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

---

SUPPLEMENTAL RESPONSE BRIEF FOR APPELLEES

J. Lee McNeely, Atty. No. 9542-73
Cynthia A. Bedrick, Atty. No. 21547-49
Scott A. Milkey, Atty. No. 32070-49
MCNEELY STEPHENSON
2150 Intelliplex Drive, Suite 100
Shelbyville, IN 46176
Phone: (317) 825-5110
Fax: (317) 825-5109
E-mail: J.L.McNeely@msth.com
Cynthia.A.Bedrick@msth.com
Scott.A.Milkey@msth.com

Samuel B. Gedge, Temporary Admission No. 5425-95-TA
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Fax: (703) 682-9321
E-mail: sgedge@ij.org

Wesley Hottot, Temporary Admission No. 5426-95-TA
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, WA 98101
Phone: (206) 957-1300
Fax: (206) 957-1301
E-mail: whottot@ij.org

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

ARGUMENT 6

Forfeiting Tyson Timbs's vehicle violates the Excessive Fines Clause 6

A. A forfeiture like this one is unconstitutional if grossly disproportional to the gravity of the underlying offense 7

1. The State's objection to a proportionality standard contradicts its Court of Appeals briefs, its transfer petition, and its first oral argument 7

2. The State's objection to a proportionality standard conflicts with the weight of authority 9

B. The record confirms that forfeiting Timbs's vehicle is an excessive fine 11

1. Timbs's vehicle was incidental to a single controlled buy 12

2. Forfeiting Timbs's vehicle is grossly disproportional to the gravity of his offense 14

CONCLUSION 17

WORD COUNT CERTIFICATE 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. United States,
509 U.S. 602 (1993) 9, 12

Batchelor v. State,
119 N.E.3d 550 (Ind. 2019) 7

Commonwealth v. 1997 Chevrolet,
160 A.3d 153 (Pa. 2017) 9, 12, 15

Ex parte Kelley,
766 So.2d 837 (Ala. 1999) 9

Hughley v. State,
15 N.E.3d 1000 (Ind. 2014) 8

Gonzalez v. State,
74 N.E.3d 1228 (Ind. Ct. App. 2017) 13

Johnson v. State,
830 N.E.2d 895 (Ind. 2005) 14

Livingston v. State,
113 N.E.3d 611 (Ind. 2018) 15

Marion-Adams Sch. Corp. v. Boone,
840 N.E.2d 462 (Ind. Ct. App. 2006) 12

Medlock v. 1985 Jeep Cherokee,
470 S.E.2d 373 (S.C. 1996) 10

Miller v. 2001 Pontiac Aztek,
669 N.W.2d 893 (Minn. 2003) 9

State v. 633 E. 640 N.,
994 P.2d 1254 (Utah 2000) 9, 14, 15

State v. Timbs,
62 N.E.3d 472 (Ind. Ct. App. 2016) 13

United States v. 25 Sandra Court,
135 F.3d 462 (7th Cir. 1998) 9

United States v. 45 Claremont St.,
395 F.3d 1 (1st Cir. 2004) 9

United States v. 300 Blue Heron Farm Lane,
115 F. Supp. 2d 525 (D. Md. 2000) 10

United States v. 415 E. Mitchell Ave.,
149 F.3d 472 (6th Cir. 1998) 9

United States v. 817 N.E. 29th Drive,
175 F.3d 1304 (11th Cir. 1999) 9

United States v. Ahmad,
213 F.3d 805 (4th Cir. 2000) 10

United States v. Bajakajian,
524 U.S. 321 (1998) 7, 10

United States v. Brunk,
11 F. App'x 147 (4th Cir. 2001) 10

United States v. Chandler,
36 F.3d 358 (4th Cir. 1994) 9

United States v. Dodge Caravan,
387 F.3d 758 (8th Cir. 2004) 9, 13

United States v. Dodge Caravan,
No. 2-cv-2, 2005 WL 8167033 (D. Neb. Apr. 5, 2005) 13

United States v. Ferro,
681 F.3d 1105 (9th Cir. 2012) 9

United States v. The Louisa Barbara,
26 F. Cas. 1000 (E.D. Pa. 1833) 11

United States v. Wagoner Cty. Real Estate,
278 F.3d 1091 (10th 2002) 9

United States v. Wild,
47 F.3d 669 (4th Cir. 1995) 10

von Hofe v. United States,
492 F.3d 175 (2d Cir. 2007) 9

Yskamp v. DEA,
163 F.3d 767 (3d Cir. 1998)..... 9

STATUTORY PROVISIONS

Ind. Code § 35-50-1-2(d)(1) 15

OTHER AUTHORITIES

The National Gazette, Feb. 13, 1833 11

Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. (forthcoming 2019),
https://tinyurl.com/yxbl4h9b..... 11

ARGUMENT

Forfeiting Tyson Timbs's vehicle violates the Excessive Fines Clause.

The State's brief confirms the correctness of the judgment below. Tyson Timbs—at the time, an opioid addict—sold a small amount of heroin to law enforcement. He sold the drugs only at the behest of law enforcement. He was prosecuted. He pleaded guilty, and he entered recovery. Appellees' Br. 9-11.

Now years later, the State remains more interested in Timbs's car. And to justify this civil-forfeiture case, it inflates his culpability beyond recognition. In the State's telling, Timbs's addiction becomes "a staggering number of drug crimes." Appellant's Br. 29. Buying drugs to feed that addiction becomes "traffic[king]." *Id.* 10. On the undisputed record, however, the lower courts were right to hold that forfeiting Timbs's vehicle is excessive. The link between the vehicle and Timbs's drug sales was negligible; put differently, the vehicle was not an "instrumentality" of his crime. The forfeiture is also "grossly disproportional" to his wrongdoing.

Perhaps because the forfeiture is so disproportional, the State spends most of its brief debuting a new argument: The Excessive Fines Clause "simply does not impose any proportionality requirement on *in rem* instrumentality forfeitures." *Id.* 10-11. In the State's view, all that matters is a link between property and crime; proportionality is beside the point. This argument contradicts the State's Court of Appeals briefs. And its petition to transfer. And its first oral argument. It also conflicts with precedent nationwide. In the past quarter-century, eight federal courts of appeals and many state high courts have applied some form of proportionality review to forfeitures like this one.

Applying the correct standard, there is no support for the State's contention that the lower courts erred. On whether Timbs's vehicle was an instrumentality of his crime, the State says it

"clearly" was. But the record undercuts that claim. The State skirts the record again on proportionality, relying instead on theoretical punishments for theoretical offenders. That could not be further from the fact-based inquiry the Excessive Fines Clause demands. If the Court chooses to reach the merits of the State's appeal—and vacating transfer may be the better course (Appellees' Br. 12-15)—the judgment below should be affirmed.

A. A forfeiture like this one is unconstitutional if grossly disproportional to the gravity of the underlying offense.

As detailed in Timbs's opening brief (at 18), the Excessive Fines Clause standard entails two main inquiries: whether the property to be forfeited was "instrumental" to the underlying crime and, if so, whether the forfeiture is grossly disproportional to the crime's gravity. As its new line of defense, the State jettisons proportionality. In the State's view, the Excessive Fines Clause "simply does not impose any proportionality requirement on *in rem* instrumentality forfeitures." Appellant's Br. 10-11. If there is a link between the property and a crime, the State argues, the property becomes an "instrumentality" of the crime and the Clause is "*necessarily* satisfie[d]." *Id.* 27; *see also* Oral Arg. 43-45, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (arguing that a Bugatti could be forfeited as the "instrumentality" of a traffic infraction), https://tinyurl.com/y7yvvhfl. That contention is both barred and meritless.

1. The State's objection to a proportionality standard contradicts its Court of Appeals briefs, its transfer petition, and its first oral argument.

Procedurally, the State's seismic shift in argument raises serious questions of waiver and invited error. *See Batchelor v. State*, 119 N.E.3d 550, 556-58 (Ind. 2019). Before the Court of Appeals, the State declared "the principle of proportionality" the "touchstone" of the Excessive Fines Clause analysis. Appellant's Ct. App. Br. 14 (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). The State then petitioned this Court for transfer to "provide state-specific

guidance for applying the Eighth Amendment's grossly disproportionate standard." Pet. Trans. 14. And the State adhered to the proportionality standard at its first argument in this Court:

> [Justice David]: Is it the State's position that there is essentially no limitation on the amount of forfeiture? What if any limitations would you articulate, that the State would be willing to advocate exist?
>
> [State's Counsel]: Well, the limitation is set by the United States Supreme Court in *Bajakajian* -- and it's grossly disproportionate is the standard, that the punitive nature of the forfeiture cannot be grossly disproportionate to the gravity of the crime, and *Bajakajian* --
>
> [Justice David]: And you're fine with that? The State is not advocating for anything any different than that? Is that --
>
> [State's Counsel]: Well, that's set by the United States Supreme Court, so I think that's binding upon everyone.

Oral Arg. 1:40-2:30 (Ind. Mar. 23, 2017), https://tinyurl.com/y8slhl3p.

Now, six years in, the State has reversed course: Two-thirds of its brief argue that "the Excessive Fines Clause simply does not impose any proportionality requirement on *in rem* instrumentality forfeitures." Appellant's Br. 10-11. That change of heart is unfair to the Court of Appeals, which took the State's original arguments at face value. It is unfair to this Court, which granted review in response to the State's plea for "guidance" on the "grossly disproportionate standard." Pet. Trans. 14. It is also unfair to Timbs. Forfeitures like this one "have significant criminal and punitive characteristics," which bind the State to act "within both the letter and spirit of the law." *Hughley v. State*, 15 N.E.3d 1000, 1005 (Ind. 2014) (citation omitted). An about-face on something as basic as the correct legal standard breaks with the letter and spirit of orderly appellate review. It conflicts with this Court's rules on waiver and invited error. And it calls even more into question whether the Court should retain jurisdiction over this appeal.

2. The State's objection to a proportionality standard conflicts with the weight of authority.

On the merits, the State's new standard contravenes precedent nationwide. In the State's view, the Excessive Fines Clause "does not impose any proportionality requirement" on what the State terms "*in rem* instrumentality forfeitures." Appellant's Br. 11. Yet every federal court of appeals to have confronted the issue holds differently. While their precise analyses may differ, the Courts of Appeals for the First, Second, Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits all hold that some form of proportionality review applies to forfeitures like this one.[1] So too do many state high courts. *See, e.g.*, *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 186 (Pa. 2017); *Miller v. 2001 Pontiac Aztek*, 669 N.W.2d 893, 896 n.2 (Minn. 2003); *State v. 633 E. 640 N.*, 994 P.2d 1254, 1257 (Utah 2000); *Ex parte Kelley*, 766 So.2d 837, 840 (Ala. 1999).

The State acknowledges none of this. It resorts instead to a one-Justice concurrence, in *Austin v. United States*, 509 U.S. 602 (1993), and to a Fourth Circuit decision from 1994, *United States v. Chandler*, 36 F.3d 358. Appellant's Br. 11, 26. These opinions, the State asserts, reasoned correctly that disproportionality does not affect excessiveness. Yet Justice Scalia's *Austin* concurrence is not the law. *See generally United States v. 25 Sandra Ct.*, 135 F.3d 462, 465-66 (7th Cir. 1998) ("One can easily imagine cases in which Justice Scalia's freestanding instrumentality approach could lead to results that would seem grossly unfair."). And the Fourth Circuit has all but repudiated *Chandler*. Only five months after issuing it, the court

[1] *United States v. 45 Claremont St.*, 395 F.3d 1, 6 (1st Cir. 2004) ("We . . . join almost all of our sister circuits in deciding that the punitive nature of civil *in rem* forfeitures under § 881(a)(7) warrants application of the 'grossly disproportional' standard to determine whether a forfeiture violates the Excessive Fines Clause."); *von Hofe v. United States*, 492 F.3d 175, 184 (2d Cir. 2007); *Yskamp v. DEA*, 163 F.3d 767, 773 (3d Cir. 1998); *United States v. 415 E. Mitchell Ave.*, 149 F.3d 472, 477 (6th Cir. 1998); *United States v. Dodge Caravan*, 387 F.3d 758, 762-63 (8th Cir. 2004); *United States v. Ferro*, 681 F.3d 1105, 1115 (9th Cir. 2012); *United States v. Wagoner Cty. Real Estate*, 278 F.3d 1091, 1100 n.7, 1101 n.8 (10th Cir. 2002); *United States v. 817 N.E. 29th Dr.*, 175 F.3d 1304, 1309-10 (11th Cir. 1999).

acknowledged that *Chandler* "stands alone among the circuits" in holding that "proportionality is not to be considered in determining whether an *in rem* forfeiture amounts to an excessive fine." *United States v. Wild*, 47 F.3d 669, 673 n.10 (4th Cir. 1995). In 2001, the court splintered on whether to address *Chandler*'s continuing force. *United States v. Brunk*, 11 F. App'x 147. A year earlier, another panel observed that the "'grossly disproportional' analysis applies when determining whether any punitive forfeiture—civil or criminal—is excessive." *United States v. Ahmad*, 213 F.3d 805, 815 (4th Cir. 2000); *see also United States v. 300 Blue Heron Farm Lane*, 115 F. Supp. 2d 525, 527 (D. Md. 2000) ("[T]he *Chandler* test effectively has been overruled by the Supreme Court's recent decision in [*Bajakajian*]."). In short, the State's standard is not the law in the Fourth Circuit or elsewhere.[2]

The State also claims (Br. 13) that *in rem* forfeitures were "fundamentally distinct from *in personam* penalties" in centuries past and so should be exempt from proportionality review today. But whatever might be said historically, modern "forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture." *Bajakajian*, 524 U.S. at 331 n.6. And—in the Fourth Circuit's words—the Court in *Bajakajian* "nowhere suggested that its 'gross disproportionality' test did not apply to civil in rem forfeitures that are punitive in nature." *Ahmad*, 213 F.3d at 815 n.4; *see also id.* ("Indeed, the Court implied the contrary[.]"). Having conceded that "most of what is occurring here is punitive," Oral Arg. 14:54-15:06 (Ind. Mar. 23, 2017), the State is alone in claiming power to impose grossly disproportional forfeitures.

[2] The South Carolina Supreme Court may adhere to *Chandler*'s "'instrumentality' test." *Medlock v. 1985 Jeep Cherokee*, 470 S.E.2d 373, 377 (1996). We know of no other court that does so.

In one respect, at least, the State's historical excursus is instructive. As it did at the U.S. Supreme Court, the State singles out the case of *The Louisa Barbara*, a ship confiscated in the 1830s for carrying a few too many passengers. *United States v. The Louisa Barbara*, 26 F. Cas. 1000, 1001 (E.D. Pa. 1833); Appellant's Br. 16-17. The decision's relevance here is negligible, not least because the Eighth Amendment appears nowhere in it. The case's aftermath, though, is a lesson in sound judgment: Shortly after the district court's ruling, higher-ups in the federal government ordered *The Louisa Barbara* "liberated" and restored to its captain. The National Gazette, Feb. 13, 1833, at 2; *see generally* Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. (forthcoming 2019) (analyzing Treasury Secretaries' remission practices from 1789 to 1807 and noting that they offer "good reason to reject assertions—like those made by the state of Indiana this past term in *Timbs*—that there is no historical basis for subjecting civil forfeiture to the [Excessive Fines] Clause's proportionality requirement"), https://tinyurl.com/yxbl4h9b.

B. The record confirms that forfeiting Timbs's vehicle is an excessive fine.

On this record, the lower courts correctly held that forfeiting Timbs's vehicle violates the Excessive Fines Clause. The standard entails an inquiry not just into the link between the property and the predicate crime, but also into the forfeiture's severity and the gravity of the underlying offense. On all points, the evidence here is dispositive. The record confirms that Timbs's vehicle lacked a substantial link to drug-dealing. Appellees' Br. 16-17. The record confirms that Timbs's culpability was modest. *Id.* 18-21. The record also confirms that forfeiting his vehicle is an excessively punitive economic sanction. *Id.* 21-27; *see generally* Br. Amici Curiae ACLU et al. 16-33.

For the State, the record is an afterthought. The State overlooks the evidence showing the vehicle's tenuous link to drug-dealing. It discounts the record again in claiming that the forfeiture is proportional, and its few remaining points are meritless.

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

In weighing a forfeiture's excessiveness, the "threshold inquiry" is whether the government has shown a close enough "relationship between the property to be forfeited and the underlying criminal activity." *1997 Chevrolet*, 160 A.3d at 185. Here—as the State conceded at the first argument—the predicate offense was a single controlled buy. *See* Appellees' Br. 11 n.2. It was induced by undercover officers. *Id.* 9-10. And the vehicle's involvement was an "isolated event." *See 1997 Chevrolet*, 160 A.3d at 185. Even if "connected to a crime," then, the vehicle was "not significantly used in the crime." *See id.*

The State has no real answer. With pages on the history of "instrumentality forfeitures," Appellant's Br. 10-11, 12-27, the State dedicates one paragraph to the forfeiture here. It claims that Timbs's vehicle "clearly" meets the "traditional definition of 'instrumentality.'" *Id.* 27. But even under Justice Scalia's concurrence in *Austin*—the State's gold standard—the instrumentality test would not be met. For Justice Scalia, the paradigmatic excessive forfeiture would be of a "building . . . in which an isolated drug sale happens to occur." 509 U.S. at 627-28. This case is similar; much like Justice Scalia's building, Timbs's vehicle had only a happenstance link to one drug sale. *See* Appellees' Br. 17.

The State also suggests (Br. 27) that Timbs's vehicle may have been an "instrumentality" of transporting drugs for his personal use, even if it were not an instrumentality of selling drugs. But as Timbs's opening brief explains (at 26), the record says little about whether and how often Timbs transported heroin in his vehicle, as opposed to using the drugs immediately upon purchase. *Cf. Marion-Adams Sch. Corp. v. Boone*, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006)

("[T]he appellant bears the burden of showing reversible error by the record, as all presumptions are in favor of the trial court's judgment."). And having conceded that this case was predicated on Timbs's dealing offense (*see* Appellees' Br. 11 n.2), the State's pivot to his addiction raises still more procedural questions. *State v. Timbs*, 62 N.E.3d 472, 477 (Ind. Ct. App. 2016) ("If the State wished to seek forfeiture of the Land Rover based on Timbs's other criminal acts, it should have done so more clearly in its forfeiture complaint."). In fact, this appears to be a recurring problem, with the State routinely filing boilerplate forfeiture complaints and trying to reverse-engineer the factual basis later. In 2017, for example, the Court of Appeals cited a complaint materially identical to the one here—filed by the same firm—and remarked that "[t]he State did not move to amend the complaint of forfeiture, make an opening statement, or otherwise specify what crime [the defendant] allegedly facilitated with his currency before the evidence concluded." *Gonzalez v. State*, 74 N.E.3d 1228, 1231 n.3 (Ind. Ct. App. 2017).

Of course, all this distracts from a more obvious point: Even if the State had shown that Timbs's vehicle was an instrumentality of his addiction, the forfeiture still would be grossly disproportional. *See* pages 14-16, below. The State's own authority hammers this point home. The State cites Judge Colloton's separate opinion in *United States v. Dodge Caravan*, 387 F.3d 758 (8th Cir. 2004), for the principle that "the actual means" by which a crime occurs can always be confiscated. Appellant's Br. 27-28. Yet not only was Judge Colloton writing in dissent on that issue, but the State overlooks the case's outcome: On remand, the district court held that the forfeiture—of an addict's $14,000 minivan—"would violate the Eighth Amendment's excessive fines clause." *United States v. Dodge Caravan*, No. 2-cv-2, 2005 WL 8167033, at *3 (D. Neb. Apr. 5, 2005). The lower courts were right to hold similarly here.

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

Like the question whether property is "instrumental" to a crime, evaluating proportionality is factually intensive. *See* Appellees' Br. 16. The record supports the trial court's judgment here. Timbs's culpability was comparatively minimal; he was merely an addict until undercover officers drew him into drug sales. *Id.* 9-10, 19, 25-27. At the same time, stripping someone like Timbs of his vehicle is an unusually harsh economic sanction. *Id.* 21-24. Given these circumstances, the lower courts were correct to hold that the State overstepped.

a. The State contends (Br. 32) that forfeiting Timbs's vehicle is "plainly not grossly disproportionate" because the maximum sentence for his dealing conviction included twenty years' imprisonment. But this benchmark—of the sort the State criticized in its transfer petition—has no obvious bearing on proportionality. Lawmakers set maximum sentences with an eye toward "the worst offenders and offenses." *Johnson v. State*, 830 N.E.2d 895, 898 (Ind. 2005). And as the State admits, 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). At base, the fact that someone more culpable than Timbs might earn a stiffer sentence than Timbs sheds no light on the questions that matter: How culpable is Timbs, and how harsh is this forfeiture?[3]

A better data point is the sentence actually imposed. That is why several courts look to "the actual sentence the defendant received as a result of the offense compared to the maximum punishments authorized." *State v. 633 E. 640 N.*, 994 P.2d 1254, 1268 (Utah 2000); *see generally* Br. Amici Curiae State of Utah et al. 7 ("The persuasive power of [out-of-state] decisions peaks

[3] By contrast, a forfeiture harsher than the maximum criminal fine signals that it is greater than the severest economic sanction set for even the worst offender. The Court of Appeals thus correctly viewed as "instructive" the mismatch between Indiana's $10,000 maximum fine and the forfeiture of Timbs's vehicle. Appellees' Br. 23-24.

when the decision comes from a State court of last resort."). Here, the prosecutor in Grant County agreed that Timbs's offenses warranted no prison time at all. Appellee's App. Vol. I pp. 14-16. The "actual penalty imposed" thus confirms that Timbs's culpability was at the low end of the spectrum. *1997 Chevrolet*, 160 A.3d at 190.

b. The State's index of penalties in other jurisdictions (Br. 33-34) also has little value. Like the theoretical sentences the State cites under Indiana law, the sentence a more culpable offender might receive in Arizona or Vermont "has limited relevance in determining proportionality" here. *See 633 E. 640 N.*, 994 P.2d at 1261. If anything, the State's thought-experiment strays even further from the relevant question: whether, on this record, confiscating Timbs's property is disproportional to his wrongdoing.

c. The State likewise errs in invoking Timbs's addiction. Because Timbs was an addict, the State contends that it could have charged him with countless possession offenses, yielding "hundreds of thousands of dollars of fines" and imprisonment "for the rest of his life." Appellant's Br. 29. By comparison, the State reasons, confiscating his vehicle is unobjectionable. That argument betrays a misunderstanding of how Indiana's other institutions address addiction. *See* Appellees' Br. 26-27. It is also incorrect. Indiana law almost certainly bars the consecutive sentences the State envisions. Ind. Code § 35-50-1-2(d)(1). Even without that barrier, life imprisonment would be unlikely for a trial court to impose and a textbook candidate for modification or vacatur on appeal. *See, e.g.*, *Livingston v. State*, 113 N.E.3d 611, 614 (Ind. 2018).

The State's argument also exposes the outer limits of its theory. Until he entered recovery, Timbs was like any other addict. So the State's reasoning would support confiscating not just Timbs's vehicle, but anything belonging to anyone fighting addiction. On the State's

theory, every addict in Indiana is courting life imprisonment. And since forfeiture beats prison, the sky's the limit when it comes to taking their property. That cannot be squared with the Excessive Fines Clause.

d. Lastly, the State salts its brief (at 10, 30) with references to Timbs's "burden." But the allocation of proof is largely beside the point. The State lost in the trial court and in the Court of Appeals. Now, the onus is on the State to show that those courts erred. It has not done so. Its main argument conflicts not only with nationwide precedent but with its own earlier position in this Court. The question on which it sought transfer is not implicated by the Court of Appeals' decision. Appellees' Br. 12-15. It concedes that this forfeiture is punitive. It concedes that Timbs might have a defense if he owned a Rolls-Royce. *Id.* 22. It has kept Timbs's property for six years. It has obliged him to defend his rights at every level of the American judiciary. And it has yet to even settle on the legal standard it thinks should apply. The judgment below should be affirmed.

CONCLUSION

For the foregoing reasons and those in Timbs's opening brief, 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.

Dated: June 14, 2019.

Respectfully submitted,

/s/ J. Lee McNeely
J. Lee McNeely, Atty. No. 9542-73
Cynthia A. Bedrick, Atty. No. 21547-49
Scott A. Milkey, Atty. No. 32070-49
MCNEELY STEPHENSON
2150 Intelliplex Drive, Suite 100
Shelbyville, IN 46176
Phone: (317) 825-5110
Fax: (317) 825-5109
E-mail: J.L.McNeely@msth.com
Cynthia.A.Bedrick@msth.com
Scott.A.Milkey@msth.com

Samuel B. Gedge, Temporary Admission No. 5425-95-TA
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Fax: (703) 682-9321
E-mail: sgedge@ij.org

Wesley Hottot, Temporary Admission No. 5426-95-TA
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, WA 98101
Phone: (206) 957-1300
Fax: (206) 957-1301
E-mail: whottot@ij.org

Attorneys for Appellees

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 3,500 words, in accordance with this Court's March 27, 2019 order.

/s/ J. Lee McNeely
J. Lee McNeely

CERTIFICATE OF SERVICE

I certify that on June 14, 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 June 14, 2019:

Thomas M. Fisher
Kian J. Hudson
Julia C. Payne
Justin F. Roebel
Aaron T. Craft
Chandra K. Hein
OFFICE OF THE INDIANA ATTORNEY GENERAL
302 W. Washington Street
IGCS - 5th Floor
Indianapolis, IN 46204

Brian J. Paul
Andrew D. Dettmer
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204

Richard Aaron Greenwalt
740 West Green Meadows Drive, Suite 320
Greenfield, IN 46140

Kevin S. Smith
10765 Lantern Road, Suite 201
Fishers, IN 46038

I further certify that on June 14, 2019, this document was served upon the following persons by first-class U.S. Mail, postage prepaid:

Joshua S. Lipshutz
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Thomas Q. Swanson
Daniel L. Chen
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105

/s/ J. Lee McNeely
J. Lee McNeely

MCNEELY STEPHENSON
2150 Intelliplex Drive, Suite 100
Shelbyville, IN 46176