

## **APPENDIX**

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## APPENDIX A

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### STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

**The State of West Virginia,  
Petitioner Below, Respondent,**

**vs) No. 17-0365**  
(Raleigh County 15-CAP-3-K)

**Brenda Jeffrey,  
Respondent Below, Petitioner.**

**FILED**

**June 18, 2018**  
Edythe Nash Gaiser,  
Clerk Supreme Court  
of Appeals of West  
Virginia

### CORRECTED MEMORANDUM DECISION

Petitioner Brenda Jeffrey, by counsel Robert G. Hanshaw and Cindy J. Fernald, appeals the March 17, 2017, order of the Circuit Court of Raleigh County denying her motion for injunction and prohibition to set aside a ruling or, in the alternative, to remand to magistrate court for fact finding. Respondent, the State of West Virginia (“the State”), by counsel Gordon L. Mowen II, filed its response, to which petitioner submitted a reply.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no

substantial question of law. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

On May 23, 2014, August 15, 2014, and August 17, 2014, petitioner's dog, Jasper, attacked and bit two children in Prosperity, Raleigh County, West Virginia, reportedly without provocation. After an investigation, petitioner and Jasper's other owner, Randall Jerome Smith, were criminally charged with harboring a vicious dog. The State filed its "Petition to Destroy Caninus Familiaris" on or about January 16, 2015, in the Circuit Court of Raleigh County. Shortly thereafter, the circuit court held an evidentiary hearing on that motion. During the hearing, the court determined that petitioner and Mr. Smith had surrendered Jasper to the Humane Society of Raleigh County ("HSRC") and did not have standing to contest the State's petition to euthanize the dog.<sup>1</sup> The court found Jasper to be vicious, as defined by West Virginia Code § 19-20-20, and directed that the dog be euthanized. An order to that effect was entered on February 11, 2015. On March 3, 2015, petitioner and Mr. Smith entered pleas of guilty to harboring a vicious dog before the Magistrate Court of Raleigh

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<sup>1</sup> The "Statement of Voluntary Surrender" petitioner signed specifically provides as follows: "I hereby surrender all of my interest in said animal to the Humane Society of Raleigh County." It appears that petitioner initialed the portion of the form that provides "IT HAS BEEN EXPLAINED TO ME BY THE HSRC THAT AFTER I RELINQUISH THE ANIMAL, IT CANNOT BE RETURNED TO ME." Petitioner's magistrate case number is also included on that form, which was signed on August 20, 2014.

County. Both were represented by counsel at that time.

On May 13, 2015, the magistrate who conducted the criminal proceeding held a hearing pertaining to the second element of West Virginia Code § 19-20-20, that is, to determine whether Jasper was dangerous such that he should be euthanized. Petitioner was present during that hearing. The magistrate found that Jasper attacked two children, ages four and eight, unprovoked on three separate occasions. He also found that the injuries they suffered as a result of these attacks required that the children be taken to a hospital on two of those occasions and that the eight-year-old suffered such severe injuries to her arm that she was still seeking medical treatment months after the attack. Based on those findings, he also concluded that Jasper is a vicious dog within the meaning of West Virginia Code § 19-20-20, posed a threat to society, and must be euthanized. The HSRC appealed the magistrate court's May 13, 2015, order, but neither petitioner nor Mr. Smith filed an appeal of their convictions in magistrate court or appealed the magistrate court's decision to euthanize the dog.

On February 23, 2016, the circuit court conducted a hearing pertaining to the HSRC's petition for appeal and writ of prohibition, and determined by order entered on March 1, 2016, that the HSRC did not have standing to bring such appeal or assert other pertinent rights regarding the magistrate court proceedings. The HSRC appealed that order to this Court, and by memorandum decision entered on January 6, 2017, this Court declined to address the HSRC's sole assignment of error due to its inadequate brief before this Court. *State v. Humane Society of Raleigh*

*County, Inc.*, Appeal No. 16-0414, 2017 WL 65476 (W.Va. Jan. 6, 2017)(memorandum decision).

On or about January 31, 2017, the circuit court conducted a hearing “to determine the mechanics of the euthanization of the dog and the effect of [this Court’s] [m]emorandum [d]ecision.” The circuit court set out a schedule for the destruction of the dog and determined how the euthanization should be carried out. Prior to the expiration of that schedule, petitioner filed in the circuit court a “Motion for Injunction and Prohibition and Motion to Set Aside a Ruling Based on W.Va. Rule 60(B), or in the Alternative, To Remand to Magistrate Court for Fact Finding.” The circuit court then heard oral argument on those motions. On March 17, 2017, the circuit court entered its order denying petitioner’s motions. At the conclusion of that order, the circuit court denied and refused petitioner’s motion for injunction and writ of prohibition; denied petitioner’s motion to set aside the magistrate court’s ruling pursuant to Rule 60(b), or in the alternative, remand to the magistrate court for fact finding; affirmed the May 13, 2015, order of the Magistrate Court of Raleigh County finding that Jasper is vicious and ordering his euthanization; denied petitioner’s request to obtain and review the victim’s reconstructive medical records; and stayed Jasper’s euthanization for thirty days from the date of the order to provide petitioner the opportunity to appeal its decision if desired. Petitioner appeals from that order.<sup>2</sup>

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<sup>2</sup> On April 18, 2017, the circuit court entered an “Order Extending Stay of Execution of Jasper Pending Appeal” ordering

While petitioner's motion below was submitted pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, the proceeding at issue is a criminal proceeding so Rule 60(b) is inapplicable.<sup>3</sup> We have, however, found that

“[w]here prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.” Syllabus Point 2, *Woodall v. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973).

Syl. Pt. 4, *State ex rel. Shelton v. Burnside*, 212 W. Va. 514, 575 S.E.2d 124 (2002).

On appeal, petitioner asserts four assignments of error, all of which stem from petitioner's right to appear before the magistrate and/or circuit court to oppose the State's petition to destroy Jasper.<sup>4</sup> This

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that Jasper remain at the HSRC pending resolution of the appeal before this Court.

<sup>3</sup> See *Durham v. Jenkins*, 229 W. Va. 669, 673, 735 S.E.2d 266, 270 (2012) (“Section 19-20-20, which is entirely criminal in nature . . . . During that criminal proceeding, upon finding that the dog is dangerous, which is an element of the crime to be proved, the judge may then order the dog killed.”).

<sup>4</sup> On appeal, petitioner asserts four assignments of error: (1) The circuit court committed plain error by denying its lawful ability to exercise jurisdiction over petitioner's motion for a new

Court has long held that it “may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.’ Syllabus point 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).” Syl. Pt. 3, in part, *Bowyer v. Wyckoff*, 238 W. Va. 446, 796 S.E.2d 233 (2017). Based upon our review of the record before this Court, we affirm the circuit court’s denial of petitioner’s motions based upon grounds not set forth by petitioner on appeal.

Because petitioner relinquished Jasper to the HSRC in 2014, we find that she lacks standing to assert an appeal related to the destruction of the dog. As we previously set forth,

[s]tanding is comprised of three elements: First, the party attempting to establish standing must have suffered an “injury-in-fact” — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must

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hearing for additional findings of fact; (2) by refusing to order a new hearing the circuit court denied petitioner’s right to due process under the United States Constitution; (3) by refusing to order a new hearing the circuit court denied petitioner’s right to due process under the West Virginia Constitution; and (4) by refusing to order a new hearing the circuit court denied petitioner’s right to be assisted by counsel during a critical stage of her criminal case in violation of the United States Constitution.

be likely that the injury will be redressed through a favorable decision of the court.

Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002). In *Findley*, we stated that “when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication on a particular issue[.]” *Id.* at 95, 576 S.E.2d at 822 (quoting *Flast v. Cohen*, 392 U.S. 83, 99–100 (1968) (footnote omitted)). While petitioner is the proper party to appeal or attempt to withdraw her plea and resulting sentence, because she has not owned or been the caretaker for Jasper in over three years, she lacks standing to pursue this appeal.

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** June 18, 2018

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Robin Jean Davis  
Justice Menis E. Ketchum  
Justice Elizabeth D. Walker

Justice Loughry, Allen H., II suspended and therefore not participating.

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## APPENDIX B

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**IN THE CIRCUIT COURT OF  
RALEIGH COUNTY, WEST VIRGINIA**

STATE OF WEST )  
VIRGINIA, )  
Petitioner, )  
v. ) Case No. 15-CAP-3-K  
BRENDA JEFFREY; )  
RANDALL JEROME )  
SMITH, )  
Respondents. )

**ORDER DENYING AND DISMISSING THE  
RESPONDENT BRENDA JEFFREY'S MOTION  
FOR INJUNCTION AND PROHIBITION AND  
MOTION TO SET ASIDE RULING BASED  
UPON W.VA. RULE 60(8) OR IN THE  
ALTERNATIVE, TO REMAND TO THE  
MAGISTRATE COURT FOR FACT FINDING**

On the 15th day of February, 2017, came the State of West Virginia by Assistant Prosecuting Attorney, John W. Gallaher, Jr., and came the Respondent Brenda Jeffrey, in person and by counsel Cindy J. Fernald and Timothy N. Barber, pursuant to proper

notice of hearing. Thereupon, the court heard arguments from counsel, both in support of, and against, the Respondent's "Motion for Injunction and Prohibition and Motion to Set Aside a Ruling Based on W.Va. Rule 60(8), or in the Alternative, to Remand to the Magistrate Court for Fact Finding." At the conclusion of the arguments presented, the court found that it did not have jurisdiction to grant any manner of relief sought by the Respondent in this matter. Specifically, this court concluded: (1) that the Respondent is time-barred from appealing the Magistrate Court's order of May 13, 2015, which directed that the dog, "Jasper," be euthanized; and (2) that because the case at issue is a criminal case, Rule 60(8) of the West Virginia Rules of Civil Procedure does not apply in this concern. Therefore, the court determined that the Respondent's motions must be REFUSED and DENIED, in their entirety.

#### **FINDINGS OF FACT**

1. On May 23, 2014, August 15, 2014, and August 17, 2014, the dog, "Jasper," attacked and bit two children, who resided at 103 Northern Court, in Prosperity, Raleigh County, West Virginia.
2. The owners of "Jasper" were Brenda Jeffrey and Randall Jerome Smith, Respondents herein.
3. These incidents were reported and investigated by the Raleigh County Sheriff's Office. The Respondents Brenda Jeffrey and Randall Jerome Smith were criminally charged with harboring a vicious dog in *State of West Virginia v. Randall Smith* (14-M-3926) and *State of West Virginia v. Brenda Jeffrey* (14-M-3927).

4. West Virginia Code §19-20-20 provides, in pertinent part, as follows:

Upon satisfactory proof before a circuit court or magistrate that such dog is vicious, dangerous, or in the habit of biting or attacking other persons or other dogs on animals, the judge may authorize the humane society to cause such dog to be killed.

5. The State filed a Petition to Destroy *Caninus Familiaris* on or about January 16, 2015, in the Circuit Court of Raleigh County. On January 28, 2015, an evidentiary hearing was held on the State's Petition to Destroy *Caninus Familiaris* before the undersigned circuit judge. At such hearing, this court determined, at that time, that the Respondents, Brenda Jeffrey and Randall Jerome Smith, had surrendered their dog to the Raleigh County Humane Society, and did not have standing regarding the State's petition to euthanize the dog. The court found the dog, "Jasper," to be vicious, as defined by *West Virginia Code* § 19-20-20, and directed that the dog be euthanized. An order to this effect was entered herein on February 11, 2015.
6. Thereupon, by Order entered herein on March 25, 2015, this court vacated its February 11, 2015 Order Granting the State's Petition to Destroy *Caninus Familiaris* in its entirety, on the basis that the circuit court lacked jurisdiction to grant the State's motion in this matter. Specifically, this court reviewed the case of *Durham v. Jenkins*, 229 W.Va. 669, 735

S.E.2d 266 (2012), which clearly sets forth the procedure for the destruction of vicious animals. This court therefore acknowledged error in the procedure followed in its proceedings of January 28, 2015. The *Durham* Court explained that the correct procedure for the destruction of a vicious animal is for the circuit judge or magistrate that hears the criminal case against the dog's owner to determine whether the dog is dangerous (which is an element of the crime charged against the dog's owner and must be proved "beyond a reasonable doubt"), and then the judge may order the dog to be euthanized on motion of the State.

7. On March 3, 2015, Respondents Brenda Jeffrey and Randall Jerome Smith entered pleas of Guilty to Harboring a Vicious Dog before Raleigh County Magistrate Tomi Peck, and were assessed court costs and fines. Both Respondents were represented by counsel at this time. Such convictions satisfied the first procedural element of *West Virginia Code* § 19-20-20.
8. On May 13, 015, Raleigh County Magistrate Tomi Peck conducted a hearing pertaining to the second element of *West Virginia Code* § 19-20-20, upon the State's refiled Petition to Destroy Caninus Familiaris, concerning the discretionary determination as to whether or not to euthanize "Jasper." Magistrate Peck found that the subject dog in this matter attacked two small girls, one 4 years old, and one 8 years old, on three (3) separate occasions without provocation while the children were

playing in their neighborhood in Raleigh County, West Virginia. Magistrate Peck also found that the injuries received by the infant children as a result of these attacks required the children to be taken to a local hospital on two of the three occasions. Lastly, Magistrate Peck found that the most recent attack left the 8-year-old child with appalling injuries to her arm, which still required her to seek further medical treatment, months after the attack, for cosmetic and reconstructive surgery. Magistrate Peck concluded that the subject dog in this matter, "Jasper" is a vicious dog, within the meaning of *West Virginia Code § 19-20-20* and poses a continued threat to society and accordingly must be euthanized.

9. The present case is a criminal action, and the true parties to this cause are the State of West Virginia and Brenda Jeffrey and Randall Jerome Smith. Although the Raleigh County Humane Society did file a timely appeal of the Magistrate Court's May 13 2015 Order finding "Jasper" to be a vicious dog and ordering its destruction, neither Brenda Jeffrey nor Randall Jerome Smith have filed an appeal of their convictions in Magistrate Court or the Magistrate's decision to euthanize the dog.
10. Rule 20 of the West Virginia Rules for Criminal Procedure for Magistrate Court requires that a notice of appeal be filed with the court within twenty (20) days after the magistrate hearing. Rule 20 further permits a circuit court, not later than ninety (90) days after the hearing, to grant an appeal upon a showing of good cause as to

why such appeal was not filed within the 20-day period. The 20-day time limit to appeal the Magistrate's May 13, 2015 order expired on or about June 2, 2015, and the "good cause" deadline for appeal of the Magistrate's May 13, 2015 order expired on or about August 11, 2015.

11. On February 23, 2016, this court conducted a hearing pertaining to the Raleigh County Humane Society's Writ of Prohibition and Appeal, and determined by Order entered herein on March 1, 2016, that the Raleigh County Humane Society had no standing to bring an appeal, or to assert other pertinent rights, regarding the Magistrate Court proceedings in which Respondents Brenda Jeffrey and Randall Jerome Smith were both found Guilty of Harboring a Vicious Dog and the additional finding of the Magistrate that the canine, "Jasper" is a vicious dog and must be destroyed.
12. Thereafter, the Raleigh County Humane Society appealed this court's Order of March 1, 2016, to the West Virginia Supreme Court of Appeals, which by Memorandum Decision filed January 6, 2017, affirmed the Order of the Circuit Court of Raleigh County.
13. On or about January 31, 2017, this court conducted a hearing to determine the mechanics of the euthanization of the dog and the effect of the Supreme Court of Appeals' aforesaid Memorandum Decision. This court set out a schedule for the destruction of the dog,

and determined how such euthanization should be carried out.

14. Prior to the expiration of the euthanization schedule, the Respondent Brenda Jeffrey filed the present "Motion for Injunction and Prohibition and Motion to Set Aside a Ruling Based on W.Va. Rule 60(8), or in the Alternative, To Remand to Magistrate Court for Fact Finding". The court scheduled these motions for hearing on February 15, 2017.

#### **CONCLUSIONS OF LAW**

1. *West Virginia Code* § 19-20-20 is a criminal statute which forbids a person from harboring a dog known to be vicious, and allows a Court or a Magistrate to order the euthanization of such dog upon satisfactory proof that the dog is vicious. See, *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012).
2. After Respondent Brenda Jeffrey entered a Guilty plea to the offense of Harboring a Vicious Dog, and pursuant to the filing by the State of a Petition to Destroy Caninus Familiaris, Raleigh County Magistrate Tomi Peck conducted an evidentiary hearing on May 13, 2015. At such hearing, Magistrate Peck ultimately found the dog, "Jasper," to be vicious within the meaning of *West Virginia Code* § 19-20-20, and directed the dog to be euthanized by Order entered in Magistrate Court on May 13, 2015.
3. Respondent Brenda Jeffrey did not file or perfect an appeal of Raleigh County Magistrate Tomi Peck's Order of May 13, 2015, directing the dog, "Jasper," to be euthanized within the

appropriate 20-day appeal period provided by Rule 20 of the West Virginia Rules of Criminal Procedure. Furthermore, Respondent Brenda Jeffrey did not avail herself of the additional opportunity to request the Circuit Court of Raleigh County to grant an appeal of Magistrate Peck's Order of May 13, 2015, within 90 days after the hearing, by showing good cause why such appeal was not filed within the 20-day period.

4. Raleigh County Magistrate Peck's Order of May 13, 2015, directing the euthanization of the dog, "Jasper," is now final and unappealable.
5. This Court has no jurisdiction, and thereby no authority, to order a new trial of the subject criminal proceedings held before Raleigh County Magistrate Peck held back in May of 2015, and which ordered the destruction of the dog, "Jasper;" nor does this court now have the jurisdiction or lawful ability to modify, alter, or set aside such magisterial ruling.
6. Furthermore, having determined that this matter is a criminal case, as such, Respondent Brenda Jeffrey's motion under Rule 60(b) of the West Virginia Rules of Civil Procedure is misplaced and is therefore inapplicable here.
7. Even if the court did have proper jurisdiction to consider extending the 20-day period enabling Respondent Brenda Jeffrey to appeal Raleigh County Magistrate Peck's May 13, 2015 Order, this court finds that the Respondent has failed to show good cause that would be sufficient to

vacate or set aside lawful proceedings that occurred almost two years ago.

8. The Respondent's request for victim medical records regarding any reconstructive surgery either of the victims have had to undergo as a result of the injuries sustained during the attacks are not relevant to these proceedings, as there has been ample photographic evidence presented and admitted into the Court record in this case, as well as medical records from the victims' emergency room visits following these attacks, to demonstrate the extent of the victims' injuries. In addition, the State does not have custody nor access to these records.

**WHEREFORE**, based upon the aforesgoing Findings of Fact and Conclusions of law, it is hereby **ORDERED, ADJUDGED** and **DECreed**, as follows:

1. That the Motion for Injunction and Writ of Prohibition filed by the Respondent Brenda Jeffrey is **DENIED** and **REFUSED**;
2. That the Respondent Brenda Jeffrey's Motion to Set Aside Ruling Based Upon Rule 60(8), or in alternative, Remand to Magistrate Court for Fact Finding is **DENIED**;
3. That the Raleigh County Magistrate Court's Order of May 13, 2015, finding that the dog, "Jasper," is vicious, and ordering its euthanization is **AFFIRMED** and confirmed;
4. That the Respondent Brenda Jeffrey's request for reconstructive medical records from the victims in this matter is **DENIED** ;

5. That the Raleigh County Sheriff may designate an appropriate representative to witness the euthanization of this dog, which shall be permitted to take place at the Raleigh County Animal Shelter, and upon the death of the dog, its body shall be turned over to the custody of the Raleigh County Humane Society for disposition as deemed appropriate; and,
6. That the euthanization of the dog, "Jasper," shall be stayed for thirty (30) days, from and after the entry of this Order, to provide to the Respondent an opportunity to appeal this decision, if so desired.

The Court preserves all necessary and appropriate objections and exceptions to the findings, conclusions, and rulings set forth in this Order.

The Clerk shall provide attested copies of this Order to counsel for the State, counsel for the Respondent, and the Raleigh County Sheriff's Office.

**ENTER** this Order on this the 17th day of March, 2017.

/s/ Kirkpatrick  
JUDGE

The foregoing is a true copy of  
an order entered in this office  
on the 17 day of March, 2017.  
PAUL H. FLANAGAN, Circuit  
Clerk of Raleigh Co., WV  
By MBJ Deputy

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## APPENDIX C

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### STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on October 9, 2018, the following order was made and entered:

State of West Virginia,  
Petitioner Below, Respondent

vs) No. 17-0365

Brenda Jeffrey,  
Respondent Below, Petitioner

### ORDER

The Court, on October 4, 2018, having maturely considered the petition for rehearing filed by the petitioner, Brenda Jeffrey, by Roger G. Hanshaw and Cindy J. Fernald, her attorneys, is of the opinion to and does hereby refuse said petition for rehearing.

Justice Allen H. Loughry II suspended and therefore not participating. Justice Paul T. Farrell sitting by temporary assignment.

A True Copy

Attest: /s/Edythe Nash Gaiser  
Clerk of Court

