**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

Supreme Court No.: 23-603
Case No.: 22-F-93
Circuit Court of Cabell County

AUSTIN STEVENS,

Defendant Below, Petitioner.

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# PETITIONER'S BRIEF

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## ASSIGNMENT OF ERROR

The circuit court erred in ruling that misdemeanor animal cruelty, as a matter of law, is not a lesser included offense of felony animal cruelty and accordingly erred in refusing to instruct the jury on that lesser included offense.

## STATEMENT OF THE CASE

### A. The Issue

The Petitioner Austin Stevens was indicted by a Cabell County grand jury for the offense of felony animal cruelty in violation of W.Va. Code § 61-8-19(b) stemming from an incident in which the Petitioner wounded an Angus calf with two arrows shot from a compound bow leading to the putting down of the animal. A.R. 365. At the conclusion of the evidence at trial, the circuit court heard argument on the jury instructions. The defense offered an instruction on the lesser included offense of misdemeanor animal cruelty in violation of W.Va. Code § 61-8-19(a)(1)(A). A.R. 296-97. See the proposed lesser included offense instruction at A.R. 397. Initially the court rightly refused to give the tendered lesser included offense instruction for the stated reason that the proposed instruction "...talks about being a misdemeanor and a possible fine and up to six months in jail. That is not allowed in any case. You never tell the jury what the penalty is." A.R. 296. Defense counsel immediately offered to amend the proposed instruction to "remove the penalty language." A.R. 296. Nevertheless, the court refused to give the instruction for the stated legal reason that, "I don't think that is a lesser included offense." A.R. 297.

W.Va. Code § 61-8-19(a)(1)(A) provides that it is "unlawful for any person to intentionally, knowingly or recklessly, ... [m]istreat an animal in cruel manner." Subsection (a)(2) makes any violation of subsection (a)(1)(A) a misdemeanor. Subsection (b) of this same statute makes any "person who intentionally tortures, or mutilates or maliciously kills an animal, ... guilty of a felony...." It is the position of the Petitioner that the court below erred in not giving the requested lesser included offense jury instruction since a subsection (a)(1)(A) misdemeanor violation is clearly intended by the Legislature to be a lesser included offense of a subsection (b) felony violation.

## B. The Procedural History

A one-day jury trial in this matter took place on May 30, 2023. A.R. 87. The State called three witnesses. The first witness was Vickie Scarberry. A.R. 161. She was the wife of Rusty Scarberry. The two of them were owners of the calf that was killed. A.R. 162-64. She testified that on December 4, 2021, she found one of their calves with two arrows in it, one arrow in the side and the other between the eyes, and she called 9-1-1. A.R. 164. She then called her husband Rusty, and he came home and went looking for whoever had shot the calf by following a trail of blood. A.R. 166-70. During cross-examination, Mrs. Scarberry testified that there was a history of cows escaping from their property somewhere between "once a week" and "every few months." A.R. 172.

The State's next witness was Rusty Scarberry, the husband of Vickie Scarberry and the co-owner of the calf. A.R. 174-75. Mr. Scarberry testified that at one time the Petitioner Mr. Stevens had been his employee and that the employment had ended in unfriendly circumstances. A.R. 177-78. Mr. Scarberry indicated that on December 4, 2021 he received a phone call from his wife and came home and found the calf with two arrows sticking out of its face and side. A.R. 178-79. He then followed a trail of blood back to the house of the Petitioner and confronted the Petitioner regarding the calf. A.R. 183-84. The police and animal control officer Jon Rutherford arrived on the scene shortly afterward and assumed investigation of the matter. A.R. 186-87.

The State's third witness was former animal control officer Jon Rutherford. A.R. 197. He testified that he arrived at the scene and observed the calf and its wounds. A.R. 200-02. Officer Rutherford stated that the arrow in the chest was "ticking to each heartbeat" indicating that it was shot directly into the heart and that it was a fatal injury. A.R. 203-04. Officer Rutherford further testified that he followed the blood trail from the Scarberry property to the Petitioner's home. A.R. 207. He then interviewed the Petitioner about what had happened. The Petitioner acknowledged that he had shot the calf with his compound bow. A.R. 208. The reasons were (1) that the Petitioner was "sick of it coming over on his property and … shitting everywhere," (2) the Petitioner did not like the neighbor, presumably Mr. Scarberry, and (3) that the Petitioner was fearful of the animal. A.R. 208-09. Officer Rutherford then took a written statement from the Petitioner which was read to the jury but never admitted as an exhibit. A.R.

209, 215-16. A recorded audio statement of the Petitioner was also taken by Officer Rutherford and was played for the jury and admitted into evidence as State's Exhibit 18. A.R. 214, 229-36. Officer Rutherford euthanized the calf because he believed the injuries were fatal. A.R. 239-40, 244-45. The State then rested. A.R. 246.

The Petitioner called two witnesses in his case in chief. The first witness was Karen LeGrand, the grandmother of the Petitioner. A.R. 248. Mrs. LeGrand testified that she was the owner of the property on which the Petitioner lived and that in the 9 months or so before the December 4, 2021 incident cows belonging to the Scarberrys would come onto her land about every two weeks. A.R. 249-50. She also stated that when the cattle came onto her land, she would call Mr. Scarberry's mother-in-law, who was her aunt, and ask that the complaint be communicated to the Scarberrys. A.R. 250. She did not call Mr. Scarberry directly because she felt he was disrespectful and would cuss her and tell her to mind her own business. A.R. 250. Mrs. LeGrand also indicated that on a number of occasions she called the Cabell County Sherriff's office, 9-1-1, and the animal shelter, but that nothing was ever done about the situation. A.R. 251, 257. She also testified that the cattle damaged her property by moving the earth and leaving their excrement where it had to be mowed over. A.R. 251, 256.

The next and final defense witness was the Petitioner Austin Stevens. A.R. 261. He testified that on December 4, 2021 he came home from work to find the calf at his house which happened on a pretty frequent basis. A.R. 262. At the time the Petitioner's three-to-four-month-old, ten-pound puppy, went up to the calf and sniffed and barked. A.R. 263-64. The Petitioner tried to shoo the calf away without success. A.R. 264. The calf started snorting and moving around a lot. A.R. 265. The Petitioner testified that he was afraid the calf would kill his small dog by bucking, kicking, or stomping. A.R. 265. The Petitioner retrieved his bow and arrows from his house. A.R. 266. He once again repeatedly tried to shoo the animal away to no avail. A.R. 266. At this point the Petitioner decided to kill the calf. He shot it in the heart with an arrow. A.R. 267. The animal kept going and did not back off. A.R. 267. The Petitioner shot the calf again, this time in the head, in an attempt to quickly kill it. A.R. 267. The calf then walked back to the Scarberry property. A.R. 269. After a few minutes the Petitioner is confronted by Mr. Scarberry who shares "a few choice" words with the Petitioner and tells him that he is going to jail. A.R. 271. The Petitioner further stated that Mr. Scarberry had previously

threaten to kill him. A.R. 272. The police then arrived, and the Petitioner gave both a written and a recorded oral statement. A.R. 271, 282. The defense then rested. A.R. 287.

At this point the State recalled each of its three witnesses in rebuttal. First, Rusty Scarberry retook the stand and denied that prior to the incident in question he had threatened the Petitioner. A.R. 288. Second, Vickie Scarberry testified that her mother had received a phone call from Mrs. LeGrand about cows being on her property prior to the incident. A.R. 289-90. Finally, animal control officer Rutherford testified that he was not aware of any complaint by the Petitioner concerning cows on his property. A.R. 291.

The court then took up the matter of jury instructions. The Petitioner's counsel offered a jury instruction on the lesser included offense for the misdemeanor violation of W.Va. Code § 61-8-19(a)(1)(A) for intentionally, knowingly or recklessly "[m]istreat[ing] an animal in cruel manner." A.R. 296-97, 397. The felony version of animal cruelty required the accused "intentionally tortures, or mutilates or maliciously kills an animal." W.Va. Code § 61-8-19(b). The court refused the instruction stating that, "I don't think that is a lesser included offense." A.R. 297.

The jury was instructed, the parties did closing arguments, and the jury deliberated and returned a verdict of guilty of the felony offense of animal cruelty without being offered the option of convicting of the misdemeanor lesser included offense. A.R. 330, 402. The Petitioner filed a Motion for New Trial seeking a new trial, for among other reasons, that the court erred in not instructing the jury on the lesser included offense. A.R. 403.

The court held a sentencing hearing on September 15, 2023. At this hearing the court orally denied the motion for new trial. A.R. 349. The court then sentenced the Petitioner to four years probation, with the first year to be served on home confinement, plus payment of $1500 in restitution and a $1000 fine. A.R. 357, 408-09. A final Sentencing Order was entered on September 20, 2023. It is from this final order that the Petitioner brings this timely appeal.

## SUMMARY OF ARGUMENT

Misdemeanor animal cruelty (W.Va. Code § 61-8-19(a)(1)(A)) is a lesser included offense of felony animal cruelty (W.Va. Code § 61-8-19(b)) and the circuit court erred when it found otherwise as a matter of law and refused to give the lesser included instruction to the jury. A.R. 296-97, 397. The first inquiry in deciding if a crime is a lesser included offense is whether by virtue of its *legal* elements or definition it is included in the greater offense, and as such is a purely legal determination subject to *de novo* review. The second inquiry is a *factual* one which involves a determination by the trial court of whether there is *evidence* which would tend to prove such lesser included offense." [Emphasis added] *State v. Blankenship,* Syl. Pt. 4, 208 W.Va. 612, 542 S.E.2d 433 (2000); quoting *State v. Jones*, Syl. Pt. 1, 174 W.Va. 700, 329 S.E.2d 65 (1965).

The misdemeanor described in § 61-8-19(a)(1)(A) as "[m]istreat[ing] an animal in cruel manner" is a lesser included offense of "maliciously kill[ing]" an animal under subsection (b). As demonstrated below, it is impossible to maliciously kill an animal without mistreating it in a cruel manner. Furthermore, this statute should be construed this way in order to give effect to the legislative intent. See *Smith v. State Workmen's Comp. Comm'r,* Syl. Pt. 1, 159 W.Va. 108, 219 S.E.2d 361 (1975); *State v. White*, Syl. Pt. 2, 188 W.Va. 534, 425 S.E.2d 210 (1992); and *State v. Maichle*, __W.Va. __, 895 S.E.2d 181, 187 (2023). Second, the evidence presented at trial, when viewed in the light most favorable to the State, would tend to prove guilt of the misdemeanor.

Accordingly, the circuit court committed reversible error when it refused to give the tendered instruction and the conviction of the Petitioner should be set aside and a new trial ordered.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests Rule 20 argument as counsel believes this case presents a question of first impression as to whether misdemeanor animal cruelty is a lesser included offense of felony animal cruelty under W.Va. Code § 61-8-19. While the Petitioner believes that it is a lesser included offense, no decision of this court says so. This appeal also presents an excellent vehicle

for this Court to analyze and discuss the principles that control whether one offense is a lesser included offense of another.

## ARGUMENT

The circuit court erred in ruling that misdemeanor animal cruelty, as a matter of law, is not a lesser included offense of felony animal cruelty and accordingly erred in refusing to instruct the jury on that lesser included offense.

STANDARD OF REVIEW: "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." *State v. Hinkle*, Syl. Pt. 1, 200 W.Va. 280, 489 S.E.2d 257 (1996). The first inquiry having to do with whether a crime is a lesser included offense is whether by virtue of its *legal* elements or definition it is included in the greater offense, and as such is a purely legal determination subject to *de novo* review. *State v. Blankenship*, Syl. Pt. 4, 208 W.Va. 612, 542 S.E.2d 433 (2000); quoting *State v. Jones*, Syl. Pt. 1, 174 W.Va. 700, 329 S.E.2d 65 (1965).

"A trial court's refusal to give a requested instruction is reversible only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense." *State v. Blankenship*, Syl. Pt. 3, 208 W.Va. 612, 542 S.E.2d 433 (2000); quoting *State v. Derr*, Syl. Pt. 11, 192 W.Va. 165, 451 S.E.2d 731 (1994). "If these prerequisites are met, the trial court abuses its discretion in refusing the instruction 'no matter how tenuous that defense may appear to the trial court.'" *State v. Hinkle*, 200 W.Va. 280, 285, 489 S.E.2d 257, 262 (1996), quoting *U.S. v. Dove*, 916 F.2d 41, 47 (2nd Cir. 1990).

"The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a *legal* one having to do with whether the lesser offense is by virtue of its *legal* elements or definition included in the greater offense. The second inquiry is a *factual* one which involves a determination by the trial court of whether there is *evidence* which would tend to prove such lesser included offense." [Emphasis added] *State v. Blankenship, supra,* Syl. Pt. 4, quoting *State v. Jones*, Syl. Pt. 1, 174 W.Va. 700, 329 S.E.2d 65 (1965).

The Petitioner's argument is simple and straightforward. *Misdemeanor* animal cruelty (W.Va. Code § 61-8-19(a)(1)(A)) is a lesser included offense of *felony* animal cruelty (W.Va. Code § 61-8-19(b)) and the circuit court erred when it found otherwise as a matter of law and refused to give the lesser included instruction to the jury. A.R. 296-97. See proposed instruction at A.R. 397. W.Va. Code § 61-8-19 provides in pertinent part as follows.

> (a)(1) It is unlawful for any person to intentionally, knowingly or recklessly,
> (A) Mistreat an animal in cruel manner;
> (B) Abandon an animal;
> (C) Withhold;
> (i) Proper sustenance, including food or water;
> (ii) Shelter that protects from the elements of weather; or
> (iii) Medical treatment, necessary to sustain normal health and fitness or to end the suffering of any animal;
> (D) Abandon an animal to die;
> (E) Leave an animal unattended and confined in a motor vehicle when physical injury to or death of the animal is likely to result;
> (F) Ride an animal when it is physically unfit;
> (G) Bait or harass an animal for the purpose of making it perform for a person's amusement;
> (H) Cruelly chain or tether an animal; or
> (I) Use, train or possess a domesticated animal for the purpose of seizing, detaining or maltreating any other domesticated animal.
> (2) Any person in violation of subdivision (1) of this subsection 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) A 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, 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.

It is obvious from the structure of this statute the Legislature intended subsection (a)(1) to cover a large range of criminal conduct including to "[m]istreat[ing] an animal in cruel manner" pursuant to subsection (a)(1)(A) that is at issue in this case. Subsection (a)(2) made this conduct a misdemeanor. The Legislature then went on in subsection (b) to create a felony offense for any "person who intentionally tortures or mutilates or maliciously kills an animal." Clearly this felony was intended to reach wrongful conduct that exceeded that which was outlawed by the

preceding subsection (a)(1). The evidence in this case could not possibly provide proof beyond a reasonable doubt of torture or mutilation. There was no evidence at all of torture or mutilation. The evidence in this case, when viewed in the light most favorable to the State, could only support a verdict based upon maliciously killing the calf. Indeed, that was the theory of the prosecution, and the judge instructed the jury at length on the definition of "malice." A.R. 304-06. See prosecutor's closing argument at A.R. 308-10, 312-13.

The issue in this case when narrowed to its essence is whether the misdemeanor described in § 61-8-19(a)(1)(A) as "[m]istreat[ing] an animal in cruel manner" is a lesser included offense of "maliciously kill[ing]" an animal under subsection (b). In order to answer this question, the Court must determine the intent of the Legislature. *Smith v. State Workmen's Comp. Comm'r,* Syl. Pt. 1, 159 W.Va. 108, 219 S.E.2d 361 (1975) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature."). In analyzing legislative intent, this Court considers a statute as a whole. *State v. White*, Syl. Pt. 2, 188 W.Va. 534, 425 S.E.2d 210 (1992) ("In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation."). For the most recent statement of these principles, see *State v. Maichle*, __W.Va. __, 985 S.E.2d 181, 187 (2023).

First, the salient fact that the misdemeanors set forth in subsection (a) are followed immediately by the felonies set forth in subsection (b) indicates they are intended to be lesser and greater versions of the same offense, that is, animal cruelty. Indeed, § 61-8-19 is entitled "Cruelty to animals; penalties; exclusions" indicating that it includes different penalties for different degrees of the same type of criminal conduct.

"The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense." *State v. Wright*, Syl. Pt. 5, 200 W.Va. 549, 490 S.E.2d 636 (1997). See also *State v. Maichle,* __ W.Va. __, 895 S.E.2d 181, 187 (2023); *State v. Drakes*, 243 W.Va. 339, 348, 844 S.E.2d 110, 119 (2020); *State v. Louk*, Syl. Pt, 1, 169 W.Va. 24, 285 S.E.2d 432 (1981), overruled on other grounds by *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994).

With regard to the subsection (a)(1)(A) misdemeanor of intentionally, knowingly or recklessly mistreating an animal in cruel manner, it requires two elements in addition to the mental state or *mens rea*, (1) mistreatment, and (2) cruelty. A subsection (b) felony violation on the other hand requires (1) malice, and (2) the killing of an animal. The misdemeanor can be committed by mere recklessness resulting in cruel mistreatment, or in intending or knowing cruel mistreatment will result. This is extraordinarily broad language that captures a vast amount of behavior. The felony is much narrower and requires more. Obviously, the felony requires that the animal in question die. But there is another difference. The felony requires "malice," a much higher and more culpable mental state than mere intent, knowledge or recklessness required for the misdemeanor.

The court below instructed the jury as to the definition of "malice" as follows.

> The word malice as used in these instructions is used in a technical sense. It may be either express or implied, and it includes not only anger, hatred, and revenge, but other unjustifiable motives.
>
> Malice is not confined to ill will toward any one or more particular persons, but malice is every evil design in general, and by it is meant that the fact has been attended by such circumstances as are ordinarily symptoms of a wicked, depraved, and malignant spirit, and carry with them the plain indications of a heart, regardless of social duty, fatally bent upon mischief.
>
> It is not necessary that malice must have existed for any particular length of time, and it may first come into existence at the time of an act or at any previous time.

A.R. 304-05. The above quote does not include the portion of the instruction regarding inferences that may be drawn since it is not part of the *definition* of "malice."

Given this definition of "malice," two things are clear. "Malice" means far more than just cruelly mistreating an animal, and it is impossible to "maliciously kill" an animal without that also being "[m]istreat[ment] [of] an animal in cruel manner." Accordingly, one cannot be guilty of the greater felony without also being guilty of the lesser misdemeanor. That makes it a lesser included offense as a matter of law. Otherwise, an accused could be charged, tried, convicted, and sentenced consecutively for both subsection (a)(1)(A) misdemeanor animal cruelty and subsection (b) felony animal cruelty. This would be an absurdity. The Legislature could not possibly have intended that a defendant could be convicted and punished separately for both the felony and misdemeanor versions of animal cruelty.

The Petitioner recognizes that the literal wording of subsection (b) does not contain all the elements of subsection (a)(1)(A), plus one or more additional elements, making it immediately obvious that one is the lesser included offense of the other. That however is no impediment to this Court finding that the misdemeanor is a lesser included offense of the felony. "It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." *State v. Henning*, Syl. Pt. 3, 238 W.Va. 193, 793 S.E.2d 843 (2016), quoting *Click v. Click*, Syl. Pt. 2, 98 W.Va. 419, 127 S.E. 194 (1925) and *Conseco Fin. Servicing Corp. v. Myers*, Syl. Pt. 2, 211 W.Va. 631, 567 S.E.2d 641 (2002). "A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part." *State v Henning, supra*, Syl. Pt. 4, quoting *State v. Snyder*, Syl. Pt. 5, 64 W.Va. 659, 63 S.E. 385 (1908). The animal cruelty statute, like all other statutes, should be construed in this manner, and when it is, it is clear that misdemeanor animal cruelty is, as a matter of law, a lesser included offense of felony animal cruelty. Accordingly, the circuit court erred when it refused to give the offered lesser included offense instruction and found under the first prong of the test set forth in the *Blankenship* and *Jones* cases *supra* that subsection (a)(1)(A) of W.Va. Code § 61-8-19 is not a lesser included offense of the subsection (b) felony. A.R. 296-97, 397. This ruling by the circuit court was a purely legal determination and is subject to *de novo* review by this Court.

The legal determination of whether misdemeanor animal cruelty is a lesser included offense of felony animal cruelty is only the first prong of the test to answer the question of whether a defendant is entitled to an instruction on that lesser included offense and whether to not give the instruction is reversible error. The second inquiry is a *factual* one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense. *Blankenship, supra*, Syl. Pt. 4; *Jones, supra*, Syl. Pt. 1. Since the trial court erroneously found that the misdemeanor was not a lesser included offense of the felony, it did not reach or rule upon this second inquiry. The record in this case however makes it absolutely clear that the evidence, when viewed in the light most favorable to the State, tended to prove, and was sufficient to support, a verdict of guilty of misdemeanor animal cruelty. In the view of the prosecution the Petitioner was not justified in wounding the calf. The evidence

showed that the Petitioner shot the calf twice with an arrow. Once in the heart and once in the forehead. A.R. 164, 267. The animal suffered. A.R. 223-24. It had trouble breathing, walking, and had blood coming from its nose. A.R. 203-04. As a result of its injuries the calf had to be euthanized. A.R. 223-24. The Petitioner had guns in his house and supposedly could have killed the calf more quickly and humanely with a firearm. A.R. 224, 242, 270. The prosecutor tried to emphasize the alleged cruelty on the part of the Petitioner by pointing out in closing argument that the calf was killed "[n]ot with a gun, but with an arrow," and that the animal suffered. A.R. 307-08, 319. It cannot be seriously suggested that a jury might not have found this evidence and argument by the State adequate to convict the Petitioner of the misdemeanor of "[m]istreat[ing] an animal in cruel manner" in violation of subsection (a)(1)(A).

By the court not giving the lesser included instruction the trial court impaired the Petitioner's "ability to effectively present a given defense" in violation of *State v. Blankenship, supra*, Syl. Pt. 3 and *State v. Derr, supra*, Syl. Pt. 11. That defense being that the Petitioner was only guilty of the less serious charge of misdemeanor animal cruelty. This is the rule "no matter how tenuous that defense might seem to the court." *State v. Hinkle,* 200 W.Va. at 285, 489 S.E.2d at 262. The Petitioner was foreclosed from bringing this defense to the felony in the present case.

Finally, if the evidence presented at trial was *not* sufficient to justify giving the lesser include offense instruction for misdemeanor animal cruelty, it would mean that if the Petitioner had been convicted of "[m]istreat[ing] an animal in cruel manner" under subsection (a)(1)(A), and appealed to this Court arguing insufficiency of the evidence, this Court would have had to reverse the misdemeanor conviction of the Petitioner on that basis. See *State v. Guthrie*, Syl. Pt. 1, 194 W.Va. 657, 461 S.E.2d 163 (1995). Such an argument in this case, given the evidence at trial, would have been frivolous in the extreme. Likewise, it would be without merit to argue that the second factual prong of the *Blankenship* and *Jones* cases test is not met by the evidence of record below.

For all the reasons set forth above, the circuit erred in not giving the tendered lesser included instruction of the Petitioner after defense counsel offered to remove the reference to the penalty upon conviction. A.R. 296-97, 397.

## CONCLUSION

American society trusts juries to decide criminal cases. But for a jury to do its job properly and fairly it must be offered all verdict options as provided by law. The trial court refused to give a lesser included offense jury instruction when the evidence presented at trial, viewed in the light most favorable to the State, would have supported a conviction for either misdemeanor or felony animal cruelty, and the misdemeanor offense was, as a matter of law, a lesser include offense of the felony. In doing so the court committed a reversible error and the jury verdict was rendered unreliable as to whether the jury might have only convicted the Petitioner of the misdemeanor had it been an option.

Considering all the above, this Court should reverse the conviction of the Petitioner and remand this case to the circuit court for a new trial.

Respectfully submitted,
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