

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SEP 22 2011

DOCKET NO. 11-0283

**TRICIA DEAN**

Respondent Below, 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,**

Petitioners Below, Respondents.

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**Petitioner's Reply Brief**

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## TABLE OF AUTHORITIES

### CASES

<u>Aluise v. Nationwide Mutual Fire Insurance</u> , 218 W. Va. 498, 625 S.E.2d 260 (2005) . . . . .	3,4
<u>Austin v. United States</u> , 509 U.S. 602 (1993) . . . . .	8
<u>State v. Forty Three Thousand Dollars and No Cents (\$43,000.00) In Cashier's Checks</u> , 214 W. Va. 650, 591 S.E. 2d 208 (2003) . . . . .	8
<u>United States v 300 Blue Heron Farm Lane, Chestertown, Md.</u> , 115 F. Supp.2d 525 (D. Md. 2000) . . . . .	7
<u>United States v. Chandler</u> , 36F.3d 358 (4 <sup>th</sup> Cir. 1994) . . . . .	8

### STATUTES

W. Va. Code § 60A-7-703 (a) (8) . . . . .	6
W. Va. Code § 60A-1-101 et. seq. . . . .	6

### OTHER

U.S. CONST. amend. VIII . . . . .	passim
U.S.S.G. §§ 5 E1. 2(c)(3) and (4) . . . . .	7
W. Va. R. Civ. P. 56(c) . . . . .	2, 3
W. Va. CONST. art. III, § 5. . . . .	passim

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**SEP 16 2011**

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**TRICIA DEAN,**  
Petitioner

V.)

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

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**PETITIONER'S REPLY BRIEF**

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The Petitioner, Tricia Dean, files this Reply Brief to address the various arguments set forth in the Respondents' Brief. None of the arguments set forth by the Respondents alter the conclusion that the Circuit Court erred in granting the Respondents' Motion for Summary Judgment forfeiting the Petitioner's home and land based on facts outside of the agreed upon record; relying on the wrong standard to determine whether the forfeiture was an excessive fine under the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution, and denying an evidentiary hearing to the Petitioner. These arguments are more fully set forth below.

**I. Requiring the Respondents and the Circuit Court to Rely Only On the Facts in Evidence in a Summary Judgment Proceeding Is Hardly "Silly" As the Respondents Maintain**

The Respondents make two arguments as to why the Circuit Court did not err in its decision on summary judgment by relying on facts beyond the record. First, the Respondents argue that the circuit court did not go beyond the "agreed upon" record, because the facts, while not the specific

facts agreed to by the parties, were “. . . nothing more than the circumstances that gave rise to Count 5 of the Indictment in the first place.” Respondents’ Br. 4. Second, Respondents argue that even if the Court did rely on facts outside of the record, it is permissible to do so under Rule 56 of the West Virginia Civil Rules of Procedure. Neither argument is correct.

**A. In a Summary Judgment Proceeding Where The Parties Agree to a Stipulated Set of Facts, the Circuit Court Cannot Go Beyond These Facts in Rendering Its Judgment.**

As set forth in the Petitioner’s Initial Brief, the agreed upon or stipulated facts for which the Circuit Court was to render judgment were the facts contained in Count 5 of the Indictment—nothing more, nothing less. Count 5 of the Indictment provided:

On or about February 25, 2010, at approximately 4:00pm in Kearneysville, Jefferson County, West Virginia, within the North Judicial District of West Virginia, defendants Michelle Evette Craig, **Tricia Lynn Dean** and Gary Rufus Caviness, Jr. aided and abetted by 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,” to a person known to the Grand Jury in exchange for \$600; in violation of 21 U.S.C. §§ 841 (a)(1), 841(b)(1)(C) and 18 U.S.C. §2.

App. Vol. 1:46

To suggest, as the Respondents do, Respondents’ Br. 8, that the Petitioner is “silly” because she believes that the Court considered disputed facts, as opposed to stipulated facts, after she forfeited her right to discovery, is ridiculous. Clearly, if the court had considered non-material disputed facts (e.g. that on the day of the drug exchange the Petitioner was wearing a red dress) than her argument would be silly. However, the circuit court relied heavily in its forfeiture decision on the disputed fact that the Petitioner actually took a “cut” of the exchange. See App. Vol. 1: 3. This disputed fact is the only basis, apart from the generalized statement made by the court that “drugs are bad,” that the circuit court gave for granting the state’s motion for summary judgment. If the state wanted to use other facts, it should not have made the agreement to the stipulated facts.

Rather, it should have provided the discovery propounded by the Petitioner so that she could defend against the motion for summary judgment by filing opposing affidavits and other materials. Once the Petitioner withdrew her request for discovery, and the parties agreed upon a set of stipulated facts, (i.e. the facts contained in Count 5 of the federal indictment), no other “facts” could be used, whether made by the prosecutor in his argument to the court, or in documents provided to the court. Despite this, the assistant prosecuting attorney below, and now the assistant attorney general here, try to prejudice this court by referring to facts not in evidence, under the guise of “setting the stage.” However, when the Petitioner gave up her substantial rights to discovery in the proceeding below to obtain information from the prosecutor, including the monitored telephone conversations and the videotaped materials, she did so on the express agreement by the prosecutor that he intended to rely solely on the facts alleged in Count 5 of the Indictment. The Prosecutor presumably made this agreement on the belief that he had sufficient evidence to obtain summary judgment, and did not want to risk providing the information to the Petitioner because of her ongoing criminal case. Whatever the strategy of the prosecutor was, the Respondents cannot expect this court to review and consider evidence that was not in the record, and that should not have been considered by the Circuit Court. To do otherwise, would simply ignore the existing agreement between the prosecutor and the Petitioner, and deny the substantial rights of the Petitioner.

**B. Contrary to Respondents’ Assertion, Nothing in Rule 56(c) or in West Virginia Case Law Permits the Court in a Motion for Summary Judgment to Consider Facts Outside of the Record.**

Concerned that this Court may, in fact, find that the lower court did consider facts outside the agreed upon record, the Respondents make the alternative argument that even if the lower court considered facts outside of the record, that it was permissible to do so under Rule 56(c) of the West Virginia Rules of Civil Procedure. To the contrary, neither Rule 56(c) of the West Virginia Rules of Civil Procedure nor the case cited by the Respondents, support their contention. Respondents cite

to a single case, *Aluise v. Nationwide Mutual Fire Insurance*, 218 W. Va. 498, 625 S.E. 2d 260 (2005) in support of their contention. In *Aluise*, a case between the purchasers of a home and an insurance company, the homeowners claimed that “. . . the only type of evidence a circuit court may consider on a motion for summary judgment are pleadings, depositions, answers to interrogatories, admissions and affidavits.” *Id.* at 498. (emphasis supplied) The homeowners essentially viewed Rule 56(c) as prohibiting any other type of evidence that was not specifically enumerated in the Rule 56(c)<sup>1</sup> *Aluise* certainly does not stand for the proposition, as Respondents claim, that the court can rely on information that is not in evidence, as was the case here.

## **II. Forfeiture of Petitioner’s Home and Land Was a Violation of the Eighth Amendment and Article III, Section 5 of the West Virginia Constitution Because It Constituted an Excessive Fine**

Respondents’ argument that the forfeiture of Petitioner’s home was not in violation of either the Eighth Amendment bar on excessive fines, or in violation of Article III, Section 5 of the West Virginia Constitution, fails in three important respects. First, the Respondents use facts not in evidence to buttress their argument regarding the nature and severity of the crime committed by the Petitioner. Second, the Respondents rely exclusively on federal cases as the basis for what is considered excessive, when the statute upon which the forfeiture was based is a state statute, and thus state laws should apply. Third, even if the federal cases were applicable here, the Respondents have chosen to rely on the standard set forth in every circuit but the appropriate circuit, the Fourth Circuit Court of Appeals.

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<sup>1</sup> Rule 56(c) states that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

**A. Respondents' Use of Facts Not in Evidence to Buttress Their Argument That Because of the Nature and Severity of the Crime, the Forfeiture of Petitioner's Home Was Not Disproportionate to the Crime Committed is Improper**

As discussed above in the argument on whether or not the court relied on facts not in the record, the Respondents continue to use some of these same "facts" to buttress their argument about the nature and severity of the crime committed by the Petitioner. For reasons already stated, the use of material outside the stipulated record was improper in the granting of summary judgment. It is equally improper to use this same information to determine whether the forfeiture was an "excessive fine" under the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

The Respondents' brief is replete with references to information that was outside of the stipulated facts or agreed upon record.<sup>2</sup> For instance, the Respondents refer to the federal plea agreement to argue that the amount of the drugs involved was greater than that stated in the Petitioner's Brief. See Respondents' Br. 17-18. Additionally, the Respondents, again relying on material from the federal plea agreement, argue that the role of the Petitioner in the drug transaction was greater than that stated in the Petitioner's Brief. Id. at 18. The reliance by the Respondents on information from the Plea Agreement concerning the extent of Petitioners' role in the drug transaction or the total amount of drugs (otherwise known as "relevant conduct" under the federal sentencing guidelines) was not before the Circuit Court, nor should it be considered by this Court, in determining whether or not the Circuit Court erred in granting the motion for summary judgment in violation of the Eight Amendment to the U.S. Constitution and Article III, Section 5 of the West

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<sup>2</sup> It is important to understand the difference between two documents filed in federal court and which were included by the Prosecutor in his Motion for Summary Judgment. The first is the Change of Plea Order, See App. Vol. I, p.52-56 which relates only to the charge upon which the defendant is convicted. Here, the Change of Plea Order relates only to Count 5 of the Indictment. The Plea Agreement, See App. Vol. I. p.47-51, goes beyond the charge of conviction, and for purposes of sentencing, contains statements on the role of the participant and the "relevant conduct." In a federal drug case, the "relevant conduct" includes the amount of drugs the prosecutor believes he or she could show at trial for both the convicted offense, as well as other counts charged.

Virginia Constitution. Rather this Court, as the Circuit Court should have done, should only rely on those facts that were in evidence at the time (i.e. the Stipulated Facts) and disregard any other information. The Prosecuting Attorney's Office chose the route of summary judgment, not trial. It cannot now change the rules of the game in order to justify the desired result.

**B. Respondents' Reliance on Federal Cases to Determine Whether the Forfeiture was Excessive is Entirely Misplaced When The Forfeiture Occurred Pursuant to State Law and in State Court.**

It is undisputed that the Petitioner's property was forfeited under the West Virginia Contraband Forfeiture Act (WVCFA) at W.Va. Code 60A-7-703(a) (8), which permits the government to take a person's property when it is used ". . . to commit or to facilitate the commission of a violation of . . . [the Uniform Controlled Substances Act, W.Va. Code §§60A-1-101 et seq.,] punishable by more than one year imprisonment." The operative language here is the taking of property when it is used to commit or facilitate a commission of a violation of the West Virginia Uniform Controlled Substances Act<sup>3</sup> Thus, because the provision upon which the State relied to forfeit the property is based upon a violation of its own statute, the West Virginia Uniform Controlled Substances Act, the Respondents' reliance on the fines that could be imposed under the federal controlled substances act is irrelevant. The Circuit Court and this Court, in determining whether the forfeiture of Petitioner's property was excessive under Article III, Section 5 of the West Virginia State Constitution, should look to state law, and what the Petitioner would have been subject to under state law, not federal law. All of the cases cited by the Respondents involve cases where the forfeiture action was brought in federal court under the federal forfeiture provisions. See generally cases cited in Respondents' Br. 15-16. In each of these instances, the defendant would

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<sup>3</sup> Ms. Dean argued below, see App. Vol. II, Tr. of Dec. 12, 2010, p. 12, 16-19, that because the state had dismissed its criminal action against her charging her with violations of the state controlled substances act, that the state forfeiture act would not apply. The Circuit Court disagreed, finding that the evidence from her plea of guilty to Count 5 of the federal indictment was sufficient to find that she had violated the state controlled substances act, and that a conviction under the state controlled substances act was not required. Id. at 19. Petitioner has not appealed the forfeiture of her property on these grounds.

potentially have faced a maximum fine of \$1, 000, 000. With the benchmark set at \$1, 000,000.00, virtually no forfeiture would be deemed excessive. If, however, the Circuit Court had looked at the maximum fines that could be imposed if the Petitioner were convicted under the state controlled substances act, the Petitioner would have faced a maximum fine of \$25,000.<sup>4</sup> In making the decision as to whether the forfeiture was proportionate to the crime committed, the Circuit Court and this Court should rely on the maximum fine that the Petitioner would have been subject to under the State law which served as the basis for the forfeiture of her property.

**C. Even if this Court Decides to Rely on Federal Authority Because the Petitioner Was Charged with a Federal Crime, the 4<sup>th</sup> Circuit Court of Appeals Has Articulated The Standard for Determining Excessiveness, and it Has Little to Do With the Amount of the Fine That Could Be Imposed for the Offense**

The Respondents cite to a number of federal circuit cases, including the 2<sup>nd</sup>, 6<sup>th</sup> and 11<sup>th</sup> Circuits for the proposition that the key factor in determining whether the forfeiture is excessive under the Eighth Amendment to the Constitution is the fine that could be imposed on the person for the crime committed. Under the federal substances control act, the maximum fine is \$1,000,000.00. Thus, when a defendant is facing a maximum fine under the federal substances control act, virtually any forfeiture of property is not excessive, because rarely does the value of the property exceed the maximum fine of \$1, 000, 000.00.<sup>5</sup>

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<sup>4</sup> Petitioner was originally charged in a criminal complaint for violating W.Va.Code §60A-4-401(a) (i), which provides in pertinent part: “Except as authorized by this act, it is unlawful for any person to manufacture, deliver, possess with intent to manufacture or deliver a controlled substance. Any person who violates this subsection with respect to: (i) A controlled substance classified in Schedule I or II, which is a narcotic drug, is guilty of a felony and, upon conviction, may be imprisoned in the state correction facility for not less than one year nor more than fifteen years, or fined not more than twenty-five thousand dollars, or both.” (emphasis supplied)

<sup>55</sup> *But see, U.S. v 300 Blue Heron Farm Lane, Chestertown, Md.*, 115 F. Supp.2d 525, 528 (D. Md. 2000), a case also cited by Respondents, Resps’ Br. 14, where the court held that in determining whether a forfeiture is grossly disproportional, it . . . **requires analysis of the maximums authorized under the Sentencing Guidelines**, as well as the statutory penalties.” (emphasis supplied) The Sentencing Guidelines provide for fines based upon the amount of drugs involved in the drug transaction. For instance, under the Sentencing Guidelines, for 4.8 grams of crack cocaine, the range of the fine would be from \$5,000 to \$50,000. Even using the Respondents’ reliance on 14.8 grams of crack cocaine from the “relevant conduct” in the federal Plea Agreement, the range of the fine is \$7,500 to \$75,000. However, because the maximum statutory fine exceeds \$250,000.00, under § 5 E. 1.2(4) of the Sentencing Guidelines does not have to rely on

However, to the extent this court relies on federal law, it should look to the standard articulated by the Fourth Circuit Court of Appeals in *United States v. Chandler*, 36 F.3d 358 (4<sup>th</sup> Cir. 1994), as “the appropriate standard to be applied in conducting an excessiveness analysis under the Eighth Amendment for in rem forfeitures.” *Chandler*, at 363. Departing from the other circuits cited by the Respondents, the 4<sup>th</sup> Circuit rejected a proportionality test, and instead articulated an “instrumentality test.” *Id.* at 364. Quoting from Justice Scalia’s concurring opinion in *Austin v. United States*, 509 U.S. 602 (1993) the court in *Chandler*, stated that “the question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense. *Id.* at 364. For the Fourth Circuit, “the question of excessiveness is thus tied to the “guilt of the property” or the extent to which the property was involved in the offense, and not its value. *Id.* To illustrate its analysis of the “guilt of the property” and where forfeiture would not be excessive, the Court in *Chandler* provided a hypothetical case in which there was a “\$14 million yacht, specially outfitted with high powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the United States.” *Id.* at 364.<sup>6</sup>

To determine the strength and extent of the nexus between the property and the offense, the 4<sup>th</sup> Circuit said that the following factors should be considered: (1) whether the property’s role was supportive, important, or even necessary to the success of the illegal activity; (2) whether the use of the property was deliberate or planned, as distinguished from incidental or fortuitous; and (3) whether the property was used once or repeatedly, and whether the property was put to other uses

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<sup>5</sup>(...continued)  
this range, and may impose the maximum fine of \$1, 000,000.00. *See* Federal Sentencing Guidelines U.S.S.G. §§ 5 E1. 2(c)(3) and (4).

<sup>6</sup> The court’s illustration is similar to the circumstances described by the Petitioner in her initial Brief (Petitioner’s Br. 10) to contrast her case with the more common scenario that occurs in West Virginia; where a drug dealer or dealers move into an area (e.g. a trailer park subdivision), essentially take over the trailer, and then use the trailer to engage in hundreds of drug transactions, involving numerous individuals over a lengthy period of time. Petitioner’s Br. 10.

and the extent of those uses. *Chandler*, 36 F. 3d at 365. The 4<sup>th</sup> Circuit’s instrumentality test parallels the “nexus” test articulated by this Court in *State v Forty Three Thousand Dollars and No Cents (\$43,000.00) In Cashier’s Checks*, 214 W. Va. 650, 591 S.E. 2d 208 (2003), a case cited by the Respondents in their brief, Respondents’ Br. 12, fn. 12. In this case, this Court held that “the State in forfeiting property, is required to demonstrate by a preponderance of the evidence that there is a substantial connection between the property seized and the illegal drug transaction.” *Id.* at 213

Whether you apply the factors of the “nexus test” or the “instrumentality test”, to the facts in Petitioner’s case, the result is the same--forfeiture of the Petitioner’s home and land was excessive. Based upon the evidence that was properly before the Circuit Court, the Petitioner engaged in a single transaction of a small amount of crack; the transaction was initiated by a confidential informant, and occurred in her home, where she resided.

**III. Regardless of What Standard Is Used in Determining Whether The Forfeiture Was Excessive, The Petitioner Was Denied An Evidentiary Hearing to Counter The Respondents’ Introduction of Information and Material Not In the Record**

Respondents argue that the Petitioner is not entitled to an evidentiary hearing on two grounds. First, Respondents argue that there was ample evidence presented to the court for the court to make its ruling on summary judgment. Second, Respondents argue that to provide the Petitioner with a full evidentiary hearing would defeat the purpose adjudicating this case by summary judgment. *See generally* Respondents’ Br. 20-21. Respondents are wrong on both counts.

As indicated above in Arguments I and II, on the facts that were properly before the Court, the Circuit Court erred in granting summary judgment. However, if this Court were to agree with Respondents’ that the material upon which the Circuit Court made its decision was, in fact, a part of the record, or it was permissible, as Respondents claim, for the Circuit Court to rely on material outside the record, then, at the very least, the Petitioner should have the opportunity for an evidentiary hearing. An evidentiary hearing is necessary for the Petitioner to counter the “facts”

produced by the Respondents in their Motion for Summary Judgment and during their oral argument on their Motion, concerning the role and culpability of the Petitioner, and the quantity of drugs, among other factors. It is critical to remember, that the Petitioner forfeited her right to discovery based upon the agreement that the prosecutor and the Circuit Court would rely only on those facts set forth in Count 5 of the federal Indictment. Respondents argue that no evidentiary hearing is necessary because there is ample evidence in the record. However, as the Petitioner has repeatedly pointed out above, and elsewhere in this Reply Brief, that is because the Respondents and Circuit Court essentially supplemented the record with disputed facts.

Respondents' argument that providing the Petitioner with a full evidentiary hearing would defeat the purpose of adjudicating this case by summary judgment is equally without merit. First, under Rule 56(c) of the Rules of Civil Procedure, summary judgment is only appropriate when there are no material disputed facts. *See Syl. pt.3 Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E. 2d 770 (1963). Here, there are disputed facts. Additionally, even in summary judgment proceedings in various types of cases (i.e. medical malpractice, environmental penalty cases and personal injury) the court determines liability and then, after hearing, affixes the penalty. So for the Respondents to claim that an evidentiary hearing defeats the purpose of adjudicating a case by summary judgment is spurious. Similarly, in criminal cases, where the issue of "proportionality" and excessive fines under the state and federal constitution have been addressed, this Court has required that in the imposition of sentence, the Circuit Court consider all the facts surrounding the offense to reach a decision as to whether the sentence is disproportionate to the offense charged. *See generally*, the cases cited in Petitioner's Br. at 13.

For the Petitioner to have an opportunity to counter the facts relied upon by the Circuit Court in its determination of whether the forfeiture of the Petitioner's home and land was not

excessive under either the state or federal constitution, the Petitioner is entitled to an evidentiary hearing.

### **CONCLUSION**

The Circuit Court's Order granting the State's Motion for Summary Judgment should be reversed.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of September, 2011, true and accurate copies of the foregoing **Petitioner's Reply Brief** were delivered by U.S. Mail to:

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