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IN THE
COURT OF APPEALS OF INDIANA

Terry L. Abbott,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner.

February 15, 2021

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

Appeal from the Elkhart Superior Court

The Honorable Teresa L. Cataldo, Judge

Trial Court Cause No. 20D03-1506-PL-140

Bailey, Judge.

Case Summary

[1] The State filed a civil forfeiture action concerning four firearms and more than $9,000 in cash found at the residence of Terry L. Abbott ("Abbott") during the execution of a search warrant. The bulk of the cash—$6,760—was found on Abbott's person, in the pocket of his pants. Abbott claimed that he lawfully obtained the cash in his pocket and that he possessed the cash on his person because he intended to purchase a motorcycle on the day of the search. Abbott initially hired a lawyer. However, without access to the cash, Abbott could not pay legal fees and the court allowed Abbott's lawyer to withdraw. Abbott then requested the appointment of counsel at public expense. The court denied the request, determining that Abbott was ineligible under the pertinent statutes. Even though there were thousands of dollars in seized funds available to hire a lawyer, Abbott was unrepresented for the remainder of the proceedings.

[2] The State sought summary judgment, designating evidence that Abbott was engaged in drug dealing. Although Abbott disclaimed interest in the firearms and $11 of the cash, Abbott designated evidence showing a lawful source of the cash in his pocket and a lawful intended use for that cash. Despite Abbott's designated evidence regarding the bulk of the *res*, the court granted summary judgment to the State. Abbott then pursued this appeal *pro se*. In doing so, Abbott alleged that he was indigent and he unsuccessfully sought a transcript at public expense. On appeal, Abbott argues that the court erred in granting summary judgment. Abbott also asserts that the trial court improperly denied his request for appointed counsel.

[3] Because there are material issues of fact regarding a nexus between the seized cash and criminal activity, we conclude that the trial court erred in granting summary judgment as to the bulk of the cash. Turning to Abbott's request for appointed counsel, we conclude that Abbott failed to show his entitlement to counsel at public expense. However, under the circumstances—where the bulk of the *res* was removed from Abbott's pocket and he made a plausible claim to that cash—we conclude that Abbott should be permitted to use the *res* to pay for a lawyer, a transcript, and other expenses for his defense. We ultimately affirm summary judgment as to all property other than $8,923 in cash. We otherwise reverse and remand for further proceedings consistent with this opinion.

Facts and Procedural History

[4] On June 1, 2015, the State filed this *in rem* action seeking the forfeiture of four firearms and $9,184 in cash found during the execution of a search warrant at Abbott's residence. Although Abbott was initially represented, his counsel moved to withdraw in part because Abbott had failed to pay legal fees.[1] The court granted the motion to withdraw in November 2015. The State eventually filed a motion for summary judgment on July 30, 2018.[2] Abbott alleged that he

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[1] Although certain filings below were not provided on appeal, we located the documents through the Odyssey system. *See* Ind. Appellate Rule 27 ("The Record on Appeal shall consist of the Clerk's Record and all proceedings before the trial court . . . whether or not transcribed or transmitted to the Court on Appeal.").

[2] At one point, the trial court issued a notice under Trial Rule 41(E) for failure to prosecute. The State responded by filing a Motion to Retain on Active Docket, asserting that "[t]he criminal matter relative to the [instant case] is no longer pending and the State will be filing a Motion for Summary Judgment to resolve this

was indigent and he requested the appointment of counsel at public expense. The trial court denied Abbott's request, determining that, *inter alia*, Abbott's "likelihood of prevailing on the merits is slim[.]" Appellant's App. Vol. 2 at 14.

[5] In support of its motion for summary judgment, the State designated evidence that Abbott was suspected of dealing drugs in 2015. The evidence showed that the police conducted two controlled buys, acquiring methamphetamine and narcotics from Abbott. The police then obtained a warrant to search Abbott's residence. During the execution of the warrant, the police found four firearms and a variety of drugs, including methamphetamine, marijuana, and MDMA pills. The police also found $9,184 in cash. Of that cash, $6,760 was found in the pocket of Abbott's pants. More than $2,000 of the cash—of which $250 was documented as "drug buy" money—was found in a safe in Abbott's bedroom. In the basement, $11 of the cash was found in a bag commingled with pills. Abbott was arrested and eventually convicted of several offenses, including Dealing in Methamphetamine and Dealing in a Controlled Substance. A later investigation led to a separate criminal case, the outcome of which is unclear.

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matter." The trial court granted the State's motion in December 2016. However, the State did not file a motion for summary judgment until July 2018. The record does not disclose a reason for the State's eighteen-month delay in filing its motion for summary judgment. This sort of delay is troubling because delays in forfeiture proceedings "mirror[] the concern of undue delay encompassed in [a criminal defendant's] right to a speedy trial[.]" *United States. v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850)*, 461 U.S. 555, 564 (1983). Indeed, when forfeiture proceedings are delayed, "there is a due process violation at some point." *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1163 (2d Cir. 1986). In any case, because Abbott has not alleged that the delay violated his right to due process, we need not further address this issue.

[6] Abbott designated evidence in response to the State's motion for summary judgment. Among the designated evidence is an affidavit in which Abbott averred that "[t]he $6,760.00 that was in my pants pocket . . . was lawfully obtained. The funds were intended to be used to purchase a motorcycle the day of my arrest" and "complications with the title for the motorcycle coupled with haggling over the sale price postponed the sale. I had simple [*sic*] not removed the money from my pocket." *Id.* at 34. Abbott further averred that he had been employed leading up to his arrest. He designated tax documents from 2015 showing two sources of lawful wages that collectively exceeded $20,000.

[7] After Abbott had filed his written response and designation of evidence, the court held an evidentiary hearing on April 9, 2019, the transcript of which is not included on appeal. On June 25, 2019, the court granted the State's motion for summary judgment. In its order, the trial court made the following remarks:

> In his Affidavit, [Abbott] simply asserted that the money ($6,760.00) he had in his pants pocket when he was arrested was set aside for the purchase of a motorcycle. He did not, however, set out contrary facts or evidence that create a genuine issue as to where the money in [his] pants pocket came from so as to contradict the State's **overwhelming designated evidence** that the currency was used in the course of, intended for use in the course of, derived from or realized through [Abbott's] criminal conduct. Even though [Abbott] produced copies of W-2 forms for 2015 showing that he earned money from work at Forest River and Gulf Stream, he did not in any way connect those earnings to the cash found on his person on the date of his arrest. In other words, [Abbott] did not present evidence sufficient to create a genuine issue of fact as to the source of the money found on his person when he was arrested.

Id. at 26-27 (emphasis added).

[8] Abbott appealed. On appeal, Abbott asserted that he was indigent and filed a motion seeking to obtain a transcript at public expense. This Court denied Abbott's motion but allowed him to proceed on appeal without a transcript.[3]

Discussion and Decision

Summary Judgment

Standard of Review

[9] We review *de novo* a ruling on summary judgment. *Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd.*, 134 N.E.3d 370, 376 (Ind. 2019). Summary judgment is proper "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Hughley v.*

[3] The State argues that Abbott waived his challenge to summary judgment by failing to obtain a transcript. As we discuss herein, Abbott should have been able to use the *res* to pay for a transcript. In any case, whenever possible, we prefer to resolve cases on the merits instead of on procedural grounds like waiver. *Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015). Here, Abbott's Appendix contains his written designations of evidence and, as we explain below, that evidence shows a genuine issue of material fact. Moreover, that genuine issue of material fact would persist regardless of additional evidence. Thus, although we encourage litigants to provide a complete evidentiary transcript, we have not been impeded in our review of this case.

State, 15 N.E.3d 1000, 1003 (Ind. 2014) (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)).

[10] The initial burden is on the movant to demonstrate the absence of any genuine issue of material fact, "at which point the burden shifts to the non-movant to 'come forward with contrary evidence' showing an issue for the trier of fact." *Id.* (quoting *Williams*, 914 N.E.2d at 762). Under this standard, summary judgment may be precluded "by as little as a non-movant's 'mere designation of a self-serving affidavit.'" *Id.* (quoting *Deuitch v. Fleming*, 746 N.E.2d 993, 1000 (Ind. Ct. App. 2001), *trans. denied*). Indeed, by adopting this standard, "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Id.* at 1004.

[11] In conducting appellate review, we view the designated evidence in a light most favorable to the non-movant. *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019). Moreover, although the non-movant "has the burden on appeal of persuading us that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that he was not improperly denied his day in court." *Hughley*, 15 N.E.3d at 1003 (quoting *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 916 N.E.2d 906, 909-10 (Ind. 2009)).

Merits

[12] "Civil forfeiture is a device, a legal fiction, authorizing legal action against inanimate objects for participation in alleged criminal activity, regardless of whether the property owner is proven guilty of a crime—or even charged with a

crime." *Serrano v. State*, 946 N.E.2d 1139, 1140 (Ind. 2011). In seeking summary judgment, the State sought forfeiture under Indiana Code Chapter 34-24-2. *See* Br. of Appellee at 18 (clarifying the statutory basis for the State's motion for summary judgment). To prevail under that Chapter, the State had the burden of showing that the seized property was "used in the course of, intended for use in the course of, derived from, or realized through" criminal conduct constituting Corrupt Business Influence. I.C. § 34-24-2-2(d).

[13] Notably, Abbott conceded below that "he is not seeking entitlement or return of any of the firearms" seized from his residence. Appellant's App. Vol. 2 at 56. We therefore affirm summary judgment as to those unchallenged items and focus on the $9,184 in cash. As to that *res*, Abbott disclaimed interest in the $11 found commingled with pills and he has not presented a cogent argument concerning the $250 of documented "drug buy" money. Thus, we decline to reverse summary judgment as to $261 and hereafter regard the *res* as $8,923.[4]

[14] In seeking summary judgment, the State claimed entitlement to the *res* because the cash was connected to criminal drug-dealing activities. Assuming without deciding that the State met its initial burden, Abbott designated evidence that he lawfully obtained $6,760 of the *res*. By doing so, he created a genuine issue of

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[4] In its complaint, the State listed the cash as a single line item. *See* Appellee's App. Vol. 2 at 2-5. Apart from the $261, we ultimately regard the cash as a single *res* in analyzing the propriety of summary judgment. Moreover, even if we were to explore a dollar-by-dollar approach to summary judgment, we note that (1) we conclude herein that a genuine issue of material fact precludes summary judgment as to the bulk of the cash and (2) this Court need not address *de minimis* sums on appeal. *See, e.g.*, *D & M Healthcare, Inc. v. Kernan*, 800 N.E.2d 898, 900 (Ind. 2009) (discussing and applying the "practical doctrine" of *de minimis non curat lex*).

material fact as to whether the *res* was "derived from," "realized through," or "used in the course of" criminal conduct. I.C. § 34-24-2-2. That leaves only whether the *res* was "intended for use in the course of" criminal conduct. *Id.*

[15] Critically, Abbott averred that he intended to use the $6,760 found in his pocket to purchase a motorcycle. It is inherently lawful to purchase a motorcycle. The State argues that "even lawfully obtained property intended for a legal purchase would be subject to forfeiture if the purchase was related to [Abbott's] ongoing illegal drug dealing business." Br. of Appellee at 19. According to the State, "[a] reasonable inference, which Abbott never denied, is that any new vehicle would have been used to transport or deliver drugs." *Id.* The State directs us to *Hughley*, where a defendant specifically averred that a seized vehicle had no relationship to unlawful activity. 15 N.E.3d at 1004. The State suggests that Abbott should have been more specific as to his intended use of a motorcycle.

[16] Notably, however, "conflicting inferences . . . preclude summary judgment." *Id.* at 1004 n.1. Here, there is designated evidence that Abbott intended to use lawfully acquired cash to purchase a motorcycle. Although the State contends that a reasonable fact-finder could infer that a motorcycle would have been used for drug dealing, a fact-finder could instead infer that a motorcycle would have been used for personal transportation. Thus, the designated evidence supports conflicting inferences as to the intended use of the $6,760 in Abbott's pocket.

[17] Ultimately, Abbott's affidavit created a genuine issue of material fact as to the State's entitlement to the *res*. We therefore conclude that the trial court

improperly granted summary judgment and we reverse and remand for further proceedings regarding the *res*. In so concluding, we note that forfeitures are not favored and should be enforced only when within the letter and the spirit of the law. *Hughley,* 15 N.E.3d at 1005. We further note that "[e]nsuring that parties are not prematurely denied their day in court is always important, but it is especially vital before exacting criminal-like penalties" through civil forfeiture. *Id.* We therefore express concern that the trial court characterized the State's designated evidence as "overwhelming." Appellant's App. Vol. 2 at 27. We remind courts that "weighing [evidence]—no matter how decisively the scales may seem to tip—[is] a matter for trial, not summary judgment." *Hughley*, 15 N.E.3d at 1005-06. Moreover, we also remind courts that the non-movant may avoid summary judgment through as little as a self-serving affidavit, "regardless of whether [the non-movant] would likely prevail at trial." *Id.* at 1002.[5]

Procurement of Counsel

[18] Having concluded that further proceedings are required, we turn to Abbott's contention that the court erred by denying his request for appointed counsel.

[5] It seems that the court was relying on Indiana Code Section 34-24-1-1(d), which provides that money found near a person attempting to commit certain offenses "shall be admitted into evidence in an action under [that Chapter] as prima facie evidence that the money. . . is property that has been used or was to have been used to facilitate the violation of a criminal statute or is the proceeds of the violation of a criminal statute[.]" The State has clarified that it was seeking summary judgment under a different Chapter. In any case, this statute helps only to establish a prima facie case. "[T]he prima facie case is only the beginning of the story—it merely shifts the burden to [the defendant], as the non-movant, to raise a 'genuine issue of material fact'" precluding summary judgment. *Hughley*, 15 N.E.3d at 1004 (quoting *Williams*, 914 N.E.2d at 761-62).

[19] "[F]orfeitures are civil actions," *Hughley*, 15 N.E.3d at 1005, and there is generally no absolute right to appointed counsel in a civil action, *In re G.P.*, 4 N.E.3d 1158, 1163-64 (Ind. 2014); *see Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 26-27 (1981) (noting that principles of due process generally afford a litigant the right to appointed counsel "only when, if he loses, he may be deprived of his physical liberty"). Even when a litigant does not have an absolute right to appointed counsel, Indiana Code Section 34-10-1-1 provides that an indigent person "may apply to the court . . . for leave to prosecute or defend as an indigent person." If the court is satisfied that the person does not have sufficient means to prosecute or defend the action, the court: "(1) shall admit the applicant to prosecute or defend as an indigent person; and (2) may, under exceptional circumstances, assign an attorney to defend or prosecute the cause." Ind. Code § 34-10-1-2(b). In determining whether to appoint counsel, "[t]he factors that a court may consider" include "(1) [t]he likelihood of the applicant prevailing on the merits of the applicant's claim or defense[; and] (2) [t]he applicant's ability to investigate and present the applicant's claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action." I.C § 34-10-1-2(c). Moreover, Indiana Code Section 34-10-1-2(d) specifies that the court "shall deny" the application for appointed counsel if the court determines that "[t]he applicant is unlikely to prevail on the applicant's claim or defense."

[20] Here, Abbott applied for counsel under the foregoing statutes and the court denied Abbott's request. In reviewing the request, the court analyzed Abbott's

likelihood of success on the merits. Yet, before ever analyzing a person's likelihood of a success, the court must first be "satisfied that [the] person . . . does not have sufficient means to . . . defend the action[.]" I.C. § 34-10-1-2(b). Indeed, this means-based inquiry precedes any other analysis. That makes sense, because our civil-appointment statutes are designed to help those who need help—not to give a free defense to someone who has the means to pay for one. Thus, if a person has the means, there is no need for any further inquiry.[6]

[21] Critically, this proceeding concerns thousands of dollars seized from Abbott, including nearly $7,000 found in his pocket. As to this cash, Abbott had a plausible explanation for possessing the cash. He also designated evidence indicating that the cash was derived from a lawful source. It is fundamental that the aim of a forfeiture proceeding is to determine whether private property

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[6] The dissent would reorder the inquiry, concluding that Abbott is not entitled to counsel at public expense because the trial court determined that he was unlikely to prevail. Yet, bypassing the primary means-based inquiry glides past the most fundamental, troubling issue presented in this appeal. That is, if a person has the funds to hire a lawyer, shouldn't the person be allowed to hire a lawyer if he wants one? As discussed herein, principles of justice require us to consider this nuanced issue of access to justice, however well developed.

Moreover, although the dissent suggests that this nuanced issue would warrant our consideration if the issue were more developed, we are not sure how much more developed this issue could be. Indeed, Abbott is a *pro-se* litigant and the issue is a *pro-se* litigant's lack of access to counsel. Waiting for further development would require waiting for the perfect *pro-se* litigant, one with extensive legal training who can point out the injustice created by both withholding the *res* and declining to appoint counsel. Meanwhile, other litigants would be left to defend their interests without counsel. Furthermore, we note that anyone represented by counsel would not have a stake in raising this issue because that litigant would already be represented.

In any case, even if we were to focus on the likelihood of success on the merits, the lack of access to counsel strongly tips the likelihood of success on the merits in the State's favor. The reality is that 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. The fight would hardly be fair and the odds would surely be in the trained boxer's favor. For these reasons, the issue of likelihood of success is not dispositive.

should be forfeited to the State. It is equally fundamental that, with the burden of proof resting with the State, the private property belongs to the defendant until the State has proven otherwise. *See* I.C. § 34-24-2-2(d) (providing that, "[u]pon a showing by a preponderance of the evidence" of a nexus to criminal activity, the subject property "shall . . . [be] forfeited to the [S]tate").

[22] Notably, whereas under federal forfeiture law, "title to property used to commit a crime (or otherwise 'traceable' to a crime) often passes to the [g]overnment at the instant the crime is planned or committed," *Luis v. United States*, 136 S. Ct. 1083, 1090 (2016) (plurality opinion), Indiana forfeiture law does not contain this type of title-shifting provision, *compare, e.g.*, 21 U.S.C. § 853(c), *with* I.C. art. 34-24. Furthermore, even under the federal approach, if seized property is untainted—that is, not connected with criminal activity—the property "belongs to the defendant, pure and simple." *Luis*, 136 S. Ct. at 1090 (plurality opinion) (noting that untainted property "differs from a robber's loot, a drug seller's cocaine, a burglar's tools, or other property associated with the planning, implementing, or concealing of a crime").

[23] Here, Abbott raised a plausible defense to forfeiture, asserting that the bulk of the *res* was untainted. We recognize that the State has a conditional interest in Abbott's cash, *i.e.*, an interest that turns on whether it prevails in the action. At the same time, the cash is still Abbott's. We therefore agree with the trial court that Abbott is not entitled to counsel at public expense—not because Abbott is unlikely to prevail, but because Abbott has the means to fund his own defense. *See Sholes v. Sholes*, 760 N.E.2d 156, 161 (Ind. 2001) (explaining that an

indigency determination under Indiana Code Section 34-10-1-2 involves consideration of a person's disposable income "or other resources reasonably available to him" (quoting *Moore v. State*, 401 N.E.2d 676, 679 (Ind. 1980)); *see also Sabo v. Sabo*, 812 N.E.2d 238, 243 (Ind. Ct. App. 2004) (adhering to *Sholes*).

[24] We find support in the purposes animating our civil-appointment statutes and forfeiture statutes. As to those purposes, our civil-appointment statutes exist to afford access to justice, which is a cause worthy of public expense. *See generally* I.C. § 34-10-1-2. Turning to civil forfeiture, our forfeiture statutes exist to ensure that criminals do not enjoy the fruits of their crimes. *See generally* I.C. art. 34-24. Moreover, under our forfeiture statutes, the State has an interest in private property only insofar as that property has a nexus to criminal activity. *See, e.g.*, I.C. §§ 34-24-1-4 & -2-2. In other words, if the private property lacks a nexus to criminal activity, the private property cannot be forfeited under the statutory scheme.

[25] When examining these statutory purposes, it becomes evident just how peculiar it would be to exclude seized property from an indigency analysis in the context of forfeiture. Notably, excluding the *res* from an indigency analysis would work a windfall for the defendant who has a high likelihood of success, is appointed counsel, and then enjoys a defense at public expense. Indeed, this scenario does not work justice in the way intended by our civil-appointment statutes.

[26] Moreover, because the State has an interest in private property only insofar as that property has a nexus to criminal activity, we cannot say that the State

would be harmed by allowing a person to use the *res* for the limited purpose of funding a defense. Allowing this limited use (1) levels the playing field and (2) ensures that private property is not needlessly and unjustly forfeited to the State. Furthermore, allowing use of the *res* to fund a defense comports with Article 1, Section 12 of the Indiana Constitution, which mandates that "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law" and that "[j]ustice shall be administered freely, and without purchase; completely, and without denial[.]" *Cf. Smith v. Ind. Dep't of Correction*, 883 N.E.2d 802, 807-810 (Ind. 2008) (determining that a statute ran afoul of Article 1, Section 12 by prohibiting inmates from filing new claims); *Campbell v. State*, 96 N.E.2d 876, 878 (1951) (identifying a violation of Article 1, Section 12 where a criminal defendant was convicted and sentenced without advisements regarding the right to counsel, including the right to appointed counsel upon proof of indigency); *Murfitt v. Murfitt*, 809 N.E.2d 332, 334-35 (Ind. Ct. App. 2004) (determining that Article 1, Section 12 guarantees an inmate the opportunity to defend his interests in a civil action).

[27] Additionally, allowing use of the *res* would advance the interests of justice in the scenario described above. That is, allowing use of the *res* would preserve public resources for those who truly lack the means and avoid allocation of resources to those who only lack the means because of the State's seizure. *See Sholes*, 760 N.E.2d at 166 (acknowledging that public funding may be insufficient to allow the appointment of counsel in all civil cases requiring the appointment of counsel under Indiana Code Section 34-10-1-2). Further, allowing the owner to

use the *res* to procure representation in the forfeiture action ensures both sides will be represented by trained counsel. *See State v. Timbs*, 134 N.E.3d 12, 33 (Ind. 2019) (expressing concern about the potentially "oppressive use of civil forfeiture"); *Caudill v. State*, 613 N.E.2d 433, 436-437 (Ind. Ct. App. 1993) (juxtaposing law enforcement's heightened interest in forfeiture actions with potential "harsh consequences" suffered by the *res* owner, who—although a party to a quasi-criminal proceeding—lacks "the usual panoply of constitutional rules of criminal procedure afforded to criminal defendants"). Such representation lessens the chance of unchallenged error, including constitutional violations, and thereby increases both the efficiency and the accuracy of the judicial process. *See, e.g.*, *Hoey v. McCarthy*, 24 N.E. 1038, 1039 (1890) ("It is manifestly the duty of the courts to see to it that justice is not allowed to fail[.]"); *Ivy v. State*, 847 N.E.2d 963, 967 (Ind. Ct. App. 2006) (reversing a forfeiture judgment entered in favor of the State despite a *pro-se* litigant's legal missteps); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (explaining that identifying "the specific dictates of due process generally requires consideration of," among other things, "the risk of an erroneous deprivation of [a person's] interest through the procedures used").

[28] Civil forfeiture proceedings implicate several constitutional rights. *See, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (Eighth Amendment excessive fines clause); *United States v. $39,000.00 in U.S. Currency*, 951 F.3d 740, 741-42 (6th Cir. 2020) (Fifth Amendment privilege against self-incrimination). As to those constitutional rights, non-lawyers may lack the knowledge or skill to articulate

arguments helpful to the court in reaching a just determination. "At the heart of our adversarial system of justice is the opportunity for both sides of a controversy to be fairly heard." *In re Anonymous*, 729 N.E.2d 566, 569 (Ind. 2000). Having counsel on both sides keeps that heart beating vigorously.

[29] We ultimately find no statute precluding a court from (1) considering the *res* when examining a person's means or (2) allowing use of the *res* for the limited purpose of funding a defense to forfeiture. Not only do we discern no statutory impediment here, allowing use of the *res* harmonizes the pertinent statutes and is consistent with Indiana law. Indeed, it is especially notable that Indiana Code Section 34-24-2-4(c), which applies to this appeal, expressly provides that the *res* "is considered to be in the custody of [law enforcement], subject only to order of the court." Allowing use of the *res* is such an order of the court.[7]

[30] Turning to the matter at hand, Abbott requested counsel at public expense, asserting that he was incarcerated, did not have the means to hire counsel, and that his sole source of income was $24 per month for "working at [his] institutional job assignment or for going to school" at the correctional facility. Appellant's App. Vol. 2 at 61. Although Abbott has not specifically requested use of the *res*, he has repeatedly sought the assistance of counsel and help

[7] The dissent notes that our legislature is currently considering a bill that would permit—but not require—the assistance of a public defender in a forfeiture case. That may be so, but we cannot know whether the bill will be enacted as currently drafted. Rather, we must decide the case before us by applying current Indiana law.

paying for transcripts. Abbott would not be making these requests if he could simply use the *res*. Thus, the issue of using the *res* is properly before this Court.

[31] Regardless, even if Abbott could have more directly raised this issue, it would be inequitable to withhold the *res*—which, in this case, largely consists of cash removed from a person's pocket—when a person is otherwise financially unable to retain counsel to defend against the forfeiture of the subject *res*. *See* 30A C.J.S. *Equity* § 3 ("The purpose of equity is to promote and achieve justice with some degree of flexibility, and the traditional function of equity has been to arrive at a nice adjustment and reconciliation between competing claims."); *see also Willcox v. Stroup*, 467 F.3d 409, 412 (4th Cir. 2006) ("That possession is nine-tenths of the law is a truism hardly bearing repetition."). Indeed, in light of the equities, we are unwilling to fault Abbott—a *pro-se* litigant—for failing to directly request use of the *res* for the purpose of funding his defense.[8]

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[8] The dissent would not look to equity to resolve the instant access-to-justice issue. The dissent also asserts that "[t]he demanding analysis of whether the forfeiture statutes are unconstitutional or unconstitutional as applied to a particular defendant must take place in a case where the issue is properly raised." Slip op. at 26.

As earlier discussed, we are doubtful that this issue could be better raised by a pro-se litigant. Moreover, even if Abbott had directly raised the issue of using the *res*, we would not need to consider the constitutionality of the statutory scheme. Notably, our Supreme Court has directed us to avoid addressing constitutional issues when there are other potentially dispositive grounds. *E.g.*, *Ind. Wholesale Wine & Liquor Co., Inc. v. State ex rel. Ind. Alcoholic Beverage Comm'n*, 695 N.E.2d 99, 107-08 (Ind. 1998). We must instead harmonize statutes as best we can. *See id.* In this case, we have determined that allowing use of the *res* is in harmony with the statutory scheme—reserving public resources for those who need them and preserving the applicable burden of proof. Thus, because Indiana law permits use of the *res*, there is no reason to delve into constitutionality.

As to equity, it is well-settled that "[e]quity has the power, where necessary, to pierce rigid statutory rules to prevent injustice." *Metro. Sch. Dist. of Sw. Parke v. Vaught*, 233 N.E.2d 155, 158 (Ind. 1968). Indeed, "[t]he office of equity is to supply defects in the law. It is meant to fill in the gaps where law fails." 30A C.J.S. *Equity* § 3 (footnote omitted). Moreover "[e]quity was created to assist the person who has a right that lacks a

[32] Ultimately, in light of the parties' competing interests in the *res* and in view of Appellate Rule 66(C)(10), which permits us to grant "any . . . appropriate relief," we conclude that a defendant in a civil forfeiture proceeding is not excluded from using the *res* to retain counsel, purchase a transcript if needed, and pay for other reasonable expenses associated with preparing a defense. *Cf. Luis*, 136 S. Ct. at 1088 (determining that the restraint of untainted funds violated the Sixth Amendment where a criminal defendant needed those funds to hire chosen counsel to defend against criminal charges). Thus, on remand, we instruct the court to allow Abbott to use the *res* for these limited purposes. *Cf.* I.C. § 34-24-2-4(c) (providing that the *res* "is considered to be in the custody of the . . . officer making the seizure . . . subject only to order of the court").[9]

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remedy, and to give relief when other remedies are futile or illusory." *Id.* (footnote omitted). Regarding the adequacy of a remedy under the instant statutory framework, the dissent asserts that equity could not apply because "defendants like Abbott have a remedy at law—the civil-appointment statute." Slip op. at 26. However, we disagree that Indiana's civil-appointment statute offers an adequate remedy. Indeed, the inadequacy of that statute has spurred this very discussion, for it hardly offers an adequate remedy if Abbott could be ineligible for appointed counsel while being prohibited from using his own money to hire a lawyer.

Finally, the dissent points out that our legislature may, at times, prevent a court from exercising its equitable powers. Although we acknowledge this proposition, our legislature has not limited the application of equity in the context of civil forfeiture. To the contrary, our legislature has even called upon equity in drafting our forfeiture statutes, at one point directing courts to "order forfeitures and dispositions . . . with due provision for the rights of innocent persons." I.C. § 34-24-2-2(e). Only equity could function as the sort of gap-filling pressure-relief valve contemplated by the foregoing statute. Thus, we cannot say equity has been curtailed.

Regardless, although we have identified the inequities in this case and discern no impediment to resolving an access-to-justice issue not directly raised by the *pro-se* litigant, we have ultimately determined that allowing use of the *res* is in harmony with the statutory framework and therefore permissible under the positive law.

[9] The cited statute also states that the seized property "is not subject to replevin[.]" *Id.* Focusing on this portion of the statute, the dissent emphasizes that, "[w]hen interpreting a statute, 'it is just as important to recognize what a statute does not say as it is to recognize what it does say,' and we 'will not add something to a statute that the legislature has purposefully omitted.'" Slip op. at 24-25 (quoting *Rush v. Elkhart Cnty. Plan Comm'n*, 698 N.E.2d 1211, 1215 (Ind. Ct. App. 1998), *trans. denied*). Nevertheless, the dissent expansively reads the word "replevin," as though it is synonymous with allowing supervised use of the seized

Conclusion

[33] For the foregoing reasons, we affirm summary judgment as to all items other than $8,923 of the seized cash. Because there is a genuine issue of material fact precluding summary judgment as to that cash, we otherwise reverse and remand for further proceedings. As to the proceedings, Abbott is not entitled to counsel at public expense because he has the means to fund his own defense. On remand, we instruct the court to allow Abbott to use the *res* for defense-related expenses. Moreover, because the trial court in this civil proceeding is in the best position to reconcile the equities between competing claims, we instruct

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cash to obtain counsel. We instead take a narrower approach, giving the word "replevin" its plain meaning. That is, under Indiana law, replevin is a civil action governed by Indiana Code Section 32-35-2-1. A replevin action involves an allegation that "**personal goods**" have been "wrongfully taken or unlawfully detained[.]" I.C. § 32-35-2-1 (emphasis added); *cf. Replevin*, Black's Law Dictionary (11th ed. 2019) (defining "replevin" as "[a] lawsuit to repossess personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it"); 77 C.J.S. *Replevin* § 1 (2020) ("Replevin is an action at law for the recovery of specific items of personal property wrongfully detained.").

Here, the *res* is cash. It is hornbook law that cash—which is fungible—is not a personal good. *See Goods*, Black's Law Dictionary (11th ed. 2019) (defining "goods" as "[t]angible or movable personal property **other than money**" (emphasis added)); *cf.* Thus, because the instant *res* is not eligible subject matter for a replevin action, we cannot say that allowing the trial court to supervise use of the cash amounts to a replevin action. Nonetheless, even if we were dealing with personal goods potentially subject to replevin, allowing use of the *res* does not amount to a replevin action because it involves no contention that the *res* was wrongfully taken or unlawfully detained. We also note that the plaintiff in a replevin action may obtain not only "the delivery of the property, or the value of the property in case delivery is not possible," but also "damages for the detention of the property." I.C. § 32-35-2-33. Yet, use of the *res* here would not expose the State to damages.

Ultimately, we think it prudent of our legislature to foreclose replevin actions for personal goods potentially subject to forfeiture, allowing the State to pursue forfeiture without exposure to this type of liability. Indeed, avoiding liability is likely why our legislature chose the word "replevin" rather than a more expansive phrase that would have prohibited any use of the subject *res* during the pendency of the proceedings. Furthermore, not only did our legislature decline to draft an outright prohibition on use of the *res*, it also chose open-ended language. Indeed, Indiana Code Section 34-24-2-4(c) provides that, although seized property is not subject to replevin, the property is "considered to be in the custody of [law enforcement], subject only to order of the court." Allowing this limited use of the *res* is such an order of the court, falling squarely within the statute.

the court to adopt reasonable procedures to supervise expenditures from the *res*.[10]

[34] Affirmed in part, reversed in part, and remanded for further proceedings.

Weissmann, J., concurs.
Vaidik, J., concurs in part and dissents in part with separate opinion.

[10] Having resolved the case on the foregoing grounds, we need not address any other issue presented.

Terry L. Abbott,
Appellant-Respondent,

v.

State of Indiana
Appellee-Petitioner.

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

Vaidik, Judge, concurring in part, dissenting in part.

[35] I concur with the majority that the trial court erred in granting summary judgment because there are material facts at issue. But I respectfully dissent from my colleagues' determination Abbott should be able to use the seized cash to pay for an attorney in the civil-forfeiture proceeding.

[36] Abbott first argues the trial court erred in granting summary judgment. As the majority notes, Abbott claimed a portion of the cash seized was lawfully earned by him. *See* Appellant's App. Vol. II pp. 45-46. This is sufficient to prevent summary judgment. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (holding defendant's "perfunctory and self-serving" affidavit sufficient to raise a genuine issue of material fact and defeat a summary-judgment motion). Abbott also argues the trial court erred in not appointing him an attorney under Indiana Code section 34-10-1-2(b), which allows a trial court to appoint an attorney for

a civil litigant "under exceptional circumstances[.]" However, the trial court "shall deny" the request for an attorney if the defendant "is unlikely to prevail[.]" *Id* at (d). The trial court found Abbott did not have a likelihood of prevailing on the merits and declined to appoint him an attorney. I agree.

[37] Law-enforcement officers conducted two controlled buys at Abbott's house. During both buys Abbott sold illegal drugs to a confidential informant. Officers then executed a search warrant at his home, where they found marijuana, methamphetamine, and hundreds of pills containing amphetamine and alprazolam, as well as several firearms, drug paraphernalia, $2,414 in a safe, and $6,760 on Abbott's person. Abbott was later convicted of four felonies, including dealing in a controlled substance and dealing in methamphetamine, and received a sentence of twenty-eight years. Based on his criminal convictions and the evidence seized from his house, I do not believe the trial court erred in concluding Abbott is unlikely to prevail in his defense and denying him appointed counsel under the statute.

[38] This is where the analysis should end—an affirmation of the trial court's ruling on Section 34-10-1-2 and a reversal of the order granting summary judgment. Yet the majority goes on to bypass Indiana's forfeiture statutes and, invoking "equity," creates a new remedy allowing indigent defendants to use property seized by law enforcement to fund their defense. Because equity is not the appropriate avenue for relief, I dissent.

[39] Chapters 1 and 2 of Title 34, Article 24 of the Indiana Code govern civil forfeitures. Chapter 1 provides for the forfeiture of property used in violation of certain criminal statutes, and Chapter 2 provides for the forfeiture of property incident to corrupt business influence. And while both chapters address the custody of the seized property pending judgment and allow its release in certain circumstances, those circumstances are not present in Abbott's case. For example, both chapters address replevin, an action which primarily involves a court's determination of "present possession" over seized property until a final judgment can be made. *State Exchange Bank of Culver v. Teague*, 495 N.E.2d 262, 266 (Ind. Ct. App. 1986) ("The only issue necessarily decided in a replevin action is the right to present possession."). Like replevin, the majority's remedy involves the present possession and release of seized property during the pendency of the proceedings. Chapter 1 prohibits replevin entirely, while Chapter 2 allows replevin only where the prosecution did not bring the forfeiture action within the statutory time period or where the replevin action is brought by a person unaware of the criminal activity whose right, title, or interest is of record. Ind. Code §§ 34-24-1-2(l), 34-24-2-4(c). And Chapter 1 provides for the "provisional release [of seized property] pending final forfeiture determination." I.C. § 34-24-1-2(d). But the statute limits the property that may be provisionally released to "real property or a vehicle," not cash. *Id*.

[40] When interpreting a statute, "it is just as important to recognize what a statute does not say as it is to recognize what it does say," and we "will not add something to a statute that the legislature has purposely omitted." *Rush v.*

Elkhart Cnty. Plan Comm'n, 698 N.E.2d 1211, 1215 (Ind. Ct. App. 1998), *trans. denied*. Here, the legislature has created a statutory forfeiture scheme detailing the procedure for civil forfeitures, from the initial seizure to its custody in the interim to its disposition after judgment. That the legislature included limited means of release of property—replevin and provisional release —shows it was aware of its ability to provide the relief suggested by the majority here. Yet it chose not to do so in situations like Abbott's.[11]

[41] Nor do I agree with the majority that Chapter 2's provision that seized property "is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court," I.C. § 34-24-2-4(c), means any court may order any relief regarding the seized property. Such a reading would render much of the statutory scheme irrelevant—why allow and prohibit certain relief if any court can implement any remedy it chooses?

[42] Therefore, the forfeiture statutes do not allow the use of seized property to pay for an attorney during the pendency of the appeal. The majority attempts to circumvent the forfeiture statute by claiming equity demands the inclusion and use of the seized property when making an indigency determination under the civil-appointment statute. There are two flaws in this reasoning. First, equity

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[11] Other state legislatures have enacted statutes permitting the release of seized property to fund a defense. *See* N.Y. C.P.L.R. § 1312(4) (allowing release of funds for "attorneys' fees and expenses for the representation of the defendant in the forfeiture proceeding"); Conn. Gen. Stat. § 54-36h(e) (allowing release of funds subject to forfeiture for "legitimate attorney's fees in connection with [defendant's] defense in a criminal prosecution").

cannot be used by the judiciary to bypass inconvenient statutes. Nor can equity supersede otherwise constitutional statutes. *See State ex rel. Root v. Circuit Court of Allen Cnty.*, 259 Ind. 500, 289 N.E.2d 503, 506 (1972) ("[T]he Legislature may constitutionally prevent a court from exercising its equity jurisdiction as long as it does not prevent parties from obtaining due process in the proceedings created by statute."). The demanding analysis of whether the forfeiture statutes are unconstitutional or unconstitutional as applied to a particular defendant must take place in a case where the issue is properly raised.

[43] Second, equity is only available when there is no adequate remedy at law. *Branham Corp. v. Newland Resources, LLC*, 44 N.E.3d 1263, 1273 (Ind. Ct. App. 2015) ("[C]ourts will not exercise equitable powers when an adequate remedy at law exists."). Indigent defendants like Abbott have a remedy at law—the civil-appointment statute. Although the forfeiture statutes do not permit an indigency determination to consider the seized property, defendants like Abbott can still obtain relief under the civil-appointment statute if they satisfy the conditions of the statute. But in this case, the trial court found Abbott failed to show he met the conditions. If the majority disagrees with this trial-court finding, it should say so.

[44] While I recognize there has been prosecutorial overreach in civil-forfeiture cases requiring our intervention, this is not one of those cases. And when there is abuse, the judiciary has appropriate remedies to address such issues—holding the State to its burden of proof, overturning statutes based on constitutional violations, and appointing an attorney under the civil-appointment statute. *See*

Gonzalez v. State, 74 N.E.3d 1228, 1232 (Ind. Ct. App. 2017) (holding State did not sufficiently prove a nexus between the property and commission of an offense); *State v. Timbs*, 134 N.E.3d 12 (Ind. 2019) (applying Eighth Amendment's Excessive Fines Clause to forfeitures). We are not handcuffed as a judiciary. But we cannot substitute our will for the legislature and circumvent a detailed statutory scheme using equity to provide our desired relief.[12]

[45] Finally, I am also concerned that this issue—which has far-reaching consequences—was addressed sua sponte. Neither party argued this issue in the trial court or on appeal, nor were they given an opportunity to submit supplemental briefing on the issue. As the United States Supreme Court recently reiterated, courts are "passive instruments" who "do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quotation and brackets omitted). Especially in a case such as this, with vast consequences to the future of forfeiture law, we should address only the questions presented to us or at least allow the parties the opportunity to advocate on this issue.

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[12] SB 24 has been introduced in this, the 2021, legislative session that among other things provides that if the owner of seized property is a person who was represented by a public defender in a related criminal case, then the public defender may represent the person in the forfeiture proceeding.