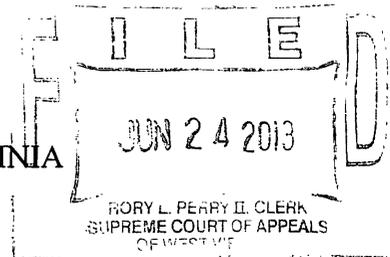


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA

VS.

Supreme Court No. 12-1486

Circuit Court No. 12-F-32  
(Logan)

LAMAR DORSEY,

Petitioner.

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PETITIONER BRIEF

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## STATEMENT OF THE CASE

Lamar Dorsey was convicted of two counts of conspiracy<sup>1</sup> and, two counts of delivery of a controlled substance, crack cocaine<sup>2</sup>, with all sentences ordered to be served consecutively. (A.R. Vol. I, p. 52.) Mr. Dorsey was acquitted of one count of delivery of marijuana by the jury. He also won a motion for judgment of acquittal on one count of felon in possession of a firearm as the court agreed with counsel the State failed to establish its case on this charge. It is from this conviction and sentence Mr. Dorsey appeals.

On January 21, 2012, based on two tips that Lamar Dorsey was back in town selling crack out of Wendi Gillespie's home and nothing more, Troopers' Harris (hereinafter T. Harris), (A.R. Vol. I, p.22-24). Powers, Dick, and Hensley drove to Gillespie's home surrounded it and knocked on the door. Troopers did not leave when no one answered the door even though they were there to conduct a consensual knock and talk and **despite the fact they knew they did not have probable cause for a search.** (A.R. Vol. I, 26,83). Instead, per his and Gillespie's testimony, T. Harris continued to knock. The testimony and statements given as to how the events unfolded, after, the initial knock by T. Harris are inconsistent. However, no one disputes T. Harris ultimately ordered Gillespie to "open the door" based on his authority as a State Trooper on more than one occasion and, that all the troopers on scene burst through the door into the residence immediately after Gillespie complied with his order. (A.R. Vol. I, 29-30,56). Further it is undisputed, that once the troopers were inside everyone in the home was detained and, the entire home was immediately searched, despite the admitted lack of probable cause.

On the evening of January 21, 2011, troopers had no evidence that Mr. Dorsey was in fact inside Gillespie's home and, T. Harris admitted the officers did not have probable cause to

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<sup>1</sup> Each count of conspiracy carries a possible sentence of not less than one nor more than five years in prison.

<sup>2</sup> Each count of delivery of cocaine carries the possible sentence of not less than one nor more than 15 years in prison.

enable them to secure a warrant. (A.R. Vol. I, p. 52). Additionally, attempts to obtain probable cause after receiving the tips was unsuccessful. Mr. Dorsey's presence at Gillispie's residence was a key fact troopers were seeking to verify when they decided to go to her home and attempt to conduct a knock and talk. (A.R. Vol. I, p. 25). Counsel filed a motion to suppress all the evidence recovered as a result of the illegal entry and search of Gillespie's home and, a hearing was held on the motion. (A.R. Vol. III, p. 1702).

During the suppression hearing, T. Harris testified he received information that Lamar Dorsey was back in town selling drugs out of Wendi Gillispie's home. (A.R. Vol. I, p. 23) (A.R. Vol. II, p. 912-13). T. Harris testified the informants' information was not enough to establish probable cause which would enable him to secure a warrant to search Gillespie's home. (A.R. Vol. I, p. 24)(A.R. Vol. II, p. 914). T. Harris' further testified he was under an obligation to investigate allegations of illegal behavior but his attempt to gather more information in order to satisfy probable cause was unsuccessful. (A.R. Vol. II, p. 914-15). Based on this belief that he was obligated, as an officer of the law, to investigate an allegation of criminal activity T. Harris and three other troopers went to Gillespie's house. (A.R. Vol. I, p. 24-25, 84, 87-8)(A.R. Vol. II, 915). T. Harris testified that a knock and talk was a consensual interaction in which individuals have the right to cooperate or not to cooperate. (A.R. Vol. I, p. 86-87).

T. Harris further testified a knock and talk is an investigative tool used "I guess you could say to obtain probable cause." (A.R. Vol. I, p. 86-87). The knock and talk procedure T. Harris described, in which an individual has a choice whether or not to cooperate, and the knock and talk he carried out at Gillispie's home have significant differences. (A.R. Vol. I, p. 87-88). The following events occurred upon the arrival of the four troopers at Gillispie's home, in which T. Harris testified the sole purpose of the trip was to carry out a knock and talk:

1. Immediately upon arrival Gillespie's trailer was surrounded. A trooper was positioned at each side of the residence. One of the troopers was actually looking in the windows of the home.
2. Once the trailer was surrounded, T. Harris knocked on the door, but he did not identify himself at this time.
3. No one opened or came to the door. T. Harris testified he could hear movement inside the trailer.
4. T. Harris testified he knocked again and this time identified himself by stating "state police."
5. Again, no one opened the door or came to the door to see who was there.
6. T. Harris heard movement once again.
7. At this point, the trooper at the back door informed T. Harris someone ran to the back of the trailer and, the other trooper heard what he believed was a toilet flushing.
8. T. Harris knocked on the door announced "State Police" and under the guise of his authority as a State Trooper issued an **order** "open the door."
9. No one opened the door.
10. T. Harris issued a second **order**: "Wendi you need to hurry up and open the door." (A.R. Vol. I, p. 26-29)(A.R. Vol. II, p. 915).

It is an undisputed fact that when Gillespie complied with T. Harris' orders to open the door, all the troopers at the scene busted through the door, detained everyone without a request to enter the residence, without any attempt to first determine who was in the home by gathering information from Gillespie, and most importantly without a warrant or probable cause. (A.R. Vol. I, p. 33, 63). T. Harris agreed with counsel at the suppression hearing, that immediately upon entry everyone in the house was detained. (A.R. Vol. I, 32). T. Harris further testified once the individuals in Gillespie's home were detained, they were not free to leave or move about the trailer. (A.R. Vol. I, p. 70)(A.R. Vol. II, p. 922-23). T. Harris explained that once the door was opened he had no time to investigate and he had the right to do a Terry frisk on everyone inside based on officer safety.<sup>3</sup> (A.R. Vol. I, p. 30, 88-90) The illegal Terry frisks did not turn up any contraband. However, the search that immediately ensued of the entire house turned up a brown paper bag containing a couple thousand dollars, a razor blade with white residue, and a set of

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<sup>3</sup> Counsel does not agree with this assertion. However, counsel would note the, illegal frisk of all of the occupants by the troopers turned up nothing incriminating.

scales. (A.R. Vol. I, p. 46)(A.R. Vol. II, 927-28, 934). All of the items were recovered from a back bedroom Gillespie testified was Mr. Dorsey's room. A 9mm pistol was recovered under the dryer. (A.R. Vol. II, p. 930).

In an attempt to justify the forced entry into Gillespie's home, T. Harris testified he had no time to advise Gillespie "I am investigating a report that criminal activity is occurring in your residence...I did not have time to explain all of that when Mr. Dorsey may be in the back of the residence obtaining a handgun, shotgun." (A.R. Vol. I, p. 90-92). When asked if he knew what was going on in the residence when officers bolted through the door T. Harris testified: "No sir, I had I had my suspicions but at that point I didn't know for sure. **I had reasonable suspicion that a crime was occurring and, I detained them for officer safety purposes.**" (A.R. Vol. I, p. 88-90).

T. Harris made these assertions despite the fact officers had no evidence Mr. Dorsey was in-fact inside the home, nor did officers see Mr. Dorsey while they were there-- before they entered Gillespie's home, seized everyone inside, frisk them, and searched the entire home. (A.R. Vol. I, p. 25). Further, there was no evidence or testimony that prior to going in the home officers thought or knew Ms. Gillespie to be a drug dealer, drug user, or that she was known to own guns. In fact Gillespie testified she has never owned a gun. (A.R. Vol. II, p. 1014). When asked by defense counsel why he felt he could enter the residence without a warrant or consent, go to the back of the residence without a warrant or consent, and detain everyone in the residence without a warrant or consent, Trooper Harris testified:

Once again, when I went to the residence and knocked on the door and entered the residence. It was not to conduct a search, wasn't to do anything other than to locate and make sure that---I had reasonable suspicion that a crime was occurring....**I simply went into the residence to secure individuals inside the residence detain them to advise them what was going on, to let them know**

**what my suspicions were and then to investigate the matter further.** (A.R. Vol. I, p. 90-91).

Gilliespie testified when the officers were knocking on the door she knew they were not leaving. (A.R. Vol. II, p. 1054). She explained officers knocked a minimum of 5 times and each time the knocking was louder. *Id.* She testified that troopers were stating “Wendi let me in”, and “Wendi it’s the police you need to let us in” (A.R. Vol. I, p. 125, 141). Further, in two separate statements to police, one on the night of her arrest and one months later, (A.R. Vol. II, p. 1042). Gillespie stated the officers told her if she did not open the door they were going to kick the door down. (A.R. Vol. I, p. 145-146)(A.R. Vol. II, p. 1042). Gilliespie later denied officers threatened to kick the door down and testified that part of her statement was a lie. She gave a second explanation as to why she stated this claiming she was confused and, it was Hurley who said open the door or the cops will kick it in. (A.R. Vol. I, p. 144)(A.R. Vol. 2, p. 1131). Hurley, an individual who was also present in the trailer when officers arrived, testified troopers stated open the door or we will kick it in. He also testified that immediately upon Gilliespies opening the door officers burst in, detained everyone, and searched the place. (A.R. Vol. II, p. 1123-24).

Gillespie claims she consented to the search. She testified her opening of the door was her consent for officers to come into her home. (A.R. Vol. I, p. 149). Her testimony describes the following situation: officers bust through the door as soon as she complied with the order to open it, officers immediately detain everyone, and immediately begin searching her home, “going all through it.” (A.R. Vol. I, p. 125, 151)(A.R. Vol. II, p. 1011). She testified she signed the consent to search but does not remember when, she testified she could not say it was before her home was searched, or even while she was at her home. (A.R. Vol. I, p. 127, 148, 165) (A.R. Vol. II, p. 1011). She further testified she was not free to move, or leave while this was going on. (A.R. Vol. I, p. 136, 151) She testified troopers told her not to move. Importantly, Gilliespie

testified she was not advised she could refuse the search and further testified she felt like she had no choice. (A.R. Vol. I, p. 152). Additionally, Gillispie testified she had just smoked a joint of marijuana when officers arrived at her home, and she had smoked crack earlier that evening around 5:30 p.m. (A.R. Vol. I, p. 121, 127)(A.R. Vol. II, p. 1009, 1039, 1051). Finally, T. Harris testified he told Gillispie how bad the situation, how serious the charges were that she faced and that it was in her best interest to cooperate with officers. (A.R. Vol. I .p. 35, 37-38, 41)(A.R. Vol. II, p. 924). He also informed her, his main interest was not in her but, in Mr. Dorsey.

The court denied counsel's motion to suppress and in doing so made the following findings counsel finds significant:

The Court did FIND that the Defendant did not have an expectation of privacy in the residence as it was rented solely by, and legally under the control of the co-defendant, Wendi Gillispie.

Thereupon the Court, further did FIND that the search was the result of void consent given by the owner/renter of the property, Wendi Gillispie.

(A.R. Vol. III, p. 1718). The Court made these findings despite Gillispie's testimony that Mr. Dorsey was a guest in her home for approximately three weeks. ( A.R. Vol. I, p. 112)(A.R. Vol. II, p. 995). Gillispie testified that while Mr. Dorsey was in her home she felt like she was the guest. She detailed how he controlled everything that occurred in the home; this included answering the door when someone came to her house and even controlling her movement and behavior within the house. (A.R. Vol. I, p. 160)(A.R. Vol. II, p. 998, 1000-1002). She testified that Mr. Dorsey paid her for allowing him to stay in her home by giving her crack and by paying the water bill. <sup>4</sup> (A.R. Vol. I , p. 91, 107)(A.R. Vol. II, p. 995). She further acknowledged he bought food and brought it to her house. (A.R. Vol. II, p. 1002) She explained that she did not intend this to be a permanent situation, he was only to be there for a limited period of time. (A.R.

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<sup>4</sup> Gillispie testified Mr. Dorsey paid the water bill on two occasions.

Vol. I. p. 117, 159). Finally, she verified Mr. Dorsey had his own bedroom that only he stayed in during the three week period he was at her home. (A.R. Vol. I , p. 119).

The first day of trial in Lamar Dorsey's case consisted of a significant amount of plea bargaining and, conducting the majority of the voir dire process. Mr. Dorsey refused the offers made by the State. On the second day of trial, the court, the lawyers, and Mr. Dorsey convened in the small courtroom to take care some administrative matters before reconvening in the big courtroom in front of the jury panel. One of the issues addressed in the small court room was the fact that a new plea offer had been made, and Mr. Dorsey expressed a willingness to accept the offer. The trial court refused to allow Mr. Dorsey to accept the plea. Defense counsel requested it be placed on the record that the trial court was made aware of the offer and Mr. Dorsey's willingness to accept the plea and the court refused to allow Mr. Dorsey to enter the plea. (A.R. Vol. II , p. 857-58).

The following discussion was had on the record:

Defense counsel: Your Honor, I would like to place on the record out of an abundance of caution. There were discussions of other possible pleas that were offered...Mr. Dorsey had agreed to plead to that....It is my understanding that the court will not accept that plea....It is my understanding the court is not inclined to accept that plea either. I just wanted to place that on the record.

Court: Okay. That was the offer?

Prosecution: That was the State's offer.....

Court: The Court spent more than enough time yesterday giving the parties a chance to reach whatever resolution so we'll proceed to trial today. There being nothing further we will adjourn to the main courtroom.

(A.R. Vol. II , p. 857-858).

Counsel with the prior record of its witnesses, it did not provide counsel with photo copies of the money involved, and as mentioned above it failed to provide counsel with the data from the crime lab, instead only providing counsel with the final report asserting that cocaine was present. The report did not mention the other drugs detected on the scales which were drugs Mr. Dorsey

Mr. Dorsey had several lawyers while this case was pending. During the time the 404(b) hearing was held he had a different lawyer than the one who ultimately tried his case. Trial counsel objected to the court's 404(b) ruling and proffered his exceptions to the use of the evidence. He further noted his objection to the manner in which the 404(b) hearing was conducted. (A.R. Vol. I, p. 459, 460). The trial court allowed the prosecutor to proffer what the evidence was and made a ruling on the State's ability to introduce 404(b) evidence from two co-defendant's without hearing testimony from the sworn witnesses themselves. Counsel objected to this and argued that it was not proper for the court to rule on the 404(b) evidence without first hearing the evidence in the form of testimony from the witnesses themselves. (A.R. Vol. I , p. 234-270).

The evidence was highly prejudicial and included testimony from Mr. Osbourne, Gillispie's neighbor, and Gillespie detailing the same arrangement had occurred at Mr. Osbourne's house. Mr. Dorsey came and sold crack out of Mr. Osbourne's home and gave Osbourne crack while he was there. The amount of buys and how many people came to Mr. Osbourne's house. The prosecutor proffered that Gillispie purchased crack from Mr. Dorsey while he was selling from Osbourne's home. The trial court noted counsel's objection but, held Mr. Dorsey was represented by counsel at the hearing who did not object to the manner in which

it was conducted, therefore, the court held that its rulings as to the 404(b) evidence would stand. (A.R. Vol. II , p. 1579-1581).

### **SUMMARY OF THE ARGUMENT**

On January 21, 2011, based on two uncorroborated tips that Lamar Dorsey was back in town selling crack out of Wendi Gillispie's home and nothing more, four West Virginia State Troopers got in their cruisers and drove to Gillispie's trailer to conduct a "consensual knock and talk." Troopers admittedly entered Wendi Gillispie's (herein after Gillispie) home based on an order they issued to her to open her door despite the fact they knew they did not have probable cause to enter or search her residence. This lack of probable cause made the troopers' reliance on exigent circumstances based on officer safety improper, because in order to justify the warrantless entry into a persons' home both probable cause and exigent circumstances must exist. Therefore, all of the evidence seized and the statements that were taken based on the unlawful entry and detention of all the occupants inside Gillispie's home were illegally seized and should have been suppressed. The trial court's denial of Mr. Dorsey's motion to suppress and, the findings it made in support of the denial were erroneous and requires the reversal of Mr. Dorsey's conviction.

The trial court also committed reversible error on the second day of trial when it refused to accept the plea agreement the parties had agreed upon based on solely on the fact that it had given the parties more than enough time to reach an agreement the day before. Finally, the court erred when it allowed the State to proffer what it expected the 404(b) evidence to be and made its findings and rulings allowing the introduction of the 404(b) evidence at trial based on the representations of the prosecutor as to what he expected the witnesses to testify to at trial.

Therefore, the trial court failed to follow the procedure set out by this court's precedent to consider the evidence and make its rulings based on its findings.

## STATEMENT REGARDING ORAL ARGUMENT

The issues involved in this case are all based on clearly decided issues of law. Therefore, counsel requests a Rule 19 presentation on Mr. Dorsey's behalf.

## ARGUMENT

- I. **The warrantless entry, by four troopers, into Gillispie's home without probable cause to suspect that a crime was occurring was illegal; rendering the consent Gillispie gave to search her residence invalid. Exigent Circumstances is only applicable in a situation where probable cause exists. Trooper Harris testified he only had reasonable suspicion at the time troopers entered Gillispie's home. Therefore, all of the evidence recovered and all of the statements taken were illegally seized and, should have been suppressed by the trial court.**

Mr. Dorsey's Federal and State Constitutional rights against unreasonable searches and seizures were violated in two independently recognized ways. The trial court's denial of counsel's motion to suppress and its findings in support of that denial: that Mr. Dorsey had no right to privacy in Gillispie's residence, and that the search was the product of voluntary consent given by Gillispie are erroneous and should be held as such by this Honorable Court.

### Standard of Review

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error. *Syl. Pt. 1 State v. Lacy, 196 W.Va. 104 (1996)*

The Fourth Amendment to the Constitution provides: ‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’ This guarantee of protection against unreasonable searches and seizures **extends to the innocent and guilty alike**. It marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation. **And the law provides as a sanction against the flouting of this constitutional safeguard the suppression of evidence secured as a result of the violation**, when it is tendered in a federal court. *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191(1948)(internal citations omitted)(emphasis added).

Situations in which an individual claims their right against unreasonable searches and seizures has been violated can be analyzed in two separate ways by a reviewing court, one analysis relies on the individual’s reasonable expectation of privacy and the other looks at the situation on a more concrete level determining if there was in fact an actual invasion of a property right or trespass. The first theory is an ever evolving theory and will be tied to what society deems to be a reasonable expectation of privacy. This analysis was applied first by United States Supreme Court when it held a claim of protection under the Fourth Amendment and the right to challenge the legality of a search depends **not upon a person's property right** in the invaded place or article of personal property, **but upon whether the person has a legitimate expectation of privacy in the invaded place or thing**. *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512 (1967)

The second theory which is the one that existed at the time the fourth amendment was drafted looks for an actual invasion of a particular type of property “It is important to be clear about what occurred in this case: The Government physically occupied private property for the

purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a “search” within the meaning of the Fourth Amendment...” *United States v. Jones*, --U.S.--, 132 S.Ct. 945, 949 (2012). Both theories are applicable and relevant to the context in which the search occurred in Mr. Dorsey’s case. Mr. Dorsey was a guest of Gillispie and as such he held a legally recognized expectation of privacy. See *Minnesota v. Olson*, 495 U.S. 91, 98, 110 S.Ct. 1684 (1990) (Fourth Amendment's privacy protections extended to overnight guests.)

The troopers were trespassers at the point they exceeded the bounds of a consensual knock and talk and forced their way into Gillispie’s home under the guise of their authority. Testimony of T. Harris supports this assertion, when asked if he knew what was going on in the residence when officers bolted through the door T. Harris testified: “No sir, I had I had my suspicions but at that point I didn’t know for sure. **I had reasonable suspicion that a crime was occurring and, I detained them for officer safety purposes.**” (A.R. Vol. I, p. 88-90). He further testified: “**I simply went into the residence to secure individuals inside the residence detain them to advise them what was going on, to let them know what my suspicions were and then to investigate the matter further.**” (A.R. Vol. I, p. 90-91).

In a knock and talk situation, officers have no more right than the average lay person. Therefore, their forced presence in Gillispie’s home when they did not have probable cause to be there was unlawful. The United States Supreme Court discussed the appropriate bounds of a knock and talk in *Kentucky v. King*, --U.S.--, 131 S.Ct. 1849, 1862(2011):

When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. Cf. *Florida v. Royer*, 460 U.S. 491, 497–498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). (“[H]e may decline to listen to the questions at all and may go on his

way”). When the police knock on a door but the occupants choose not to respond or to speak, “the investigation will have reached a conspicuously low point,” and the occupants “will have the kind of warning that even the most elaborate security system cannot provide.” *Chambers*, 395 F.3d, at 577 (Sutton, J., dissenting). **And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.**

In *Florida v. Jardines* –U.S. 133 S.Ct. 1409, (2012), expanding on this issue, Justice Scalia explained again and more in-depth that when doing a knock and talk officers are limited to what a social visitor could do at ones door: “social norms that invite a visitor to the front door do not invite him there to do a search.” Once again emphasizing in a knock and talk situation officers hold no more authority than the average citizen:

But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's “very core” stands “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). **This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.**

*Florida v. Jardines* –U.S. 133 S.Ct. 1409, (2012) Scalia further explained:[t]his area around the home is ‘intimately linked to the home, both physically and psychologically,’ and is where ‘privacy expectations are most heightened.’” *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)).

The right to privacy is at its strongest in one’s home. There are few bright lines in the law that is guarded as jealously as the right of an individual to be free from unreasonable searches and seizures in one’s own home. ‘The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. **When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by**

**a policeman or Government enforcement agent.”** *Johnson v. United States* 333 U.S. 10,17, 68 S.Ct. 367,370-71 (1948)(*emphasis added*) “There is no question ... that activities which take place within the sanctity of the home merit the most exacting [article III, § 6] protection.” *State v. Lacy*, 196 W.Va. 104, 111, 468 S.E.2d 719, 726 (1996). This Court has long held that article III, § 6 “protect[s] the rights of citizens from unreasonable searches and seizures in their houses.” *State v. McNeal*, 162 W.Va. 550, 555, 251 S.E.2d 484, 488 (1979). For this reason, the jurisprudence of this Court addressing article III, § 6 has “drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *State v. Craft*, 165 W.Va. 741, 755, 272 S.E.2d 46, 55 (1980) (internal quotations and citation omitted). That is, with limited exceptions, “any search of a person [‘s] ... dwelling **on mere suspicion and the seizure of any article found as a result thereof, without ... a search warrant, is an unlawful search and seizure** in violation of Section 6, Article 3 of the Constitution of West Virginia.” Syl. pt. 1, in part, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972). *See also State v. Slat*, 98 W.Va. 448, 449, 127 S.E. 191, 192 (1925) (“Any search of a person’s house without a valid search warrant is an unreasonable search, under section 6, art. 3, [of the] Constitution of West Virginia [.]”). *State v. Mullens*, 221 W.Va.70, 90, 650 S.E.2d 169(2007)(*emphasis added*)

- A. Entry into Gillispies home was unlawful which invalidates later given consent.

The trial court’s finding that the search conducted by Troopers on January 21, 2011, was the result of a valid consent given by the owner/renter of the property, Wendi Gillispie” is erroneous. The precedent of both the United States Supreme Court and this Honorable Court is clear: whether or not consent was given is irrelevant when the entry into the home itself was unlawful.

If the entry is unlawful anything obtained due to the unlawful entry is inadmissible even if consent is obtained. Therefore, the trial court's finding that Gillispie voluntarily granted consent to search was erroneous because the officers admittedly went to Gillispie's home with nothing more than a tip [reasonable suspicion] that Mr. Dorsey was selling crack out of Gillispie's home.

When asked by defense counsel why he felt he could enter the residence without a warrant or consent, go to the back of the residence without a warrant or consent, and detain everyone in the residence without a warrant or consent, Trooper Harris testified:

Once again, when I went to the residence and knocked on the door and entered the residence. It was not to conduct a search, wasn't to do anything other than to locate and make sure that---I had reasonable suspicion that a crime was occurring....**I simply went into the residence to secure individuals inside the residence detain them to advise them what was going on, to let them know what my suspicions were and then to investigate the matter further.** (A.R. Vol. I, p. 90-91).

The United States Supreme Court addressed this very issue stating that “[a]n officer gaining access to private living quarters under color of his office and of the law which he personifies **must then have some valid basis in law for the intrusion.** Any other rule would undermine ‘the right of the people to be secure in their persons, houses, papers and effects,’ and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law. *Johnson v. United States* 333 U.S. 10,17, 68 S.Ct. 367,370-71 (1948)(emphasis added)

Importantly, T. Harris testified officers **did not have probable cause** on January 21, 2011, when they arrived at Gillispie's home and knocked on the door. T. Harris further testified the purpose for going to the house was to conduct a knock and talk. However, the troopers' behavior went well beyond the knock and talk parameters. T. Harris continuously beat on the door in an increasingly menacing manner each time he knocked. The holding in, *U.S. v. Jerez*,

*108 F.3d 684 (7th Cir. 1997)*, is cited by many authorities on the issue of whether a knock and talk is no longer a consensual encounter and therefore constituted a seizure. The *Jerez Court*, held that defendants were seized within the meaning of the Fourth Amendment when deputy sheriffs repeatedly knocked for a few minutes on the door and window of the defendant's motel room after 11:00 at night, identified themselves *See Also Bailey v. Newland, 263 F.3d 1022 (9th Cir. 2001)* (police persistence in attempting to make contact with the occupants of the room amounted to a demand to open the door, and thus the defendant's compliance with the demand was not voluntary.)

Gillispie estimated there was at a minimum five separate and distinctive instances of knocking. (A.R. Vol. II, p. 1054). Therefore applying the analysis of *Jerez*, a seizure had occurred even before Gillispie was ordered to open the door. T. Harris testified he announced "State Police" and issued orders to Gillispie to open the door which definitely took the encounter out of the knock and talk investigation and constituted a seizure.<sup>5</sup> Gillespie testified she did not believe officers would leave. *Id.* Therefore, this entry and search of Gillispie's home was due to submission to authority not a voluntary grant of consent. She did what she was ordered to do...open the door and she further testified she felt as though she did not have a choice as to whether to let officers search or not once they were inside her home. Therefore, the officers behavior invalidated consent "[a]lthough evidence acquired by consent is admissible against the accused in trial, mere submission to colorable authority of police officers is insufficient to

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<sup>5</sup> Mr. Hurley an individual that was in the trailer when officers arrived, who was detained and arrested upon their illegal entry into the home testified that troopers also threatened to kick the door in if Gillispie did not open it. Gillispie's two statements given to police supports this assertion. However, at the motion hearing and, at trial Gillispie denied that occurred explaining she was lying in her statements and she also testified she was confused and it was actually Mr. Hurley that said the police would kick the door in if she did not open it. Gillispie's testimony at the suppression hearing and at trial came after she was granted an offer of leniency from the State in exchange for her testimony against Mr. Dorsey. Her statements were given prior to her offer of leniency.

validate a 'consent' search or to legitimize the fruits of the search, and evidence so obtained is incompetent against an accused." *Syl. Pt. 8, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).*

The United States Supreme Court held the same by stating that "[e]ntry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Johnson v. United States 333 U.S. 10,13, 68 S.Ct. 367,368 (1948)(internal citations omitted)* This Court set out a specific set of factors a trial court should use in determining whether or not consent was voluntarily granted or if it was the product of coercion:

The circuit court, and this Court on review, should consider the following six criteria when evaluating the voluntariness of a defendant's consent: 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse to consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel. While each of these criteria is generally relevant in analyzing whether consent is given voluntarily, no one factor is dispositive or controlling in determining the voluntariness of consent since such determinations continue to be based on the totality of the circumstances.

*Syl. Pt. 3, State v. Buzzard, 194 W.Va.544, 461 S.E.2d 50 (1995).*

Applying these factors to the search in question makes it evident the consent given in this case was not voluntary. Gillespie testified she did not believe officers would leave so she did what she was ordered to do...open the door. (A.R. Vol. II, p. 1054). When she complied troopers busted through her door without asking permission. Once they were inside everyone was detained. Gillispie testified she felt as though she did not have a choice as to whether to let officers search or not. (A.R. Vol. I, p. 152). She further testified she could not state when she signed the consent to search form. T. Harris told her the situation was bad, the charges involved

were serious, and it would be in her best interest to cooperate with officers. His is coercion did not stop there, he further told her she was not who he was interested in, it was Mr. Dorsey.

The trial court's finding that Mr. Dorsey "did not have an expectation of privacy in the residence as it was rented solely by, and legally under the control of, the co-defendant, Wendi Gillispie" is clearly erroneous. The fact that Mr. Dorsey was not on the lease does not in any way diminish his right to privacy within Gillispie's home. This court specifically addressed this exact situation in *State v. Adkins*, 176 W.Va. 613, 616-17, 346 S.E.2d 762, 766(1986) (*internal citations omitted*), holding: "a defendant who is more than a casual visitor to an apartment or dwelling in which illegal drugs have been seized has the right under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution to challenge the search and seizure of the illegal drugs which he is accused of possessing." Further, the Fourth Amendment's privacy protections extended to overnight guests. *Minnesota v. Olson*, 495 U.S. 91, 98, 110 S.Ct. 1684 (1990)

It is an undisputed fact that Mr. Dorsey lived at Gillispie's home for a period of at least three weeks, hence he was more than a casual guest. Therefore, according to this court's precedent Mr. Dorsey did have an expectation of privacy inside Gillispie's home, and his right to privacy was violated by the Troopers unlawful entry.<sup>6</sup> The officers learned what they learned on January 21, 2012, by physically intruding on Gillispie's property by the improper use of their authority in order to gather evidence which resulted in an illegal search that violated Mr. Dorsey's reasonable expectation of privacy.

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<sup>6</sup> It was undisputed that she was not entitled to have a roommate but she was allowed to have guests per her lease. Gillispie testified that she agreed to allow Mr. Dorsey to stay in her home in exchange for him paying her utilities and giving her crack cocaine.

Additionally, there is another level to the argument that the search of the home violated Mr. Dorsey's right to privacy as he was not asked for consent to search the room in which was private to him during his stay. Gillespie testified Mr. Dorsey was the only one who had access to his room while he was there for the three week period. Further, it is clear from all of the testimony that Mr. Dorsey was telling Gillespie not to open the door to the troopers. Additionally, she testified he was in control of the home while he was there to the point that she felt as though she was a guest in her own home. (A.R. Vol. II, p. 988-1000-1002). Therefore, there is sufficient evidence to challenge the search of his room based on the Trooper's failure to request his consent as to the search of his room. Therefore all of the evidence they recovered as a result of that search should have been suppressed by the trial court.

*Syl. Pt. 9 State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974)*, further refutes the finding of the trial court that Gillespie's consent was voluntarily given: "[a] suspect whose acquiescence to search is secured during police custody occurring by reason of an illegal arrest, or similar form of overt or subtle detention, is in no position to refuse to comply with the demands of the officer in whose custody he is, whether such demand is couched in the language of a polite request or direct order, and he cannot be held to have consented to the search voluntarily." Once inside the house T. Harris testified that all the individuals inside were "detained" immediately upon entry into the home and told not move. Gillespie, who the trial court deemed voluntarily and freely consented to the search of her home, testified she was not free to move or leave and, in-fact she was ordered not to move. This court has defined such an encounter as "an arrest—plainly an Section 6, Article III "seizure" that must be based on probable cause. In determining whether a "seizure" under Section 6 of Article III has occurred we must consider " 'if, in view of all the circumstances surrounding the [encounter], a reasonable

person would have believed that he was not free to leave.’ ” *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979(1988), quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980). See *State v. Jones*, 193 W.Va. 378, 386, 456 S.E.2d 459, 467 (1995) (“[a]t the point where a reasonable person believes he is being detained and is not free to leave, then a [seizure] has occurred and Section 6 of Article III is triggered”). The reasonable person test, of course, is an objective test.” *State v. Todd Andrew H* 198, *W.Va.* 615, 619-20, 474 *S.E.2d* 545, 549-50 (1996)

B. Exigent Circumstances was not applicable to the situation that existed at Gillispies home because probable cause did not exist

This Court’s precedent requires a showing that **both probable cause and exigent circumstances** existed before an officer can justify the warrantless entry into one’s home. In *State v. Buzzard*, 194 *W.Va.* 544, 461 *S.E.2d* 50 (1995), this Court explained: “Exigent circumstances exist where there is a compelling need for the official action and there is **insufficient time to secure a warrant**, police may then enter and search private premises ... without obtaining a warrant.” 194 *W.Va.* at 549 n. 11, 461 *S.E.2d* at 55 n. 11., this denotes probable cause must exist in order to rely on exigent circumstances. Again, in Syl. Pt. 2, *State v. Mullins*, 177 *W.Va.* 531, 355 *S.E.2d* 24 (1987), the *Mullins Court* held: “A warrantless arrest in the home **must be justified not only by probable cause**, but by exigent circumstances which make an immediate arrest imperative.” That along with the United States Supreme Court holding in *Kentucky v. King*, -*U.S.*-, 131 *S.Ct.* 1849 (2011) that “warrantless entry . . . is allowed where police do not create the exigency through actual or threatened Fourth Amendment violation”

There is no doubt the exigency was created in this case by a violation of the Fourth Amendment. Officers showed up to conduct a knock and talk. If they would have carried it out

as they are required to do the troopers would have left after the first set of knocking ended with no answer at the door. Even given the benefit of the doubt they should have left by the second unsuccessful knock. But instead officers continued the knocking and according to the United States Supreme Court illegally seized the occupants of the home at that point. However, the troopers did not stop there and issued an illegal order to open the door. As detailed throughout this petition all troopers had was reasonable suspicion and, the self-created, unsupported assertion of officers safety which is not enough to justify the warrantless entry into Gillispies home. T. Harris testified that he had no time to advise Gillespie “I am investigating a report that criminal activity is occurring in your residence...I did not have time to explain all of that when Mr. Dorsey may be in the back of the residence obtaining a handgun, shotgun.” (A.R. Vol. I, p. 90-92). Therefore, the excuse given by officers to justify warrantless entry of the home, even if probable cause were to be deemed to have existed<sup>7</sup>, officer safety, was flawed and invalid because officers were trying to rely on, Mr. Dorsey’s presence in the home, which is the very fact they asserted they were there to investigate.

This court’s long line of precedent states searches outside the judicial process, without prior approval of a judge or magistrate are per se unreasonable under the Fourth Amendment however, there are a few specifically established and well-delineated exceptions the party seeking the exemption must be able to show very specific facts were present in order to justify the warrantless entry into a home and the exceptions are very jealously guarded. *Syl. Pt. State v. Moore, 165 W.Va. 837, 272 S.E.2d 804(1980)*. Officers must be able to show not only that probable cause existed but that the situation was such that they did not have time to secure a warrant because immediate action was required. This is because the warrant requirement

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<sup>7</sup> A point counsel adamantly disputes, and the state conceded throughout the entire trial did not exist based on the testimony of T. Harris.

protects one of the most important rights that every citizen of this state is guaranteed, under both State and Federal Law, --that is the right against unreasonable searches and seizures in one's home. This is accomplished by placing a the neutral judicial officer in the process to consider all of the facts and to make a determination as to whether or not probable cause does in fact exist to justify the intrusion of an individual's home.

Moreover, the assertion of exigent circumstance by the Troopers was flawed even beyond the obvious and admitted lack of probable cause, in Mr. Dorsey's case. The facts T. Harris asserted to justify warrantless entry of Gillispie's home, due to officer safety<sup>8</sup>, were dependent on, and based on the assumption that Mr. Dorsey was in Gillispie's home. However, an attempt to determine if Mr. Dorsey was in fact at Gillispie's residence was the very reason troopers asserted the knock and talk was necessary. The troopers went to Gillispie's home to attempt to talk to her and investigate whether or not Mr. Dorsey was there —therefore, his presence was not a fact that was known to them upon their arrival at her residence. (A.R. Vol. I, p. 25). However, Mr. Dorsey's presence in the residence and, T. Harris' knowledge that Mr. Dorsey had a gun in the past were the very facts the officers relied on to justify exigent circumstances.

Importantly, troopers did not testify to any knowledge nor did the State present any evidence to demonstrate troopers knew for a fact Mr. Dorsey was actually at the residence when they arrived. Additionally there was no knowledge or evidence presented that Gillispie herself being present would serve as exigent circumstance as the State never asserted that Gillispie was a known drug dealer or a known addict, nor was there any knowledge or evidence presented that she had a criminal history or importantly that she was a gun owner.

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<sup>8</sup> Troopers Harris did not assert the destruction of evidence as an exigent circumstance that caused them to move into Gillispies home. He did say there was a possibility that was going on but he asserted officer safety as the reason officers moved into the home.

In *Syl. Pt. 10 State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), this Court held: “[a]n arrest cannot be justified by the fruits of an illegal search nor can a search be justified by what it produces.” Mr. Dorsey’s arrest and conviction were based solely on the fruits of an illegal search. A search officers illegally carried out by violating one of the most sacred rights a person holds under the laws of this country and state—**The right against unreasonable searches and seizures in one’s home.** A right the United States Supreme Court specifically held is a guaranteed protection that “extends to the innocent and the guilty alike.” *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191(1948) Therefore, all of the evidence seized during the illegal search of Gillispies home, and all of the evidence that flowed from that search should have been suppressed. The trial court committed reversible error when it denied counsels motion to suppress and allowed the state to introduce the illegally seized evidence at trial against Mr. Dorsey, in violation of his rights under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution.

**II. The trial court’s summary rejection of the plea agreement despite the defendant’s willingness to accept the plea based on nothing more than the parties failure to reach a plea agreement the day before was a failure to exercise its discretion, and therefore constituted an abuse of discretion that requires a reversal of Mr. Dorsey’s conviction.**

In this case, the trial court did not exercise its discretion in rejecting the plea agreement the parties had reached. The trial court did follow Rule 11 procedures for the presentation of the plea agreement in open court but failed to give fair consideration to the offer, it did not request the information normally elicited at the plea hearing which is necessary to the court’s exercise of sound discretion, such as discussing Mr. Dorsey’s prior record, whether the amount of time he faced was adequate based on the circumstances surrounding the offense. Instead the court after allowing the offer to be placed on the record refused the plea agreement by stating that the court

had given parties more than enough time to reach an agreement the day before and that the case would proceed to trial. The trial court's action of refusing to accept the plea agreement based on an arbitrary time frame it had imposed, according to this Honorable Court's precedent, was an abuse of discretion that requires reversal.

### Standard of Review

“Where the issue on 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). “A court may reject a plea in exercise of sound judicial discretion.” *State v. Sears*, 208 *W.Va.* 700, 704, 542 *S.E.2d* 863, 867 (2000) (quoting *Santobello v. New York*, 404 *U.S.* 257, 262, 92 *S.Ct.* 495, 498 (1971)).

The trial court's actions mirror that of the trial court's in *State v. Sears*, 208 *W.Va.* 700, 703, 542 *S.E.2d* 863, 866 (2000), there parties reached a plea agreement but the trial court rejected it without considering its substantive terms because it violated a local rule prohibiting pleas after pretrial hearings were concluded. The defendant was convicted of aggravated robbery at trial and sentenced to sixty years in prison. *Id.* This Court reversed the conviction, stating:

When a criminal defendant and the prosecution reach a plea agreement, it is an abuse of discretion for the circuit court to summarily refuse to consider the substantive terms of the agreement solely because of the timing of the presentation of the agreement to the court.

*Id. at Syl. Pt. 5.*

The *Sears* Court reversed *Sears*' conviction and remanded to the trial court with instructions to permit him “to offer to the Court his plea pursuant to the plea negotiation originally agreed to by the State.” *Id. at 705, 542 S.E.2d at 868.* This Court should order the same relief in this case.

Our nation's courts have long recognized that plea bargaining “is an essential component of the administration of justice.” *State v. Sears*, 208 *W.Va.* 700, 703, 542 *S.E.2d* 863, 866 (2000)

(quoting *Santobello v. New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 498 (1971)). While Rule 11 of the West Virginia Rules of Criminal Procedure gives the trial court discretion to refuse a plea bargain, *Syl. Pt. 5, State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984), the court must exercise “sound judicial discretion” in doing so. *Santobello*, 404 U.S. at 262, 92 S.Ct. at 498. *Accord Sears*, 208 W.Va. at 704, 542 S.E.2d at 867.

As a general matter, “[a] court’s ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice.” *Syl. Pt. 4, Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).\_ “A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant’s prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.” *Id. at Syl. Pt. 6*.

More specifically, Criminal Rule 11 provides a detailed set of standards and procedures governing the plea bargaining process and the court’s exercise of sound discretion. *Id. at 664, 319 S.E.2d at 788*. Criminal Rule 11 (e)(2) provides that “[i]f a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court. . . at the time the plea is offered.” *Accord State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 321, 305 S.E.2d 268, 277 (1983). Rule 11 expressly recognizes the trial court must have all of the details of the plea agreement to properly exercise its discretion to accept or reject the agreement. Here the trial court was advised of two separate offers the State had presented to Mr. Dorsey. Trial counsel advised the court of the specific offer Mr. Dorsey was willing to accept. The trial court asked the prosecution if that was in fact an offer available to Mr. Dorsey and the State verified that it was in fact the State’s offer. The trial court refused to accept the plea offer

not based on any procedure in which it was justified in refusing such offer but instead based on the timing of the offer. The court's specific reason for refusing the plea was that it had given parties sufficient time to come to an agreement the day before not based on the proper consideration of whether the plea would be consistent with the public interest in the fair administration of justice. Therefore the Court abused its powerful discretion it is entrusted with and this court should reverse Mr. Dorsey's conviction.

**III. The trial court erred when it allowed the State to proffer what the 404(b) evidence it intended to present at trial and ruled on its admissibility based on the proffer without actually hearing the evidence from the witnesses, who were co-defendant's of Mr. Dorsey, failing to properly follow the procedure, set out in this Court's precedent, as it is obligated to do before admitting such evidence.**

The trial court erred by allowing the state to proffer what the 404(b) evidence would be rather than requiring the actual evidence be presented before the court so that it could properly consider the evidence instead of relying on the assertions of the prosecutor to making the necessary findings required under the law to allow the production of 404(b) evidence.

Standard of Review

The **standard of review** for a trial **court's** admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial **court's** factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial **court** correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial **court's** conclusion that the "other acts" evidence is more probative than \*\*630 \*311 prejudicial under Rule 403.<sup>24</sup> See *State v. Dillon*, 191 *W.Va.* 648, 661, 447 *S.E.2d* 583, 596 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 187 *W.Va.* 457, 419 *S.E.2d* 870 (1992), *aff'd*, 509 *U.S.* 443, 113 *S.Ct.* 2711, 125 *L.Ed.2d* 366 (1993); *State v. Dolin*, 176 *W.Va.* 688, 347 *S.E.2d* 208 (1986).  
*State v. LaRock*, 196 *W.Va.* 294, 310, 470 *S.E.2d* 613, 629 (1996)

Trial counsel for Mr. Dorsey objected to the introduction of the 404(b) evidence itself. However, counsel made a second objection and that was how the court actually considered and made its ruling regarding the introduction of the evidence itself. Trial counsel was not the lawyer who conducted the 404(b) hearing. That counsel did lodge an objection to the introduction of the 404(b) evidence at that motion hearing in which the court made the ruling, however, counsel did not object to the State failing to call the witnesses and actually put on the evidence. The evidence was highly prejudicial and included testimony from Mr. Osbourne, Gillispie's neighbor, and Gillespie detailing the same arrangement had occurred at Mr. Osbourne's house. Mr. Dorsey came and sold crack out of Mr. Osbourne's home and gave Osbourne crack while he was there. The amount of buys and how many people came to Mr. Osbourne's house. The prosecutor proffered that Gillispie purchased crack from Mr. Dorsey while he was selling from Osbourne's home.

However, at the time that trial counsel made his objection, pointed out the error and gave the trial court an opportunity to fix the error by in fact holding a hearing and requiring the State to actually present the evidence for the court's consideration as is required under *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516(1994) and *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986), rather than making a ruling on what the State proffered the evidence to be.

Trial courts serve a very important gate-keeping function when making evidentiary rulings and are obligated to ensure evidence is reliable, relevant, and is more probative than prejudicial. However, here there is no way for the court to weigh the evidence when in fact it did not hear the evidence, but relied on someone else's representations as to what the evidence would be when it was given by the witnesses. In this case the State was able to proffer what the testimony would be of two of Mr. Dorsey's co-defendants both of which received offers of

leniency in exchange for their willingness to testify against Mr. Dorsey. This clearly heightened the obligation of the court to hear the evidence itself when making its ruling as to the admissibility of the prior acts. The court committed reversible error by making its ruling on the admissibility of the evidence without actually hearing the evidence.

**CONCLUSION**

Mr. Dorsey Respectfully requests that this Honorable court reverse his conviction and remand it back the Circuit Court.

Respectfully Submitted,

Lamar Dorsey  
By Counsel

A handwritten signature in cursive script, appearing to read 'Crystal L. Walden', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Crystal L. Walden, hereby certify that on the 24<sup>th</sup> day of June, 2012, I hand delivered a copy of the foregoing *Petitioner's Brief* to counsel for respondent, Benjamin Yancey, Assistant Attorney General, Office of the Attorney General, State Capitol , Building 1, Room W-435, Charleston, WV 25305.

A handwritten signature in cursive script that reads "Crystal L. Walden". The signature is written in black ink and is positioned above a horizontal line.

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Counsel for Petitioner

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Counsel for Petitioner