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IN THE
SUPREME COURT OF INDIANA

Court of Appeals Case No. 19A-PL-1635

TERRY ABBOTT, *Respondent–Appellant*, v. STATE OF INDIANA, *Petitioner–Appellee*.	Appeal from the Elkhart Superior Court 3 Case No. 20D03-1506-PL-140 The Honorable Teresa L. Cataldo, Judge

RESPONDENT–APPELLANT'S OPPOSITION TO TRANSFER

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TABLE OF CONTENTS

Table of Authorities 3

Introduction 5

Background 5

A. Legal background 5

B. Facts and procedural history 6

Argument 10

I. The Court of Appeals faithfully applied the racketeer statute 11

II. The practical impact of the Court of Appeals' decision will be modest 14

III. If the Court elects to grant transfer and disagrees with the Court of Appeals' reasoning, the trial court's denial of appointed counsel should be reversed 17

Conclusion 19

Word Count Certificate 21

Certificate of Service 22

TABLE OF AUTHORITIES

Cases

Abbott v. State, 164 N.E.3d 736 (Ind. Ct. App. 2021) 5, 6, 7, 9, 10, 11, 12, 13, 14, 18, 19

Chan v. State, 969 N.E.2d 619 (Ind. Ct. App. 2012)..... 14

City of Indianapolis v. Armour, 946 N.E.2d 553 (Ind. 2011) 15

Coulter v. Caviness, 128 N.E.3d 541 (Ind. Ct. App. 2019)..... 12

Hughley v. State, 15 N.E.3d 1000 (Ind. 2014) 9, 19

Jackson v. State, 105 N.E.3d 1081 (Ind. 2018) 13

Schneiderman v. Costa, 172 A.D.3d 937 (N.Y. App. Div. 2019)..... 13

State v. Larkin, 100 N.E.3d 700 (Ind. 2018)..... 18

State v. Timbs, 134 N.E.3d 12 (Ind. 2019) 5, 19

Wayne Twp. v. Lutheran Hosp., 312 N.E.2d 120 (Ind. Ct. App. 1974) 15

Statutes

Ind. Code § 34-10-1-2..... 17

Ind. Code § 34-10-1-2(b) 9, 17

Ind. Code § 34-10-1-2(b)(2) 18

Ind. Code § 34-10-1-2(d)(2) 7, 18

Ind. Code §§ 34-24-1-1 *et seq.* 5–6, 11

Ind. Code §§ 34-24-2-1 *et seq.* 6

Ind. Code § 34-24-2-1(6) 11

Ind. Code § 34-24-2-2(d)..... 11

Ind. Code § 34-24-2-2(e) 11

Ind. Code § 34-24-2-4(a)(1)..... 17

Ind. Code § 34-24-2-4(c) 10, 11

Ind. Code § 34-24-2-4(f) 11

Ind. Code § 35-33-5-5 16

N.Y. C.P.L.R. 1312(4) 13

Ind. Pub. L. 47-2018, § 1 (eff. July 1, 2018) 17

Rules

Ind. Appellate Rule 57(H) 14

Ind. Evidence Rule 201(a)(1)(B) 15

Ind. Evidence Rule 201(a)(2)(C) 15

Ind. Evidence Rule 201(b)(5) 15

Ind. Evidence Rule 201(c)(2) 15

Other Authorities

24 Ind. Prac., Appellate Procedure § 13.1 (3d ed.) 14

Lisa Knepper et al., Inst. for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (3d ed. Dec. 2020), https://tinyurl.com/32kyckpj 13

INTRODUCTION

The question presented in this case is whether Indiana's racketeer statute permits civil-forfeiture defendants to make limited use of seized funds to hire counsel. The Court of Appeals held that it does, and its decision does not merit transfer. The decision is rooted "squarely" in the racketeer statute's text. *Abbott v. State*, 164 N.E.3d 736, 748 n.9 (Ind. Ct. App. 2021). Equally important, it will have minimal practical consequences. As the State has conceded, the decision "only has application to forfeiture actions brought under Indiana Code Chapter 34-24-2 [the racketeer statute]." Appellee's Pet. for Reh'g 13 (Ind. Ct. App. filed Mar. 15, 2021). And most forfeitures proceed under a different statute entirely—the general forfeiture statute, which "has no analogous provision allowing supervision of the funds by court order." Pet. 15. For this reason (and several others), the Court of Appeals' decision will not affect most forfeiture actions. The petition for transfer should thus be denied. If, however, the Court elects to grant transfer and disagrees with the Court of Appeals' analysis, the trial court's order denying Terry Abbott appointed counsel should be reversed.

BACKGROUND

A. Legal background

Civil forfeiture "is a powerful law-enforcement tool," *State v. Timbs*, 134 N.E.3d 12, 20 (Ind. 2019), and in Indiana, forfeiture typically proceeds under one of two statutes: under what the State calls the "general forfeiture statute" (codified at Ind. Code §§ 34-24-

1-1 *et seq.*) or under the "racketeer statute" (codified at I.C. §§ 34-24-2-1 *et seq.*). Statewide, forfeiture actions are most often brought under the general forfeiture statute, not the racketeer statute.

B. Facts and procedural history

1. In April 2015, Elkhart County police executed a search warrant at the home of Terry Abbott. They found drugs, several firearms, drug paraphernalia, and about $9,000 in cash. Abbott was arrested, charged with four felonies, convicted, and sentenced to 28 years' imprisonment.

2. Separately, the State filed this civil-forfeiture action to confiscate the firearms and the money. Unlike in most Indiana counties, the Elkhart County prosecutor's office appears to have a practice of filing its forfeiture complaints under both the general forfeiture statute (I.C. §§ 34-24-1-1 *et seq.*) and the racketeer statute (I.C. §§ 34-24-2-1 *et seq.*). The office followed that practice here, invoking the trial court's jurisdiction under both statutes. Appellee's App. Vol. II pp. 2–5. Having filed its two-count complaint, the State then proceeded exclusively on its racketeer count. *See, e.g.*, Appellee's Br. 15 (Ind. Ct. App. filed July 30, 2020) ("[T]he trial court's grant of forfeiture was specifically based on Section 34-24-2-2.").

At first, Abbott was represented by counsel. In late 2015, however, his lawyer withdrew, in part because Abbott had not paid him. *See Abbott*, 164 N.E.3d at 739–40. For the next five years, Abbott defended himself *pro se* from prison.

It wasn't an even match. The State, for example, let the case languish for three years—an issue the Court of Appeals would later flag as a potential due-process violation but one Abbott didn't know to raise. *See id.* at 740 n.2. Abbott also struggled to use even basic discovery tools. Beginning in October 2018, for instance, he began trying to subpoena basic information from the State's key witness. Three times, however, the trial court denied his efforts on technical grounds. Appellant's App. Vol. II p. 8–9, 11. "If the defendant is uncertain as to what proper documentation he needs to file," the court counseled in October, "he should seek the advice of an attorney licensed to practice in the State of Indiana." *Id.* at 8. A month later, the court denied Abbott's subpoena request again, noting that it "does not proceed on any document that is not properly signed." *Id.* at 9. In denying the subpoena request for a third time, in January 2019, the court again advised: "If [Abbott] is unsure of how to properly present documents to the court, he needs to contact an attorney licensed to practice in the State of Indiana." *Id.* at 11. (The court finally issued the subpoenas that February. *Id.* at 14.)

Unable to afford an attorney, Abbott moved for appointed counsel. *Id.* at 59–61. The trial court summarily denied the request. *Id.* at 14. In the court's view, "the defendant himself is the most qualified individual to investigate and present information as to why summary judgment is inappropriate and the court finds he has already done so in his response." *Id.* As another ground for denial, the court observed that Abbott's "likelihood of prevailing on the merits is slim." *Id.*; *see generally* I.C. § 34-10-1-2(d)(2) ("The court shall

deny an application made under section 1 of this chapter if the court determines . . . (2) The applicant is unlikely to prevail on the applicant's claim or defense."). As yet another ground, the court noted that Abbott "has in the past hired private counsel to represent himself in this matter." Appellant's App. Vol. II p. 14.

Soon after, the court granted summary judgment for the State. Abbott had offered evidence that most of his seized money was earned legally. For example, he submitted an affidavit affirming that the funds were "lawfully obtained" and "obtained by me in a legal manner." *Id.* at 34. He also submitted W-2 forms "show[ing] that I was gainfully employed for a significant period leading up to and at the time of my arrest." *Id*. at 33. But the trial court discounted his affidavit as "self-serving," deemed the State's evidence "overwhelming," and ruled for the government. *Id.* at 23, 27.[1]

3.a. Abbott appealed, raising both the denial-of-counsel issue and the trial court's merits judgment. Afforded only two hours per week (at most) in the prison's law library, he continued to struggle to comply with the courts' procedural requirements. *See, e.g.*, Mot. Accept Belated Br. and App. (Ind. Ct. App. filed May 28, 2020). He could not afford a transcript of trial-court proceedings. His brief and appendix were rejected repeatedly for technical defects. On at least one occasion, the prison library even mailed his filings to the wrong recipient. Mot. Return Documents (Ind. Ct. App. filed Apr. 8, 2020).

[1] Abbott disclaimed any interest in the seized firearms and in $11 of currency.

b. The Court of Appeals ultimately ruled in Abbott's favor. On the summary-judgment question, the panel held unanimously that Abbott had presented a triable fact issue on whether his money (or most of it) was subject to forfeiture. *Abbott*, 164 N.E.3d at 743. In doing so, the panel "express[ed] concern" that the trial court had favored the State's factual account in granting it summary judgment. *Id.*; *see also id.* ("We remind courts that 'weighing [evidence]—no matter how decisively the scales may seem to tip—[is] a matter for trial, not summary judgment.'" (alterations in original) (quoting *Hughley v. State*, 15 N.E.3d 1000, 1005–06 (Ind. 2014))).

On the question of appointed counsel, the panel majority held that Abbott was not entitled to appointed counsel under Indiana's indigency statute. The indigency statute gives courts discretion to appoint counsel when a party "does not have sufficient means to prosecute or defend the action." I.C. § 34-10-1-2(b). And in the panel majority's view, the $9,000 seized from Abbott made him financially ineligible for appointed counsel. Because "the cash is still Abbott's," the majority reasoned, "Abbott has the means to fund his own defense." 164 N.E.3d at 745. That disqualified him from appointed counsel under the indigency statute.

By the same token, the majority also held that Abbott could use at least some of the money to hire counsel privately. The majority took the State at its word that the racketeer statute "applies to this appeal." *Id.* at 747; *see also* Appellee's Br. 8 ("The State argued that the property was subject to forfeiture under Indiana Code Section 34-24-2-2 . . . .").

The majority noted that the racketeer statute "expressly provides" that seized property "'is considered to be in the custody of [law enforcement], subject only to order of the court.'" *Abbott*, 164 N.E.3d at 747 (alteration in original) (quoting I.C. § 34-24-2-4(c)). And, the majority reasoned, "[a]llowing this limited use of the *res* is such an order of the court, falling squarely within the statute." *Id.* at 748 n.9.

c. On the counsel issue, Judge Vaidik dissented. She agreed that the trial court properly denied Abbott counsel under the indigency statute (though because she thought him unlikely to prevail on the merits, not because of his financial status). *Id.* at 750. But she disagreed with the majority's view that Abbott could use his seized money to retain counsel. *Id.*

ARGUMENT

The State seeks transfer on the premise that the Court of Appeals "all but concede[d] that there is no basis in Indiana law" for its decision. Pet. 11. That is wrong; by its terms, the Court of Appeals' decision was based "squarely" on Indiana's racketeer statute. 164 N.E.3d at 748 n.9. For its part, the State barely acknowledges the Court of Appeals' analysis—much less refutes it. Nor does the State try to show that the court's decision implicates any of the usual considerations warranting transfer. For these reasons, transfer should be denied. If the Court elects to grant transfer and disagrees with the Court of Appeals' decision, however, the trial-court order denying Abbott counsel should be reversed.

I. The Court of Appeals faithfully applied the racketeer statute.

A. The Court of Appeals correctly determined that the racketeer statute "allow[s] [for] use of the *res* for the limited purpose of funding a defense to forfeiture." *Abbott*, 164 N.E.3d at 746. Unlike Indiana's general forfeiture statute (I.C. §§ 34-24-1-1 *et seq.*), the less-used racketeer statute sounds mainly in equity. Its chief remedies are injunctive, with courts authorized to "make any . . . order or judgment that the court considers appropriate." *Id.* § 34-24-2-1(6). The statute's forfeiture provisions are similarly flexible. If the State fails to timely file its complaint, property owners may "at any time" seek "replevin; foreclosure; or another appropriate remedy." *Id.* § 34-24-2-4(f) (numerals omitted). Likewise, the courts have latitude to act "with due provision for the rights of innocent persons." *Id.* § 34-24-2-2(e). They also have discretion to "specify the manner of disposition" of property once it is forfeited. *Id.* § 34-24-2-2(d).

Against this backdrop, the Court of Appeals applied the racketeer statute correctly. As the court observed, the statute provides that a seizing agency's custody of property is always "subject . . . to order of the court." *Id.* § 34-24-2-4(c). And "[a]llowing use of the *res*" to retain defense counsel is just such an order. *Abbott*, 164 N.E.3d at 747. That "limited use of the *res* . . . fall[s] squarely within the statute." *Id.* at 748 n.9; *see also id.* at 747.

B. Much like the dissenting opinion below, the State's transfer petition offers little response to the Court of Appeals' analysis. Instead, the State pivots to a different

statute entirely: Indiana's general forfeiture statute. Whatever might be said of the racketeer statute, the State asserts, the *general* forfeiture statute "has no analogous provision allowing supervision of the funds by court order." Pet. 15. But the powers conferred by the general forfeiture statute are beside the point because the State invoked (and, in moving for summary judgment, proceeded exclusively under) the racketeer statute. The State harnessed the courts' authority under the racketeer statute. Appellee's App. Vol. II pp. 2–3. It sought judgment under that statute alone. *Id.* at 70–73. On appeal, it defended its victory by insisting that "[t]he trial court's grant of forfeiture was specifically based on Section 34-24-2-2 [the racketeer statute]." Appellee's Br. 15. And the Court of Appeals took the State at its word: In resolving the questions before it, it construed the racketeer statute. *Abbott*, 164 N.E.3d at 743 n.5, 747; *cf. Coulter v. Caviness*, 128 N.E.3d 541, 546 (Ind. Ct. App. 2019) ("[T]he trial court granted summary judgment based solely on the state RICO statute, and, thus, our analysis will entail that statute only."). That should be the end of the matter. The Court of Appeals was right to focus on the statute the State had placed before it, and nowhere does the State's petition seriously dispute that the statutory language the Court of Appeals cited supports the result it reached. *See* Pet. 15–16.

Likewise without merit is the State's appeal to legislative intent. In the State's view, the General Assembly's "purpose" in enacting Section 34-24-2-4 must have been merely to authorize courts "to guarantee the security of the seized assets while in law enforcement custody." Pet. 16. But "[t]he 'best evidence' of [legislative] intent is the

statute's language," *Jackson v. State*, 105 N.E.3d 1081, 1087 (Ind. 2018) (citation omitted), and the State cites nothing in the racketeer statute's language to support its view. If anything, the statute as a whole shows an intent to give courts latitude to balance the interests of the State and property owners. *See* p. 11, above.

The State also asserts that the Court of Appeals' decision invites "all sorts of obvious problems"—from the prospect of a defendant's "dissipat[ing] the *res*" to a defendant's using funds for "non-legal debts." Pet. 16. The State's concerns are misplaced. The trial court has the power "to supervise expenditures from the *res*" to prevent precisely the sort of dissipation the State envisions. *Abbott*, 164 N.E.3d at 749. And the Court of Appeals cabined its decision to payments "for a lawyer, a transcript, and other expenses for . . . defense," *id.* at 739, meaning the State's "home mortgage" payments are obviously not covered, Pet. 16.[2]

Lastly, the State contends that the Court of Appeals "justif[ied] its holding as a matter of equity," thereby "all but conced[ing] that there is no basis in Indiana law" for its decision. Pet. 11. That, too, is incorrect. While the Court of Appeals "identified the

[2] The experience of other states reinforces that the State's concerns are overstated. New York, for example, authorizes the release of seized funds for "reasonable living expenses," "bona fide attorneys' fees," and other costs. N.Y. C.P.L.R. 1312(4); *see also Schneiderman v. Costa*, 172 A.D.3d 937 (N.Y. App. Div. 2019). Yet even with that far broader allowance, New York confiscates and forfeits an enormous amount of property. Lisa Knepper et al., Inst. for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* at 17 (3d ed. Dec. 2020) ("Looking at 2018, the year for which we have data from the most states, Florida, Texas, Illinois, California and New York used forfeiture most extensively."), https://tinyurl.com/32kyckpj.

inequities in this case," the court could not have been clearer that its end-result rested on the "positive law" of the racketeer statute's text. 164 N.E.3d at 747 n.8; *see also id.* at 748 n.9 ("Allowing this limited use of the *res* . . . fall[s] squarely within the statute."). Only by misreading the Court of Appeals' opinion can the State say the court "usurp[ed]" legislative prerogatives. Pet. 17 (citation omitted).

At base, "forfeitures are not favored in the law, and statutes authorizing forfeitures are strictly construed." *Chan v. State*, 969 N.E.2d 619, 621 (Ind. Ct. App. 2012) (Shepard, J.). The Court of Appeals faithfully construed the racketeer statute here, and its decision does not merit further review.

II. The practical impact of the Court of Appeals' decision will be modest.

Besides misinterpreting the Court of Appeals' decision, the State's petition is most notable for what it does *not* say: Nowhere does the State explain why this case warrants discretionary review. Ordinarily, transfer is reserved for "appeals that have broader impact on the development of Indiana law." 24 Ind. Prac., Appellate Procedure § 13.1 (3d ed.). Yet the State's petition says nothing about whether the Court of Appeals' decision meets any of this Court's principal considerations for transfer. Moreover, there are reasons to doubt that the case implicates any question of "great public importance" meriting further review. Ind. Appellate Rule 57(H)(4).

First, the Court of Appeals limited its decision to the racketeer statute alone. And empirically, most forfeiture actions in Indiana are prosecuted not under the racketeer

statute, but under the general forfeiture statute. Take Marion County. Of the roughly 260 forfeiture cases closed in that jurisdiction between April 2020 and April 2021, not one appears to have been brought under the racketeer statute. *See* Addendum.[3] (For reasons unexplained, Elkhart County, where this case arises, seems to favor filing its relatively few forfeiture actions under both statutes.) Put simply, the panel construed statutory language that "has no analog[y]" in the forfeiture statute the State most often uses. Pet. 15. For that reason alone, the precedential impact of the Court of Appeals' decision will likely be modest; as the State conceded in its rehearing petition, "[a]t most, th[e] Court's holding only has application to forfeiture actions brought under Indiana Code Chapter 34-24-2." Appellee's Pet. for Reh'g 13.

Second, most forfeiture cases—regardless of their statutory basis—never reach the stage where defense lawyers become an issue. Consider the 261 forfeiture cases noted above from Marion County. Of those 261, 154 ended in default judgments. And of the 94 where a defendant appeared, in only 20 did we identify a defendant who appeared *pro se*—only 20, that is, where a defendant might potentially have needed access to seized property to hire counsel. (In almost all of those, moreover, the State agreed to settle.)

[3] This information is subject to judicial notice, Ind. Evidence Rule 201(a)(1)(B), (a)(2)(C), (b)(5), and Abbott asks that judicial notice be taken, *id.* 201(c)(2); *see also City of Indianapolis v. Armour*, 946 N.E.2d 553, 562 n.10 (Ind. 2011), *aff'd*, 556 U.S. 673 (2012); *Wayne Twp. v. Lutheran Hosp.*, 312 N.E.2d 120, 122 n.2 (Ind. Ct. App. 1974).

Third, the State's petition concedes that other statutes may prevent seized property in "many" cases from being released. Pet. 14. The State emphasizes that "in many—likely most—cases, use of the *res* to fund a forfeiture defense would violate Indiana Code Section 35-33-5-5 which controls property seized in relation to ongoing criminal prosecutions." *Id.* While a parallel criminal case is pending, in other words, the State maintains that "the forfeiture court would have no authority to dispose of the property." *Id.* at 15. In this way, the State's own petition confirms the narrowness of the Court of Appeals' decision: In the State's telling, "the Court of Appeals' holding could only apply in cases—like present—where a forfeiture action continues after the criminal cause is finalized or one where no criminal cause is filed." *Id*. For this reason also, the Court of Appeals' ruling does not merit transfer.[4]

Fourth, the posture of Abbott's case makes it a poor vehicle for review. The State, for example, stresses that "the initial seizure [of property] must be reviewed for probable cause." Pet. 18. That initial review, the State suggests, makes it particularly inappropriate for property to be used for defense counsel. But unlike in many later forfeiture cases, the trial court conducted no such initial review here. *See* CCS. (Contrary to the State's

[4] There are reasons to question the State's view that seized property remains under the exclusive jurisdiction of the criminal court until related criminal cases are final. (As an example, the State often secures default judgments in civil-forfeiture cases while parallel criminal cases are pending.) Even so, the State's stance that, in "most" forfeiture cases, Section 35-33-5-5 will prevent a forfeiture court from ordering limited use of the seized *res* undermines any suggestion that this case has serious statewide implications. Pet. 14.

suggestion, the racketeer statute does not require probable-cause reviews, I.C. § 34-24-2-4(a)(1); nor did the general forfeiture statute require them when this case began in 2015. Ind. Pub. L. 47-2018, § 1 (eff. July 1, 2018).) In this way, the State's petition itself casts doubt on the suitability of transfer. In the State's view, "[a]llowing use of the *res* is . . . not necessary to advance the interests of justice" in large part because "the initial seizure must be reviewed for probable cause." Pet. 18. Yet the seizure in this particular case was subject to no such scrutiny. Even if the question the State's petition presents otherwise warranted further review, therefore, this case would not be a suitable one in which to address it.

III. If the Court elects to grant transfer and disagrees with the Court of Appeals' reasoning, the trial court's denial of appointed counsel should be reversed.

As detailed above, the Court of Appeals' decision is legally correct and meets none of the considerations favoring transfer. If this Court were to disagree, however, the correct approach would be to reverse the trial court's order denying appointed counsel and remand with instructions to assign Abbott an attorney under Section 34-10-1-2.[5]

A. When a litigant lacks "sufficient means to prosecute or defend the action," the trial court has discretion to appoint counsel. I.C. § 34-10-1-2(b). And if—as the State contends—Abbott's seized money cannot be used to hire a lawyer, then the trial court's denial of appointed counsel was a grave abuse of discretion. Without access to his money,

[5] Undersigned counsel's pro bono representation of Abbott is limited to this appeal and will not continue for any trial-court proceedings on remand.

Abbott is undisputedly indigent, *see* Appellant's App. Vol. II p. 61, and the trial court's three reasons for denying counsel do not withstand even deferential review:

First, the court noted that Abbott "has in the past hired private counsel to represent himself in this matter." *Id.* at 14. But that counsel withdrew in part *because* Abbott is indigent. *Abbott*, 164 N.E.3d at 739.

Second, the court stated that Abbott "is the most qualified individual" to defend his case. Appellant's App. Vol. II p. 14. But Abbott's struggles with basic procedure belie that conclusion. In fact, the trial court itself repeatedly admonished him to "seek the advice of an attorney licensed to practice in the State of Indiana." *Id.* at 8.

Third, the trial court opined that Abbott's "likelihood of prevailing on the merits is slim." *Id.* at 14; *see also* I.C. § 34-10-1-2(d)(2). But as the Court of Appeals later held, Abbott has shown a triable fact question on whether the State should win. *See* Pet. 20 (inviting this Court to summarily affirm the Court of Appeals' summary-judgment ruling); *see also* p. 9, above. The trial court's original view of the merits—since reversed—thus cannot be a valid basis for denying Abbott's request for counsel. *Cf. State v. Larkin*, 100 N.E.3d 700, 703 (Ind. 2018) ("A trial court abuses its discretion when it misinterprets the law.").

B. More broadly, cases like this one present just the sort of "exceptional circumstances" that merit appointed counsel. *See* I.C. § 34-10-1-2(b)(2). Unlike a civil dispute between purely private parties, forfeiture actions "have significant criminal and punitive

characteristics." *Hughley*, 15 N.E.3d at 1005. One side—the government—is always represented by repeat-player counsel. As this half-decade case highlights, litigation can drag on for years. "[A]ggressive *in rem* forfeiture practices" are common. *Timbs*, 134 N.E.3d at 33. And it is rare for defendants to represent themselves *pro se*. *Compare* Pet. 19 ("[E]ven an indigent applicant may have 'sufficient means' to proceed without appointed counsel in a type of action that is often handled without counsel."), *with* Addendum (identifying only 20 out of 261 forfeiture actions where defendants appeared *pro se*). As the Court of Appeals recognized, "expecting a *pro-se* litigant with no legal training to defend a forfeiture action brought by not just any litigant—the State—is akin to throwing a spectator in the ring with a professional boxer." *Abbott*, 164 N.E.3d at 744 n.6. The record of Abbott's struggle to represent himself only drives home the point. If he cannot use his own money to defend himself, he is a clear candidate for counsel under Section 34-10-1-2.

CONCLUSION

This case satisfies none of this Court's principal considerations for whether to grant transfer. The Court of Appeals did not depart from any statutes or other established law, and it did not decide an important question of law or a matter of great public importance. It issued a narrow decision that properly construed the statute before it. Transfer should be denied.

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Respectfully submitted,

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Pursuant to Indiana of Appellate Procedure 44(F), I certify that this brief contains 4,029 words excluding parts of the document exempted by Rule 44(C).

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