

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA

Appellee/Plaintiff Below,

v.

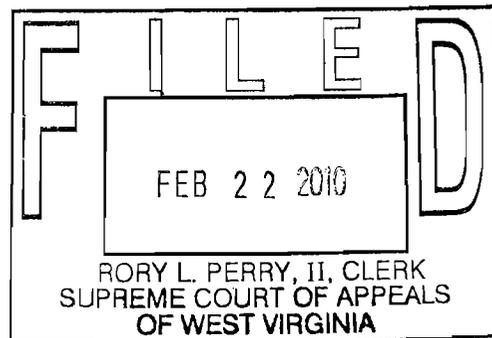
Docket No.: 35275

MARA SPADE,

Appellant/Defendant Below.

**BRIEF OF THE STATE OF WEST VIRGINIA**

Christopher C. Quasebarth  
Chief Deputy Prosecuting Attorney  
State Bar No.: 4676  
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304-264-1971



## I. STATEMENT OF THE CASE.

This case concerns the Appellant's inability to care for approximately one hundred fifty dogs. The Appellant hoarded the dogs on a misguided mission to save them from neglect but ultimately ended up neglecting and cruelly mistreating the dogs herself. The dogs were seized pursuant to a civil statute and search warrants by Animal Control. The Appellant was subsequently charged in the Magistrate Court with a single misdemeanor charge of animal cruelty.

The Appellant vigorously litigated the criminal charge, the civil seizure of the animals, and her corresponding statutory financial obligation to pay the county for the care of the seized animals. This litigation involved the Magistrate and Circuit Courts, as well as a foray before this Court. The Appellant was, and is, represented throughout all of these proceedings by retained counsel.

The Appellant entered a no contest plea in Magistrate Court to one misdemeanor count of animal cruelty. The statutory sentence was suspended for probation, following a psychological evaluation, as per the plea agreement. Previous findings were made by the Magistrate Court in the civil seizure proceeding, and endorsed by the Circuit Court, as to the amount owed by the Appellant to the county, pursuant to **W. Va. Code** §§ 7-10-4 and **W. Va. Code** § 61-8-19, for eight months of care, feeding and medical care for those one hundred fifty dogs. Based on those findings, the Appellant was ordered at her restitution hearing in the criminal case to pay restitution and costs.

The Appellant then appealed her conviction to the Circuit Court. The Circuit Court dismissed the appeal based on the express language of Rule 20.1 of the *West Virginia Rules of Criminal Procedure for Magistrate Courts*, which bars appeals as a matter of right to the circuit

court from misdemeanor convictions on counseled pleas in magistrate court.

The Appellant now appeals from that dismissal to this Court. The State of West Virginia respectfully requests this Court to affirm the ruling of the circuit court.

## **II. STATEMENT OF THE FACTS AND PROCEEDING BELOW.**

**W. Va. Code § 7-10-4** establishes a civil procedure for county humane officers to seize animals which are abandoned, neglected or cruelly treated. That statute provides for judicial oversight of such seizures, requiring a probable cause hearing before a magistrate. Upon a finding that the animals were abandoned, neglected or cruelly treated, the seizure is ratified and the owner is required to post a bond to bear the cost of the animals' maintenance pending final resolution of the criminal charges brought under **W. Va. Code § 61-8-19**.

**W. Va. Code § 61-8-19** is the State's criminal animal cruelty statute.

The case *sub judice* is governed by these statutes. This case has a long and tortured history since 2006. There was a seizure of approximately one hundred fifty dogs who were alleged cruelly mistreated by the Appellant. Hearings were held in that civil proceeding pursuant to **W. Va. Code § 7-10-4** on the seizures, the required bond for the care and feeding of the seized animals, and the disbursement of those bond funds.

Hearings in the criminal case were held upon the single count of misdemeanor animal cruelty, pursuant to **W. Va. Code § 61-8-19**, encompassing the mistreatment of all one hundred fifty dogs. After two years of litigation, the Appellant ultimately pleaded no contest to the charge.

After the final resolution of the criminal charge, the Appellant appealed that plea as to the

issue of restitution to the circuit court. The circuit court denied the appeal, prompting this appeal before this Court. The Appellant did not, after final resolution of the criminal case, appeal to the circuit court the findings made in the civil seizure cases.

The factual and procedural history known to the State follows.

A. Investigation, April 2006.

1. In April 2006, Berkeley County Animal Control Officers Webber and McMahan investigated complaints received about the Appellant holding scores of dogs in inhumane and unhealthy conditions at a location in Berkeley County that the Appellant called "Second Chance Rescue."

2. At that time, Officers Webber and McMahan noticed a light brindle pit mix with a 5"x7" open wound on its neck and a white pit mix with mange. A Mr. Kenneth Green was present for Second Chance Rescue at the time and stated that a third dog also had mange. Mr. Green was advised to seek medical care for the three dogs.

3. In follow-up visits to Second Chance Rescue in May 2006 by Officers McMahan and Webber, it appeared that the light brindle mix and the white pit mix had received treatment. However, water bowls were observed dry and there was not enough shelter for all of the dogs. An underweight medium size white dog was observed. Also observed was a black lab mix with a 2"x1" laceration approximately 1" deep on its right side with what appeared to be maggots crawling around in and around the area.

4. On or about May 24, 2006, a search warrant was executed at Second Chance Rescue upon allegations of animal cruelty and a total of four (4) dogs were then seized. A dead dog was found on the premises at the time. [Search Warrant, 5/24/06; located in Magistrate Case No.: 06-

C-2369.]

5. A custody hearing, pursuant to **W. Va. Code** § 7-10-4, based on that seizure and scheduled for June 7, 2006, in Magistrate Court was continued by agreement of the parties for monitoring for corrective action on the Appellant's part, with the understanding that if the problems were unresolved the matter would come back for hearing. [State v. Mara Spade, Magistrate Case No.: 06-C-1860.]

6. Due to continuing problems, on or about June 29, 2006, a second search warrant was executed at Second Chance Rescue upon allegations of animal cruelty and a total of forty-two (42) dogs were then seized. Another dead dog was found on the premises at the time. A local veterinarian, Dr. Todd Sauble, accompanied the officers and observed too many dogs per pen, inadequate ventilation, horrible sanitation, inadequate food and water, multiple dogs with open wounds and lameness, puppies with "pot bellies" and diarrhea, inadequate fencing and piles of rotten food. Dr. Sauble then recommended removal of all the animals. [Search Warrant, 6/29/06; located in Magistrate Case No.: 06-C-2369.]

7. On or about July 6, 2006, a third search warrant was executed at Second Chance Rescue upon allegations of animal cruelty to seize the remainder of the dogs that could not be practicably taken into custody on June 29, 2006, and a total of one hundred three (103) dogs were then seized, bringing the total number of dogs seized from the Appellant's inhumane treatment to approximately one hundred fifty (150). [R., Vol. II (Cir. Ct. Case No.: 06-C-560), p. 3-9; Search Warrant, 7/6/06; located in Magistrate Case No.: 06-C-2369.]

8. A Criminal Complaint was filed against the Appellant, alleging a single count of cruelty to animals, pursuant to **W. Va. Code** § 61-8-19. [State v. Mara Spade, Magistrate Court

Case No.: 06-M-3271.]

B. The 2006 Magistrate Court Hearings.

1. Notice of the seizures and the Appellant's liability for cost and care of the seized animals was provided to defendant, pursuant to **W. Va. Code** § 7-10-4. The Appellant requested a hearing, pursuant to **W. Va. Code** § 7-10-4(b). That probable cause hearing was held before the Honorable Magistrate Joan Bragg, on July 12, 2006, with the parties present. [State v. Mara Spade, Magistrate Case Nos.: 06-C-1860, 2305, 2369.]

2. By oral ruling given on July 12, 2006, with written Order entered July 19, 2006, the Magistrate found by a preponderance of the evidence (utilizing the statutory "probable cause" standard of **W. Va. Code** § 7-10-4(b) and (c)) that the seized animals were "neglected, deprived of necessary medical care or cruelly treated." The Magistrate then awarded custody of the animals, pursuant to **W. Va. Code** § 7-10-4(c), to the Berkeley County Animal Control for further disposition pursuant to law. [Order Granting Custody of Canines to Animal Control, 7/19/06, id.; R. Vol. II, (Cir. Ct. Case No. 06-C-560) p. 10-11.]

3. The Appellant was further ordered, pursuant to **W. Va. Code** § 7-10-4(c), to post a bond in the sum of twenty-five thousand dollars (\$25,000.00) for the maintenance of the dogs, the sum estimated to cover necessary costs for a thirty (30) day period. Also pursuant to **W. Va. Code** § 7-10-4(c), the Berkeley County Animal Control was authorized by that Order to draw upon the bond for "the actual reasonable costs incurred in providing care, medical treatment and provisions" to the animals from the initial date of seizure. [Id.]

4. On July 19, 2006, the Appellant posted with the Magistrate Clerk the twenty-five thousand dollar (\$25,000.00) cash bond required for maintenance of the seized animals. (Due to

the amount of money involved, that bond was subsequently transferred to the Circuit Clerk.)

[Receipt for Bond, 7/19/06, Case No.: 06-P-170; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 5.]

5. Upon being presented with an Order detailing the incurred actual reasonable costs for the care, medical treatment and provisions of the seized animals in the sum of \$35,714.98, through August 8, 2006, with a copy provided to the Appellant's counsel, the Magistrate Ordered a draw-down of the entire twenty-five thousand dollar (\$25,000.00) bond. The Appellant was also Ordered to post an additional twenty-five thousand dollar (\$25,000.00) bond, pursuant to **W. Va. Code** § 7-10-4(c). [Order Granting Disbursement of Funds to Berkeley County Animal Control, 8/22/06; R. Vol. I (Cir. Ct. Case No.: 06-P-170), p. 8-9; Expenses, Magistrate Case No.: 06-C-1860.]

6. The bond was not disbursed on the Magistrate's Order since the size of the bond required that it be maintained by the Circuit Clerk, who required a Circuit Judge's order to release the monies. After the State provided notice to the Appellant, and following the proceedings and hearings described below, on October 3, 2006, the Circuit Court endorsed the same August 22, 2006, Order of the Respondent Magistrate. [Order Granting Disbursement of Funds to Berkeley County Animal Control, 10/3/06; Case No.: 06-P-170; Tr. 8/29/06, 06-C-560, 562, 564; Faxed Copies of Invoices, dated 9/28/06, 10/3/06, R. Vol. I (Cir. Ct. Case No.: 06-P-170), p. 10-13, 15-27, 29-30.]

7. The Berkeley County Circuit Clerk then disbursed the \$25,000.00 to Animal Control. [Check, 10/5/06, Case No.: 06-P-170; R. Vol. I (Cir. Ct. Case No.: 06-P-170), p. 31.]

C. The 2006 Circuit Court Hearings.

1. After the Magistrate entered her ruling at the initial July 12, 2006, seizure hearing that

the dogs were “neglected, deprived of necessary medical care or cruelly treated,” the Appellant filed a Petition for Writ of Prohibition with the Circuit Court seeking to bar the Magistrate from entering the Order. The Circuit Court, Honorable Christopher C. Wilkes, without issuing a Rule to Show Cause, denied the Petition by written Order entered July 19, 2006. [SER Mara Spade v. The Honorable Joan Bragg, Case No.: 06-C-495; R. Vol. I (Cir. Ct. Case No.: 06-C-495), p. 65-69.]

2. Two weeks after having her Petition for Writ of Prohibition denied by Judge Wilkes, and on or about August 4, 2006, the Appellant filed a Notice of Removal to Circuit Court, attempting to remove the entire proceeding from Magistrate Court to the Circuit Court. [Notice of Removal to Circuit Court, Circuit Court Nos.: 06-C-560, 652, 564; R. Vol. II (Cir. Ct. Case No.: 06-C-560), p. 17-18.]

3. On or about that same date, August 4, 2006, and without posting the statutorily required appeal bond, the Appellant also filed a Petition for Appeal in the Circuit Court (utilizing the same circuit court case numbers). [Petition for Appeal, Circuit Court Nos.: 06-C-560, 562, 564; R. Vol. II (Cir. Ct. Case No.: 06-C-560), p. 12-16.]

4. Three weeks later, on or about August 25, 2006, the Appellant then filed in the Circuit Court, under those same case numbers, additional Petitions for Writ of Prohibition. These Petitions sought to bar the Magistrate from ordering disbursement from the bond that was posted for “the actual reasonable costs incurred in providing care, medical treatment and provisions” to the animals seized. The Appellant alleged that the Magistrate no longer possessed jurisdiction over the cause since the Appellant had appealed the case to the Circuit Court. [Petition for Writ of Prohibition, SER Mara Spade v. The Honorable Joan Bragg, Circuit Court Nos.: 06-C-560,

562, 564; R. Vol. II (Cir. Ct. Case No.: 06-C-560), p. 21-44.]

5. On August 29, 2006, the Honorable Circuit Judge Sanders conducted a hearing to determine whether to issue a Rule to Show Cause on these extraordinary writs, the appeal and the removals. The parties appeared and, upon the arguments of counsel and careful review of the statutory provisions, the Circuit Court ruled that the Magistrate's July 19, 2006, Order was an unappealable interlocutory order since the seizures under **W. Va. Code** § 7-10-4 were intertwined with the criminal proceeding under **W. Va. Code** § 61-8-19. The Appellant's Petition for Appeal was, therefore, dismissed. The Circuit Court also ruled that, since the appeal was improperly filed, the Magistrate maintained jurisdiction over the matter to entertain the bond issues. The Circuit Court ruled that the Magistrate did not exceed her lawful authority under **W. Va. Code** § 7-10-4(c) in disbursing the initial \$25,000.00 upon the finding that the expenses incurred to date, \$35,714.98, exceeded the \$25,000.00 bond sum. The Petitions for Writs of Prohibition were, therefore, also denied. The Removal to the Circuit Court was also dismissed. [Order Denying Petition for Writ of Prohibition and Dismissing Appeal and Removal, 8/31/06; Tr. 8/29/06, 06-C-560, 562, 564; R. Vol. II (Cir. Ct. Case No.: 06-C-560), p. 63-66.]

6. Following those ruling by the Circuit Court, and without further challenge to the finding of actual reasonable costs incurred by the county for the care of the seized animals, on August 30, 2006, the Appellant posted with the Circuit Clerk the second required twenty-five thousand dollar (\$25,000.00) bond. [Receipt for Bond, 8/30/06, Case No.: 06-P-170; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 7.]

7. As noted above, the Circuit Clerk refused to pay out the initial twenty-five thousand dollar (\$25,000.00) bond on the Magistrate's August 22, 2006, Order, instead insisting that a

Circuit Judge's authorization was required. Further notice was provided to the Appellant by the State as to the underlying basis of the claim on the bond, and, on October 3, 2006, the Circuit Court endorsed the same August 22, 2006, Order of the Magistrate. [Order Granting Disbursement of Funds to Berkeley County Animal Control, 10/3/06; Faxed Copies of Invoices, dated 9/28/06, 10/3/06, Case No.: 06-P-170; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 10-13, 15-27, 29-30.]

8. The Berkeley County Circuit Clerk then disbursed the initial twenty-five thousand dollar (\$25,000.00) bond to Animal Control as partial reimbursement for their actual expenses in the care, feeding and shelter of the seized dogs. [Check, 10/5/06, Case No.: 06-P-170; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 31.]

D. The 2006 Writ Taken to this Court.

1. On or about October 10, 2006, the Appellant filed a Petition for Writ of Prohibition And/or Mandamus And/or in the Alternative for Appeal with this Court. State of West Virginia ex rel. Mara Spade v. Honorable David H. Sanders, Judge of the Circuit Court of Berkeley County, and Honorable Joan Bragg, Magistrate for Berkeley County, Docket No.: 062672. [; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 37-120.]

2. That Petition alleged that the Circuit Court and Magistrate Court erred in the proceedings noted above. The undersigned filed a response in opposition to the Petition. This Court refused the Petition. [Order, 11/15/06.]

E. Further Proceedings in the Circuit Court, October 2006.

1. Subsequent to the Appellant filing the above-noted Petition in this Court, the Appellant also moved the Circuit Court to reconsider its October 3, 2006, Order allowing the

initial twenty-five thousand dollar (\$25,000.00) bond disbursement. [Trial Court Rule 22 Scheduling Order, 10/16/06; Motion, 11/2/06, Case No.: 06-P-170; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 32, 184-187.]

2. After consideration of the pleadings, the Circuit Court denied the Appellant's Motion for Reconsideration. [Order Denying Motion to Reconsider October 3, 2006, Order, 11/2/06, Case No.: 06-P-170; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 178-179.]

F. Further Proceedings in the Magistrate Court Civil Case.

1. Meanwhile, the Berkeley County Animal Control was still providing food, care and shelter to the seized dogs, or contracting for the same, as they had for in excess of six months. (Of the one hundred fifty dogs were seized in June 2006, a few were voluntarily relinquished by the Appellant in the intervening months, and were adopted by new owners. A very few others died as a result of the poor physical condition they were in when seized from the Appellant. Those that died were being treated by a veterinarian.)

2. On January 7, 2007, the State provided the Appellant with a proposed order and supporting invoices for the Magistrate to authorize a second disbursement of the bond that was posted by the Appellant in August 2006. The total actual reasonable expenditures for the maintaining almost one hundred fifty seized dogs for over six months by then exceeded one hundred thirty thousand dollars. [Proposed Order Granting Second Disbursement, with attachments, Magistrate Court Case Nos.: 06-C-1860, -2305, -2369.]

3. A hearing was held in the civil seizure case on February 2, 2007, before the Magistrate on the request for disbursement and that a new bond be posted. The State was then prepared to present its witnesses in support of the actual reasonable costs incurred to date (after first

subtracting the initial \$25,000.00 bond paid out) totaling one hundred thirty-nine thousand eight hundred eighty-three dollars and seventy-seven cents (\$139,883.77). The Appellant elected not to challenge those sums. No witnesses were then called. The State asked for disbursement of the current twenty-five thousand dollar (\$25,000.00) bond (reducing the sum to one hundred fourteen thousand eight hundred eighty-eight dollars and seventy-seven cents (\$114,883.77)). The State also asked that the new bond be set at an amount to cover the actual expenses to date, plus an additional twenty-five thousand dollars (\$25,000.00) to cover future expenses, totaling one hundred thirty-nine thousand eight hundred eighty-three dollars and seventy-seven cents (\$139,883.77). The Magistrate made those findings and ordered disbursement of the current bond and ordered the Appellant to post a new bond in the amount of one hundred thirty-nine thousand eight hundred eighty-three dollars and seventy-seven cents (\$139,883.77). [Order Granting Disbursement of Funds and Requiring New Bond, 2/21/07, Case No. 06-P-170; R. Vol. I (Cir. Ct. No.: 08-M-AP-3), p. 143-145.]

4. Since the Magistrate's Order in the civil seizure case would have to be endorsed by the Circuit Court for the Circuit Clerk to release the bond amount, on or about February 21, 2007, the State and Appellant submitted the Order Granting Disbursement of Funds and Requiring New Bond to the Circuit Court. That Order was initialed by counsel for the parties. The Order noted the Appellant's unspecified exception. The Order was then endorsed by both the Circuit Court and the Magistrate and entered. [Order Granting Disbursement of Funds and Requiring New Bond, 2/21/07, Case No. 06-P-170; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 195-197.]

5. Per the terms of that February 21, 2007, Order, the second twenty-five thousand dollar (\$25,000.00) bond was ordered disbursed. The Appellant was required to post a new bond in the

amount of one hundred thirty-nine thousand eight hundred eighty-three dollars and seventy-seven cents (\$139,883.77) by February 28, 2007, or the Appellant would relinquish her rights to the dogs to the Berkeley County Animal Control. [Id.]

6. The Berkeley County Circuit Clerk then disbursed the second twenty-five thousand dollar (\$25,000.00) to Animal Control for partial reimbursement of their actual reasonable expenses in the care, feeding and shelter of the seized dogs. [Check, 2/22/07, Case No.: 06-P-170; ; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 198.]

7. The Appellant did not post the additional bond by February 28, 2007, as ordered. Pursuant to the language of **W. Va. Code** § 7-10-4(c), and after eight months of having been cared for, fed, and provided medical treatment and shelter by Berkeley County Animal Control, the remaining seized dogs were awarded to the county. All of the dogs were then quickly adopted. No further expenses accrued after this time, or were ever requested beyond what was allowed in the February 21, 2007, Order.

G. Further Proceedings in the Magistrate Court Criminal Case.

1. After further protracted negotiations, the Appellant and the State finally agreed to a plea whereby the Appellant pleaded no contest to one misdemeanor count of Animal Cruelty, for which the State would recommend probation following the required psychological examination. A restitution hearing was to be scheduled. [Guilty Plea, 12/3/07, Magistrate Case No.: 06-M-3271; R. Vol. I (Cir. Ct. No.: 08-M-AP-3), p. 19-20.]

2. The psychological examination, which was apparently obtained by the Appellant in October 2006, but not disclosed by the Appellant until January 2008, concluded that “This is an atypical case of animal hoarding, apparently arising not from a compulsion to acquire and

possess animals, but from an exaggerated sense of mission to save animals from euthanasia.

There is evidence of psychological and neuropsychological factors that have interfered with [the Appellant's] ability to accurately assess the appropriateness of her actions in acquiring the number of dogs she kept at any one time." [Psychological Evaluation, 10/4/06; Magistrate Case No.: 06-M-3271; R. Vol. I (Cir. Ct. No.: 08-M-AP-3), p. 50-60.]

3. On February 4, 2008, the Appellant was sentenced to the statutory sentence of ninety (90) days in jail and given credit for the four (4) days she served in jail when her bail was revoked; the remainder of the sentence was suspended for two (2) years of probation. The Appellant was statutorily prohibited from possessing animals for five (5) years. [Probation Order, 4/4/08, Magistrate Case No.: 06-M-3271; R. Vol. I (Cir. Ct. No.: 08-M-AP-3), p. 178.]

4. At the scheduled restitution hearing before the Magistrate on March 26, 2008, the State argued that the Appellant had the ability to challenge the restitution sums at the prior civil seizure hearings related to the bond disbursements before the Magistrate and the Circuit Court, but elected not to challenge those sums. The State argued that the Circuit Court's prior findings were *res judicata* and the Appellant was collaterally estopped as to the sums owed the Berkeley County Animal Control for their actual reasonable expenses for the care, feeding and shelter of the dogs. [Motion for Order of Restitution as Res Judicata, 3/24/08, Magistrate Case No.: 06-M-3271; R. Vol. I (Cir. Ct. No.: 08-M-AP-3), p. 171-181.] The Magistrate agreed, and ordered the Appellant to pay the remaining balance of one hundred fourteen thousand eight hundred eighty-three dollars and seventy-seven cents (\$114, 883.77), the sum remaining after deducting the two previous twenty-five thousand dollar bond disbursements. [Order of Restitution, 7/17/08, Magistrate Case No.: 06-M-3271; R. Vol. I (Cir. Ct. No.: 08-M-AP-3), p. 44-45.] The Appellant

took exception to the ruling.

H. The August 2008 Appeal to Circuit Court.

1. On August 1, 2008, the Appellant appealed the no contest plea in the criminal case to the Circuit Court. The Honorable Christopher C. Wilkes, Circuit Judge dismissed the appeal based on the express language of Rule 20.1 of the *West Virginia Rules of Criminal Procedure for Magistrate Courts*. [Order Dismissing Appeal, 8/11/08, Case No.: 08-M-AP-3; R. Vol. I (Cir. Ct. No.: 08-M-AP-3), p. 292-293.]

2. The Appellant appeals from that dismissal.

3. The State of West Virginia respectfully requests this Court to deny the Petition for Appeal and affirm the ruling of the circuit court.

**III. ISSUES PRESENTED.**

**A. WHETHER THE CIRCUIT COURT PROPERLY REFUSED THE APPELLANT’S PETITION FOR APPEAL FROM A COUNSELED NO CONTEST PLEA AND CONVICTION IN MAGISTRATE COURT PURSUANT TO THE EXPRESS LANGUAGE OF RULE 20.1 OF THE *WEST VIRGINIA RULES OF CRIMINAL PROCEDURE FOR MAGISTRATE COURTS*, WHICH BARS APPEALS FROM COUNSELED PLEAS IN MAGISTRATE COURT?**

**B. WHETHER THE MAGISTRATE COURT PROPERLY AFFORDED THE APPELLANT A HEARING ON RESTITUTION AS PART OF THE PLEA AND PROPERLY FOUND THAT THE RESTITUTION WAS PREVIOUSLY RULED UPON BY BOTH THE MAGISTRATE AND CIRCUIT COURTS?**

**IV. TABLE OF AUTHORITIES.**

*West Virginia Constitution* Art VIII, § 6.....16.

*State v. Lowery*, 222 W.Va. 284, 664 S.E.2d 169 (2008).....16, 18.

*State ex rel. O’Neill v. Gay*, 169 W.Va. 16, 285 S.E.2d 637 (1981).....17.

*SER Vernatter v. Warden*, 207 W. Va. 11, 528 S.E.2d 207 (1999).....18, 25.

*State ex rel. Richey v. Hill*, 216 W.Va. 155, 603 S.E.2d 177 (2004).....23-24.

*Brooks v. Galen of West Virginia, Inc.*, 220 W.Va. 699, 649 S.E.2d 272 (2007).....24.

*State ex rel. Gibson v. Hrko*, 220 W.Va. 574, 648 S.E.2d 338 (2007).....25-26.

**W. Va. Code** § 50-5-13(e).....16, 17, 25.

**W. Va. Code** § 61-8-19 [2005].....21-22, 23, 24, 25.

**W. Va. Code** § 7-10-4 [2006].....18-20, 22, 23, 24, 25.

*West Virginia Rules of Criminal Procedure for Magistrate Courts* 20.1(a).....16, 17, 18, 25, 26.

*W.V.R.Cr.P.* 37(a)(2).....17.

## V. ARGUMENT.

### A. THE CIRCUIT COURT PROPERLY REFUSED THE APPELLANT'S PETITION FOR APPEAL FROM A COUNSELED NO CONTEST PLEA AND CONVICTION IN MAGISTRATE COURT PURSUANT TO THE EXPRESS LANGUAGE OF RULE 20.1 OF THE *WEST VIRGINIA RULES OF CRIMINAL PROCEDURE FOR MAGISTRATE COURTS*, WHICH BARS APPEALS FROM COUNSELED PLEAS IN MAGISTRATE COURT.

#### 1. Standard of Review.

The standard of review applying to this proceeding is:

“This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

Syl. Pt. 1, *State v. Lowery*, 222 W.Va. 284, 664 S.E.2d 169 (2008).

#### 2. Discussion.

The appellate jurisdiction of circuit courts from judgments in magistrate court proceedings is as “allowed by law.” *West Virginia Constitution* Art VIII, § 6. *West Virginia Rules of Criminal Procedure for Magistrate Courts* 20.1(a) excepts from an appeal of right those misdemeanor convictions in magistrate court based on a guilty plea where the defendant was represented by counsel at the time of the plea entry:

Except for persons represented by counsel at the time a guilty plea is entered, any person convicted of a misdemeanor in a magistrate court may appeal such conviction to the circuit court as a matter of right.

*West Virginia Rules of Criminal Procedure for Magistrate Courts* 20.1(a)(in pertinent part).

Similarly, **W. Va. Code** § 50-5-13(e) specifically excludes guilty plea convictions from magistrate court when the convict was represented by counsel at the time of the plea:

Notwithstanding any other provision of this code to the contrary, there shall be no appeal from a plea of guilty where the defendant was represented by counsel at the time the plea was entered. Provided, That the defendant shall have an appeal from a plea of guilty where an extraordinary remedy would lie or where the magistrate court lacked jurisdiction.

**W. Va. Code** § 50-5-13(e).<sup>1</sup> *See also W.V.R.Cr.P.* 37(a)(2).

There is absolutely no dispute that the Appellant was represented by the same retained counsel throughout all of these proceedings and, specifically, at the time of the entry of the plea upon which she was convicted. **W. Va. Code** § 50-5-13(e) and Rule 20.1(a) exclude this Appellant from an appeal to the circuit court as a matter of right from her misdemeanor conviction upon her plea in magistrate court. There is no other way to apply the plain language of the statute or rule. The Circuit Court properly denied the appeal on this basis.

The Appellant does not challenge the Circuit Court's reasoning that "no contest" pleas leading to misdemeanor convictions should be treated no differently than "guilty" pleas leading to misdemeanor convictions for the purposes of this rule.

Both **W. Va. Code** § 50-5-13(e) and Rule 20.1 are addressed exclusively to the appeal from misdemeanor *convictions* in magistrate court. The Appellant asserts that the Circuit Court misapplied Rule 20.1 because she was not appealing the *conviction*. If she is not appealing the conviction than she has nothing to appeal. The Appellant is trying to pick and choose the aspects of her conviction that she dislikes: she wants to preserve her lenient punishment of a term of probation but challenge the order requiring restitution for the actual reasonable expenses incurred

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<sup>1</sup> **W. Va. Code** § 50-5-13(e) and Rule 20.1 overrule this Court's prior holding in State ex rel. O'Neill v. Gay, 169 W.Va. 16, 285 S.E.2d 637 (1981), that a person entering a guilty plea to a misdemeanor in magistrate court has an appeal of right to the circuit court.

by the county in maintaining the one hundred fifty dogs for eight months. This type of stealth appeal is not provided for by law; nor does the Appellant provide any legal authority to support this approach.

The Appellant does not prove that the circuit court misapplied Rule 20.1 when it dismissed the appeal of her magistrate court misdemeanor conviction on a counseled no contest plea. Lowery, supra. This Court is respectfully requested to deny the Petition for Appeal and affirm the ruling of the circuit court.

**B. THE MAGISTRATE COURT PROPERLY AFFORDED THE APPELLANT A HEARING ON RESTITUTION AS PART OF THE PLEA AND PROPERLY FOUND THAT THE RESTITUTION WAS PREVIOUSLY RULED UPON BY BOTH THE MAGISTRATE AND CIRCUIT COURTS.**

Even were this Court to find that the Circuit Court erred in dismissing the Petition for Appeal, the end result is unchanged. This Court has a long-standing rule of affirming trial court judgments when the record supports those judgments, even if for some other legal basis:

‘This Court 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 ground, reason or theory assigned by the lower court as the basis for its judgment. Syllabus Point 3, *Barnett v. Woolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).’

Syl. Pt. 11, SER Vernatter v. Warden, 207 W. Va. 11, 528 S.E.2d 207 (1999).

The civil animal seizure proceedings brought pursuant to **W. Va. Code § 7-10-4 [2006]**<sup>2</sup>

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<sup>2</sup> **W. Va. Code § 7-10-4 [2006]** reads:

(a) Subject to the provisions of subsection (h) of this section, a humane officer shall take possession of any animal, including birds or wildlife in captivity, known or believed to be abandoned, neglected, deprived of necessary sustenance, shelter, medical care or reasonable protection from fatal freezing or heat exhaustion, or cruelly treated or used, as defined in sections nineteen and nineteen-a, article eight, chapter sixty-one of this code.

(b) The owner or persons in possession, if his or her identity and residence is known, of any

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animal seized pursuant to subsection (a) of this section shall be provided written notice of the seizure, his or her liability for the cost and care of the animal seized as provided in this section and the right to request a hearing before a magistrate in the county where the animal was seized. The magistrate court shall schedule any hearing requested within ten working days of the receipt of the request. The failure of an owner or person in possession to request a hearing within five working days of the seizure is prima facie evidence of the abandonment of the animal. At the hearing, if requested, the magistrate shall determine if probable cause exists to believe that the animal was abandoned, neglected or deprived of necessary sustenance, shelter, medical care or reasonable protection from fatal freezing or heat exhaustion, or otherwise treated or used cruelly as set forth in this section.

(c)(1) Upon finding of probable cause, or if no hearing is requested and the magistrate finds probable cause based upon the affidavit of the humane officer, the magistrate shall enter an order awarding custody of the animal to any humane officer for further disposition in accordance with reasonable practices for the humane treatment of animals. The owner of the animal shall post a bond with the court in an amount sufficient to provide for the reasonable costs of care, medical treatment and provisions for the animal for at least thirty days. The bond shall be filed with the court within five days following the court's finding of probable cause. At the end of the time for which expenses are covered by the original bond if the animal remains in the care of the humane officer and the owner desires to prevent disposition of the animal by the humane officer, the owner shall post an additional bond with the court within five days of the expiration of the original bond. During this period the humane officer is authorized to place the animal in a safe private home or other safe private setting in lieu of retaining the animal in an animal shelter. The person whose animal is seized is liable for all costs of the care of the seized animal.

(2) If a bond has been posted in accordance with subdivision (1) of this subsection, the custodial animal care agency may draw from the bond the actual reasonable costs incurred by the agency in providing care, medical treatment and provisions to the impounded animal from the date of the initial impoundment to the date of the final disposition of the animal.

(d) Any person whose animal is seized and against whom a finding of probable cause is rendered pursuant to this section is liable during any period it remains in the possession of the humane officer for the reasonable costs of care, medical treatment and provisions for the animal not covered by the posting of the bond as provided in subdivision (1), subsection (c) of this section. The magistrate shall require the person liable for these costs to post bond to provide for the maintenance of the seized animal. This expense, if any, becomes a lien on the animal and must be discharged before the animal is released to the owner following the acquittal of the owner or withdrawal of the complaint. Upon acquittal, or withdrawal of the complaint, any unused portion of posted bonds shall be returned to the owner. Upon a criminal conviction, all interest in the impounded animal shall transfer to the humane officer for the further disposition in accordance with reasonable practices for the humane treatment of animals. Any additional expense above the value of the animal may be recovered by the humane officer or custodial agency.

(e) If, after the humane officer takes possession of the animal pursuant to the finding of probable cause a licensed veterinarian determines that the animal should be humanely destroyed to end its suffering, the veterinarian may order the animal to be humanely destroyed and neither the humane officer, animal euthanasia technician, nor the veterinarian is subject to any civil or criminal liability as a result of such action.

(f) The term "humanely destroyed" as used in this section means:

(1) Humane euthanasia of an animal by hypodermic injection by a licensed veterinarian or by an animal euthanasia technician certified in accordance with the provisions of article ten-a, chapter thirty of this code; or

obligated the Appellant for the reasonable costs of care, medical treatment and provisions for the animals that were incurred by the county in maintaining the seized dogs. *See W. Va. Code* § 7-10-4(c)[2006] (“The person whose animal is seized is liable for all costs of the care of the seized animal”). *See W. Va. Code* § 7-10-4(d)[2006] (“Upon a criminal conviction, all interest in the impounded animal shall transfer to the humane officer for the further disposition in accordance with reasonable practices for the humane treatment of animals. Any additional expense above the value of the animal may be recovered by the humane officer or custodial agency.”).

The seizure of the animals was approved by the Magistrate at the civil probable cause hearing held in July 2006. [Order Granting Custody of Canines to Animal Control, 7/19/06, *id.*; R. Vol. II, (Cir. Ct. Case No. 06-C-560) p. 10-11.] The statutory bond was then ordered to be posted to cover the anticipated costs for maintaining the animals for thirty days. [Id.]

The animals were maintained by the county for eight months pending resolution of the seizure case and the surrounding ancillary litigation initiated by the Appellant. In these civil

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(2) Any other humane euthanasia procedure approved by the American veterinary medical association, the humane society of the United States or the American humane association.

(g) In case of an emergency in which an animal cannot be humanely destroyed in an expeditious manner, an animal may be destroyed by shooting if:

(1) The shooting is performed by someone trained in the use of firearms with a weapon and ammunition of suitable caliber and other characteristics designed to produce instantaneous death by a single shot; and

(2) Maximum precaution is taken to minimize the animal's suffering and to protect other persons and animals.

(h) The provisions of this section do not apply to farm livestock, as defined in subsection (d), section two, article ten-b, chapter nineteen of this code, poultry, gaming fowl or wildlife kept in private or licensed game farms if kept and maintained according to usual and accepted standards of livestock, poultry, gaming fowl, wildlife or game farm production and management, nor to the humane use of animals or activities regulated under and in conformity with the provisions of 7 U.S.C. § 2131 et seq. and the regulations promulgated thereunder.

[The 2008 amendment to this statute makes no substantive change as it relates to the issues in this case.]

seizure proceedings, the first bond was disbursed, the second bond ordered and disbursed, and the dogs finally relinquished by the Appellant when she failed to pay the third ordered bond. [Order Granting Disbursement of Funds to Berkeley County Animal Control, 10/3/06; Faxed Copies of Invoices, dated 9/28/06, 10/3/06, Case No.: 06-P-170; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 10-13, 15-27, 29-30; Order Granting Disbursement of Funds and Requiring New Bond, 2/21/07, Case No. 06-P-170; R. Vol. I (Cir. Ct. No.: 06-P-170), p. 195-197.] Aside from the Appellant's attempt to appeal the probable cause order to the circuit court in August 2006, which was refused as premature, at no time after she relinquished the dogs in February 2007 or after she was convicted on February 8, 2008, did the Appellant ever directly appeal these civil orders.

The criminal animal cruelty statute, **W. Va. Code § 61-8-19 [2005]**,<sup>3</sup> of which the

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<sup>3</sup> **W. Va. Code § 61-8-19 [2005]** reads:

(a) If any person cruelly mistreats, abandons or withholds proper sustenance, including food, water, shelter or medical treatment, necessary to sustain normal health and fitness or to end suffering or abandons any animal to die, or intentionally, knowingly or recklessly leaves an animal unattended and confined in a motor vehicle when physical injury to or death of the animal is likely to result, or rides an animal when it is physically unfit, or baits or harasses any animal for the purpose of making it perform for a person's amusement, or cruelly chains any animal or uses, trains or possesses any domesticated animal for the purpose of seizing, detaining or maltreating any other domesticated animal, he or she is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than three hundred nor more than two thousand dollars or confined in jail not more than six months, or both.

(b) If any person who intentionally tortures, or mutilates or maliciously kills an animal, or causes, procures or authorizes any other person to torture, mutilate or maliciously kill an animal, he or she is guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility not less than one nor more than five years and be fined not less than one thousand dollars nor more than five thousand dollars. For the purposes of this subsection, "torture" means an action taken for the primary purpose of inflicting pain.

(c) Any person, other than a licensed veterinarian or a person acting under the direction or with the approval of a licensed veterinarian, who knowingly and willfully administers or causes to be administered to any animal participating in any contest any controlled substance or any other drug for the purpose of altering or otherwise affecting said animal's performance is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five hundred nor more than two thousand dollars.

(d) Any person convicted of a violation of this section shall forfeit his or her interest in any animal and all interest in the animal vests in the humane society or county pound of the county in which

Appellant was convicted on her counseled plea also obligated the Appellant for the costs incurred by the county in maintaining the seized dogs. *See W. Va. Code* § 61-8-19(d)[2005] (“the person shall, in addition to any fine imposed, be liable for any costs incurred or to be incurred by the humane society or county pound as a result”).

Part of the plea agreement whereby the Appellant pleaded no contest to the misdemeanor

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the conviction was rendered and the person shall, in addition to any fine imposed, be liable for any costs incurred or to be incurred by the humane society or county pound as a result.

(e) For the purpose of this section, the term "controlled substance" has the same meaning ascribed to it by subsection (d), section one hundred one, article one, chapter sixty-a of this code.

(f) The provisions of this section do not apply to lawful acts of hunting, fishing, trapping or animal training or farm livestock, poultry, gaming fowl or wildlife kept in private or licensed game farms if kept and maintained according to usual and accepted standards of livestock, poultry, gaming fowl or wildlife or game farm production and management, nor to humane use of animals or activities regulated under and in conformity with the provisions of 7 U.S.C. § 2131, et seq., and the regulations promulgated thereunder, as both statutes and regulations are in effect on the effective date of this section.

(g) Notwithstanding the provisions of subsection (a) of this section, any person convicted of a second or subsequent violation of subsection (a) is guilty of a misdemeanor and shall be confined in jail for a period of not less than ninety days nor more than one year, fined not less than five hundred dollars nor more than three thousand dollars, or both. The incarceration set forth in this subsection is mandatory unless the provisions of subsection (h) of this section are complied with.

(h)(1) Notwithstanding any provision of this code to the contrary, no person who has been convicted of a violation of the provisions of subsection (a) or (b) of this section may be granted probation until the defendant has undergone a complete psychiatric or psychological evaluation and the court has reviewed the evaluation. Unless the defendant is determined by the court to be indigent, he or she is responsible for the cost of said evaluation.

(2) For any person convicted of a violation of subsection (a) or (b) of this section, the court may, in addition to the penalties provided in this section, impose a requirement that he or she complete a program of anger management intervention for perpetrators of animal cruelty. Unless the defendant is determined by the court to be indigent, he or she shall be responsible for the cost of the program.

(i) In addition to any other penalty which can be imposed for a violation of this section, a court shall prohibit any person so convicted from possessing, owning or residing with any animal or type of animal for a period of five years following entry of a misdemeanor conviction and fifteen years following entry of a felony conviction. A violation under this subsection is a misdemeanor punishable by a fine not exceeding two thousand dollars and forfeiture of the animal.

[The 2008 amendment to this statute, reorganizing subsection (a) and making some other stylistic changes is not at issue in this case.]

of animal cruelty, pursuant to **W. Va. Code** § 61-8-19 [2005], was that the Appellant would pay restitution. As noted, **W. Va. Code** § 61-8-19(d)[2005] made the Appellant liable for any costs incurred or to be incurred by the county as a result of the seizure of the animals. On February 8, 2008, the Appellant was convicted and sentenced on the charge. The Magistrate scheduled a March 26, 2008, restitution hearing. That restitution hearing took place on that date with the Appellant present. At that restitution hearing, the State argued that the Magistrate's and Circuit Court's prior findings and rulings as to the civil seizure of the dogs and the actual reasonable costs incurred by the county were *res judicata* and that the Appellant was collaterally estopped on the issue of restitution owed pursuant to **W. Va. Code** § 61-8-19(d)[2005] and **W. Va. Code** § 7-10-4(c) and (d)[2006]. The Magistrate agreed and ordered the Appellant to pay, as restitution, the remaining balance of one hundred fourteen thousand eight hundred eighty-three dollars and seventy-seven cents (\$114, 883.77). This sum represented the same sum she was already determined to have owed in the civil seizure proceedings for the actual reasonable costs incurred by the county in caring, feeding, and providing medical care for the approximately one hundred fifty dogs seized from the Appellant for eight months (after deducting the two previous twenty-five thousand dollar bond disbursements). The Magistrate Court properly found that these sums had previously been ruled on by both the Magistrate and the Circuit Courts while determining the bond amounts required by **W. Va. Code** § 7-10-4 [2006].

As to the application of the principles of *res judicata*, this Court holds:

“Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified

for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.” Syllabus point 4, *Blake v. Charleston Area Medical Center*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

Syl. Pt. 5, *State ex rel. Richey v. Hill*, 216 W.Va. 155, 603 S.E.2d 177 (2004).

The principles of collateral estoppel are similar:

“Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.” Syllabus Point 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

*Brooks v. Galen of West Virginia, Inc.*, 220 W.Va. 699, 649 S.E.2d 272 (2007).

The case *sub judice* does not present the classic facts for *res judicata* and collateral estoppel involving a prior completely separate action. The animal seizure civil proceeding herein brought under **W. Va. Code** § 7-10-4[2006] (Magistrate Case Nos.: 06-C-1860, 2305, 2369) is necessarily intertwined with the criminal proceeding brought under **W. Va. Code** § 61-8-19[2005] (Magistrate Case No.: 06-M-3271). The circuit court proceedings related to the bond for maintaining the animals flow directly from these same Magistrate Court proceedings (Circuit Court Case Nos.: 06-P-170, 06-C-560, 562, 564).

Nonetheless, the Magistrate properly applied these principles of *res judicata* and collateral estoppel. The same Magistrate, the Honorable Joan Bragg, presided over all of the proceedings in Magistrate Court on the seizure hearings and the criminal charge. Magistrate Bragg was well aware that she previously made findings relating to the actual reasonable costs

for the care of those dogs by Order entered August 22, 2006. Magistrate Bragg was well aware that those findings were the subject of the Petitions for Writ of Prohibition brought by the Appellant and denied after hearing by the circuit court. Magistrate Bragg was well aware that she previously made the exact same findings at the February 2, 2007, hearing that she was being asked to make at the March 26, 2008, restitution hearing. Magistrate Bragg was well aware that at the February 2, 2007, hearing the Appellant declined to challenge the State's evidence as to the actual reasonable costs incurred by the county feeding, housing and providing medical care for all of these dogs for eight months. Magistrate Bragg was also well aware that the circuit court had reviewed and endorsed that written Order entered February 21, 2007, effectuating her findings.

Since the same factual findings were made previously in earlier civil proceedings related to the criminal case, and because both **W. Va. Code** § 7-10-4[2006] and **W. Va. Code** § 61-8-19[2005] hold the Appellant financially obligated for those costs, the Magistrate did not err at the restitution hearing in ordering those same costs payable as restitution in the criminal case. The Appellant's position that having a restitution hearing was part of the plea agreement was satisfied by the Magistrate conducting the March 26, 2008, restitution hearing. That the hearing did not turn out the way the Appellant hoped is not a sound basis for an appeal from her conviction.

This Court holds:

“Specific performance of a plea bargain is an available remedy only when the party seeking it demonstrates that he has relied on the agreement to his detriment and cannot be restored to the position he held before the agreement.” Syllabus point 1, *State v. Wayne*, 162 W. Va. 41, 245 S.E.2d 838 (1978), *overruled on other grounds by State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412 (1983).

Syl. Pt. 4, State ex rel. Gibson v. Hrko, 220 W.Va. 574, 648 S.E.2d 338 (2007).

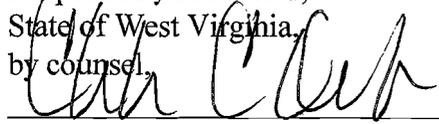
Regardless of whether the Appellant had an appeal from the magistrate court conviction as a matter of right, which she did not pursuant to **W. Va. Code** § 50-5-13(e) and Rule 20.1(a), the circuit court would have properly denied the appeal on the issue of restitution as unfounded.

The Appellant does not prove that the Magistrate did anything that would have required either reversal of the Appellant's conviction or rehearing on any issue of restitution such that the Circuit Court could reasonably be proved to have erred when it dismissed the appeal of the Appellant's magistrate court misdemeanor conviction on a counseled no contest plea. The denial of the appeal was appropriate, even if for a reason different than the fact that it was not permitted by *West Virginia Rules of Criminal Procedure for Magistrate Courts* 20.1(a). SER Vernatter v. Warden, *supra*. This Court is respectfully requested to deny the Petition for Appeal and affirm the ruling of the circuit court.

## **VI. CONCLUSION.**

For the foregoing reasons, this Court is respectfully requested to affirm the Circuit Court's denial, pursuant to *West Virginia Rules of Criminal Procedure for Magistrate Courts* 20.1(a), of the Appellant's appeal from her magistrate court misdemeanor conviction on a counseled plea. This Court is respectfully requested to deny the Petition for Appeal.

Respectfully submitted,  
State of West Virginia,  
by counsel,

  
\_\_\_\_\_  
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304-264-1971

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **BRIEF OF THE STATE OF WEST VIRGINIA** on this the 18<sup>th</sup> day of February, 2010, by  hand-delivery,  first-class mail, postage prepaid,  facsimile to:

Paul G. Taylor, Esq.  
134 W. Burke Street  
Martinsburg, West Virginia 25401



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Christopher C. Quasebarth