

No. 11-0283 – *Tricia Dean v. State of West Virginia and Jefferson County Sheriff's Department*

**FILED**  
**November 9, 2012**  
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RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Ketchum, Chief Justice, concurring:

I write to emphasize that the excessive fine factors listed in the majority's opinion are not an exclusive list; there are many other factors that a court may consider in assessing whether a property forfeiture should be allowed. For example, the defendant may assert a "legitimate sources defense," *i.e.*, may prove that the seized property had an independent, innocent source that is not traceable to criminal activity. An excellent primer on the forfeiture process that a prosecutor should follow – a primer that details a host of applicable defenses – is Joseph Cramer, "Civilizing Criminal Sanctions – A Practical Analysis of Civil Asset Forfeiture under the West Virginia Contraband Forfeiture Act," 112 W.Va.L.Rev. 991 (2010).

I am concerned that our Contraband Forfeiture Act may be unconstitutional. The Act provides that ten percent of the forfeiture proceeds must be given to the prosecuting attorney's office that filed the forfeiture proceeding. The balance is placed in a law enforcement investigation fund to be used by the law enforcement agency that seized the forfeited property. However, Article XII, Section 5 of the West Virginia *Constitution* provides that "the net proceeds of all forfeitures" are to go to support free schools. *See Cramer, supra* at 1014, 1018.

In view of the foregoing concerns, I respectfully concur.