IN THE
SUPREME COURT OF INDIANA

No. 27S04-1702-MI-00070

Court of Appeals Case No. 27A04-1511-MI-1976

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

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SUPPLEMENTAL OPENING BRIEF FOR APPELLEES

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INTRODUCTION

Next Wednesday—May 29, 2019—will be six years to the day since the State of Indiana seized Tyson Timbs's vehicle. It will be 1,370 days since the trial court held that forfeiting the vehicle violates the Excessive Fines Clause. It will be 951 days since the Court of Appeals affirmed and 919 days since the State petitioned this Court for transfer. Now on remand from the U.S. Supreme Court, the State's appeal suffers from two threshold problems that make it a poor candidate for further review in this Court. Foremost, the question presented in the State's transfer petition is not raised by the Court of Appeals' decision. Nor does that decision otherwise implicate any considerations favoring transfer. For these reasons, the Court may wish to vacate transfer as improvidently granted, deny the State's petition, and reinstate the Court of Appeals' decision.

If the Court chooses not to vacate transfer, the judgment below should be affirmed; confiscating Timbs's vehicle violates the Excessive Fines Clause under either the "instrumentality" inquiry or the "proportionality" inquiry. The facts speak for themselves. Like many in Grant County, Timbs struggled with heroin addiction. He relapsed shortly after his father died, in 2012, and a few months later, he came to the attention of the local drug taskforce. The taskforce could have directed him to drug treatment, to the problem-solving courts, or to any number of other resources for addicts. Instead, officers teamed up with an informant to turn Timbs into a drug dealer; at the behest of government agents, Timbs sold undercover officers a small amount of heroin for a few hundred dollars. He was arrested, he was charged with felony dealing, he pleaded guilty, and he turned his life around.

Timbs's recovery has been made immeasurably harder, however, because the State of Indiana has spent the past six years trying to forfeit his vehicle. The vehicle undisputedly was

bought with lawfully obtained money. It was linked incidentally to a single, government-instigated controlled buy. Its value exceeds the maximum statutory fine by tens of thousands of dollars. And for a low-income, recovering addict like Timbs, a car is crucial to earning an honest living and reintegrating into his community. As the lower courts concluded, forfeiting Timbs's vehicle is an excessive fine.

The State's concessions at the first oral argument before this Court only underscore the forfeiture's excessiveness. The State admitted that Timbs "might not be the worst offender one can imagine." The State conceded that "most of what is occurring here is punitive." And the State suggested—paradoxically—that the destitute Timbs would have had a viable excessiveness defense if only he'd been rich enough to drive a Bentley.

The most revealing aspect of the State's position, however, is what it perceives as its strongest argument. When pressed at the first oral argument, the State identified a sole claim of error: that the lower courts should have factored in not just Timbs's isolated dealing offense (the basis for this action) but his "other crimes" too. Yet the Court of Appeals did just that. It reviewed the record *de novo* and found that—until law enforcement got involved—Timbs had been an addict, buying drugs to feed his addiction. However much the State tries to recast that addiction as "heroin trafficking," the record is undisputed. Government agents induced Timbs's only acts of dealing. Government agents were his only customers. And the State has spent over a half-decade trying to confiscate a vehicle from a low-income recovering addict. This is a deeply unjust exercise of governmental power. The judgment below should be affirmed.

BACKGROUND

1. Tyson Timbs can trace his addiction back 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. Appellee's App. Vol. II p. 26. He began "buying the pills on the street in addition to his prescription." *Id.* That dependency soon escalated to heroin abuse. 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. And Timbs 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.

"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.* In 2011, he moved from Ohio (where his father and sister lived) to Marion, Indiana, to help his grandmother and a sick aunt and to get a fresh start. *Id.* pp. 25, 26; State's Trial Ex. 1 at 23:27-23:59.

For a time, he got clean. Appellee's App. Vol. II p. 26. But in December 2012, his father died. *Id.* 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. Hr. Tr. 38:12-38:21, 40:15-40:18 (July 15, 2015). In the coming months, he suffered another relapse. Appellee's App. Vol. II pp. 26-27.

About four months into his relapse, one of his aunt's former neighbors called and "asked [him] if [he] wanted to sell some" heroin. Hr. Tr. 41:12-41:13 (July 15, 2015); State's Trial Ex. 1 at 28:57-29:05. Timbs "had never sold heroin until he called." Hr. Tr. 41:12 (July 15, 2015). 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; *see also id.* ("'I wasn't a dealer.'"). Even so, he agreed to meet the neighbor's contacts, who were undercover members of the local drug taskforce.

At the first controlled buy, Timbs sold the undercover officers two grams of heroin for $225. Hr. Tr. 26:03-26:16 (July 15, 2015). He drove his new Land Rover to the meeting, a five-minute drive from where he was living at the time. *Compare id.* 25:11-25:12 *with id.* 28:01-28:14; *see also id.* 37:08-37:12.

Days later, one of the officers contacted Timbs directly to set up a second transaction. *Id.* 28:18-29:02. 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. *See id.* 29:01-29:20, 32:05-32:12. The officers then asked him to get them painkillers, but he had none. *Id.* 29:23-30:12. So the officers set up another heroin buy. *Id.* En route to that third meeting, Timbs was pulled over and arrested. *Id.* 13:13-14:08. Officers seized his new vehicle on the spot. *See* Appellant's App. p. 10.

2. The State charged Timbs with two counts of dealing a controlled substance and one count of conspiracy to commit theft, Appellee's App. Vol. I pp. 12-13; he pleaded guilty to one of the two counts of dealing and to the conspiracy count, *id.* pp. 15-18.[1] The criminal court then sentenced him to one year of home detention (with his aunt) and five years' probation, including a court-supervised addiction-treatment program. *Id.* pp. 19-20. The court also assessed

[1] Post-arrest, detectives asked why Timbs and his companion had no heroin in the vehicle at the time of his arrest, since 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." State's Trial Ex. 1 at 19:23-20:00, 21:03-21:25. These statements appear to have been the basis for the conspiracy charge.

investigation costs ($385), an interdiction fee ($200), court costs ($168), a bond fee ($50), and $400 for drug-and-alcohol assessment through the probation department. *Id.*

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. While the case was pending, he checked into Recovery Matters, an inpatient drug-treatment facility south of Chicago. *Id.* p. 27.

3. Also while the criminal case was pending, a private law firm filed a civil lawsuit to forfeit Timbs's vehicle on behalf of the State. Appellant's App. pp. 10-11. Because Timbs had driven his new vehicle to the first of the two controlled buys, the State "demand[ed] judgment . . . for forfeiture of [the] vehicle." *Id.* p. 10.[2]

Following Timbs's guilty plea in criminal court, the civil court held a trial in the forfeiture case. Based on the record, the court determined that forfeiting Timbs's vehicle would be "grossly disproportional to the gravity of [Timbs's] offense" and unconstitutional under the Eighth Amendment's Excessive Fines Clause. *Id.* p. 15. "While the negative impact on our society of trafficking in illegal drugs is substantial," the court acknowledged, "a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to the Defendant's illegal conduct." *Id.* pp. 15-16. The court ordered the vehicle "released to the Defendant immediately." *Id.* p. 16.

[2] The complaint contains no factual allegations about the criminal conduct the State believed supported forfeiture, Appellant's App. pp. 10-11, but at the first argument before this Court, the State identified the first controlled buy as the predicate offense for forfeiture, Oral Arg. 29:15-29:25 (Ind. Mar. 23, 2017). Because the vehicle had no link to the second controlled buy, the State does not appear to contend that that offense could supply a basis for forfeiture. *See D.A. v. State*, 58 N.E.3d 169, 172 (Ind. 2016) ("[C]ivil forfeiture actions . . . are justified by the property's role in criminal activity." (emphasis omitted)).

4. The State did not release the vehicle. Instead, it appealed the trial court's judgment, and a divided Court of Appeals panel affirmed. *State v. Timbs*, 62 N.E.3d 472 (Ind. Ct. App. 2016). The State still did not release the vehicle. It appealed to this Court, requesting transfer on the following question: "Is the $10,000 fine applicable to all felonies in Indiana the proper benchmark for determining whether Indiana's statute authorizing forfeiture of property used in crimes violates the Eighth Amendment?" Pet. Trans. 2. Timbs's then-counsel did not respond to the State's petition.

Having granted transfer, this Court reversed, reasoning that the Excessive Fines Clause had yet to be incorporated against the states. The U.S. Supreme Court then vacated that judgment, held the Clause incorporated, and remanded to this Court for further proceedings.

ARGUMENT

I. The Court may wish to vacate transfer as improvidently granted.

Review under Appellate Rule 57(H) is "a matter of judicial discretion," and this Court has not hesitated to vacate transfer if it "determine[s] that transfer of jurisdiction was improvidently granted." *State v. Velasquez*, 962 N.E.2d 637, 637 (Ind. 2012). Vacatur would be appropriate here because the Court of Appeals' decision does not warrant this Court's review. The question presented in the State's transfer petition is not implicated by the Court of Appeals' decision. Nor does that decision otherwise raise any considerations favoring transfer.

A. The Court of Appeals' decision did not turn on the issue for which the State sought transfer.

The State's transfer petition asks this Court to answer one question: "Is the $10,000 fine applicable to all felonies in Indiana the proper benchmark for determining whether Indiana's statute authorizing forfeiture of property used in crimes violates the Eighth Amendment?" Pet. Trans. 2. That question is not presented in this case, however, because the Court of Appeals

performed nothing like the analysis the State ascribes to it. Contrary to the State's view, the Court of Appeals did not "limit[]" itself "to comparing the value of the property forfeited with Indiana's $10,000 statutory fine for felonies." *Id.* 6. Indeed, the Court of Appeals disclaimed that approach emphatically. "[W]e do not," the court stressed, "suggest that forfeiture of any asset valued over the maximum fine is automatically a violation of the Excessive Fines Clause." *State v. Timbs*, 62 N.E.3d 472, 476 (Ind. Ct. App. 2016).

There is thus a jarring disconnect between what the Court of Appeals did and the question the State asks this Court to answer. The State faults the Court of Appeals for looking only to the $10,000 cap on statutory fines. But in truth, the court ruled against the State using the legal standard the State argued for and accounting for all the evidence the State cited. Far from "focus[ing] too narrowly" on the maximum potential fine, Pet. Trans. 10, the Court of Appeals did what the State asked of it. It identified the maximum potential fine as merely "instructive to our analysis." *Timbs*, 62 N.E.3d at 476; *see also* Appellant's Ct. App. Reply Br. 9. It then reviewed the entire record *de novo*, including every piece of evidence the State cited. *Timbs*, 62 N.E.3d at 475. And having done so, it weighed the following other considerations:

- That Timbs's vehicle "was not purchased with the proceeds of [his] crimes." *Id.* at 477.
- That "the nature of Timbs's offense was serious." *Id.* at 476.
- That the criminal-court judge "found no need to impose *any* fine." *Id.*
- That the "financial burdens . . . imposed on Timbs when he pleaded guilty" were significant. *Id.*
- That the "only evidence before the trial court was that Timbs sold heroin twice." *Id.* at 477.

- That both drug sales were "a result of controlled buys." *Id.*
- That to the extent Timbs had transported drugs at other times, "it was apparently for his own use." *Id.*

Put simply, the Court of Appeals did not even plausibly commit the error the State asked this Court to correct. For this reason, the Court may wish to vacate transfer, deny the State's transfer petition, and reinstate the Court of Appeals' decision. *Cf. Conway v. Cal. Adult Auth.*, 396 U.S. 107, 110 (1969) (per curiam) (dismissing writ of certiorari when petition raised a "purely artificial and hypothetical issue").

B. The Court of Appeals' decision implicates none of the principal considerations favoring transfer.

Vacating transfer would also be appropriate because the Court of Appeals' decision raises none of the usual considerations that favor transfer. This Court's "principal function" is "to address major legal questions that have broad implications," 24 Ind. Prac., Appellate Procedure § 13.2 (3d ed.). The Court of Appeals' decision raises no such questions. The State's petition, for example, billed the decision as contravening federal precedent, as deciding unsettled questions of law, and as deviating from accepted practice. Pet. Trans. 6 (citing Ind. Appellate Rules 57(H)(3), (4), and (6)). Yet the petition identifies no question warranting this Court's review. As discussed, the Court of Appeals did not announce the $10,000 "benchmark" that forms the centerpiece of the State's petition. *Id.* 2, 6, 10-11, 14-15. And far from "indicat[ing] that a forfeiture in excess of $10,000 would not be allowed for any crime," *id.* 14-15, the Court of Appeals said just the opposite, *Timbs*, 62 N.E.3d at 476 ("[W]e do not suggest that forfeiture of any asset valued over the maximum fine is automatically a violation of the Excessive Fines Clause."). Only by overlooking most of the Court of Appeals' decision could the State present it as one with statewide consequences.

At base, the State sought transfer by claiming a legal error the Court of Appeals did not commit. Transfer secured, the State then asked this Court to divert its resources to the very definition of fact-bound error-correction—with no errors apparent. The first oral argument before this Court drove home the point; rather than contesting the legal standard applied by the lower courts, the State pivoted to the far less consequential matter of how the judges below weighed the facts in the record. Oral Arg. 2:33-3:09, 10:59-11:39 (Ind. Mar. 23, 2017), https://tinyurl.com/y8slhl3p. Because these objections "present[] no issues to this Court" warranting review, *Baker v. Fisher*, 260 Ind. 513, 515, 296 N.E.2d 882, 883 (1973), vacatur of transfer may be appropriate for this reason also.

II. If the Court does not vacate the grant of transfer, the judgment below should be affirmed.

If the Court chooses to reach the merits, the judgment below should be affirmed. Again, the State's transfer petition narrows the issues substantially. The State does not request a soup-to-nuts review of the excessiveness question. It focuses, instead, on what it perceives as the Court of Appeals' reliance on statutory fines as a dispositive "benchmark." Pet. Trans. 2. As discussed, however, the Court of Appeals disavowed such a benchmark, making the State's question presented a simple one to answer. The State argued below that potential statutory fines are a "proper" but not dispositive consideration under the Excessive Fines Clause. Appellant's Ct. App. Reply Br. 9. The Court of Appeals treated them as such. *See* p. 13, above. That should be the end of the matter.

The judgment below would likewise merit affirmance if this Court were to venture beyond the State's petition and survey excessiveness more broadly. "[A] modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part." *United States v. Bajakajian*, 524 U.S. 321, 331 n.6 (1998). The State concedes that forfeiting

Timbs's vehicle is punishment. Oral Arg. 15:01-15:04 (Ind. Mar. 23, 2017). And on this record, the forfeiture is unconstitutionally excessive. While the excessiveness inquiry is "factually intensive" and ill-suited to "a one-size-fits-all test or a weighting for the factors," *United States v. 829 Calle de Madero*, 100 F.3d 734, 738 (10th Cir. 1996), the analysis distills to three main questions. How closely was the confiscated property linked to the predicate offense? How blameworthy is the owner? How harsh are the forfeiture's consequences? These inquiries all point decisively to excessiveness here. Timbs's vehicle was tied only incidentally to drug dealing; only one of his two sales involved the vehicle at all. Timbs's culpability was minimal, not least because he sold drugs only to—and only at the behest of—police officers. And confiscating his vehicle is ruinously punitive, particularly given his economic circumstances.

A. Timbs's vehicle was incidental to a single controlled buy.

A "threshold inquiry" in evaluating a forfeiture's excessiveness is whether the government has shown a close "relationship between the property to be forfeited and the underlying criminal activity." *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 185 (Pa. 2017); *see generally* Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1157 (2017) (describing *1997 Chevrolet* as "one of the most comprehensive excessive fines opinions of any court in the nation"). This "instrumentality analysis" derives from the legal fiction behind civil forfeiture: that the government can confiscate only property that is "guilty" of a crime. *1997 Chevrolet*, 160 A.3d at 184-85. States do not have a roving warrant to strip wrongdoers of their belongings. So "if there is not a sufficient nexus between the property and the crime, then forfeiture is an excessive fine, regardless of the harshness of the penalty or the seriousness of the offense." *United States v.*

1990 Ford Ranger, 876 F. Supp. 1283, 1292, *vacated in part on other grounds*, 888 F. Supp. 1170 (N.D. Ga. 1995); *633 E. 640 N.*, 994 P.2d 1254, 1257 (Utah 2000).

These principles apply with full force here. Far from being "integral" to drug-dealing, Timbs's vehicle had only an "incidental and fortuitous" link to his offense. *1997 Chevrolet*, 160 A.3d at 185. Timbs bought his vehicle with lawfully obtained money, not criminal proceeds. *See* p. 9, above. He drove it to one drug sale. *See* p. 10, above. That sale was orchestrated by the government. *See id.* It involved two grams of heroin. *See id.* And it took place a short distance from Timbs's house. *See id.* Reinforcing the vehicle's tenuous link to drug-dealing, Timbs did not even drive it to the second of the two controlled buys; he walked. *See id.*; *cf. People v. 2005 Acura*, 77 N.E.3d 783, 789 (Ill. App. Ct. 2017) (holding vehicle forfeiture excessive when owner "could just as easily have taken public transportation or walked" to crime scenes). On these facts, any link between the vehicle and drug-dealing is "more a function of happenstance than reason." *von Hofe v. United States*, 492 F.3d 175, 185 (2d Cir. 2007). Much like a "building . . . in which an isolated drug sale happens to occur," Timbs's vehicle lacks "a close enough relationship to the offense" to sustain a forfeiture under the Eighth Amendment. *Austin v. United States*, 509 U.S. 602, 628 (1993) (Scalia, J., concurring in part and concurring in the judgment). The vehicle was no more instrumental to selling drugs than was the apartment Timbs drove it to.

For its part, the State all but conceded this point at the first argument before this Court. "You can have a case like this," the State acknowledged, "where the vehicle -- the relationship was just using it in the crime," so "most of what is occurring here is punitive." Oral Arg. 14:54-15:03 (Ind. Mar. 23, 2017). Just so. Timbs's vehicle was not "'significantly utilized in the commission' of the offense," and for that reason its forfeiture "cannot withstand Eighth Amendment scrutiny and the inquiry ends." *1997 Chevrolet*, 160 A.3d at 185, 186.

B. Forfeiting Timbs's vehicle is grossly disproportional to the gravity of his offense.

Confiscating Timbs's vehicle is also "grossly disproportional" to his offense, and for this reason, too, the forfeiture is unconstitutionally excessive. *Bajakajian*, 524 U.S. at 334. Even if the vehicle had been linked enough to Timbs's drug sale to be an "instrumentality," the Excessive Fines Clause still acts as a check on such an outsized sanction. "If the property is an instrumentality, the inquiry continues to the proportionality prong and an assessment of whether the value of the property sought to be forfeited is grossly disproportional to the gravity of the underlying offense." *1997 Chevrolet*, 160 A.3d at 191; *see also 633 E. 640 N.*, 994 P.2d at 1257. A Bugatti might be "instrumental" to rolling through stop signs, for instance—without the car there'd be no crime—but forfeiting it on that basis would be excessive all the same. *Accord* Oral Arg. 43-45, *Timbs v. Indiana*, 139 S. Ct. 682 (2019), https://tinyurl.com/y7yvvhfl.

By any measure, forfeiting Timbs's vehicle is grossly disproportional here. The gravity of Timbs's offense was relatively minor, and—since his only customers were undercover officers—he harmed no one. On the other side of the ledger, confiscating his vehicle is a devastating sanction; as even the State acknowledged, "the punitive side is stronger in this case" than it would be in many other cases. Oral Arg. 15:08-15:16 (Ind. Mar. 23, 2017). The lower courts were thus correct in holding that forfeiture of Timbs's vehicle violates the Excessive Fines Clause.

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

In evaluating the seriousness of an offense, federal and state courts often look to whether the offender "fit[s] into the class of persons for whom the statute was principally designed." *Bajakajian*, 524 U.S. at 338. Courts also evaluate the harm the offender caused. *Id.* at 339; *see*

also 1997 Chevrolet, 160 A.3d at 191-92 (synthesizing similar factors). These considerations confirm Timbs's lower level of culpability here.

First, Timbs does not "fit into the class of persons for whom the statute was principally designed." *Bajakajian*, 524 U.S. at 338. Like many Hoosiers, Timbs battled heroin addiction, and shortly after his father died, he relapsed. He was not selling heroin. He had virtually no criminal history. He was destitute. Appellee's App. Vol. II p. 26. For all that, Grant County's drug taskforce teamed up with an informant to trap Timbs in a drug deal. His only two drug sales were prompted by the taskforce. Beyond $385—which he later returned—he reaped no "personal benefit." *See 829 Calle de Madero*, 100 F.3d at 738. And while his criminal case was pending, he turned his life around. *See* p. 11, above. With some understatement, even the State admits that Timbs "might not be the worst offender one can imagine in that class [of drug offenders]." Oral Arg. 14:00-14:04 (Ind. Mar. 23, 2017).

Indiana's "law enforcement Weapons of Mass Destruction" were not designed for the likes of Timbs. *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"; having orchestrated the sale, the State then charged the seller with dealing. 249 Ind. 629, 631, 231 N.E.2d 793, 795 (1967). Beyond the one controlled buy, 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, this Court held the conviction invalid.

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." *Id.* That is doubly true here. Unlike in *Gray*, 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 lawyers who filed the forfeiture complaint have a personal financial stake. *Id.* §§ 34-24-1-4(d)(3)(A), -8. 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). For nearly 30 years, in fact, 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; *see also* Appellant's App. pp. 10-11 (complaint). There is thus every reason to conclude that the forfeiture here is "out of accord with the penal goals of retribution and deterrence." *See Timbs*, 139 S. Ct. at 689 (citation omitted).

Second, Timbs's wrongdoing caused no harm, which also bears on the gravity of his offense. "[T]he only evidence before the trial court was that Timbs sold heroin twice, both times as a result of controlled buys." *Timbs*, 62 N.E.3d at 477. The sales were isolated incidents. And with the police his only customer, Timbs harmed no one. He even reimbursed the taskforce its buy money. Appellee's App. Vol. I p. 19.

With no harms to cite, the State instead asserts that drug crimes writ large are "very serious." Oral Arg. 5:35-5:36 (Ind. Mar. 23, 2017). Yet "[t]he culpability of the offender should be examined specifically, rather than examining the gravity of the crime in the abstract." *United States v. $100,348.00*, 354 F.3d 1110, 1123 (9th Cir. 2004) (citation omitted). "[G]eneric considerations of harm," after all, are "largely unhelpful," since "all crimes have a negative impact in some general way to society." *1997 Chevrolet*, 160 A.3d at 190. In short, the trial court had it exactly right. "[T]he negative impact on our society of trafficking in illegal drugs" may be "substantial," Appellant's App. p. 15, but Timbs's personal culpability is not.

2. Confiscating Timbs's vehicle is a debilitating sanction.

At the same time, confiscating Timbs's vehicle is ruinously punitive. Not only was the vehicle's value "approximately four times the maximum permissible statutory fine," *Timbs*, 62 N.E.3d at 477, but Timbs's economic circumstances make the forfeiture particularly severe. One of the "great object[s]" of provisions like the Excessive Fines Clause is to guarantee that "[i]n no case could the offender be pushed absolutely to the wall." *United States v. Levesque*, 546 F.3d 78, 84 (1st Cir. 2008) (quoting William McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 287 (2d ed. 1914)). And while the Supreme Court has yet to decide whether "wealth or income are relevant to the proportionality determination," *Bajakajian*, 524 U.S. at 340 n.15, the Court has strongly suggested that they are, *see, e.g.*, *Timbs*, 139 S. Ct. at 688 ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . ." (quoting 4 William Blackstone, *Commentaries* *372)). Hence, it is "entirely appropriate" to consider the property owner's economic circumstances in weighing a forfeiture's severity. *1997 Chevrolet*, 160 A.3d at 189; *see also 633 E. 640 N.*, 994 P.2d at 1260.

Timbs's circumstances highlight the forfeiture's excessiveness here. Timbs is poor. At the time of his sentencing—shortly before the trial court's ruling in this case—he had "no current income" and no "money saved." Appellee's App. Vol. II p. 26. He lived (and still lives) with an aunt who suffers serious health problems. *See id.* p. 25. And during the nearly four years this appeal has been pending, his financial circumstances have improved only marginally. He could not even afford a lawyer when he was last before this Court. *See* Mot. to Withdraw ¶¶ 1-2 (Ind. Mar. 8, 2017); *see also Timbs*, 62 N.E.3d at 476 (noting the "financial burdens [that] had already been imposed on Timbs when he pleaded guilty").

For people on such shaky economic footing, losing their primary means of transportation is 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. Put simply, forfeitures like this one strip low-level offenders of property that is often vital to earning a living, to recovering from addiction, and to reintegrating into their communities.

The State's first oral argument before this Court put the issue into sharp relief. If only Timbs had been arrested in a Bentley, or a Rolls-Royce, or a private jet—the State contended—he might have had a winning excessiveness defense. Oral Arg. 11:57-12:45, 27:38-28:10 (Ind. Mar. 23, 2017); Appellant's Ct. App. Br. 16. But the Excessive Fines Clause protects the poorest

among us as well as the richest; "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). And it is in part *because* Timbs cannot afford a Bentley, or a Rolls-Royce, or a Gulfstream that stripping him of his vehicle is so disproportional to his comparatively minor offense.

3. The maximum statutory fine confirms the General Assembly's skepticism of outsized economic sanctions.

The maximum statutory fine set by the General Assembly only reinforces the mismatch between Timbs's crime and his punishment. *See Bajakajian*, 524 U.S. at 339 n.14. The default maximum fine for any felony in Indiana—from odometer-fraud to murder—is $10,000. I.C. §§ 35-43-6.5-2(b), 35-50-2-3(a), 35-50-2-7(b). That relatively modest cap reflects the General Assembly's skepticism of crippling economic sanctions. It also accords with 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. *Id.* § 35-50-5-2. So 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, the Court of Appeals was therefore correct to view as "instructive" the disparity between the $10,000 maximum potential fine and the forfeiture of Timbs's vehicle.[3] Equally telling is the mismatch between the forfeiture and "the actual fines and penalties

[3] Like the trial court, the Court of Appeals estimated the value of Timbs's vehicle at "approximately four times the maximum permissible statutory fine," or around $40,000. *Timbs*, 62 N.E.3d at 477; *see also id.* at 476 ("[T]he evidence before the trial court was that Timbs's vehicle was worth approximately four times the amount of the maximum fine." (emphasis omitted)); Appellant's App. p. 15-16 ¶ 9 (trial-court judgment). The State has disclaimed any challenge to the trial court's factual findings. Oral Arg. 10:54-10:56 (Ind. Mar. 23, 2017).

imposed" in Timbs's criminal case. *633 E. 640 N.*, 994 P.2d at 1261; *1997 Chevrolet*, 160 A.3d at 190 (similar); Appellant's Ct. App. Reply Br. 9 (conceding that "the limited likelihood of $10,000 fine is also a proper consideration"). The criminal court concluded that Indiana's punitive, rehabilitative, and deterrent goals could be served through a combination of house arrest, probation, and drug treatment. Appellee's App. Vol. I pp. 19-20. The court imposed no criminal fine at all. *Id*. And even accounting for the $1,200 assessed in fees and costs, the value of Timbs's vehicle still outstrips that sum by a factor of more than 30.

These discrepancies underscore the severity of this forfeiture as compared to the gravity of Timbs's offense. Indeed, confiscating Timbs's vehicle is a far more arbitrary punishment than a purely pecuniary fine would have been. As with other aspects of criminal sentencing, pecuniary fines may be tailored to the defendant's culpability and means. On one occasion, for example, the Court of Appeals invalidated as "clearly, plainly, and obviously unreasonable" a $10,000 fine imposed on someone who—like Timbs—sold a few grams of drugs to an informant. *Like v. State*, 760 N.E.2d 1188, 1192-93 (Ind. Ct. App. 2002); *see also* I.C. § 35-38-1-18(a)(3), (d)(3) (providing for payment of fines in installments and through garnishment). In civil-forfeiture cases, by contrast, the courts have no statutory discretion to calibrate the sanction to the offense, and the end-result is "wild-card" forfeitures like this one. David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 Nev. L.J. 1, 42 (2012). Stripping Timbs of his vehicle bears no "relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. It is a deeply punitive sanction and, on this record, it is one the Excessive Fines Clause does not countenance.

C. The State's attempt to magnify Timbs's criminality confirms the injustice of this case.

At the first oral argument, the State's concessions fortified many of the points discussed above. The State conceded that "most of what is occurring here is punitive." Oral Arg. 15:01-15:04 (Ind. Mar. 23, 2017). It conceded that the nexus between drug-dealing and Timbs's vehicle was negligible. *Id.* 14:55-15:00. It conceded that "there was some disproportional[ity] here" (though "not grossly disproportional"). *Id.* 5:01-5:03. It tried to walk back that concession seconds later (*id.* 5:03-5:18) before again volunteering 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. It conceded that Timbs "might not be the worst offender one can imagine." *Id.* 14:00-14:04. And it conceded that things would be different if Timbs had been arrested in a luxury car rather than in the "average" vehicle he happens to own. *Id.* 11:57-12:45.

Even so, the State stands firmly behind its campaign to forfeit Timbs's property. Notably, though, it has largely abandoned the basis on which it sought forfeiture originally: the first controlled buy. *See* p. 11 n.2, above. When asked "where's the error" in the trial judge's ruling, the State could cite only a single perceived mistake: "his unwillingness to consider *the other crimes*." Oral Arg. 10:58-11:18 (Ind. Mar. 23, 2017) (emphasis added); *see also id.* 10:05-10:18 ("[Chief Justice]: What did the trial court judge not do in its order that you think he should have done for this to withstand *de novo* constitutional scrutiny? [State's Counsel]: Well, I don't think he really considered the other acts."). Confiscating Timbs's vehicle based on its link to the one controlled buy might be excessive, the State appears to agree. But because Timbs also used the vehicle for what the State styles "heroin trafficking," Appellant's Ct. App. Br. 8-9, the State contends that those "other crimes" tip the balance in its favor, Oral Arg. 10:58-11:18 (Ind. Mar. 23, 2017).

This argument lacks merit. To start, the Court of Appeals undertook precisely the analysis the State requested and weighed every item of evidence the State cited. The court, to be sure, voiced concern at the marked lack of factual allegations in the State's complaint. *Timbs*, 62 N.E.3d at 476-77 & n.6. Yet it nevertheless "consider[ed]" all the evidence the State cited on appeal. *Id.* at 477. It reviewed the record *de novo*. *Id.* at 475. And with the entire record before it, it affirmed the excessiveness of forfeiting Timbs's vehicle. If anything, the lower courts misread the record *in the State's favor* when they found that the vehicle "was used . . . to transport the heroin back to Marion." Appellant's App. p. 14 (trial-court judgment); *Timbs*, 62 N.E.3d at 477. In fact, the record says vanishingly little about whether and how often Timbs drove heroin back to Marion, as opposed to using the drugs immediately upon purchasing them. *See, e.g.*, Hr. Tr. 59:12-59:14 (Oct. 14, 2015) ([Defense Counsel]: "[N]obody ever asked him 'did you buy the drugs and bring them back to Marion?' That was not into evidence.").

In any event, the State's attempt to recast Timbs's heroin addiction as "heroin trafficking" only underlines the injustice of this case. Timbs was an addict. He got clean. He relapsed. He bought heroin to feed his personal addiction. And no matter how often the State recites the word "trafficking"—a dozen times in its Court of Appeals briefing alone—the fact remains that it has spent the past six years fighting to strip a recovering addict of his car. *See, e.g.*, *Timbs*, 62 N.E.3d at 477 ("The remaining times he transported heroin, it was apparently for his own use.").

That makes the State's last-ditch defense all the more remarkable: Timbs's addiction, the State posits, makes its case *more* righteous, not less. Because Timbs was an addict, the State argues that it could have charged him with hundreds of drug-use counts, yielding "aggregate fines in excess of $250,000." Appellant's Ct. App. Br. 13. But that, of course, would have been

excessive too; indeed, courts nationwide have used the Excessive Fines Clause to invalidate forfeitures that are predicated on drug use alone. *See, e.g.*, *State v. A House*, 886 P.2d 534, 541-42 (Utah 1994); *United States v. 2000 Dodge Caravan*, No. 2-cv-2, 2005 WL 8167033, at *3 (D. Neb. Apr. 5, 2005) ("From all appearances, [the car owner's] only motive was the satisfaction of her drug addiction."). The State's argument also turns its back on the guiding light 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 destitute addicts hundreds of thousands of dollars. Quite the opposite; statewide, public servants dedicate their careers to rehabilitating people like Tyson Timbs. The General Assembly has authorized drug courts. I.C. §§ 33-23-16-1 *et seq.* Agencies sponsor opioid summits. *See* NextLevel Recovery Indiana, *Statewide Opioid Summit*, http://tinyurl.com/y6nswraj. Across Indiana—as one official recently remarked—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/y5xdtokm.

The State's efforts to amplify Timbs's culpability thus spotlight how far it has strayed from its first duty: to see that justice is done. The State has had every opportunity to rethink this case—in 2013, when officers induced Timbs to begin selling drugs; in 2015, when the trial court ordered the State to return his vehicle "immediately"; in 2016, when the Court of Appeals issued its opinion; even earlier this year, when the U.S. Supreme Court remanded for further proceedings. This case has offered countless opportunities for "a fresh exercise of prosecutorial discretion." *United States v. Abair*, 746 F.3d 260, 272 n.2 (7th Cir. 2014) (Sykes, J., dissenting). The State has blown past them all. Over a half-decade into litigation, this case encapsulates why the Excessive Fines Clause is a bedrock check on "the power of those entrusted with the

criminal-law function of government." *Timbs*, 139 S. Ct. at 687 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989)). The judgment below should be affirmed.

CONCLUSION

For the reasons set forth above, the trial court's judgment should be affirmed. Alternatively, the Court may wish to vacate its order granting transfer, deny the State's transfer petition, and reinstate the opinion of the Court of Appeals.

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Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7,000 words, in accordance with this Court's March 27, 2019 order.

/s/ J. Lee McNeely
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CERTIFICATE OF SERVICE

I certify that on May 24, 2019, 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 May 24, 2019:

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