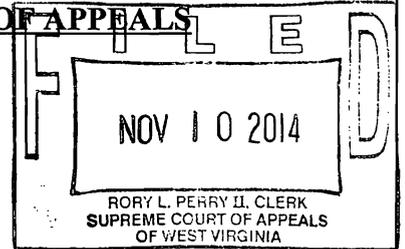


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



STATE OF WEST VIRGINIA,

Plaintiff/Respondent Herein,

v.

Case No.: 14-0757
(Wayne County Circuit Court
Nos.: 14-M-15 and 14-M-16)

MICHAEL BLATT and
KIM BLATT,

Defendants/Petitioners Herein.

PETITIONERS' BRIEF

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ASSIGNMENT OF ERROR

1. The Circuit Court of Wayne County, West Virginia, Erred in Denying Defendants'/Petitioners' Oral Motion to Dismiss by Improperly and Incorrectly Attempting to Distinguish the Case of *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012).
2. The Circuit Court of Wayne County, West Virginia, Erred in Finding that West Virginia Code § 19-20-20 Stands for the Proposition That West Virginia Code § 19-20-20 Does Not Require the Conviction of the Owner as a Prerequisite for Finding That a Dog is Vicious and Should be Euthanized.
3. The Circuit Court of Wayne County, West Virginia, Erred in its Holding that Tinkerbelle Attacked a Child Unprovoked and that such One-Time Incident is Sufficient Evidence to Find that Tinkerbelle is Vicious, Dangerous and in the Habit of Biting People.
4. The Circuit Court of Wayne County, West Virginia's Decisions Following the June 17, 2014 Criminal Hearing and June 30, 2014 Destruction Hearing are Conflicting Rulings that have Infringed Upon Petitioners' Rights Under the United States Constitution and West Virginia Constitution and have subjected the Petitioners to "double jeopardy."

STATEMENT OF THE CASE

On March 31, 2014, a minor child (hereinafter referred to as "L.L.", but also referred to as "L.S." in the bench trial transcript) was playing at the house of the Petitioners with Petitioners' children in the back yard. At that time, Michael Blatt was grilling food and had the family dog "Tinkerbelle" contained within the house and/or fenced-in front yard. Sometime during the day, a relative came to the residence and opened the front gate allowing Tinkerbelle to gain access to the back yard area where L.L. and the other children were playing. The testimony of the only eyewitness, Nicholas Cole Blake, the nine year old son of the Petitioners, was that Tinkerbelle entered the back yard where L.L. and he were playing. Tinkerbelle grabbed a ball, began to play with the ball and punctured the ball. Tinkerbelle then proceeded to attempt to bury the ball. While Tinkerbelle was attempting to bury the ball, L.L. took the ball from Tinkerbelle and held it over his head in either a game of "keep away" or to throw the ball for Tinkerbelle to

retrieve. Tinkerbelle approached L.L. and jumped up for the ball, striking L.L. in the face and mouth area. (See Appendix Exhibit 11, page 19). As a result, L.L. suffered significant cuts and/or lacerations to his upper and lower lips.

In May 2014, Petitioners, as owners of Tinkerbelle, were charged with violation of West Virginia Code § 19-20-20 for unlawfully owning, keeping and/or harboring a dog known to them to be vicious, dangerous or in the habit of biting or attacking other persons. Although the events in question actually occurred on March 31, 2014, the Petitioner's were charged with said violation for actions allegedly occurring on April 1, 2014.

A bench trial was held before the Honorable Darrell Pratt in the Circuit Court of Wayne County, West Virginia, on June 17, 2014. After said bench trial, Judge Pratt found the Petitioners not guilty of the alleged offense, but also ruled that this finding of not guilty, in his "opinion of the statute" did not foreclose the finding that Tinkerbelle was vicious for purposes of euthanization. (See Appendix, Exhibit 10, pages 121-122).

On June 30, 2014, the Petitioners appeared before the Circuit Court of Wayne County, West Virginia, for a hearing on whether or not Tinkerbelle was "vicious, dangerous or in the habit of biting or attacking other persons." Undersigned counsel appeared on behalf of Mr. and Mrs. Blatt and orally moved the Court to dismiss the action under the authority of *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012). The Court denied said Motion and a hearing was held with testimony being elicited from three witnesses called by the Petitioners and none by the Prosecution. Instead of ruling based upon the testimony presented, the Court proceeded to read its ruling from pre-prepared notes quoting case law from other states and by, in the opinion of the Petitioners, misapplying applicable West Virginia law. The Court's ultimate

ruling was that Tinkerbelle was vicious, dangerous or in the habit of biting or attacking other persons and the Court ordered her destruction.

SUMMARY OF ARGUMENT

The Circuit Court of Wayne County, West Virginia, erred by denying Petitioners' oral Motion to Dismiss which was based on the authority of *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012), by: 1) failing to recognize that West Virginia Code § 19-20-20 requires a criminal conviction before a dog is found vicious and ordered euthanized; 2) holding that a one-time isolated incident is sufficient for finding that a dog is vicious, dangerous or in the habit of biting people; and, 3) by rendering conflicting rulings that have violated the Petitioners' rights against double jeopardy.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners assert that although the facts and legal arguments are (or will be) adequately presented in the briefs and record on appeal, this case involves assignments of error in the application of settled law and claims of insufficient evidence (or a result against the weight of the evidence) under Rule 19(a) of the West Virginia Rules of Appellate Procedure. For these reasons, the Petitioners believe that oral argument is appropriate under Rule 19 if so determined by this Honorable Court.

In the event that oral argument is held, the time limits set forth in Rule 19(e) of the West Virginia Rules of Appellate Procedure should be sufficient.

ARGUMENT

STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals in *State v. Cavallaro*, 210 W.Va. 237, 557 S.E.2d 291 (2001) indicated:

“We have held that ‘[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.’ Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).” 557 S.E.2d at 292-293.

The factual findings upon which a court relies in making its decision are subject to review upon appeal under a clearly erroneous standard. *Coordinating Council for Indep. Living, Inc. v. Palmer*, 109 W. Va. 274, 546 S.E.2d 454, 460 (2001).

I. The Circuit Court of Wayne County, West Virginia, Erred in Denying Defendants’/Petitioners’ Oral Motion to Dismiss by Improperly and Incorrectly Attempting to Distinguish the Case of *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012).

Petitioners were charged with, and acquitted of, violating West Virginia Code § 19-20-20, which specifically reads:

“Except as provided in section twenty-one [§19-20-21] of this article, no person shall own, keep or harbor any dog known by him to be vicious, dangerous, or in the habit of biting or attacking other persons, whether or not such dog wears a tag or muzzle. 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 or animals, the judge may authorize the humane officer to cause such dog to be killed.”

The West Virginia Supreme Court of Appeals was asked to address this statute in the case of *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012). In *Durham*, the parents of a dog attack victim brought suit against the dog’s owners to have the dog killed pursuant to

West Virginia Code §19-20-20. In rendering its decision, the *Durham* Court specifically found that:

“Section 19-20-20, which is **entirely** criminal in nature, only provides for the killing of a dog when it is first found that the dog’s owner committed a crime described in the first sentence of the section. 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.” 735 S.E.2d at 270. (Emphasis added).

Based upon the holding in *Durham* that a dog may only be killed when it is first found that the dog’s owner committed a crime described in the first sentence of §19-20-20, undersigned counsel, on behalf of the Petitioners herein, moved for a dismissal of the “destruction hearing” which was set for June 30, 2014. The basis for this Motion was that Mr. and Mrs. Blatt were found not to have committed a crime under the first sentence, or any sentence, of West Virginia Code §19-20-20. In fact, Mr. and Mrs. Blatt were acquitted of the charges brought against them under this statutory provision. (See Appendix, Exhibit 10, pages 121-122).

In response, the Court attempted to distinguish the *Durham* holding by the fact that the *Durham* case was a private action not brought by a prosecutor. (See Appendix, Exhibit 11, page 8). When posed with the fact that the precise holding in *Durham* requiring a criminal conviction before euthanization was appropriate and that this was controlling law at the time of the destruction hearing, the Court responded:

“Not in this Court. Appeal it. They can tell me. Five Justices up there, or three of them, can tell me that it doesn’t control. Right now, my law is different in this Court. Okay? I understand your reasoning but that’s not my finding in this case.” (See Appendix, Exhibit 11, page 9).

By this ruling, the Circuit Court clearly had no interest in following precedent and wholly failed to recognize that the *Durham* Court found that §19-20-20 is “entirely criminal in nature.” Instead, the hearing was held and the Court read from a pre-prepared ruling citing cases from states other than West Virginia regarding the dangers of “pit-bulls” and the West Virginia case of *Hardwick v. Town of Ceredo*, an unpublished opinion. 2013 WL 149628. Although the Court recognized that the *Hardwick* case was an unpublished memorandum decision, it still took “judicial notice” of the holding which upheld a Ceredo ordinance banning “pit-bulls” and the “nature of those dogs.” (See Appendix, Exhibit 10, pages 63-64). The Court, in ignoring the holding in *Durham* has instead given credence to an unpublished memorandum opinion that does not even apply in the case at hand. While the *Hardwick* Court upheld town ordinances prohibiting ownership of “pit bull terriers” as not being unconstitutionally vague or violating the defendants’ due process rights, the fact remains, the case at hand does not involve any such ordinance as the Petitioners do not live within the boundaries of Ceredo or any other town or municipality having any such ordinance. Therefore, the Circuit Court’s reliance on *Hardwick*, for any purpose, is clearly misplaced and completely improper in regard to the Petitioners’ claims. The present case does not involve the constitutionality of a municipal ordinance or the rational relation of any legitimate interest of a municipality. Essentially, the Circuit Court elected to disregard and blatantly ignore clear precedent as outlined in *Durham*, and relied instead upon the unpublished and inapplicable ruling in *Hardwick*.

Petitioners submit that the holding in *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012) is clearly applicable to the facts of this case. As such, the order for execution of Tinkerbelle is not appropriate as there was no finding that Mr. and/or Mrs. Blatt committed any

crime under West Virginia Code §19-20-20, which is a prerequisite for a destruction order. Therefore, the Court's Order of July 7, 2014, demanding the destruction of Tinkerbelle was in error and must be overturned.

II. The Circuit Court of Wayne County, West Virginia, Erred in Finding That West Virginia Code § 19-20-20 Stands for the Proposition That West Virginia Code § 19-20-20 Does Not Require the Conviction of the Owner as a Prerequisite for Finding That a Dog is Vicious and Should be Euthanized.

In the July 7, 2014 Order which directed the destruction of Tinkerbelle, the Wayne County Circuit Court stated:

“The Court further finds that WV Code §19-20-20 is a regulatory statute with a two-fold purpose. **First**, for the Court to determine if there is satisfactory proof that the subject dog is vicious, dangerous or in the habit of biting other persons, and should be killed by the humane officer; **Second**, for the Court to determine if there is proof beyond a reasonable doubt that the owner knew the dog to be vicious, dangerous or in the habit of biting other persons. The two distinct findings are not mutually inclusive, and have a vastly different burden of proof. Therefore, a conviction of the owner is not a prerequisite for the finding that the dog is vicious and should be euthanized.”
(Emphasis in original) (See Appendix, Exhibit 9, pages 0069-0070).

This ruling by the Circuit Court wholly misinterprets the statute in question and completely ignores prior rulings of this Court. Again, this Court's ruling in *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012) clearly and unequivocally states that West Virginia §19-20-20 is “entirely criminal in nature” and not a regulatory statute as held by the Circuit Court. Likewise, in ignoring the holding in *Durham*, the Circuit Court has, on its own, created a “two-fold purpose” for this statute that simply does not exist. Again, this Court in *Durham* specifically held:

“Section 19-20-20, which is entirely criminal in nature, only provides for the killing of a dog when it is first found that the dog’s owner committed a crime described in the first sentence of the section.”
735 S.E.2d at 270

This language could not be more clear that a conviction of a dog owner under §19-20-20 of a crime is, in fact, a prerequisite for the euthanization of a dog. The Circuit Court wholly ignored this fact and instead elected to create a “two-fold purpose,” one being criminal and one being “regulatory,” that simply does not and cannot exist given that this statute was previously deemed “entirely criminal in nature.” As the Blatts were not found to have committed a crime under §19-20-20, the order of euthanization of Tinkerbelle is erroneous and must be reversed as being a complete misapplication, misinterpretation or blatant disregard of existing law.

III. The Circuit Court of Wayne County, West Virginia, Erred in its Holding that Tinkerbelle Attacked a Child Unprovoked and that Such One-Time Incident is Sufficient Evidence to Find that Tinkerbelle is Vicious, Dangerous and in the Habit of Biting People.

As indicated above, there was only one eyewitness to the incident in question regarding Tinkerbelle’s incident with “L.L.” -- Nicholas Blake. Although Nicholas was not called to testify at the criminal trial, he was called as a witness at the destruction hearing on June 30, 2014. Tinkerbelle entered the back yard where he and L.L. were playing. Tinkerbelle grabbed a ball, began to play with the ball and punctured the ball. Tinkerbelle then proceeded to attempt to bury the ball. While Tinkerbelle was attempting to bury the ball, L.L. took the ball from Tinkerbelle and held it over his head in either a game of “keep away” or to throw the ball for Tinkerbelle to retrieve. Tinkerbelle approached L.L. and jumped up for the ball, striking L.L. in the face and mouth area. (See Appendix Exhibit 11, page 19). Testimony from Nicholas Blake at the

destruction hearing and testimony from Michael Blatt at the criminal trial were consistent in that both stated that after the incident in question, Tinkerbelle ran into the house and hid under a chair or barstools. (See Appendix Exhibit 11, page 29 and Exhibit 10, page 113). These actions and the description of the incident are in no way indicative of a dog that is “vicious, dangerous or in the habit of biting or attacking other persons.”

During the criminal trial, the prosecution advanced the testimony of Jason Owen and Tara Smith (or “Schmidt” depending on the portion of the transcript), the parents of the child involved with the incident with Tinkerbelle. Mr. Owen testified that they were familiar with Tinkerbelle as they saw her being walked in the neighborhood by members of the Blatt family. (See Appendix, Exhibit 10, pages 23). Mr. Owen also admitted that his children had played at the Blatt home before, that there had never had any previous problems with Tinkerbelle and he had no knowledge of any other incidents of biting or vicious behavior on the part of Tinkerbelle. (See Appendix, Exhibit 10, pages 25-26).

Tara Smith testified in this matter that “L.L.” had played at the Blatt home before with her knowledge of Tinkerbelle being present since at least August 2013, that there were no previous problems with Tinkerbelle while her child was at the Blatt home and that her daughter had commented that Tinkerbelle was “hyper” and would “jump on the kids and knock them over once in a while.” (See Appendix, Exhibit 10, pages 42-44). Ms. Smith went on to testify that she was not worried about Tinkerbelle while her children were playing at the Blatt home and that she had never heard anything about Tinkerbelle being vicious, dangerous or biting people. (See Appendix, Exhibit 10, pages 44-45).

The prosecution also called Carl David Farley, an employee of the Wayne County Health Department, to testify at the criminal trial. Mr. Farley, a registered Sanitarian and Epidemiologist, testified that he conducted an investigation into the dog bite of "L.L." (See Appendix Exhibit 10, p. 46). Mr. Farley admitted that he never met with the Blatts as part of his investigation, that he never saw Tinkerbelle in person and that he was never called upon in his job duties with the Health Department to ever investigate Tinkerbelle prior to this incident. (See Appendix Exhibit 10, p. 51). Mr. Farley admitted that in his report, he noted that the child who was bit was playing ball and the dog escaped from the owner's fence area and charged at the ball and bit the child in the mouth while lunging for the ball. (See Appendix Exhibit 10, p. 52-53). He also admitted that it was unknown if the dog was attacking the ball or the child and that this information came from the mother of the bitten child. (See Appendix Exhibit 10, p. 52-53).

The prosecution next called Gregory Scott Iseli, the Assistant Director of the Huntington-Cabell-Wayne Animal Shelter during the criminal bench trial. Mr. Iseli indicated that he was also an Animal Control Officer for five years. Mr. Iseli admitted that he never saw Tinkerbelle in person, only in photographs, but was still able to determine that she was a "pit bull." (Appendix Exhibit 10, p. 61). He also admitted that although he knew what "pit bulls" were like "normally," he could not testify as to Tinkerbelle's specific disposition as he was never able to meet her. (Exhibit 10, p. 61). Although Mr. Iseli testified that "pit bulls" are "sometimes more aggressive," he could not state that all "pit bulls" are of this nature. (Exhibit 10, p. 63). Given the fact that Mr. Iseli was not able to testify that Tinkerbelle herself was vicious and only testified as to the general characteristics of other dogs, defense counsel moved to strike Mr. Iseli's testimony. (Exhibit 10, p. 67). This Motion was denied by the Court.

During the criminal trial, Phil Hickey, an Animal Control Officer with the Cabell-Wayne Animal Shelter was called to testify by the prosecution. Mr. Hickey was the officer that arrived to take custody of Tinkerbelle after this incident. When asked about Tinkerbelle's behavior, Mr. Hickey specifically testified that:

“Quite honestly, the behavior was - - it was mild demeanored when I picked up the dog. I was, frankly, just shocked that it had shown aggression, but that happens.” (Ex. 10, p. 70).

While Mr. Hickey testified that a dog can “turn,” he admitted:

“In my opinion, at that time, that dog didn't appear to be aggressive.” (Ex. 10, p. 72).

Mr. Hickey did indicate that dogs who were “human-aggressive” were typically “put down” as a precaution, but he never saw any aggressive behavior from Tinkerbelle. (Ex. 10, p. 72-73). He also admitted that he never had any prior complaints regarding Tinkerbelle and there was no problems with her at any time while she was quarantined at the animal shelter. (Ex. 10, p. 73). Mr. Hickey also admitted that he could not consider the bite of Tinkerbelle on “L.L.” to be “aggression” because he was not there to witness the events of the bite. (Ex. 10, p. 74).

As such, the prosecution failed to provide any evidence whatsoever that Tinkerbelle was “vicious,” “dangerous” or “in the habit of biting other persons” under the language of §19-20-20. To the contrary, all witnesses called by the prosecutor at the bench trial, if anything, contradicted these findings.

The prosecution also failed to provide any evidence whatsoever at the destruction hearing that Tinkerbelle is “vicious,” “dangerous” or “in the habit of biting other persons.” In fact, the prosecution presented no testimonial evidence at the destruction hearing at all and

instead, called upon the Circuit Court to take “judicial notice” of the testimony that was elicited at the criminal bench trial. As indicated above, the evidence elicited at the criminal bench trial was wholly and completely insufficient for a finding that Tinkerbelle was “vicious,” “dangerous” or “in the habit of biting other persons.”

In contrast, the Petitioners called Capri Billings to testify at the destruction hearing (Appendix, Exhibit 11, pages 35-62) and the Petitioners themselves testified at the criminal bench trial (Appendix, Exhibit 10, pages 87-118) and the testimony of these individuals covered essentially the entire life of Tinkerbelle. Other than this one remote accident, there was not one iota of evidence that Tinkerbelle ever showed any tendency of being “vicious,” “dangerous” or “in the habit of biting persons.” The word “habit” in and of itself connotes more than one occasion or instance and there simply has been no evidence whatsoever by the prosecution’s witnesses or the witnesses called by the Petitioners that Tinkerbelle is any way “vicious,” “dangerous” or “in the habit of biting persons.” To the contrary, the evidence simply and unequivocally shows that this was a **one-time accident** that was in no way prompted by Tinkerbelle being inherently dangerous. The evidence also shows that Tinkerbelle obviously believed “L.L.” was playing at the time of the incident in question and was prompted to lunge for the ball by the actions of “L.L.”

Even with this complete lack of evidence, the Court nonetheless chose to completely ignore the facts and evidence of record and instead concentrated solely on the breed of Tinkerbelle. By this logic, any dog of any particular breed who bites one time calls for the destruction of that specific dog based solely on its breed, regardless of the factual circumstances of the incident. The entire tone of both the criminal bench trial and the destruction hearing by

the Court clearly show that the Court was interested not in the facts of the incident in question, but solely upon the breed of Tinkerbelle in making the determination that she must be destroyed. It is evident from the transcripts of these proceedings that the Court had already reached its determination that Tinkerbelle should be destroyed before any evidence was even presented. This type of fear-mongering and breed-specific bias is improper and against the applicable statutes and case law of the State of West Virginia. Based upon the actual evidence of record, there are no facts that would support any finding that Tinkerbelle is “vicious,” “dangerous” or “in the habit of biting persons.” Therefore, the order of euthanization of Tinkerbelle is erroneous and must be reversed as being a complete disregard of the evidence of record.

IV. The Circuit Court of Wayne County, West Virginia’s Decisions Following the June 17, 2014 Criminal Hearing and June 30, 2014 Destruction Hearing are Conflicting Rulings that have Infringed Upon Petitioners’ Rights Under the United States Constitution and West Virginia Constitution and have subjected the Petitioners to “double jeopardy.”

The United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const., Amend. V. The United States Supreme Court has stated that the double jeopardy clause of the Fifth Amendment applies to the states through the due process clause of the Fourteenth Amendment. *Benton v. Maryland* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Likewise, the West Virginia Constitution provides that no person shall be twice put in jeopardy for the same offense. W.Va. Const., Art. III, §5. The double jeopardy clauses of the Fifth Amendment to the federal constitution and Article 3, Section 5 of the West Virginia Constitution protect an accused from repeated prosecutions or multiple punishments for the same offense. *Porter v. Ferguson*, 174 W.Va. 253, 324 S.E.2d 397 (W.Va. 1984).

As pointed out above, this Court in *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012) specifically found that West Virginia Code §19-20-20 is “entirely criminal in nature.” 735 S.E.2d at 270 (emphasis added). Nonetheless, the Petitioners were subjected to a criminal bench trial under §19-20-20 on July 17, 2014. After said bench trial, the Petitioners were acquitted of any and all violations of this criminal statute. (Appendix, Ex. 8).

Even though acquitted, the Petitioners were still yet subjected to yet another trial under the exact same subsection which was described as a “destruction hearing” by the Circuit Court of Wayne County, West Virginia. Call it a “destruction hearing” or whatever you will, the fact of the matter is, this second “hearing” was nothing more than a violation of Petitioners’ rights under the United States and West Virginia Constitutions and has wrongfully subjected the Petitioners to double jeopardy.

Although the Circuit Court has attempted to justify this second “hearing” by finding a “two-fold” purpose of §19-20-20, essentially “guilty or “not guilty” and then whether or not the dog should be destroyed; this is clearly in violation of this Court’s prior finding that §19-20-20 is entirely criminal in nature. Being entirely criminal in nature renders only two possibilities under §19-20-20: 1) a guilty finding, with destruction of the dog (property) being one of the punishments for this misdemeanor crime; or, 2) a finding of “not guilty.” There is absolutely no other interpretation of the applicable statute or case law that is possible under the Court’s holding in *Durham*. The Petitioners in this case were found not guilty of violating §19-20-20 after the criminal bench trial on June 17, 2014. Therefore, the later “destruction hearing” was nothing more than a retrial under the exact same statute and in violation of the Petitioners’ rights under the United States and West Virginia Constitutions to not be subjected to

a duplicate prosecution. As §19-20-20 has been found to be “entirely criminal in nature,” there is no available division of rights, punishments or findings as those attempted to be created by the Circuit Court.

The Circuit Court has attempted to create a split in §19-20-20 by finding that part of the statute is criminal in nature and requires proof “beyond a reasonable doubt” and then rendering the decision on destruction subject to proof “by a preponderance of the evidence.” First of all, this decision is not permissible as §19-20-20 has been deemed entirely criminal in nature and thus all evidence thereunder must be to the “reasonable doubt” standard. Secondly, there has been no evidence submitted that supports a finding that Tinkerbelle is “vicious,” “dangerous” or “in the habit of biting persons” under either standard. Given the facts and evidence as submitted, the Circuit Court’s rulings in this matter have essentially shifted the burden of proof from the prosecution to prove that Tinkerbelle is “vicious,” “dangerous” or “in the habit of biting persons” to the defendants to prove that she is not. The prosecution has failed to meet its burden and the Circuit Court erred in ruling that Tinkerbelle should be destroyed.

For these reasons, the Petitioners again assert error against the Circuit Court of Wayne County, West Virginia, and the order of euthanization of Tinkerbelle is prohibited and must be reversed as being a violation of the Petitioners’ rights against duplicative prosecution and application of an erroneous evidentiary standard.

CONCLUSION

The Petitioners are entitled to relief from this Court due to the Circuit Court’s disregard of precedent. The Circuit Court refused to recognize that the West Virginia Supreme Court in *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012) clearly and unequivocally

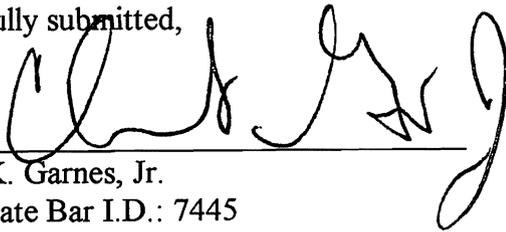
found that West Virginia Code §19-20-20 is “entirely criminal in nature” and only provides for the killing of a dog when it is first found that the dog’s owner committed a crime described in the first sentence of §19-20-20. By ignoring this clear precedent, the Circuit Court erroneously ordered the destruction of Tinkerbelle even though the Petitioners were acquitted of violating any portion of West Virginia Code §19-20-20.

The Petitioners are also entitled to relief as the evidence submitted from by the prosecution and through the prosecution’s witnesses completely failed to prove that Tinkerbelle is “vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals” under West Virginia Code §19-20-20. Instead, the evidence as a whole merely shows that this was an unfortunate accident in which a young child held a ball over his head which prompted Tinkerbelle to believe the child was playing with her and lunge for the ball, unfortunately striking the child in the face in the process. There simply was no evidence to the contrary submitted by the prosecution and there is certainly no evidence in this matter to support the conclusion that Tinkerbelle was “vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals.” There was no evidence submitted that Tinkerbelle ever acted “viciously” or “dangerously” and no evidence that Tinkerbelle was in the “habit” of “biting or attacking other persons.” The Circuit Court simply ignored the facts of this case and concentrated solely on Tinkerbelle’s alleged breed of being a “pit-bull mix” to make its erroneous and unsupported decision.

Finally, by holding the “destruction hearing,” after the Petitioners had already been acquitted of any violations of West Virginia Code §19-20-20, the Circuit Court subjected the Petitioners to yet another trial under the exact same Code section, violating the Petitioners

rights against “double jeopardy.” As there was no evidence submitted that supported a finding that Tinkerbell is “vicious,” “dangerous” or “in the habit of biting persons” under either standard. Given the facts and evidence as submitted, the Circuit Court’s rulings in this matter have essentially shifted the burden of proof from the prosecution to prove that Tinkerbell is “vicious,” “dangerous” or “in the habit of biting persons” to the defendants to prove that she is not. The prosecution has failed to meet its burden and the Circuit Court erred in ruling that Tinkerbell should be destroyed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Charles K. Garnes, Jr.', written over a horizontal line.

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,

Plaintiff/Respondent Herein,

v.

Case No.: 14-0757
(Wayne County Circuit Court
Nos.: 14-M-15 and 14-M-16)

MICHAEL BLATT and
KIM BLATT,

Defendants/Petitioners Herein.

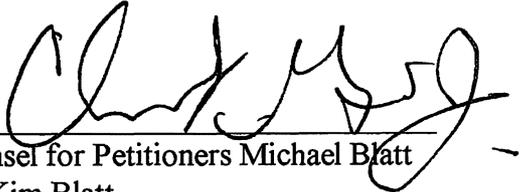
CERTIFICATE OF SERVICE

I, Charles K. Garnes, Jr., counsel for Petitioners, hereby certify that the foregoing *Petitioners' Brief* has been served upon counsel of record by depositing the same in the United State Mail, postage prepaid, addressed as follows:

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DONE this 10th day of November, 2014.


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