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IN THE
SUPREME COURT OF INDIANA

No. 20S-MI-00289

STATE OF INDIANA, *Appellant (Plaintiff below)*, v. TYSON TIMBS and a 2012 LAND ROVER LR2, *Appellees (Defendants below)*.	)	Appeal from the Grant County Superior Court Case No. 27D01-1308-MI-92 The Honorable Jeffrey D. Todd, Judge

RESPONSE BRIEF FOR APPELLEES

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STATEMENT REGARDING SUPREME COURT JURISDICTION

The State invokes this Court's mandatory jurisdiction under Appellate Rule 4(A)(1)(b). It is not clear whether the Court's jurisdiction rests on that provision. *Cf.* Notice of Appeal at 2, *State v. Timbs*, No. 27A04-1511-MI-1976 (Ind. Ct. App. Nov. 20, 2015) (invoking Appellate Rule 5 in earlier iteration of the case). Even so, this Court certainly has the discretion to hear this appeal, *see, e.g.*, Ind. Const. art. 7, § 4; Ind. Appellate Rules 1, 56(A), and Appellees do not oppose the Court's doing so.

STATEMENT OF THE ISSUE

Last October, this Court laid out a "proportionality analysis" for evaluating whether a forfeiture violates the Excessive Fines Clause. *State v. Timbs*, 134 N.E.3d 12, 39 (Ind. 2019). The standard "is factually intensive and depends on the totality of the circumstances," *id.*, and the Court remanded for the trial court to apply the standard in the first instance.

Following remand, the trial court held an evidentiary hearing and issued a fourteen-page opinion on whether forfeiting Tyson Timbs's vehicle violates the Excessive Fines Clause. The court—speaking through a judge with seventeen years' experience—found that "Timbs's transgression was minor when compared to other variants of the same offense." The court found that the forfeiture "had a particularly negative effect on Timbs." The court found that the forfeiture "made it harder for him to maintain employment." The court also found that the forfeiture "served as an impediment to his recovery from opiate dependency by making it more difficult for him to get to and from treatment programs." Based on its findings, the court then concluded "by a significant margin" that Timbs "establish[ed] that the harshness of the forfeiture of his 2013 Land Rover is grossly disproportional to the gravity of the underlying dealing offense and his culpability for the Land Rover's corresponding criminal use."

The State's opening brief contests none of the trial court's factual findings but contends that the forfeiture does not violate the Excessive Fines Clause. The issue on appeal is: whether the trial court committed reversible error when it held that forfeiting Tyson Timbs's vehicle is constitutionally excessive.

STATEMENT OF THE CASE

The State of Indiana has spent the past seven years, one month, and eleven days trying to forfeit Tyson Timbs's vehicle. This case began in August 2013, when a private law firm filed suit on behalf of the State. After a trial in 2015, the trial court ruled that the forfeiture would be "grossly disproportional to the gravity of [Timbs's] offense" and invalid under the Eighth Amendment's Excessive Fines Clause. Appellant's App. Vol. II p. 19. The court ordered the vehicle "released to the Defendant immediately." *Id.* p. 20.

The State did not release the vehicle. It appealed, and a divided Court of Appeals panel affirmed. *State v. Timbs*, 62 N.E.3d 472 (Ind. Ct. App. 2016).

Still the State did not release the vehicle. It appealed again, to this Court, which reversed and held that the Excessive Fines Clause had yet to be incorporated against the states. *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017). The U.S. Supreme Court then vacated that judgment, held the Clause incorporated, and remanded. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

On remand, this Court held last October that *in rem* forfeitures violate the Excessive Fines Clause when they are grossly disproportional. *State v. Timbs*, 134 N.E.3d 12 (Ind. 2019). That "factually intensive" inquiry, the Court explained, "depends on the totality of the circumstances." *Id.* at 39. For that reason, the Court remanded for the trial court "to apply the proportionality test to the facts of this case." *Id.*

The trial court held an evidentiary hearing this past February. As he did at the first trial, Tyson Timbs testified. In addition, he presented expert testimony about the value of his vehicle

and about the obstacles that he and other former offenders face as they try to reintegrate into society. *See* Appellant's App. Vol. II pp. 26-27 (¶ 21). He also submitted eighteen exhibits. *Id.* The State "chose to call no witnesses or move to admit any exhibits." *Id.*

On April 27, the trial court issued its judgment, holding the forfeiture excessive and again ordering the State to return the vehicle. *Id.* pp. 22-35. The State noticed this appeal two days later. Timbs's vehicle has since been released. *See* Appellees' App. Vol. II pp. 2-7.

STATEMENT OF FACTS

1. Tyson Timbs can trace his addiction to 2007, the year he visited a podiatrist for persistent foot pain. The doctor prescribed him hydrocodone—an opioid painkiller—and Timbs soon found himself hooked. Appellant's App. Vol. II pp. 24-25 (¶ 9). He began "buying the pills on the street in addition to his prescription." Appellee's App. Vol. II p. 26 (first appeal).[1] That dependency soon escalated to heroin abuse. Appellant's App. Vol. II pp. 24-25 (¶ 9). Statistically, people addicted to prescription painkillers are forty times more likely to become addicted to heroin. Ctrs. for Disease Control & Prevention, *Today's Heroin Epidemic Infographics*, http://tinyurl.com/yyczag3l. As for Timbs, he encountered heroin largely by happenstance; one day, his supplier was out of painkillers and gave him heroin instead. Appellee's App. Vol. II p. 26 (first appeal).

"It was a disaster from then on," Timbs later told a probation officer. *Id.* He battled heroin addiction for years, entering a drug-treatment program and counseling, relapsing, and eventually getting fired from his job. *Id.*; Appellant's App. Vol. II p. 25 (¶ 9). In 2011, he moved

[1] This Court granted the State's request to transmit the record from the first appeal to this appeal. Order (May 20, 2020). Citations in this brief to the record from the first appeal are designated "first appeal." Citations to the transcript from the first trial are designated "2015 Hr.," and citations to the transcript and exhibits from the second trial are designated "2020 Hr."

from Ohio to Marion, Indiana, to help his grandmother and a sick aunt and to get a fresh start. Appellee's App. Vol. II pp. 25, 26 (first appeal); Defs.' Ex. B (2020 Hr.) at 23:27-23:59.

For a time, he got clean. Appellee's App. Vol. II p. 26 (first appeal). But in December 2012, his father died. Appellant's App. Vol. II p. 25 (¶ 10). The next month, Timbs bought a new vehicle—the Land Rover at issue here—using $42,000 of the $73,000 he received in life-insurance proceeds. *Id.* (¶ 11). In the coming months, he suffered another relapse. Appellee's App. Vol. II pp. 26-27 (first appeal).

About four months into his relapse, one of his aunt's former neighbors "called and asked [him] if [he] wanted to sell some" heroin. Tr. 41:12-41:13 (2015 Hr.); Defs.' Ex. B (2020 Hr.) at 28:57-29:05. Timbs "had never sold heroin until [the neighbor] called." Tr. 41:12 (2015 Hr.). In fact, Timbs had no criminal history beyond two arrests for underage drinking and another for an open-container violation. Appellee's App. Vol. II p. 24 (first appeal). He nonetheless agreed to meet the neighbor's contacts, who were undercover members of the local drug taskforce. Appellant's App. Vol. II p. 25 (¶ 14).

At the controlled buy, Timbs sold the undercover officers two grams of heroin for $225. *Id.* (¶ 15). He drove his new Land Rover to the meeting. *Id.* Days later, one of the officers contacted Timbs directly to set up a second transaction. *Id.* pp. 25-26 (¶ 16). Because this buy took place even closer to Timbs's home, he didn't bother to drive. He walked to a nearby convenience store and sold the officers another two grams of heroin, this time for $160. *Id.* The officers then asked him to get them painkillers, but he had none. Tr. 29:23-30:12 (2015 Hr.). So the officers set up another heroin buy. Appellant's App. Vol. II p. 26 (¶ 17). En route to that third meeting, Timbs was pulled over and arrested. *Id.* Officers seized his new vehicle on the spot. *See id.*

2. The State of Indiana charged Timbs with two counts of dealing a controlled substance and one count of conspiracy to commit theft. *Id.* (¶ 18).[2] Timbs pleaded guilty to one of the two counts of dealing and to the conspiracy count. *Id.* (¶ 19). With the State's consent, *see* Defs.' Ex. E (2020 Hr.) ¶ 3, the criminal court then sentenced Timbs to one year of home detention and five years' probation, including a court-supervised drug-and-alcohol assessment, Appellant's App. Vol. II p. 26 (¶ 19). The court also assessed investigation costs ($385), an interdiction fee ($200), court costs ($168), a bond fee ($50), and $400 for the drug-and-alcohol assessment. *Id.*

3. For Timbs, the criminal case was a wake-up call. "[I]t probably saved my life," he told a probation officer; it "forced me to get help." Appellee's App. Vol. II p. 25 (first appeal). While the case was pending, he checked into Recovery Matters, an inpatient drug-treatment facility south of Chicago. *Id.* p. 27.

Since then, Timbs has worked hard to try to reintegrate into society and survive economically. Appellant's App. Vol. II p. 27 (¶ 24). He has participated in treatment and recovery programs and with the local substance-abuse taskforce. *Id.* (¶ 27). He completed his house arrest with no violations (apart from falling behind on payments). *Id.* (¶ 25). He has had no probation violations. *Id.* (¶ 26). He has held down several jobs. *Id.* (¶ 28). He contributes financially to the household he shares with his aunt. *See id.* p. 28 (¶ 30); *see also* Tr. 16:11-

[2] In a post-arrest interview, detectives asked why Timbs and his companion had no heroin in the vehicle at the time of their arrest, given that they were traveling to a meeting at which undercover officers expected to buy heroin. Timbs told them, "we thought about maybe just pulling up and, if he would've gave me the money, just driving away . . . I'm not really sure what we were going to do." Defs.' Ex. B (2020 Hr.) at 19:23-20:00, 21:03-21:25. Those statements appear to have been the basis for the conspiracy charge.

16:19, 32:13-33:4 (2020 Hr.). The Grant County Probation Department even asked him to help with one of its other probationers. Appellant's App. Vol. II p. 27 (¶ 27).

4. Throughout, the State has remained more interested in Timbs's car. Over the past seven years, it has prosecuted this case through every level of the nation's judicial system.

SUMMARY OF ARGUMENT

The trial court correctly ruled that forfeiting Tyson Timbs's vehicle is excessive. Its judgment should be affirmed.

I. Thirty of the State's forty-four pages of argument recycle theories the State pressed—without success—during the last round of appeals in this case. Br. 33-62. For a second time, the State contends that "the Excessive Fines Clause imposes no proportionality requirement on *in rem* forfeitures." *Id.* 62. Failing that, the State asks the Court to reconsider the relationship between the Excessive Fines Clause and the Cruel and Unusual Punishments Clause. This Court has rejected each of these arguments within the past year—and in this case. *State v. Timbs*, 134 N.E.3d 12, 31 (Ind. 2019) ("The Excessive Fines Clause imposes a proportionality limitation on punitive instrumentality forfeitures."); *id.* at 38 ("The Excessive Fines Clause and the Cruel and Unusual Punishments Clause impose distinct gross-disproportionality limits."). The State's bid to relitigate last year's appeal should thus be rejected based on a straightforward application of *stare decisis* and law of the case.

II. Under this Court's proportionality standard, there is no basis for the State's contention that the trial court erred. The State challenges none of the trial court's factual findings. And the trial court faithfully evaluated the "totality of the circumstances" in applying the "factually intensive" standard this Court set forth last year. *Id.* at 39.

A. The trial court correctly found that the seriousness of Timbs's predicate crime was relatively low. In a finding the State does not contest, the court determined that Timbs "simply does not fit into the class of persons for whom the [drug-dealing] statute was principally designed." Timbs had virtually no criminal history. His only drug sales were government-instigated. With undercover agents his only customers, he injured no one. And the criminal sentence imposed (house arrest, probation, and treatment) confirms what the record as a whole makes clear: "Timbs's transgression was minor when compared to other variants of the same offense." Appellant's App. Vol. II pp. 33-34 (¶ 47).

For its part, the State takes lengthy issue with the trial court's use of the word "victimless." The State appears to agree, however, that the record contains no evidence of "specific injuries to specific victims." Br. 17. Beyond that, the State devotes itself primarily to misconstruing the trial court's decision. In the State's telling, the trial court embraced a bright-line rule: "[W]henever an offense does not have an identifiable victim the Eighth Amendment forecloses as grossly disproportionate any sanction the State might impose." *Id.* 28. The trial court's judgment belies that characterization. Consistent with this Court's and the Supreme Court's precedent, the trial court considered the harm caused by Timbs's misconduct. But far from being its "sole rationale" (*id.* 16), the harm Timbs caused was but one factor among many that the court considered. Simply, the State's argument for reversal rests on a fundamental misreading of the decision below.

B. The record also supports the trial court's determination that forfeiting Timbs's vehicle is an unusually harsh economic sanction. The trial court considered Timbs's economic circumstances. It evaluated the ways that being without his car hampered Timbs's ability to get to work and to drug treatment. And it found that confiscating Timbs's vehicle has "had a

particularly negative effect on Timbs" by "depriv[ing] him of his only asset," by "ma[king] it harder for him to maintain employment," and by "serv[ing] as an impediment to his recovery from opiate dependency." Ignoring all these findings, the State paints Timbs's circumstances in rosier colors: "manageab[le]," "perfectly reasonable," "not grave." *Id.* 18, 32, 33. But the trial court found otherwise, and the State fails even to acknowledge—much less meet—the clear-error standard for disturbing the court's factual findings. The forfeiture's harshness weighs heavily in favor of affirmance.

C. As it did during the last appeal, the State also attempts to justify this forfeiture by invoking Timbs's addiction. As an addict, the State posits, Timbs could have been charged with "scores" of simple-possession counts, yielding "hundreds of thousands of dollars in fines" and "prison for the rest of his life." *Id.* 22. Compared to life imprisonment, the State reasons, virtually any forfeiture is unobjectionable. That calculus contravenes any number of statutory and constitutional provisions, not least Indiana's limit on stacked sentences. It also exposes how extreme the State's position is. For the State, Timbs's addiction appears to justify any forfeiture, however great. And because Timbs's history is much like any other addict's, that rule—if accepted by the Court—would apply not just to Timbs, but to recovering addicts statewide.

D. The State's residual arguments are equally without merit. The State suggests that the trial court invaded the "sole province" of the legislature by ruling for Timbs. *Id.* 27. Contrary to the State's view, however, the legislature does not have the power to override incorporated federal protections. The State also asserts that Excessive Fines Clause rulings should be "exceedingly rare." *Id.* 19. Empirically, though, they are; most forfeiture cases in Indiana are resolved by default judgment or settlement. Rulings like the one below are not everyday occurrences, and—also like the judgment below—most reflect a factually intensive analysis. The

State's arguments for reversal, by contrast, embody sweeping rules with statewide implications. Those arguments—and the fact that the State is still prosecuting this case at all—underscore the key role of the Excessive Fines Clause in "prevent[ing] the government from abusing its power to punish." *Austin v. United States*, 509 U.S. 602, 607 (1993) (emphasis omitted).

STANDARD OF REVIEW

Whether a fine is excessive is reviewed de novo, and "[t]he factual findings made by the [trial] courts in conducting the excessiveness inquiry . . . must be accepted unless clearly erroneous." *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998); *State v. Timbs*, 134 N.E.3d 12, 23 (Ind. 2019).

ARGUMENT

I. The State's objections to the proportionality standard are foreclosed by *stare decisis* and law of the case.

In this, its third appearance before the Court, the State devotes over half its argument to reprising already-rejected theories. More than twenty-five pages of the State's brief urge the Court to "discard" the proportionality standard the Court adopted last October. Br. 42; *see also id.* 18, 33-42, 46-62. Another four pages urge the Court to revisit the relationship between the Excessive Fines Clause and the Cruel and Unusual Punishments Clause. *Id.* 42-46; *see also* Br. Amici Curiae Texas et al. 14-24.

If those arguments sound familiar, they should; the State advanced them—and this Court rejected them—last year. *See* Appellant's Supp. Opening Br., *State v. Timbs*, No. 27S04-1702-MI-70, 2019 WL 8509556, at *12-28 (Ind. May 24, 2019). As the State acknowledges (Br. 12), this Court held that "[t]he Excessive Fines Clause imposes a proportionality limitation on punitive instrumentality forfeitures." *State v. Timbs*, 134 N.E.3d 12, 31 (Ind. 2019). The Court also held that "[t]he Excessive Fines Clause and the Cruel and Unusual Punishments Clause

impose distinct gross-disproportionality limits." *Id.* at 38. Most of the State's brief, in other words, recycles arguments this Court repudiated in its decision last October. That decision—like any other—has *stare decisis* effect. *Clifton v. McCammack*, 43 N.E.3d 213, 220 (Ind. 2015); *accord Horner v. Curry*, 125 N.E.3d 584, 616 (Ind. 2019) (Slaughter, J., concurring in the judgment) ("I take seriously the strong pull of *stare decisis*."). Not only that, it has the added force of law of the case, which "mandates that an appellate court's determination of a legal issue . . . ordinarily restricts the court on appeal in any subsequent appeal involving the same case and relevantly similar facts." *Hopkins v. State*, 782 N.E.2d 988, 990 (Ind. 2003).

That should be the end of the matter. The State's opening brief does not acknowledge law of the case. It does not try to show that "extraordinary circumstances" justify departing from law of the case. *See id.* (citation omitted). It does not acknowledge *stare decisis*. It does not try to show that "urgent reasons and a clear manifestation of error" justify departing from *stare decisis*. *See Clifton*, 43 N.E.3d at 220 (citation omitted). Much like its last appeal, the State also ignores the considerable authority aligned against it. It contends, for example, that proportionality standards are "untenable." Br. 48. But it ignores that its view "has found practically no traction among federal circuit and state supreme courts" nationwide. *Timbs*, 134 N.E.3d at 26. It ignores that at least eight federal Circuits use a proportionality standard. *See id.* (collecting authority). It ignores that many state courts do as well. *See, e.g.*, *id.* at 27. It ignores that Congress codified such a standard for federal *in rem* forfeitures. 18 U.S.C. § 983(g). And it ignores that its perceived line between *in rem* and *in personam* actions conflicts with the very precedent it cites. *Compare* Br. 49 ("[I]n *Bajakajian*, the Court was careful to distinguish *in rem* forfeitures from *in personam* forfeitures."), *with Bajakajian*, 524 U.S. at 331 n.6 ("[A] modern statutory forfeiture is

a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*.").

Enough. More than seven years into this case, the State has visited burdens enough on Tyson Timbs without resurrecting failed arguments. For Timbs, this case is not an academic exercise. He is not the party here by choice. For nearly a decade now, the State of Indiana has forced him—time and again—to relive the worst moments of his life. Its bid to relitigate last October's decision should be rejected. The Court also may wish to hold that by electing not to address *stare decisis* and law of the case, the State has waived its request that October's decision be overruled. *Cf. Smith v. Franklin Twp. Cmty. Sch. Corp.*, --- N.E.3d ----, 2020 WL 5014919, at *2 n.2 (Ind. Aug. 25, 2020); App. R. 46(C).

II. The trial court correctly held that forfeiting Tyson Timbs's vehicle is excessive.

Using this Court's proportionality standard, there is no support for the State's contention that the trial court erred. "[T]he gross-disproportionality assessment is fact intensive and depends on the totality of the circumstances," *Timbs*, 134 N.E.3d at 35-36, and it is guided by three main considerations. How serious was the underlying crime? *Id.* at 37. How harsh is the forfeiture? *Id.* at 36-37. And how responsible was the owner for the property's involvement in the offense? *Id.* at 37-38.

That last consideration can be addressed at the outset: Timbs pleaded guilty to the crime giving rise to this case. As in *Bajakajian*—the Supreme Court's leading excessive-fines case—the property owner and the offender are one person. 524 U.S. at 325-26. Even so, forfeiting Timbs's vehicle is grossly disproportional to his wrongdoing. The seriousness of the predicate crime was relatively low. Timbs acted at the behest of law enforcement; he harmed no one; and "relative to other potential violators," his blameworthiness was "small indeed." *Id.* at 339 n.14. At the same time, the forfeiture is unusually severe, not just because of the vehicle's monetary

value but because of its importance to Timbs's economic survival, recovery, and reintegration into society. The State's contrary arguments rest mainly on overlooking the trial court's factual findings and recasting Timbs's addiction as a "staggering volume of criminal conduct." Br. 22. The State also breaks at a foundational level with the Supreme Court's reasoning in *Bajakajian*—a decision the State's proportionality analysis all but ignores. *Id.* 19-33. The judgment below should be affirmed.

A. The seriousness of Timbs's predicate crime was relatively low.

In evaluating the seriousness of an offense, courts often look to whether the offender "fit[s] into the class of persons for whom the [criminal] statute was principally designed." *Timbs*, 134 N.E.3d at 37 (quoting *Bajakajian*, 524 U.S. at 338). Considerations may include "the seriousness of the statutory offense, considering statutory penalties"; "the harm caused by the crime committed"; and "the seriousness of the specific crime committed compared to other variants of the offense, considering any sentences imposed." *Id.* On balance, these considerations favor Timbs. His predicate offense was instigated by the government and caused no injury. The sentences available and those imposed also confirm that the seriousness of his wrongdoing was at the low end of the spectrum.

1. Timbs's offense was government-instigated and his blameworthiness relatively low.

In a finding the State's brief does not contest, the trial court determined that Timbs "simply does not fit into the class of persons for whom the [drug-dealing] statute was principally designed." Appellant's App. Vol. II p. 34 (¶ 47). Like many people in Indiana, Timbs struggled with addiction. *See* pp. 9-11, above. Shortly after his father died, he relapsed. *Id.* He had virtually no criminal history. He was poor. He sold drugs only at the behest of undercover officers. *Id.* p. 10. Beyond $385—which he later returned—he reaped no "personal benefit." *See United*

States v. 829 Calle de Madero, 100 F.3d 734, 738 (10th Cir. 1996). And while his criminal case was pending, he turned his life around. With some understatement, even the State has admitted that Timbs "might not be the worst offender one can imagine in that class [of drug offenders]." Oral Arg. 14:00-14:05, *State v. Timbs* (Ind. Mar. 23, 2017), https://tinyurl.com/y3q9kpnu.

Indiana's "law enforcement Weapons of Mass Destruction" were not principally designed for circumstances like these. *See Sargent v. State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting). A half-century ago, in fact, this Court admonished the State for a near-identical exercise in prosecutorial overreach. In *Gray v. State*, police officers enlisted an informant to buy "two capsules of heroin" from someone with no history "of any prior traffic in drugs." 249 Ind. 629, 631, 231 N.E.2d 793, 795 (1967). Having orchestrated the sale, the State then charged the seller with dealing. *Id.* Beyond the one controlled buy, though, the State "elicited no evidence indicating that [the defendant] was engaged in narcotics traffic." *Id.* Nor did the State have any evidence that the defendant had sold drugs previously. *Id.*

This Court reversed the defendant's conviction. "[W]e have no evidence whatever," the Court reasoned, "that this appellant, before he was approached by this informant, had been engaged in the sale of heroin or that he had any intent to make a sale before he was asked to do so by a plan of law enforcement officers." *Id.* at 796. Rather, "the only evidence . . . shows a plan to lure and entice the appellant to violate the law by selling heroin to an informant under a plan devised by law enforcement officials." *Id.* at 797. Because the police were "as responsible for the illegal transaction as the seller," *id.* at 795, the court invalidated the conviction outright. *Cf. Fundukian v. State*, 523 N.E.2d 417, 418 (Ind. 1988) (distinguishing *Gray* where the "record [was] replete with evidence demonstrating that appellant was a drug dealer and that all the police did was to supply him the opportunity to ply his trade"), *cited at* State Br. 25.

The concerns raised in *Gray* are multiplied in a case like this one. Even under ordinary circumstances, "law enforcement officers should not incite or create crime for the sole purpose of punishing individuals." *Gray*, 231 N.E.2d at 795. That is doubly true here. Like the defendant in *Gray*, "Timbs had never sold before, but the officers devised a controlled-buy plan." *Timbs*, 134 N.E.3d at 21. Unlike in *Gray*, however, the taskforce that induced Timbs to sell drugs stands to benefit financially from doing so. Ind. Code § 34-24-1-4(d)(3)(C)(iii). Even the law firm that filed the forfeiture complaint has a direct financial stake. *Id.* §§ 34-24-1-4(d)(3)(A), -8; *see also* Defs.' Exs. N-Q (2020 Hr.) (cataloguing over $175,000 in forfeiture proceeds going to the firm since 2016). For everyone who exercised discretion in bringing this case, Timbs's vehicle was an attractive "source of revenue." *See Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (citation omitted). There is thus every reason to conclude that the forfeiture here is "out of accord with the penal goals of retribution and deterrence." *See id.* (citation omitted).

2. Timbs's offense caused no injury.

a. Timbs's crime caused little if any injury, which also bears on the gravity of his offense. *See Timbs*, 134 N.E.3d at 37. The record confirms that "Timbs sold heroin twice, both times as a result of controlled buys." *State v. Timbs*, 62 N.E.3d 472, 477 (Ind. Ct. App. 2016); Appellant's App. Vol. II p. 34 (¶ 47). Those sales were isolated incidents. They took place at the behest of undercover officers. With the police his only customer, Timbs harmed no one. Appellant's App. Vol. II p. 34 (¶ 48). (The State objects fiercely to the trial court's use of the word "victimless," Br. 12, 16, 17, 22, 23-25, but appears to agree that the record contains no evidence of "specific injuries to specific victims," *id.* 17.) Under all the circumstances, the trial court correctly concluded that Timbs's wrongdoing "was of minimal severity." Appellant's App. Vol. II p. 34 (¶ 50).

b. With little to say about the record, the State devotes itself mainly to attacking arguments no one has made. The State's contentions lack merit.

First, the State faults the trial court for "impl[ying]" that "any sanction" violates the Excessive Fines Clause "whenever an offense does not have an identifiable victim." Br. 27-28; *id.* 17, 22-29 (contesting what it terms the trial court's "'discernible victim' requirement"). But the trial court did no such thing. The court acknowledged that drug-related offenses can be "serious" and that "[o]ften, the illegal sale of narcotics causes physical and emotional harm." Appellant's App. Vol. II pp. 31, 33 (¶¶ 44.a, 46). At the same time, the court considered "the seriousness of the specific crime committed compared to other variants of the offense." *Timbs*, 134 N.E.3d at 37; Appellant's App. Vol. II pp. 33-34 (¶¶ 46-47). It considered "the harm caused by the crime" Timbs committed. *See Timbs*, 134 N.E.3d at 37; Appellant's App. Vol. II pp. 33-34 (¶¶ 47-49). And in considering the totality of the circumstances, it weighed a fact that the State does not dispute: Timbs's predicate crime caused no "specific injuries to specific victims." State Br. 17; Appellant's App. Vol. II, pp. 31, 34 (¶¶ 44.a, 48). That is a factor this Court directed the trial court to consider. *Timbs*, 134 N.E.3d at 37. It is also one the Supreme Court considered in *Bajakajian*, where it emphasized that "[t]he harm that respondent caused was . . . minimal"—particularly as compared to other, "hypothetical" offenders. 524 U.S. at 339; *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001) (noting that *Bajakajian* looked to "the relationship between the penalty and the harm to the victim caused by the defendant's actions"). In considering the harm Timbs caused, the trial court thus honored both this Court's directive and Supreme Court precedent.

The State nonetheless insists that the trial court's "sole rationale" was its finding that no one was specifically harmed by Timbs's crime. Br. 16. But the court's judgment belies that

claim. Along with the harm caused, the court also considered Timbs's role in the predicate offense. Appellant's App. Vol. II p. 30 (¶ 42). And the statutory penalties available. *Id.* p. 33 (¶ 46). And the sentence imposed. *Id.* pp. 33-34 (¶ 47). And the vehicle's market value. *Id.* p. 32 (¶ 44.b). And Timbs's economic circumstances. *Id.* p. 32 (¶ 44.d). And more. *E.g.*, pp. 31, 32 (¶¶ 43.b, 44.c). Far from being the trial court's "sole rationale," the harm Timbs caused was one factor among the "totality of the circumstances" the court considered. *Timbs*, 134 N.E.3d at 39. Not for the first time, the State's case for reversal starts from a fundamental misreading of the decision under review. *Cf.* Appellees' Supp. Opening Br., *State v. Timbs*, No. 27S04-1702-MI-70, 2019 WL 8509557, at *12-15 (Ind. May 24, 2019) (noting similar phenomenon in State's original petition for transfer).

Second, the State tries once again to saddle Timbs with the human and economic costs of illicit drug use statewide. Br. 26. Unable to cite "specific injuries to specific victims," *id.* 17, the State asserts that drug offenses harm "society as a whole," *id.* 28 (emphasis omitted). But such "generic considerations of harm" are "largely unhelpful" here, because "all crimes have a negative impact in some general way to society." *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 190 (Pa. 2017); *see also id.* at 192 (directing lower courts to gauge offense's gravity by looking to "the actual harm resulting from the crime charged, beyond a generalized harm to society"). Indeed, that principle follows directly from the Supreme Court's ruling in *Bajakajian*. The Court there accepted that currency-reporting crimes writ large might include serious violations by "tax evaders, drug kingpins, or money launderers." 524 U.S. at 339 n.14. In weighing Hosep Bajakajian's misconduct, though, the Court did not impute to him the crimes of others; it considered what specific harms his specific acts had caused. *Id.* at 339.

The State's proportionality analysis all but ignores *Bajakajian*. Br. 19-33. And little wonder: The State's reasoning is far more like *Bajakajian*'s dissent than its majority. Much like the State, *Bajakajian*'s dissenting Justices would have upheld the forfeiture as a "blanket punishment," based on harms caused by "[t]he drug trade, money laundering, and tax evasion" in general. 524 U.S. at 351, 353 (Kennedy, J., dissenting). Yet that view did not secure five votes. Unlike Justice Kennedy's dissent, the majority "seems to [have] analyze[d] the gravity of Bajakajian's offense solely from a retributivist perspective—asking how much harm his particular violation of the statute caused." Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 Minn. L. Rev. 880, 901 (2004). That lesson applies straightforwardly here: Under "*Bajakajian*'s proportionality analysis," it "is not sufficient merely to invoke the notion that because drug trafficking is a serious offense, the forfeiture is, therefore, permissible." Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture after* United States v. Bajakajian, 2000 U. Ill. L. Rev. 461, 495 (2000).

Nothing in the State's brief counsels differently. Rather—and as it did during the last appeal—the State pivots to the Cruel and Unusual Punishments Clause; brushing past *Bajakajian*, it relies instead on *Harmelin v. Michigan*, a Cruel and Unusual Punishments case. 501 U.S. 957 (1991), *cited at* Br. 19, 23-24, 28. But as this Court "[u]nderscor[ed]" last October, "the proportionality inquiry in this case is distinct from a Cruel and Unusual Punishments Clause proportionality inquiry." *Timbs*, 134 N.E.3d at 39; *see also* Karlan, *supra*, at 900-02 (contrasting Justice Kennedy's *Harmelin* concurrence with the majority opinion in *Bajakajian*). And there are good reasons for that distinction: As the Supreme Court has observed, "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Timbs*, 139 S. Ct.

at 689 (citation omitted). *But cf.* State Br. 44 (suggesting the opposite). In short, the State's arguments are more of the same: Its renewed effort to conflate the two Clauses—in citing *Harmelin*, it refers obliquely to "cases involving gross disproportionality analysis under the Eighth Amendment" (Br. 23)—amounts to just one more run at last October's decision.

At base, the State's view of proportionality cannot be reconciled either with this Court's decision of last October or with the Supreme Court's decision in *Bajakajian*. The trial court, by contrast, got the analysis right. Like the majority in *Bajakajian*, the court acknowledged that "the negative impact on our society of trafficking illegal drugs can be substantial." Appellant's App. Vol. II p. 33 (¶ 46). Like the majority in *Bajakajian*, the court concluded that "some offenses in violation of [Indiana's drug-dealing] statute are less egregious than others." *Id.* And based on the record as a whole, the court rightly found that "Timbs's transgression was minor when compared to other variants of the same offense." *Id.* pp. 33-34 (¶ 47). The State offers no basis for disturbing those findings.

3. The criminal penalties available and those imposed confirm that Timbs's crime was relatively minor.

In last October's decision, this Court also observed that "statutory penalties, sentencing guidelines, and trial courts' sentencing decisions supply important cues" about a crime's seriousness. *Timbs*, 134 N.E.3d at 37. Those data points either are neutral or favor Timbs, and on this front, too, the record supports the trial court's finding that "Timbs's transgression was minor when compared to other variants of the same offense." Appellant's App. Vol. II pp. 33-34 (¶ 47).

a. To begin: the criminal penalties available. The predicate crime for this forfeiture case is Timbs's act of selling two grams of heroin on May 6, 2013. *Timbs*, 134 N.E.3d at 29. At the time, that offense was listed as a Class B felony under Indiana Code § 35-48-4-2(a)(1). The maximum sentence was 20 years' imprisonment and a $10,000 fine. I.C. § 35-50-2-5(a). While a

relevant data point, however, those maximum punishments shed little light on the seriousness of Timbs's crime. Lawmakers, after all, set maximum sentences with an eye toward "the worst offenders and offenses." *Johnson v. State*, 830 N.E.2d 895, 898 (Ind. 2005); *see also Timbs*, 134 N.E.3d at 37. So the fact that someone more reprehensible than Timbs might earn a harsher sentence "has limited relevance in determining proportionality" here. *See State v. 633 E. 640 N.*, 994 P.2d 1254, 1261 (Utah 2000). At one time, in fact, the State admitted as much. Today, the State defends this forfeiture action by imagining worlds in which a judge "would impose hundreds of thousands of dollars in fines and place Timbs in prison for the rest of his life." Br. 22. Before the Court of Appeals, however, the State took a more measured view: It conceded that the "limited likelihood" of even a $10,000 fine is a "proper consideration" in evaluating proportionality. Appellant's Reply Br., *State v. Timbs*, No. 27A04-1511-MI-1976, 2016 WL 7507913, at *9 (Ind. Ct. App. May 27, 2016).

Legislative action since Timbs's crime reinforces the trial court's finding that "some offenses in violation of th[e] [drug-dealing] statute are less egregious than others." Appellant's App. Vol. II p. 33 (¶ 46). Between Timbs's arrest and his sentencing, the General Assembly amended Section 35-48-4-2 to more precisely calibrate felony classifications for drug crimes. What was previously categorized as either a Class A or a Class B felony is now subdivided into Levels 6, 5, 4, 3, and 2 felonies based on the weight of drugs involved and any "enhancing circumstances." Since 2014, for example, delivering between one and five grams of heroin is a Level 5 felony, the second-lowest classification. Ind. Acts 2014, P.L. 168 (H.E.A. 1006), sec. 93. Those amendments did not of course apply in Timbs's criminal case; he broke the law in 2013, before the amendments took effect. Even so, they highlight an important point: The law in force in 2013 covered a wide spectrum of wrongdoing. On that spectrum—and as the trial court rightly

determined—the seriousness of Timbs's crime was low "relative to other potential violators" of the statute. *Bajakajian*, 524 U.S. at 339 n.14.[3]

b. The sentence Timbs received strengthens the trial court's conclusion. As this Court observed last October, "the sentence actually imposed may provide even more precise insight into the offense's severity, including whether the offender 'fit into the class of persons for whom the [criminal] statute was principally designed.'" *Timbs*, 134 N.E.3d at 37. And in Timbs's criminal case, "the State . . . agreed that the minimum sentence of six years with only one year executed on home detention was appropriate." Appellant's App. Vol. II p. 34 (¶ 47). Particularly when compared to the maximum sentence available, that "sentence actually imposed" confirms that Timbs's misconduct was at the low end of the spectrum. *See Timbs*, 134 N.E.3d at 37 (noting that factors may include "the seriousness of the specific crime committed compared to other variants of the offense, considering any sentences imposed"); *1997 Chevrolet*, 160 A.3d at 192 (noting that factors may include "the maximum authorized penalty as compared to the actual penalty imposed upon the criminal offender"); *633 E. 640 N.*, 994 P.2d at 1261 ("[T]he trial court placed too much reliance on the maximum penalties in its analysis of proportionality instead of focusing on the actual fines and penalties imposed."); *Commonwealth v. 2016 Chevrolet Tahoe*, No. CL-2018-3474, 2019 WL 2269901, at *4 (Va. Cir. Ct. May 24,

[3] Although this Court's October 2019 decision noted that "sentencing guidelines" might inform the proportionality analysis, *Timbs*, 134 N.E.3d at 37, the State does not argue that sentencing guidelines (federal or otherwise) support reversal here. The Court should thus treat any such argument as waived. For completeness, however, we note that the guidelines calculations the State posited during last year's appeal rested on an incorrect edition of the U.S. Sentencing Guidelines and suffered from several other errors. For a first-time offender like Timbs, for example, the maximum advisory sentence for his predicate offense would have been twelve months. *See* U.S.S.G. §§ 2D1.1(c)(14), 3E.1.1, 4A.1.1, Sentencing Table (Nov. 1, 2012); *cf. Bajakajian*, 524 U.S. at 338 (noting that maximum advisory term for Bajakajian was six months).

2019) ("In light of the broad range of culpability that the statute is intended to punish, the maximum punishment is not a clear indicator of the seriousness of the Owner's conduct.").

B. Forfeiting Timbs's vehicle is an unusually harsh economic sanction.

On the other side of the balance, the trial court found that forfeiting Timbs's vehicle would be an unusually harsh economic sanction. Appellant's App. Vol. II p. 32 (¶ 44.b). During its first appeal, the State admitted as much. The State acknowledged that "most of what is occurring here is punitive." Oral Arg. 14:54-15:03, *State v. Timbs* (Ind. Mar. 23, 2017). The State further acknowledged that "there was some disproportional[ity] here" (though "not grossly disproportional"). *Id.* 5:01-5:03. The State retreated from that concession seconds later (*id.* 5:03-5:18) then again volunteered that "the punitive side is stronger in this case than it would be in most cases where you imagine a sports car or a plane being used." *Id.* 15:08-15:16. The record confirms the State's concessions to have been well taken.

1. The market value of Timbs's vehicle was much greater than the maximum criminal fine available and the zero-dollar fine imposed.

The default maximum fine for any felony in Indiana is $10,000. I.C. §§ 35-50-2-4–7. (Although the General Assembly often adjusts other statutes for inflation, *e.g.*, Ind. Acts 2019, P.L. 245 (H.E.A. 1237), sec. 4, it has not done so for the default maximum fine.) That relatively modest cap reflects the General Assembly's skepticism of crippling economic sanctions. It also tracks the statutory scheme more broadly. Fines of more than $10,000 are permissible, for example, but only if they correspond to the wrongdoer's actual "pecuniary gain" or the victim's pecuniary loss. I.C. § 35-50-5-2. Unless the defendant reaps a substantial benefit or inflicts a substantial harm, the General Assembly has provided that monetary fines should play a limited role in punishing misconduct.

Against this backdrop, a comparison with the market value of Timbs's vehicle is striking. As the State acknowledges (Br. 31), the vehicle was worth over $35,000 when seized—three and a half times the maximum potential fine available for even a worst-case violator of Indiana's drug-dealing statute. Equally striking is the mismatch between that figure and "the actual fines and penalties imposed" on Timbs. *See 633 E. 640 N.*, 994 P.2d at 1261; *Timbs*, 134 N.E.3d at 37; *1997 Chevrolet*, 160 A.3d at 192. With the State's consent, the criminal court determined that Indiana's punitive, rehabilitative, and deterrent goals would be best served through a combination of house arrest, probation, and treatment. The court imposed no criminal fine at all. And even accounting for the $1,200 in fees and court costs, the value of Timbs's vehicle still outstrips that sum by a factor of more than twenty-nine. *Cf. Bajakajian*, 524 U.S. at 340 (invalidating forfeiture that "is larger than the $5,000 fine imposed by the District Court by many orders of magnitude").

2. Forfeiting the vehicle is unduly harsh given Timbs's circumstances.

a. "[T]he forfeiture's effect on the owner" is also "an appropriate consideration in determining the harshness of the forfeiture's punishment." *Timbs*, 134 N.E.3d at 37. Here, Timbs's circumstances confirm that the forfeiture would be unduly harsh. When his vehicle was seized, Timbs was "broke." Appellant's App. Vol. II p. 27 (¶ 23). He had no job. *Id.* He had no savings. Tr. 18:24-18:25 (2020 Hr.). He had no investments. *Id.* 19:10-19:11. He had no assets, except his new Land Rover. Appellant's App. Vol. II p. 27 (¶ 23). He lived—and still lives—with an aunt who suffers serious health problems. Tr. 16:13-16:14 (2020 Hr.).

Over the seven-year life of this case, Timbs's economic circumstances have ranged from modest to precarious. Appellant's App. Vol. II p. 27 (¶ 24). In his criminal case, "[t]he trial court found Timbs indigent and appointed a public defender." *Timbs*, 134 N.E.3d at 21. During his period of house arrest, he struggled to fulfill his legal-financial obligations; several times, his

sister had to help cover his house-arrest fees. Appellant's App. Vol. II p. 27 (¶ 25). Timbs could not even afford a lawyer when he first appeared before this Court. Mot. to Withdraw ¶¶ 1-2, *State v. Timbs*, No. 27S04-1702-MI-70 (Ind. Mar. 8, 2017), *denied* Order (Mar. 10, 2017).

For people on such shaky footing, losing their primary means of transportation is often debilitating. More than almost any other piece of property, a car is of "particular importance." *Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) (Sotomayor, J.). "[A]utomobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life." *Washington v. Marion Cty. Prosecutor*, 264 F. Supp. 3d 957, 975 (S.D. Ind. 2017) (citation omitted), *remanded on other grounds*, 916 F.3d 676 (7th Cir. 2019). Moreover, their "importance as a means to earn a living and participate in the activities of daily life is particularly pronounced in Indiana, where public transportation options are limited, even in the state's largest cities." *Id.* at 976; *see also* Appellant's App. Vol. II p. 28 (¶ 32).

Timbs's experience bears this out. Seizing his vehicle has had—and if approved, its forfeiture will continue to have—an unusually disruptive effect on him and his family. In the years since his arrest, Timbs has worked hard to try to reintegrate into society and survive economically. Appellant's App. Vol. II p. 27 (¶ 24). He has participated in treatment and recovery programs and with the local substance-abuse taskforce. *Id.* (¶ 27). He completed his house arrest with no violations, apart from falling behind on payments. *See* p. 11, above. He has had no probation violations. *Id.* He has held down several jobs. *Id.* He contributes to the household he shares with his aunt. *Id.* At the request of the Grant County Probation Department, he has helped with one of the agency's other probationers. *Id.* p. 12. He has even "shared his story and insights with a gubernatorial drug task force." Appellant's App. Vol. II p. 27 (¶ 27).

Not having his vehicle, however, has made it much harder for Timbs to survive economically. *Id.* p. 28 (¶ 31). Access to a car is indispensable to holding down jobs at the places where Timbs has worked since his arrest; most have been at least a thirty-minute drive from Marion. *Id.* (¶ 34) (Like Timbs, an estimated 85 to 90 percent of workers in Grant County rely on private vehicles to commute. *See id.* (¶ 32); Defs.' Ex. I-K (2020 Hr.).) Without his own vehicle, Timbs has had to improvise: For years, he has borrowed his aunt's car to get to work and fulfill his other obligations. Appellant's App. Vol. II pp. 28-29 (¶ 35).

That has presented its own challenges. Before Timbs's grandmother died, for example, Timbs's aunt would visit her every Saturday in her nursing home. His aunt would have to be sure to leave no later than 6:00 P.M. so Timbs could use her vehicle to get to his Narcotics Anonymous meetings. Tr. 33:15-33:21 (2020 Hr.). His aunt is also on kidney dialysis and has had other long-term health issues. *Id.* 34:1-34:4. Because Timbs needs her car to get to work, he often drops her off at appointments early so that he can get to work on time. *Id.* 33:21-33:25. On occasion, his aunt has even had to miss medical appointments because Timbs had to be at work (with her car) at the same time. *Id.* 34:8-34:14. Of course, Timbs and his aunt have had little choice but to try to make the best of it. Timbs is responsible for paying many of their basic household expenses. *Id.* 32:13-33:4. He needs a job and a means of getting to work. As the trial court found, his vehicle is "critical" to his economic self-sufficiency. Appellant's App. Vol. II p. 28 (¶ 34); *see generally* Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 Yale L.J. Forum 430, 444-45 (2020) (observing that "in cases where the loss of property may interfere with the ability of a person or his or her family to meet basic human needs," courts "should

consider that hardship along with the dollar value of the property when weighing the severity of the punishment").

b. Timbs's "economic means" inform the analysis in another, related way. *Timbs*, 134 N.E.3d at 36. A $35,000 car may be "unexceptional" for some Hoosiers (State Br. 18), but Timbs is unlikely to be able to buy such a vehicle ever again. At the time of February's hearing, he made barely $35,000 in a year. Appellant's App. Vol. II p. 28 (¶ 30). (The pandemic has since cost Timbs his job.) As a result, confiscating his vehicle does not just create a major hurdle to his economic survival; it strips him of the most valuable asset he is likely ever to own. That, too, bears on the sanction's magnitude, for "the value of a car may be a pittance to a rich man and a fortune to a poor man." *People ex rel. Waller v. 1992 Oldsmobile Station Wagon*, 638 N.E.2d 373, 377 (Ill. App. Ct. 1994); *see also Timbs*, 134 N.E.3d at 36 ("To hold the opposite would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally.").

c. As against all this, the State's only response is to paint the forfeiture's "negative effects" as "manageab[le]." Br. 18; *see also id.* 32 ("not grave"), 33 ("perfectly reasonable"). Yet the trial court found otherwise. After hearing two rounds of testimony, the court found that "[t]he forfeiture had a particularly negative effect on Timbs." Appellant's App. Vol. II p. 32 (¶ 44.d). It found that the forfeiture "deprived him of his only asset." *Id.* It found that the forfeiture "made it harder for him to maintain employment." *Id.* It found that the forfeiture "served as an impediment to his recovery from opiate dependency by making it more difficult for him to get to and from treatment programs." *Id.* And contrary to the State's view that it did Timbs a favor by taking his car (Br. 29, 32), the court found that "the seizure . . . constituted a life-altering

sanction that made it difficult for him to maintain employment and seek treatment for his addiction." Appellant's App. Vol. II p. 32 (¶ 44.b).

Plainly, the State's view of the record differs from the trial court's. Yet nowhere does the State ask this Court to set aside any of the trial court's factual findings. Nowhere does the State try to meet the high standard for disturbing those findings. Nowhere does the State identify a single finding as lacking in record support. Nowhere does the State even acknowledge what the relevant standard of review is—clear error. *See* p. 15, above; *see generally Town of Brownsburg v. Fight Against Brownsburg Annexation*, 124 N.E.3d 597, 601 (Ind. 2019) ("We will not set aside findings unless they are clearly erroneous—i.e., the record contains no facts supporting them either directly or inferentially."); App. R. 46(C) (waiver). That means the correct path forward is the simplest one. The trial court's factual findings—all unchallenged and all supported by the record—should be accepted, and based on those findings, "the harshness of the forfeiture's punishment" weighs heavily in favor of affirmance. *See Timbs*, 134 N.E.3d at 37.

C. Timbs's history of addiction reinforces the forfeiture's excessiveness.

In evaluating both the offense's seriousness and the forfeiture's harshness, this Court has also stated that crimes other than the predicate offense may inform the analysis. "[T]he relationship of the offense to other criminal activity," the Court observed, may bear on the seriousness of the crime. *Id.* Similarly, the forfeiture's harshness may be informed by both "the property's role in the underlying offenses" and its "use in other activities, criminal or lawful." *Id.* at 36. Combined, these factors bear on "the degree to which [the forfeiture is] remedial or punitive," *id.*, and they counsel affirmance here.

1. The trial court took account of Timbs's other wrongdoing. Timbs—the court acknowledged—was an addict. Appellant's App. Vol. II p. 24-25 (¶¶ 9-10). He got clean. He relapsed in early 2013. During that time, he bought heroin to feed his personal addiction. *Id.*

p. 25 (¶¶ 11-12). He drove his vehicle to get it. *Id.* His actions were those of a drug addict, much like any other addict in Grant County. On this record, the trial court reasonably found that Timbs's struggle with addiction did not substantially magnify the seriousness of his predicate crime. *Id.* p. 34 (¶¶ 49-50); *cf. United States v. 2000 Dodge Caravan*, No. 2-cv-2, 2005 WL 8167033, at *1, 3 (D. Neb. Apr. 5, 2005) (holding forfeiture of $12,000-$14,000 vehicle grossly disproportional, in part because "[f]rom all appearances, [the owner's] only motive was the satisfaction of her drug addiction").

2. The State again takes a different view of the record. As it did during the last appeal, it characterizes Timbs's addiction as a "staggering volume of criminal conduct." Br. 22. Buying drugs to feed his addiction is recast as "inject[ing]" money into the heroin trade. *Id.* 17. Because Timbs was an addict, the State asserts that prosecutors could have charged him with "scores" of simple-possession counts, aggregating to "hundreds of thousands of dollars in fines" and "prison for the rest of his life." *Id.* 22. By comparison, the State reasons, confiscating his car is unobjectionable.[4]

The trial court was right not to credit that argument. For one thing, Indiana law almost certainly bars the stacked sentences the State envisions. I.C. § 35-50-1-2(d). Worse, the State's

[4] The State also asserts that another person accompanied Timbs to Richmond "with the intent to purchase heroin." Br. 21. Contrary to the State's suggestion, however, the record says nothing about whether Timbs's companion made or intended to make "heroin purchases." *Id.* 28; *see also* Tr. (2020 Hr.) 31:13-32:7 ("[Q]: [D]id anyone ever ride with you? [A]: M'hmm. . . . . [Q]: [A]bout how frequently would he be- would he ride with you? Most times? [A]: M'hmm."); Defs.' Ex. B (2020 Hr.) at 14:15-14:20, 21:40-22:12 (similar). On this record, it was not clear error for the trial court to decline to accept the State's view of the facts. Nor was the court required to accept the State's characterization of Timbs's Class D conspiracy charge as "attempt[ed]" robbery. Br. 28; *cf.* p. 11 n.2, above ("I'm not really sure what we were going to do."). In any event, even if the State's characterizations enjoyed record support, it still would not be error for the trial court to conclude, based on the entire record, that "Timbs's transgression was minor when compared to other variants of the same offense." Appellant's App. Vol. II pp. 33-34 (¶ 47).

argument betrays one of the touchstones of Indiana's penal system—"reformation, and not . . . vindictive justice." Ind. Const. art. 1, § 18. Contrary to the State's view, we do not fine low-income addicts hundreds of thousands of dollars. *Cf. Like v. State*, 760 N.E.2d 1188, 1192 (Ind. Ct. App. 2002) (invalidating as "clearly, plainly, and obviously unreasonable" a $10,000 fine based on a low-level dealing offense). Quite the opposite; statewide, public servants dedicate their careers to helping people like Timbs rehabilitate themselves. The General Assembly has authorized drug courts. I.C. §§ 33-23-16-1 *et seq.* Agencies sponsor opioid summits. Across Indiana—as one official remarked last year—these programs "seek to promote outcomes that benefit the litigants and their families, victims, and society." Bob Kasarda, *Judges take on extra work to give offenders a second chance*, Times of Northwest Indiana (Apr. 23, 2019), https://tinyurl.com/y29pd7d3.

The State's argument also exposes the outer limits of its theory. Even on the State's view of the record, Timbs was much like any other addict. (What addict hasn't used drugs "scores" of times? Br. 22. What addict hasn't "injected" money into the drug trade? *Id.* 17.) So the State's reasoning is unjust not only for Timbs, but for recovering addicts statewide. On the State's theory, every addict in Indiana is courting life imprisonment. *Id.* 22. And since forfeiture beats prison, the sky's the limit when it comes to taking their property.

That view cannot be squared with the Excessive Fines Clause. To the contrary, Timbs's history of addiction is among the totality of circumstances supporting the trial court's judgment. As this Court remarked last year, a forfeiture's proportionality depends in part on "the extent to which the forfeiture would remedy the harm caused." *Timbs*, 134 N.E.3d at 36. And far from remedying harm, the State's forfeiture campaign is calculated to exacerbate it here. Confiscating Timbs's vehicle "constitute[s] a life-altering sanction" precisely because it has "made it difficult

for him to maintain employment and seek treatment for his addiction." Appellant's App. Vol. II p. 32 (¶ 44.b); *see also id.* pp. 28, 32 (¶¶ 33, 44.d). That outcome harms Timbs and the community more broadly: "Because employment and treatment are crucial to reintegration into society after committing a criminal offense," the trial court found, "the seizure of the Land Rover put the public at risk" by "increas[ing] the likelihood that Timbs would recidivate." *Id.* p. 33 (¶ 44.d). As with the court's other findings, these, too, are unchallenged. Indeed, the State previously "acknowledged 'most of what is occurring here is punitive,' rather than remedial." *Timbs*, 134 N.E.3d at 39. On this record, the trial court was right to conclude that Timbs has shown—"by a significant margin"—that forfeiting his vehicle is excessive. Appellant's App. Vol. II p. 35; *Timbs*, 134 N.E.3d at 28 (noting preponderance-of-the-evidence standard).

D. The State's remaining arguments lack merit.

Apart from reprising its arguments against proportionality (Br. 33-62), the State advances two other reasons for reversal. Neither is persuasive.

1. The State suggests that the trial court infringed "the sole province of the legislature" by ruling for Timbs. Br. 27. That is wrong; Indiana's police powers are not "exclusive[]" (*id.* 29) as against incorporated Bill of Rights protections. *See McDonald v. Chicago*, 561 U.S. 742, 784-85 (2010) (plurality opinion). "[T]he discretion of state and local governments to explore legislative and regulatory initiatives does not include 'the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights.'" Br. Amici Curiae of Texas, Indiana, et al., *McDonald*, 561 U.S. 742, 2009 WL 4378909, at *22 (08-1521).

Even on their own terms, moreover, the State's arguments support the sort of analysis the trial court performed. For example, the State asserts that "like cases [should] be treated alike." Br. 46. But that principle validates the judgment below. Unlike every other form of criminal or quasi-criminal sanction in Indiana, a forfeiture like this one bears no "relationship to the gravity

of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. By design, like is not treated alike. Whether the forfeiture statute applies at all depends not on the degree of wrongdoing, but on happenstance. Did an offender drive his car? Or walk? If he drove, did the car belong to him? Or to a spouse? Or to a sibling? (Yes, spouse versus sibling might matter. I.C. § 34-24-1-1(e).) The forfeiture's magnitude is no less arbitrary. It depends not on the seriousness of the crime, but on the "value of the forfeiture." *Timbs*, 134 N.E.3d at 24. It is "neither a fixed sum nor linked to the harm caused by the underlying crime." *Id.* It "ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." *Austin v. United States*, 509 U.S. 602, 621 (1993) (citation omitted). To borrow the State's phrase, "widely divergent results" are built into the forfeiture system at a structural level. Br. 33.

That is especially true in Indiana. Unlike in every other state, forfeiture cases in Indiana can be farmed out to private lawyers on a contingency-fee basis. In turn—and as noted above (at 20)—those arrangements create a unique danger that forfeitures will be pursued "in a measure out of accord with the penal goals of retribution and deterrence." *Timbs*, 139 S. Ct. at 689 (citation omitted). That danger is not hypothetical. For over thirty years, officials have attributed Indiana's "incredible growth spurt in forfeitures" to the "persistent efforts" of the very law firm that filed this case. Kyle Niederpruem & George McLaren, *Police profiting by seizures from suspects*, The Indianapolis Star (May 2, 1990), at A-8. A leading forfeiture treatise describes "Indiana's institutionalized bounty hunter system" as a "scandal." David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.01, at 1-13 (2018). In 2011, a prosecutor had his license suspended for abdicating "his duties as a public official" in service of "his private interest in his continued pursuit of forfeiture property." *In re McKinney*, 948 N.E.2d 1154, 1155-56 (Ind. 2011); Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 207 (11th ed. 2018)

(using the incident as a case study in prosecutorial ethics). Any potential for "incongruent results" (State Br. 18) follows not from the Excessive Fines Clause, but from the sort of overreach the Clause serves to address.

2. The State also observes that Excessive Fines Clause rulings should be "exceedingly rare." *Id.* 19 (citation omitted). But, factually, they are. Consider Marion County—Indiana's largest jurisdiction—which in 2019 closed an estimated 252 forfeiture cases. *See* Addendum.[5] Of those, 239 were resolved either by settlement or by default judgment. Six were dismissed voluntarily. One was dismissed for lack of probable cause. Of the 252 cases we have identified, only six reached a stage where the trial court might even theoretically have considered the Excessive Fines Clause. And that figure is likely smaller still: Four of the six involved currency alone, which courts often handle differently from "instrumentalities" like cars. *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 Nev. L.J. 1, 36-41 (2012) (contrasting "proceeds" forfeitures with instrumentality forfeitures).

Empirically, rulings like the one below are not everyday affairs, and often they are as fact-bound as this one. *Cf. Timbs*, 134 N.E.3d at 35 ("fact intensive"). By contrast, the State's grounds for reversal reflect sweeping legal rules that—if accepted—would implicate the rights of Hoosiers statewide. The State's top-line argument claims the power to impose grossly disproportional forfeitures for even the lowest-level infractions. Br. 33-62; Oral Arg. 4:12-4:24, *State v. Timbs* (Ind. June 28, 2019) ("[State's Counsel]: [T]his is the position that we've staked out already in the U.S. Supreme Court, when I was asked by Justice Breyer whether a Bugatti

[5] This information is subject to judicial notice, Ind. Evidence Rule 201(a)(1)(B), (b)(5), and Appellees ask that judicial notice be taken, *id.* 201(c)(2); *cf. City of Indianapolis v. Armour*, 946 N.E.2d 553, 562 n.10 (Ind. 2011) (taking judicial notice of materials under Rule 201(b)), *aff'd*, 566 U.S. 673 (2012).

could be forfeited for going five miles an hour over the speed limit, and historically the answer to that question is 'yes,' and we're sticking with that position here."), https://tinyurl.com/y3wszyjb. Its fallback argument is hardly less extreme: For addicts, no forfeiture is too disproportional. *See* p. 34, above. Those arguments are as dangerous as they are flawed. The State's yen for vindictive justice shows nothing so clearly as this: The Excessive Fines Clause remains a vital backstop for those instances where "in justice[,] the punishment is more criminal than the crime." *Timbs*, 134 N.E.3d at 28 (citation omitted).

This is just such an instance. In 2013, Tyson Timbs broke the law. He was arrested. He was convicted. With the State's consent, the criminal court imposed a sentence tailored to give him the opportunity to reintegrate into society. And by all accounts, he is succeeding. He has held down jobs, he has provided for himself and his aunt, he has participated in treatment, he has helped other addicts. He is doing everything that our criminal-justice system expects of him.

It's hard. The trial court heard that from two witnesses—a felon-reentry expert and Timbs himself. And at every step, the State of Indiana has tried to make it immeasurably harder by stripping Timbs of his car. In doing so, the State has stretched "the letter and spirit of the law" to breaking point and beyond. *Hughley v. State*, 15 N.E.3d 1000, 1005 (Ind. 2014) (citation omitted). It ignored the trial court's order to return Timbs's property in 2015. It argued for a proportionality standard in 2017; it argues against one now. It cites the opioid epidemic and "pauperism" to justify taking Timbs's property (Br. 17, 29), all while ignoring the trial court's findings that this forfeiture promises to aggravate those harms, not remedy them. The list goes on. It has gone on long enough. Tyson Timbs has been punished enough. The trial court's factual findings are unchallenged, and its judgment should be affirmed.

CONCLUSION

The judgment of the trial court should be affirmed.

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Respectfully submitted,

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WORD COUNT CERTIFICATE

In accordance with Indiana Rule of Appellate Procedure 44, I verify that this brief, excluding tables and certificates, contains fewer than 14,000 words according to the word-count function of the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I certify that on September 16, 2020, I electronically filed this document using the Indiana E-filing System (IEFS). I hereby certify that a copy of this document was served on the following persons using the IEFS on September 16, 2020:

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