628, 633 (2008), "Because "possession or control" is not defined in the garnishment statute, canons of statutory construction require that the term be given its plain and ordinary meaning which can be ascertained by reference to dictionary definitions. See *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000)." Applying these well-established canons of construction to the instant case compels the conclusion that Defendant cannot be convicted under the FAEPA.

**D. This Court Should Enter an Order Dismissing the Criminal Charge Under the Florida Animal Enterprise Protection Act Because the MMC Is Not an "Animal Enterprise" as Defined By the FAEPA.**

A necessary predicate for conviction under the FAEPA is that the property the defendant allegedly stole, damaged or caused to be lost must belong to an "animal enterprise." Florida Statute § 828.42 (1),Fla. Stat. provides,

A person who intentionally causes physical disruption to the property, personnel or operations of ***an animal enterprise*** by intentionally stealing, damaging, or causing the loss of, any property, including animals or records, used by the animal enterprise, and thereby causes economic damage, commits a felony of the third degree... (emphasis added)

"Animal enterprise" in turn, is defined by §828.41,Fla. Stat. as,

(1)(a) A commercial or academic enterprise that uses animals for food or fiber production, agriculture, research, or testing. (b) A zoo, aquarium, circus, rodeo, or

lawful competitive animal event; or (c) Any fair or similar event intended to advance agricultural arts and sciences...

Unquestionably, MMC interacts with animals. However, interacting with animals, even for the stated purpose of food or fiber production, agriculture, research or testing, is not enough for the statute to apply. To fall under the FAEPA's definition of an "animal enterprise," the enterprise must be one of the following: (1) commercial enterprise (2) academic enterprise (3) zoo (4) aquarium (5) circus (6) lawful competitive animal event or (7) fair or similar event intended to advance agricultural arts and sciences. The FAEPA does not define any of these terms.

Looking to dictionary meanings of the undefined statutory language as well as at MMC's official corporate and federal tax records and deposition testimony of MMC's current and immediate past Presidents, it is clear that the MMC does not fall within the meaning of any of the categories of "animal enterprise" to which FAEPA could apply. Since an "animal enterprise" is an essential element of FAEPA, and the MMC does not qualify as an "animal enterprise," the inquiry ends and the charge based on FAEPA must be dismissed. Accordingly, the instant motion to dismiss should be granted.

#### **1. The MMC Is Not a "Commercial Enterprise."**

"Commercial" is defined as,

1. of, pertaining to, or characteristic of commerce. 2. produced, marketed, etc., with emphasis on salability, profit, or the like: a commercial book. 3. Able or likely to yield a profit...Random House Webster's College Dictionary (1991)

Ballentine's Law Dictionary (1969) defines "commercial" as,

Pertaining to the purchase and sale or exchange of goods and commodities and connoting as well forms of, and occupations in, business enterprises not involved in trading in merchandise...

See *Eastern Insurance Co. v. Austin*, 396 So.2d 823,825 (Fla. 4<sup>th</sup> DCA, 1981) "[I]n its ordinary connotation, commercial or charter use involves a commercial venture with investment in gear and equipment, intent on making some form of profit..." See also *Lane v. MRA Holdings, LLC*, 242 F. Supp.2d 1205,1212 (M.D. Fla.,2002), "Under Fla. Stat. § 540.08, the terms "trade", "commercial", or "advertising purpose" mean using a person's name or likeness to directly promote a product or service..."

The MMC, in its own words, is a conservancy dedicated to saving marine mammals. It does not have any "intent to make a profit" and is not engaged in the "sale or exchange of goods." In fact, based on sworn documents filed by the MMC with state regulatory and federal tax agencies, as well as the admissions made in the deposition testimony by the current and past Presidents of the MMC, there is no genuine dispute that MMC does not qualify as a

“commercial enterprise” under FAEPA. The current President of MMC, Robert Stevens, testified at his deposition that the MMC, is a not for profit corporation and is “definitely not” a commercial enterprise.

Q. One of the things, that you’re definitely not a commercial enterprise, right?

A. MMC? No. No, not a commercial.” 64:19-21;

“[W]e ask for financial donations all the time because nobody gets paid, but there are bills.”19:1-3;

Q. And now, so MMC is definitely not for profit?

...

A. It’s definitely not for profit. It’s a 501c3 organization and so that’s, that’s one way we hopefully will entice people to contribute because we do give a certificate for contribution and they can use that on their taxes, on their tax return.” Stevens 21:10,14-18;

In like fashion, Mr. Lingenfelter testified that the MMC is not for profit. He also testified that none of Board Members, Officers, the staff or volunteers are paid. Lingenfelter 5:11-18; 13:21-24; 20:21-25; 21:1-4;

MMC applied for and was granted tax exempt status by the Internal Revenue Service under Internal Revenue Code (“IRC”) §501(c)(3). If MMC were a commercial enterprise, it could not have become, or remained, qualified for tax exempt status IRC §501(a) and (c)(3).

In addition, copies of the MMC’s IRS Form 990 for the years 2008, 2009, and 2010 document the fact that MMC is an Internal Revenue Code §501(c)(3) tax exempt not for profit organization. (A true and correct copy of the tax returns for tax years 2008 thru 2010 is attached as Exhibit 1 to the Declaration of \_\_\_\_\_) In addition, Article V of MMC’s Articles of Incorporation filed with the Florida Department of State expressly provide that, “The Corporation is a not-for profit corporation...[and] is not formed for pecuniary profit.” (A true and correct copy of MMC’s Articles of Incorporation filed with the Department of State is attached as Exhibit 2 to the Declaration of \_\_\_\_\_) Accordingly, the MMC cannot qualify as an “animal enterprise” under the FAEPA’s category of “commercial enterprise.”

## **2. The MMC Is Not an “Academic Enterprise.”**

The second category of an “animal enterprise” under the FEPA is “academic enterprise.” “Academic enterprise” is not defined by the FAEPA and is not a phrase that is commonly used in the English lexicon.<sup>1</sup> Thus, “animal enterprise” is facially ambiguous, and requires an analysis of each word separately, as well as the two terms taken together. “[W]hen the language is susceptible of differing

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<sup>1</sup> An extensive review of dictionaries as well as decisional authorities reveal no formal definition of what the phrase means.



constructions, it shall be construed most favorably to the accused...” FS§775.021 (Fla. Stat.(1989) When the plain and ordinary meaning of each word is ascertained by reference to a dictionary, and also when the two words of the term are taken together, it is clear that the MMC is not an “academic enterprise.”

**a. The Plain and Ordinary Meaning of “Academic” References an Academy, School, Institution of Higher Learning, or Conforming to the Traditions of a School or Official Academy.**

“Academic” is defined by Merriam-Webster’s Collegiate Dictionary (11<sup>th</sup> ed.) as follows:

Of, relating to, or associated with an academy or school, esp. of higher learning... based on formal study esp. at an institution of higher learning. 2. Of, or relating to literary or artistic rather than technical or professional studies ... conforming to the traditions or rules of a school (as of literature or art) or an official academy<sup>2</sup>

See *Sisters of Town of Mercy v. Town of Hooksett*, (1945) 93 N.H. 301 42 A.2d 222, 225, “[A]cademic’ is ‘Of or pertaining to an academy, college, or university.’”

**b. The MMC Is a Conservancy. The MMC Is Not an Academy, School, Institution of Higher Learning, and it Does Not Conform to the Traditions of a School or an Official Academy.**

The MMC, as its name indicates, is a “conservancy. “Conservancy” is defined as: “an organization or area designated to preserve and protect natural resources”.

<http://www.merriam-webster.com/dictionary/conservancy>

The MMC expressly holds itself out as a conservancy, not as an academy, school, institution of higher learning, or as conforming to the tradition of a school, or an official academy.

**c. MMC’s Reporting Filed With the IRS Affirms That it Is Not, and Does Not Operate as an Academic Institution Such as a University or College.**

As a not for profit tax exempt 501(c)(3) organization, the MMC is required to file Form 990 each year. On its Form 990 for 2010, filed with the IRS under penalty of perjury, at p.13, Part IV, question 13, the MMC stated that it was **not** a school, university or college as defined by federal law.

13. Is the organization a school described in section 170(b)(1)(A)(ii) If “Yes,” complete Schedule E?

[§170(b)(1)(A)(ii) in pertinent part states as follows, “an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly

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<sup>2</sup> “Academy” is defined as, “1a: a school, usually above the elementary level; esp.: a private high school; b: a high school or college in which special subjects or skills are taught c: higher education...”

<http://www.merriam-webster.com/dictionary/academy>

enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on..."

In response to question 13, MMC checked the box for "No."

A review of the MMC's Form 990 returns filed with the IRS for 2010 informs the Court of MMC's activities. MMC's Form 990 filed with the federal government under penalty of perjury, at page 2, Part III, question 4, MMC asks the not for profit organization to describe its "exempt purpose achievements for each of the organization's three largest program services by expenses." The MMC identified only two program services and ***neither concerned academic related activities:***

1. Improvement to SEUS MMSN stranding network capabilities.
2. Stranding funds.
3. No third activity is listed.

(True and correct copies of MMC's Form 990 Returns for 2010 is attached as Exhibit \_\_\_ to the Declaration of \_\_\_\_\_)

Neither of the two exempt purpose program service achievements the MMC identified is "academic," and both are unrelated to an "academic enterprise". MMC had the opportunity to, and was indeed required to, identify a third program service, yet chose not to do so. In MMC's self-reporting to the IRS for 2010, the MMC admits that the MMC undertook no academic services. Thus, by its own admission and pursuant to MMC's descriptions of its activities as reported by itself, under penalty of perjury to the federal government, the MMC does not operate as, does not consider itself to be, and does not hold itself out to be an "academic enterprise".

**d. The MMC Acknowledges That It Has No Affiliation With Any College or University.**

In sworn testimony during his deposition, MMC President Lingenfleser acknowledged that the MMC is not affiliated with any college or university, has no contracts with any college or university, receives no funding from any college or university and does not provide credit for any of its training classes. In addition, the MMC does not have any contracts with any academic institution.

Q. Regarding the academia, do you have any contracts with any colleges, any specific contracts?

A. No.

Q. Or any other academic institution?

A. No... 42:16-20;

When asked whether the MMC was affiliated with any colleges, Lingenfelter answered no:

Q. [T]he colleges that you just listed, you would say those are like affiliate, you're affiliated with them, but no contracts?

A. Right.

Q. Okay.

A. I wouldn't say even specifically affiliated. They work with other members of the Stranding Network, as well.

Q. Okay.

A. So basically, they're more affiliated with National Marine Fisheries Service.

Q. Not MMC?

A. Yeah. 44:4-15;

Lingenfelter testified that MMC does not get any research grants from colleges or universities.

"Q. And do you guys get any funding or research grants or anything like that from any institutions of higher learning?

A. I'm trying to think if we've ever gotten anything from one of the schools. I don't think so..."44:16-20;

Q. ...But no direct legal or financial connection—

A. No.

Q. to a university or a school?

A. No... 45:4-8;

**e. Volunteers Who Happen to be College Students Volunteer On Their Own Time and Get No College Credit.**

MMC has volunteers from all walks of life volunteering to help with stranded mammals While some of these volunteers may also be college students, they are no different than any other volunteers who are on their own personal time.

According to Mr. Stevens, the current President of MMC:

"And then, the academia thing...if having college groups come in...[and they] wound up helping out with this stranding... Now, granted, that wasn't part of their degree-seeking

effort. That was just, you know, something that would seem to be helpful. Anyway.”  
68:5-13;

In fact, none of the college students get any college credit for their time at the MMC.

Q. But they’re not getting credit for coming down and assisting swimming the pilot whales—

A. No, no. 47:24-25;48:1;

While MMC has had requests from colleges to have their volunteer students get formal credit for assisting MMC with rescues, MMC has **turned down** all such requests. Further, MMC does not have time to teach classes. According to Mr. Lingenfelter,

Q. Any college ever contact you or college or university contact you and say, hey, why don’t you create the “Save the Whale” program, and we’ll send students down and they’ll get credit for that?

A. We’ve talked about doing that with some of our training with colleges... I didn’t have the time to teach classes. You know that would require a big commitment of time and all that and we haven’t done that. But, yes, we have had requests to do that.

Q. But it hasn’t happened?

A. No. 48:4-20;

Given the lack of any credentials as an academic institution, the lack of any affiliation with or funding by any academic organization, the lack of any formal program providing any course credit with any college, and the lack of any time to teach classes, the MMC is not an academic organization in any meaningful sense of the word. Therefore, the MMC does not qualify as an academic enterprise under the FAEPA.

**f. Training Classes and Documentaries Do Not Qualify MMC as an “Academic Enterprise.”**

Although the MMC purportedly holds training classes “sporadically” [Dr. Stevens, depo, 20:2] to instruct volunteers on how to assist in the rescue of whales, this fact does not make the MMC an “academic institution”. None of the attributes of academia are present in such classes, such as course credit or hours that can be applied to matriculation. The fact that the MMC offers training to their volunteers makes it no different from other private, government, and non-profit organizations that also offer training to their volunteers whether they be animal shelters, state prisons or any other institution or organization needing its workers and volunteers to have or develop any skills.<sup>3</sup> Yet, no one would reasonably suggest that an animal

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<sup>3</sup> See Pinellas County Florida Animal Services, “Each volunteer will get on-the-job orientation and training to effectively handle these assignments [animal control officer assistants], without being placed in harm’s way.”

shelter or prison is an “academic enterprise” simply on the basis of offering training classes to its volunteers or staff.

In addition, the fact that the MMC has publicized its activities by being part of documentaries fails to establish it is an “academic enterprise”. Such documentaries do not speak to the core elements of academics such as awarding degrees, maintaining a regular faculty and curriculum and having a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on. In the absence of any of these indicia of academia, the MMC is simply in no position to qualify as an “academic enterprise” under the FAEPA.

If it were true that these indicia of academics are not required to qualify as an “academic enterprise”, then taken to the extreme, a cooking show on television or a radio show with callers asking about relationship issues or pet-related questions could qualify as an “academic enterprise”. In fact, given the very limited nature and the infrequency of the MMC’s actual training activities, the TV and radio shows are more closely aligned with an “academic enterprise” than is the MMC.

**g. The MMC Is Not an “Enterprise.”**

The fact that the MMC is not an academic organization should, by itself, disqualify it as an academic enterprise under the FEPA. On this basis alone, the charges under the FAEPA should be dismissed.

Even assuming, *arguendo*, that the MMC is an academic organization, it still would not qualify as an “academic enterprise” which is a term that is undefined under the FAEPA. The MMC does not fall within the dictionary definition of “enterprise.”

“Enterprise” is defined as, “1. An organization or venture, esp. for business purposes.” (Black’s Law Dictionary, 9<sup>th</sup> Edition), p.611; Also see §203 (r) of the Fair Labor Standards Act which defines “enterprise,” in part, as “[T]he related activities performed...by any person or persons for a common business purpose...”

Although there may be additional definitions of “enterprise”, it should be remembered that any ambiguity in a penal statute (i.e., where a word may have more than one meaning) is always construed in favor of the accused and against the state. See §775.021, (Fla. Stat.), “[W]hen the language is susceptible of differing constructions, it shall be construed most favorably to the accused...”

While there is no definition of “enterprise” under Florida law, a review of how that term is interpreted under the Fair Labor Standard Act (“FLSA”) is instructive. A not-for-profit corporation has been held not to be an “enterprise” under the FLSA. The Court in *Kitchings v.*

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<http://www.pinellascounty.org/animalservices/volunteer.htm>; Florida Dept. of Corrections also trains volunteers in its prison outreach program. “The Florida Department of Corrections is constantly recruiting, training and supervising volunteers to work with the Department.” <http://fldocjobs.com/volunteer/request.html>;

*Florida United Methodist Children's Home*, (M.D. Fla., Orlando Div., 2005) 393 F. Supp.2d 1282, 1294 cited *Joles v. Johnson County Youth Services Bureau, Inc.*, 885 F. Supp. 1169, 1175 (S.D. Ind. 1995) for the proposition that, defendant, a non-profit corporation providing temporary shelter and care to troubled youths, was an eleemosynary, charitable organization, that ***did not engage in commercial activities in competition with private entrepreneurs, did not engage in activities performed for a business purpose, and thus was not an enterprise under the FLSA.*** (emphasis added)

In like fashion, since the MMC is a not for profit organization that does not engage in commercial activities, and is not in competition with private entrepreneurs, it should not be construed as an "enterprise" under the FAEPA. Accordingly, the charges under the Act should be dismissed.

#### **h. The MMC is Also Not an "Academic Enterprise" Based on the Plain Meaning of the Two Words of the Term Taken Together.**

The MMC is not "academic" and the MMC is not an "enterprise." However, even if the Court were to find that the MMC is an "enterprise," and even if it the Court were to find that the MMC is "academic," the MMC is still not an "academic enterprise" taking the two words of that undefined phrase together.

Construing the meaning of the two-word term "academic enterprise" in the light most favorable to the defendant, and looking to the plain meaning of the two words of the term "academic enterprise" together, it is clear that the primary purpose of an enterprise must be academic, if the term is to apply and have any meaning. Nothing in the FAEPA indicates otherwise.

Nothing in the FAEPA indicates that the academics is less than the primary part -- or is even a very significant part -- of an enterprise's services, that the enterprise would qualify as a specifically "academic enterprise". Again, construing the term in the light most favorable to the defendant, which this Court is required by law to do, this must be the interpretation where the statute does not state otherwise.

Indeed, it is very important to identify what the express statutory language of FAEPA "academic enterprise" does **not** say. The statute does not say "an enterprise which provides **some** academic programs." The statute does not say "an enterprise that provides **some** education." The statute does not say "an enterprise that provides **some** training." The statute requires an "academic enterprise", the plain and ordinary meaning of which is that the primary purpose of the enterprise must be academic. The plain meaning of "academic enterprise" does not suggest or imply enterprises, the primary focus of which is something other than academics (such as rehabbing beached whales), but which provides a modicum of training, education or even a secondary academic program. Were it otherwise, the term academic enterprise under the FAEPA would apply to the animal shelter and even the Department of Corrections, as discussed above.

The undisputed facts that the State will be unable to traverse are that the MMC does not have academics as its primary purpose. The name of the organization is “Marine Mammal Conservancy,” not Marine Mammal Academy, College, University or any other term remotely suggesting academics. The MMC’s self-reporting to the federal government on Form 990 does not identify any academic program where the MMC is required to list its three primary programs by expense. The MMC lists only two, indicating there are no other programs with expense, and neither of the two programs listed reflects academics.

The interpretation of the statutory language in the FAEPA is a question of law for this Court. Penal statutes are strictly construed, and the FAEPA, a felony that upon conviction results in incarceration of up to five years in state prison, is subject to strict scrutiny. Undefined terms must be given their plain and ordinary meaning as defined by a dictionary. Ambiguities must be construed in favor of the Defendant, Arnold Christopher Lagergren, and against the State of Florida. Following these fundamental rules of statutory construction; the express definitions in the FAEPA; dictionary definitions for undefined terms in the FAEPA; and construing the terms in favor of the defendant and against the state; leave the facts indisputable: that the MMC is a conservancy and, consistent with its own reporting to the federal government and sworn deposition statements under penalty of perjury, and the manner in which it holds itself out to the public and operates its conservancy, is not an “academic enterprise.”

#### **4. The MMC Is Not a Zoo, Aquarium, Circus, Rodeo, or Fair.**

None of the remaining categories of “animal enterprise,” applies in this case. Current MMC President Stevens testified definitively that the MMC was none of these:

“[It is not an aquarium because] I do know that National Marine Fisheries Service wants some sort of barrier to---so that the public can’t walk into the area where the rehabilitation is going on.” 52:11-14;

“Q. So I’m looking at the definition for animal enterprise. It certainly wouldn’t be a zoo, an aquarium, a circus, a rodeo or any other lawful competitive animal event, obviously?”

A. No. As a matter of fact, I think we pride ourselves on...not being, yeah. Uh-huh.” 66:17-24;

Lingenfelter also testified, without qualification, that the MMC was not an aquarium.

Q. So you’re not, you would never be considered to be like an aquarium?

A. Right.” 52:2-4;

Accordingly, given the fact that the MMC fails to fall within any category of “animal enterprise,” Defendant Lagergren cannot be convicted of violating the FAEPA. The instant meritorious motion to dismiss should therefore be granted.

### III. CONCLUSION

The State's overreaching to charge the Defendant with a felony violation of the Florida Animal Enterprise Protection Act deprives the Defendant of fundamental due process and violates the basic canons of statutory construction.

It has long been part of the American fabric of law that a court that enforces a penalty where the legislation has not clearly and unequivocally prescribed it, would result in a judicial legislation and a blatant abuse of the judicial power. "[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment..." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)

It is our duty to give effect to the language the legislature used. See *Baker v. State*, 636 So. 2d 1342, 1343 (Fla. 1994) (observing "[t]he courts 'are obliged to give effect to the language the Legislature has used.' *Cobb v. Maldonado*, 451 So. 2d 482, 483 (Fla. 4th DCA 1984). 'Courts have then no power to set it aside or evade its operation. . . . If it has been passed improvidently the responsibility is with the Legislature and not with the courts.' *Van Pelt [v. Hilliard]*, 75 Fla. 792 at 798, 78 So. [693] at 695." *D.M. v. Dobuler*, 947 So. 2d 504, 508 (Fla. 3<sup>rd</sup> DCA 2006)

In short, this Court should reject the State of Florida's errant overreaching misinterpretation of express statutory language in charging the defendant Lagergren with violating the FAEPA. The FAEPA requires an "animal enterprise" as defined by either a "commercial" or "academic" "enterprise." The MMC is neither a "commercial enterprise", nor an "academic enterprise," nor an "enterprise," and it is also not an "animal enterprise" within the purview of the FAEPA. The FAEPA does not criminalize complaints made to federal or state agencies concerning the operations of an organization such as the MMC. Nor could it; such complaints are fully protected by the First Amendment freedom of speech. The instant motion to dismiss should therefore be granted.

WHEREFORE, it is respectfully requested that this Honorable Court grant the Defendant's Motion to Dismiss.

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to the Office of the State Attorney, at 88820 Overseas Hwy., Tavernier, Florida 33070, this day of \_\_\_\_\_, 2013.



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By: \_\_\_\_\_

Rick Wunsch  
Fla. Bar No.81779

PERSONALLY APPEARED before me, the undersigned authority, Arnold Christopher Lagergren, the Defendant who, being first duly sworn, says that the allegations of fact as set forth in the above Motion to Dismiss are true.

\_\_\_\_\_  
ARNOLD CHRISTOPHER LAGERGREN  
Defendant

STATE OF FLORIDA            )  
COUNTY OF MONROE        )

The foregoing instrument was acknowledged before me this \_\_\_ day of \_\_\_\_\_, 2013 by \_\_\_\_\_. He is personally known to me or has produced \_\_\_\_\_ as identification.

\_\_\_\_\_

Notary Public

My Commission Expires: