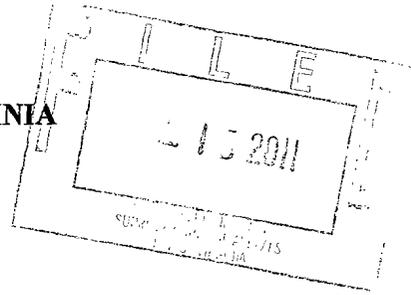


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 11-0283



**TRICIA DEAN, RESPONDENT**

Petitioner

V.)

Appeal from a final order of the  
Circuit Court of JEFFERSON  
County (10-P-31)

**STATE OF WEST VIRGINIA  
AND JEFFERSON COUNTY  
SHERIFF'S DEPARTMENT,**

Respondents

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**Petitioner's Brief**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
ASSIGNMENTS OF ERROR .....	Pg. 1
STATEMENT OF THE CASE.....	Pgs 1-3
SUMMARY OF ARGUMENT.....	Pgs. 3-5
REQUEST FOR ORAL ARGUMENT.....	Pgs. 5
ARGUMENT: .....	Pgs 9
ASSIGNMENT I:.....	Pgs. 6-8
ASSIGNMENT II:.....	Pgs. 8-13
ASSIGNMENT III:.....	Pgs. 13-14
RELIEF REQUESTED.....	Pg. 14
CERTIFICATE OF SERVICE .....	Pg. 15

## TABLE OF AUTHORITIES

### Cases:

Syllabus Point 3 of <u>Aetna Casualty &amp; Surety Co. v. Federal Ins. Co. of New York</u> , 148 W.Va. 160, 133 S.E.2d 770 (1963).....	Pg. 6
<u>Austin v. United States</u> , 509 U.S. 602 (1993).....	Pgs. 9, 10, 11
Syllabus Point 1 of <u>Burnside v. Burnside</u> , 194 W.Va. 263, 460 S.E.2d 264 (1995).....	Pgs. 6, 8, 13
<u>Games-Neely ex rel. West Virginia State Police v. Real Property</u> , 211 W.Va. 236, 565 S.E.2d 358 (2002) .....	Pg. 8
<u>State v. Adams</u> , 211 W.Va. 231, 565 S.E.2d 353 (2002).....	Pgs. 5, 12, 13
<u>State v. Cooper</u> , 172 W.Va. 266, 304 S.E.2d 851 (1983).....	Pgs. 12, 13
<u>State ex rel. Ballard v. Painter</u> , 213 W.Va. 290, 582 S.E.2d 737 (2003)  Pgs. 4, 5, 12, 13	
<u>United States v. Jalaram, Inc.</u> , 599 F.3d 347, (2010).....	Pg. 11
<u>U.S. v. Real Property Located at 1215 Kelly Road, Bellingham</u> , 860 F. Supp. 764 (W.D. Wash. 1994) .....	Pg 11
<u>WV Public Employees Retirement System v. Dodd</u> , 183 W.Va. 544, 396 S.E. 2d 725 (1990) .....	Pg. 10

### Statutes, Rules and Constitutions:

Article III, Section 5 of the West Virginia Constitution.....	passim
Eighth Amendment to the U.S. Constitution .....	passim
W. Va. Code §60A-7-703 .....	Pgs. 3,10
Rule 56 of the West Virginia Rules of Civil Procedure .....	Pg. 6
WV Contraband Forfeiture Act (WVCFA), W.Va. Code §§60A-7-701 et.seq.....	Pg. 3
WV Uniform Substances Control Act, W.Va. Code §§ 60A-1-101 et seq. ....	Pg. 3

## **I. ASSIGNMENTS OF ERROR**

- A. THE CIRCUIT COURT’S INCORPORATION AND RELIANCE UPON FACTUAL ASSERTIONS FROM THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT, THAT INCLUDED FACTS OUTSIDE THE AGREED UPON RECORD WAS IMPROPER AND PREJUDICIAL TO THE PETITIONER.**
- B. THE CIRCUIT COURT ERRED IN FINDING THAT THE FORFEITURE OF THE PETITIONER’S PROPERTY DID NOT CONSTITUTE AN ‘EXCESSIVE FINE’ UNDER ARTICLE III, SECTION 5 OF THE WEST VIRGINIA CONSTITUTION OR UNDER THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.**
- C. THE CIRCUIT COURT ERRED IN FINDING THAT THE FORFEITURE OF THE PETITIONER’S PROPERTY WAS NOT EXCESSIVE WITHOUT FIRST HAVING AN EVIDENTIARY PROPORTIONALITY HEARING.**

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

1. On April 13, 2010, the Prosecuting Attorney of Jefferson County, Respondent herein, and Petitioner below, (hereinafter “State”) filed a Petition for Forfeiture of Ms. Tricia Dean’s home and real property located at 64 White Tail Lane, Kearneysville, Jefferson County, West Virginia. [Appendix Vol. 1: 7-9].

2. On June 11, 2010, Tricia Dean, Petitioner herein, and Respondent below, (hereinafter “Ms. Dean or Petitioner”) filed a discovery request with the Prosecuting Attorney’s Office seeking production of documents, tangible items, and interrogatories. [Id. 25]

3. On June 11, 2010 Ms. Dean filed a Motion to Stay the Proceeding until the resolution of the pending federal criminal case. [Id. 28]

4. On June 28, 2010 the Circuit Court granted Ms. Dean’s Motion for a Stay of Proceedings and scheduled a Status Hearing on September 20, 2010. [Id. at 34]

5. At the Status Hearing on September 20, 2010, the parties appeared and jointly agreed that the facts set forth in the plea agreement that Ms. Dean entered in federal court would be the sole basis for the undisputed facts for the anticipated motion for summary judgment to be filed by the State. [App. Vol. 2, Sept. 20, 2011 TR: 3, lines 18-24].

6. On September 29, 2010 the State filed its Motion for Summary Judgment on its Petition for Forfeiture. [App. Vol. 1: 34-40]

7. On October 26, 2010 the Circuit Court granted the State's Motion for Summary Judgment. [Id. 58]. At the time the Circuit Court granted State's Motion, the Court was unaware that the State and Ms. Dean had informally agreed to an extension of the time for filing a response to the State's Motion for Summary Judgment.

8. On November 1, 2010 Ms. Dean filed its Opposition to the State's Motion for Summary Judgment. [Id. 62]

9. On January 13, 2011 the Circuit Court granted the State's Motion for Summary Judgment on its Petition for Forfeiture, after Ms. Dean had an opportunity to respond. [Id. 1]

10. On January 25, 2011, Ms. Dean filed a Motion for Reconsideration of the Order Granting Petitioner's Motion for Summary Judgment or in the Alternative, Modification of the Order. Id. 86-87

11. On January 31, 2011, the Court denied Ms. Dean's Motion for Reconsideration of the Order granting Petitioner's Motion for Summary Judgment or in the Alternative, Modification of the Order.

## **B. Facts**

1. Petitioner, Tricia Dean, owns a home and one and one-half acres of land at 64 White Tail Lane in Kearneysville, WV.

2. On July 15, 2010, as a result of facts developed during a criminal investigation by state and federal authorities, Ms. Dean pled guilty to distribution of crack cocaine in violation of 21 U.S.C. § 841((a)(1), in the United States District Court for the Northern District of West Virginia.

3. Specifically, Ms. Dean pled guilty to Count 5 of the federal indictment. Count 5 provides:

On or about the 25<sup>th</sup> day of February, 2010, at approximately 4:00 p.m., in Kearneysville, Jefferson County, West Virginia, within the Northern Judicial District of West Virginia, defendants Michelle Evette Craig, Tricia Lynn Dean, and Gary Rufus Caviness, Jr., aided and abetted each other, did unlawfully, knowingly, intentionally and without authority distribute approximately 4.8 grams or more of a mixture and substance containing a detectable amount of cocaine base, also known as “crack”, a controlled substance, to a person known to the Grand Jury, in exchange for \$600.00.

[App: Vol. 1: 46].

4. The parties agreed on September 20, 2010 that for purposes of the State’s Motion for Summary Judgment, the undisputed facts would be those facts that Ms. Dean pled guilty to in the plea she entered in federal court.[App. Vol. 2, Sept. 20, 2011 TR:3, lines 18-24].

### **III. SUMMARY OF THE ARGUMENT**

#### **A. Introduction**

This is a civil forfeiture action brought by the State pursuant to the West Virginia Contraband Forfeiture Act (WVCFA), W.Va. Code §§60A-7-701 et.seq. Under Section 60A-7-703(a)(8) of the WVCFA, the government can forfeit or take a person’s real property if it can show by a preponderance of the evidence, that such property was used to facilitate a violation of the West Virginia Uniform Substances Control Act, W.Va. Code §§ 60A-1-101 et seq. Often, the State proceeds, as it did here, by summary judgment motion, and relies on the facts it obtained during its criminal investigation. Here, however, after the State filed its

motion for summary judgment (based upon facts obtained during its criminal investigation, including information obtained from a confidential informant) the State dismissed its criminal case, and sought assistance from federal authorities. Federal authorities then filed an Indictment, and Ms. Dean entered a guilty plea. Subsequently, the State and Ms. Dean jointly agreed to use only the factual allegations of her plea as the factual basis for the State's motion for summary judgment. [App. Vol.2, Sept. 20, 2011 TR: 3, lines 18-24] As a result of this agreement, Ms. Dean withdrew her discovery request.

### **B. Summary of the Arguments**

1. That the Court improperly relied upon disputed and contested facts in its finding that Ms. Dean's home facilitated the illegal drug transaction. The State cited contested facts in its motion for Summary Judgment that were outside of the agreed upon record. The Circuit Court included such facts in its Order granting State's Motion for Summary Judgment. Inclusion of these contested facts was improper and prejudicial, and were material to the Circuit Court's Order Granting the State's Motion for Summary Judgment, and the Circuit Court's Order should be reversed.

2. The Circuit Court erred in finding that the forfeiture of Ms. Dean's property did not constitute an excessive fine under Article III, Section 5 of the West Virginia Constitution or under the Eighth Amendment to the U.S. Constitution. Article III, Section 5 of the West Virginia Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence." The court in State ex rel. Ballard v. Painter, 213 W.Va. 290, 582

S.E.2d 737 (2003) set forth the test for determining proportionality and stated that: “If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.” Petitioner argues in this case that the forfeiture of her home, potentially valued at up to \$100,000 as proffered by the State, for a single count of distributing cocaine valued at \$600.00, shocks the conscience and as such the Circuit Court’s decision should be reversed.

3. The Circuit Court erred in finding that the forfeiture of Petitioner’s property was not excessive without first having an evidentiary proportionality hearing. In State v. Adams the court stated that “in order to determine whether the sentence imposed on Ms. Dean shocks the conscience, the court must consider all the circumstances surrounding the offense.” 211 W.Va. 231, 233, 565 S.E.2d 353, 355 (2002). In State ex rel Ballard v. Painter, the court looked at the defendant’s criminal history, his past violent behavior, and his involvement in the crime in comparison with his co-conspirators. 213 W.Va. 290, 293 (2003). In this case, there was insufficient evidence to determine whether the punishment was proportional to the crime committed, and as such the Circuit Court failed in not ordering a full evidentiary proportionality hearing.

#### **IV. REQUEST FOR ORAL ARGUMENT**

Petitioner requests oral argument under either Rule 19 because the case concerns a ruling based upon insufficient evidence, or under Rule 20 because the case involves constitutional questions regarding the Circuit Court’s ruling.

## V. ARGUMENT

- I. **THE CIRCUIT COURT ERRED THROUGH ITS INCORPORATION AND RELIANCE UPON STATEMENTS FROM THE STATE'S MOTION FOR SUMMARY JUDGMENT, THAT INCLUDED FACTS OUTSIDE THE AGREED UPON RECORD AND IN DISPUTE, AND WAS IMPROPER AND PREJUDICIAL TO THE PETITIONER.**

### Standard of Review

Syllabus Point 1 of *Burnside v. Burnside*, 194 W.Va. 263 (1995).

In reviewing challenges to findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

The issues raised within this appeal should be analyzed with these principles of law.

### Discussion

The Circuit Court's incorporation and reliance upon statements from the State's Motion for Summary Judgment, that included facts outside of the agreed upon record and in dispute, was improper and prejudicial. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In Syllabus Point 3 of *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963), this Court held: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law."

On September 20, 2010 the parties before the Circuit Court jointly agreed that factual basis for the plea entered into by Ms. Dean in federal court would be the sole basis for the anticipated Motion for Summary Judgment to be filed by the State, and that no other factual allegations would be alleged. [App. Vol. 2, Sept. 20, 2011 TR, page 3, lines 18-24]. However, in the State's Motion for Summary Judgment, the argument before the Circuit court on that motion, and in the Circuit Court's Order granting the State's request for Summary Judgment, the state and court made many references to facts outside the agreed upon record.

In the State's Motion for Summary Judgment the State made numerous references outside the agreed upon record. For example, the State stated in its motion for summary judgment that Ms. Dean "arranged for the purchase of \$700.00 worth of crack cocaine." [Motion for Summary Judgment (MSJ), App. Vol. 1:37, ¶ 1]. The State also stated that Ms. Dean "requested and received \$100.00 for facilitating the transaction." [Id. 38, ¶ 3].

In addition to the factual statements made in its written motion for summary judgment, the State made statements during its oral argument, despite its express acknowledgement at the beginning of the hearing that, "In this case, the basis of the motion is the Defendant's entry of a guilty plea in federal court to a portion of the allegations contained within the petition." [App. Vol. II, December 12, 2010 TR: 2, lines 19-22] For instance, in the course of the hearing, the State declared that Ms. Dean arranged for the seller to come to the home, and that she sought to profit from the transaction by seeking a 20 percent commission. [Id. TR: 9, lines 9-16] The State further declared that Ms. Dean was "intricately involved in this case given the fact that she set this up and she profited from it." [Id. TR: 9, lines 18-19] Finally, in the Circuit Court's Order granting the State's motion, the Circuit Court incorporated into its Order the numerous disputed facts contained in the State's Motion for Summary Judgment, and disputed facts argued by the

State during the summary judgment hearing. Specifically, the Circuit Court, in granting the State's Motion for Summary Judgment, made a specific finding that Ms. Dean arranged for the purchase of \$700.00 worth of crack cocaine. [App. Vol. 1: 1, ¶1, Order Granting Petitioner's Motion for Summary Judgment]. Further, the Court found that Ms. Dean "received a commission for the sale of \$100.00." [Id. 2, ¶ 3]. Additionally, the Court found Ms. Dean to be "the driving force behind the sale of crack cocaine in her residence." [Id. 3, ¶ 10]. None of these "facts" were in evidence before the court, but were clearly material to the Circuit Court's granting of the State's Motion for Summary Judgment. As indicated in the Statement of Facts on page 3 of this brief, the only undisputed facts were those contained in Count 5 of the federal indictment; i.e. distribution of approximately 4.8 grams of crack cocaine in exchange for \$600.00. The Circuit Court's incorporation and reliance upon factual assertions other than these two simple facts, was improper and prejudicial to Ms. Dean. This is particularly true where, as this court has recognized, "[t]he Forfeiture Act is to be liberally construed in favor of the person(s) whose property rights are to be affected and strictly construed against the forfeiture." Games-Neely ex rel. West Virginia State Police v. Real Property, 211 W.Va. 236, 243, 565 S.E. 2d 358 (2002). Therefore, the judgment of the Circuit Court should be reversed and remanded for trial.

**II. THE CIRCUIT COURT ERRED IN FINDING THAT THE FORFEITURE OF MS. DEAN'S PROPERTY DID NOT CONSTITUTE AN "EXCESSIVE FINE" UNDER ARTICLE III, SECTION 5 OF THE WEST VIRGINIA CONSTITUTION OR UNDER THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION.**

**Standard of Review**

Syllabus Point 1 of Burnside v. Burnside, 194 W.Va. 263 (1995).

In reviewing challenges to findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate

disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

### **Discussion**

The Circuit Court erred in finding that the forfeiture of Ms. Dean's property did not constitute an "excessive fine" under Article III, Section 5 of the West Virginia Constitution or under the Eighth Amendment to the U.S. Constitution.

#### **A. The Forfeiture was Penal in Nature.**

In Austin v. United States, 509 U.S. 602 (1993), the United States Supreme Court was presented with the issue as to whether the Eighth Amendment's excessive fines clause applied to an in rem civil forfeiture proceeding under federal law. The government had argued that the Eighth Amendment could only apply to criminal actions. However, the Supreme Court rejected the Government's argument, and after a lengthy historical discussion of forfeiture generally, the Supreme Court concluded that "the question is not, as the United States would have it, whether forfeiture under the [controlled substances act] is civil or criminal, but rather whether it is punishment." Id at 610. After concluding that Congress intended the forfeiture provisions to deter and punish, and not to simply be remedial in nature, the Court held that the forfeiture provisions constitute payments to a sovereign as punishment for some offense, and as such are subject to the limitations of the Eighth Amendment's Excessive Fines Clause. Id at 622.

The West Virginia Constitution contains an excessive fines clause similar to the Eighth Amendment of the United States Constitution. Article III, Section 5 of the West Virginia Constitution provides that:

[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence. (emphasis supplied)

While this Court has found that other provisions of the WVCFA, relating to the forfeiture of raw materials and equipment used in the manufacture of drugs, W.Va. Code §60A-703(a)(2), and property which is used as a container for drugs, W.Va. Code §60A-7-703(a)(4) are not punitive for the purposes of the guarantees against double jeopardy, this Court has not yet directly addressed the issue of whether the forfeiture of real property under W.Va. Code §60A-7-703(a)(8) is punitive and thus the excessive fines clause of Article III, Section 5 would apply. The Court has found that it applies in other civil forfeiture cases. (See e.g. In West Virginia Public Employees Retirement System v. Dodd, 396 S.E. 2d 725 (W.Va. 1990)(court held that civil forfeiture of a pension under the West Virginia pension forfeiture statute was penal in nature and thus subject to prohibitions against disproportionate punishment.) Also, it is important to remember that this is not a forfeiture action where the government is claiming that the proceeds of drug sales were used in the purchase of the real property the government seeks to forfeit. Rather, this is a “facilitation” case – meaning that the property was allegedly used to facilitate the transaction. Because the property was legal to possess and was not purchased with proceeds from criminal activity, courts are more willing to consider “facilitation” forfeiture to constitute punishment. See Austin v. United States at 621.

Additionally, this is not a case, like many other cases, where the house in question was set up in a community to sell drugs, and in fact, is referred to as a “crack house” where numerous drug transactions worth thousands of dollars take place. Rather, in this case, Ms. Dean engaged in a single drug transaction in which she and two others sold a small quantity of crack cocaine for \$600.00. As a result of this single transaction the State wants to take Ms. Dean’s home and

land, where she and her two children have resided since 1996. The state did not dispute that the home and land had been given to her by her mother, and that the property has been in her family since the early 1970's. This is essentially the type of case that Justice Scalia referred to in the Austin case where forfeiture is not appropriate. In his concurring opinion Justice Scalia said:

But an in rem forfeiture goes beyond the traditional limits that the Eight Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense – the building for example in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship with the offense.

Austin at 628.

While the United States Supreme Court declined in Austin to establish a test for determining whether a forfeiture is constitutionally excessive, and this Court has not directly addressed the issue, the Fourth Circuit Court of Appeals recently articulated the factors it would use in determining whether a forfeiture was grossly disproportional to the gravity of the offense. In United States v. Jalaram, Inc., 599 F.3d 347, 356 (2010), the court set forth the following four factors it would use: (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the criminal activity (3) the relationship between the crime charged and other crimes; and (4) the harm caused by the charged crime. Other courts have devised their own factors. See, e.g. the multi-factor approach adopted by the District Court in U.S. v. Real Property Located at 1215 Kelly Road, Bellingham, Wash. 860 F. Supp. 764 (1994). In this case, Ms. Dean's home, which the State values at \$100,000.00 dollars [Vol. 2, Dec. 12, 2010 TR:5, line 23] was forfeited by the State because of a single drug transaction worth \$600.00. Under these circumstances, the forfeiture is penal, not remedial.

## **B. Proportionality Test.**

If the court finds that the forfeiture is penal in nature, then the next question that the Court should ask is if the forfeiture in this case is so excessive that it violates the West Virginia Constitutional prohibition against excessive fines. Article III, Section 5 of the West Virginia Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence.” In State v. Cooper, 172 W.Va. 266, 272, 304 S.E.2d 851, 857 (1983), this Court outlined a test used to determine whether a sentence is so disproportionate to a crime that it violates our constitution.” State ex rel. Ballard v. Painter, 213 W.Va. 290 (2003):

The first [test] is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.

State v. Cooper, 172 W.Va. 266, 272, 304 S.E.2d 851, 857 (1983).

In order to determine if a sentence “shocks the conscience”, the court must consider all the circumstances surrounding the offense. State v. Adams, 211 W.Va. 231, 233, 565 S.E.2d 353, 355 (2002).

In this case, the only fact in evidence is that Ms. Dean participated in an illegal drug transaction of a small amount of crack cocaine for \$600.00. There is no evidence in the record before the Circuit Court that addresses Ms. Dean’s past criminal history, if any; her level of participation in the drug transaction, or any other facts that might warrant the Circuit Court’s finding that the forfeiture of a house worth \$100,000 dollars was a proportional punishment for a drug transaction of \$600.00. Thus, the forfeiture of Ms. Dean’s home for a single drug transaction of \$600.00 violates the subjective test outlined in Cooper because the punishment for the particular crime shocks the conscience of the court and society.

**III. THE CIRCUIT COURT ERRED IN FINDING THAT THE FORFEITURE OF MS. DEAN’S PROPERTY WAS NOT EXCESSIVE WITHOUT FIRST HAVING AN EVIDENTIARY PROPORTIONALITY HEARING.**

**Standard of Review**

Syllabus Point 1 of Burnside v. Burnside, 194 W.Va. 263 (1995).

In reviewing challenges to findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

**Discussion**

The Circuit Court erred in finding that the forfeiture of Ms. Dean’s property did not constitute an “excessive fine” without first having an evidentiary proportionality hearing. In State v. Adams the court stated that “in order to determine whether the sentence imposed on Ms. Dean shocks the conscience, the court must consider all the circumstances surrounding the offense.” 211 W.Va. 231, 233, 565 S.E.2d 353, 355 (2002). In State ex rel Ballard v. Painter, in order to determine if the sentence imposed shocked the conscience, the court looked at the defendant’s criminal history, his past violent behavior, and his involvement in the crime in comparison with his co-conspirators. 213 W.Va. 290, 293 (2003). The court in Ballard took into consideration that Mr. Ballard used a weapon in committing his crime, injured a party, and failed to show remorse for his actions. Id. Similarly, in the Cooper case the court looked into the character of the defendant, his age, the circumstances of the case, and took into account the presentence report in order to determine whether the punishment “shocked the conscience.” 172 W.Va. 266. (1983)

In this case, the record is very limited due to the Circuit Court's failure to have an evidentiary proportionality hearing as requested by Ms. Dean. There is no evidence of Ms. Dean's prior criminal record, if any, the actual value of her home, her role in the crime, or what part her home played in the drug transaction. What little evidence that there is in regard to circumstances surrounding the criminal offense in question easily shocks the conscience and demonstrates that the punishment clearly is not proportional to the crime committed.

**Relief Requested**

For all of the reasons stated above, the Petitioner requests that the Circuit Court's Order Granting the State's Motion for Summary Judgment on Forfeiture be vacated on the grounds that the forfeiture is an excessive fine under Article III, Section 5 of the West Virginia Constitution. Alternatively, the Petitioner requests that the Circuit Court's Order granting the State's Motion for Summary Judgment be reversed, and the matter remanded to the Circuit Court for trial on the merits, and for an evidentiary hearing to determine whether the forfeiture is proportionate to the crime committed. Furthermore, Ms. Dean requests any and all other relief that this honorable court deems fit and proper.

Respectfully submitted,

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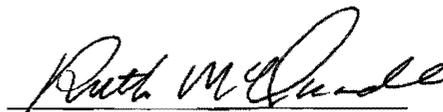
**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of July, 2011, true and accurate copies of the foregoing **Petitioner's Brief** were delivered by U.S. Mail to:

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