IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-PL-347

Terry L. Abbott,
Appellant,

–v–

State of Indiana,
Appellee.

Argued: December 9, 2021 | Decided: March 29, 2022

Appeal from the Elkhart Superior Court
No. 20D03-1506-PL-140
The Honorable Teresa L. Cataldo, Judge

On Petition to Transfer from the Indiana Court of Appeals,
No. 19A-PL-1635

Opinion by Justice David

Justices Massa, Slaughter, and Goff concur.
Chief Justice Rush concurs in part and dissents in part with separate opinion.

David, Justice.

In Indiana, civil forfeiture actions typically proceed under one of two statutes: the general forfeiture statute or the racketeering forfeiture statute. Today, we consider whether the racketeering forfeiture statute permits a court to release, to the defendant, funds seized in a forfeiture action so the defendant can hire counsel in that same action. We hold that it does not. However, we also find that Abbott's designated evidence regarding the origins of much of the seized cash was sufficient to overcome the State's motion for summary judgment in this forfeiture action. Finally, we review Abbott's request for appointed counsel and find, although exceptional circumstances may exist that would otherwise justify appointment of counsel, the trial court did not abuse its discretion by denying Abbott's request given its finding that Abbott was unlikely to succeed in defense of the forfeiture.

We therefore affirm in part, reverse in part, and remand this case for further proceedings consistent with this opinion.

Facts and Procedural History

In April 2015, following two controlled buys where Terry Abbott sold drugs to a confidential informant, police executed a search warrant of Abbott's home. There they seized marijuana, methamphetamine, hundreds of pills containing amphetamine and alprazolam (Xanax), drug paraphernalia, several firearms, and $9,185 in cash – including $6,760 that was found in Abbott's pants pocket and $2,414 that was found in a safe. Abbott was arrested and eventually convicted of several offenses, including one count of Level 2 felony dealing methamphetamine and one count of Level 2 felony dealing in a schedule II controlled substance.

While Abbott's criminal case was pending, the State filed an *in rem* civil forfeiture action against Abbott under Indiana's general forfeiture statute in Indiana Code chapter 34-24-1, and Indiana's racketeering forfeiture statute in Indiana Code chapter 34-24-2 ("Racketeering Forfeiture Statute"), seeking the forfeiture of the cash and firearms seized during the search.

Abbott initially was represented by counsel in the forfeiture action, but his counsel withdrew in October 2015. Incarcerated and without counsel, Abbott moved to have counsel appointed to defend him in the forfeiture action. The trial court denied Abbott's motion to appoint counsel to contest the forfeiture, finding he was the most qualified person to investigate and present evidence in opposing summary judgment; he "has in the past hired private counsel to represent him in this matter;" and his likelihood of prevailing on the merits in the forfeiture action was "slim." Appellant's App. Vol. II at 14; *see* Ind. Code § 34-10-1-2(d)(2) ("The court shall deny an application . . . if the court determines . . . (2) [t]he applicant is unlikely to prevail on the applicant's claim or defense."). Therefore, Abbott proceeded *pro se* in defense of the forfeiture action.

After Abbott was convicted in his criminal case, the State filed a motion for summary judgment in the forfeiture action in July 2018, alleging there was no genuine issue of material fact that the seized property was subject to forfeiture under I.C. § 34-24-2-2 based on Abbott's pattern of racketeering activity. In response, Abbott designated copies of tax forms from 2015 showing that he lawfully earned over $20,000 in income, along with an affidavit stating that the seized cash was obtained legally—and that $6,760 of the seized cash was supposed to go to the purchase of a motorcycle later that day, but the sale fell through.

Following an evidentiary hearing, the trial court granted the State's motion for summary judgment, finding "the evidence presented is undisputed and clearly establishes that [Abbott] did engage in racketeering activity." Appellant's App. Vol. II at 25. It found that Abbott's designated evidence did not create a genuine issue of material fact, given the State's "overwhelming designated evidence" that the cash was used for or was derived from Abbott's criminal conduct. *Id.* at 27. Abbott appealed, *pro se*, challenging the trial court's denial of his request for appointed counsel and seeking a reversal of the entry of summary judgment.

The Court of Appeals reversed summary judgment for $8,923 of the seized currency, finding that Abbott's designations sufficiently created a

genuine issue of material fact under our summary judgment standard.[1] *Abbott v. State*, 164 N.E.3d 736, 742–43 (Ind. Ct. App. 2021), *vacated*. The Court of Appeals also *sua sponte* found as a matter of equity that trial courts may allow forfeiture defendants to access seized cash that is the subject of the forfeiture action "to retain counsel, purchase a transcript if needed, and pay for other reasonable expenses associated with preparing a defense." *Id.* at 747–48. In reaching this conclusion, the Court of Appeals relied on language in the Racketeering Forfeiture Statute that property seized under the statute "is considered to be in the custody of the law enforcement officer making the seizure, **subject only to order of the court**." *See* I.C. § 34-24-2-4(c) (emphasis added). Based on this finding, the Court of Appeals affirmed the trial court's denial of Abbott's request for appointed counsel on grounds that Abbott could, upon the court's order, use the seized money to pay his defense costs. The majority remanded to the trial court to "adopt reasonable procedures to supervise [Abbott's] expenditures of the *res*." *Abbott*, 164 N.E.3d at 749.

Judge Vaidik concurred in reversing the grant of summary judgment but dissented as to whether Abbott could use the seized cash to pay for his defense in the forfeiture action. *Id.* at 749–50 (Vaidik, J., dissenting). She explained that once the trial court determined Abbott was unlikely to be successful in defending the forfeiture claim, the majority should not have *sua sponte* addressed the "equity" of allowing Abbott the limited use of the funds to support his defense. *Id.* at 750–51. Judge Vaidik would have affirmed the denial of appointed counsel based on the finding that Abbott was unlikely to prevail in the forfeiture action.

The State sought transfer, which we granted, vacating the Court of Appeals' opinion. *See* Ind. App. R. 58(A).

[1] The Court of Appeals affirmed the summary judgment for the State regarding $261 of the seized currency and the seized firearms. *Abbott*, 164 N.E.3d at 742; *see* Appellant's App. Vol. II at 56. Abbott does not challenge this holding on transfer.

Discussion and Decision

In Indiana, civil forfeiture actions typically proceed under either the general forfeiture statute in Indiana Code chapter 34-24-1, or the Racketeering Forfeiture Statute in Indiana Code chapter 34-24-2. This case primarily involves the Racketeering Forfeiture Statute, under which the State sought summary judgment. As an initial matter, we analyze the trial court's grant of summary judgment in the State's favor on whether the funds at issue were used in the course of, intended for, or derived or realized through Abbott's alleged criminal conduct. We then explore whether the Racketeering Forfeiture Statute permits a court to release the *res* subject to the forfeiture action to the defendant to hire defense counsel. Lastly, we review the trial court's denial of Abbott's request for appointed counsel.

I. Genuine issues of material fact exist as to whether the seized funds were a part of Abbott's alleged racketeering activity.

We first review the trial court's grant of summary judgment in the State's favor.[2] 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. T. R. 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. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (citations omitted). The party moving for summary

[2] The State asks us to "summarily affirm the [] portions of the Court of Appeals' opinion relating to the merits of summary judgment." Pet. to Trans. at 9 n.2, 20. But at oral argument, the State argued it did not concede that summary judgment was improper. Regardless, having granted transfer, we conduct a de novo review of the trial court's grant of summary judgment. *See Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd.*, 134 N.E.3d 370, 376 (Ind. 2019).

judgment bears the initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Sargent v. State*, 27 N.E.3d 729, 731 (Ind. 2015). Upon this showing, the burden shifts to the non-movant to come forward with contrary evidence showing an issue for the trier of fact. *Hughley*, 15 N.E.3d at 1003.

This Court views 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). Under our standard, summary judgment may be precluded "by as little as a non-movant's mere designation of a self-serving affidavit" because we prefer "letting marginal cases proceed to trial on the merits." *Hughley*, 15 N.E.3d at 1003–04.

"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). Under the Racketeering Forfeiture Statute, the State had the burden to show by a preponderance of the evidence 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).

In support of summary judgment, the State designated the pleadings in the forfeiture action, an affidavit of the Chief Investigator of the Elkhart County Prosecutor's Office, and the record from Abbott's criminal case. Opposing summary judgment, Abbott designated an affidavit stating that the $6,760 in cash that was seized from his pants pocket was "lawfully obtained" and that this money was intended to be used to purchase a motorcycle later that day. Appellant's App. Vol. II at 33–35. He also submitted W-2 forms showing he was employed prior to his arrest.

We find that Abbott's designated evidence creates genuine issues of material fact as to whether the *res* was "derived from," "realized through," or "used in the course of" Abbott's alleged racketeering activity. I.C. § 34-24-2-2. Abbott's designations, showing lawful income and testimony that much of the seized cash was for a lawful purpose—

purchasing a motorcycle—create the requisite "conflicting inferences" to "preclude summary judgment." *Hughley*, 15 N.E.3d at 1004 n.1 (reversing summary judgment in a forfeiture action, finding a "perfunctory and self-serving" affidavit attesting that seized currency was neither proceeds of nor used in a crime was sufficient to raise a triable issue of fact); *see also Sargent*, 27 N.E.3d at 732–33 (reversing summary judgment for the State in a forfeiture action, finding the defendant designated sufficient materials to show that the defendant was not "in possession" of the property subject to forfeiture as contemplated by the statute). Accordingly, Abbott's sworn statements create sufficient factual issues to be resolved at trial.

This does not mean that the State cannot later convince the trier of fact by a preponderance of the evidence that there was a sufficient nexus between the seized money and Abbott's alleged racketeering activity. *See Katner v. State*, 655 N.E.2d 345, 349 (Ind. 1995) (requiring the State to show, by a preponderance of the evidence, a nexus between the property sought in forfeiture and an enumerated offense); *see also* I.C. § 34-24-2-2(d). However, even if Abbott's affidavit is self-serving, this is enough to defeat a motion for summary judgment under our standard. *See Hughley*, 15 N.E.3d at 1003. Therefore, summary judgment in the State's favor regarding the $8,923 in cash was improper.

II. The Racketeering Forfeiture Statute does not authorize a court to release the seized *res* to the defendant to fund a defense in the forfeiture action.

The State contends that the Court of Appeals erred when it *sua sponte* held that a court, through its equity powers, may order the release of seized funds that are the subject of a forfeiture action to the forfeiture defendant to retain defense counsel. This implicates an issue of statutory construction regarding the Racketeering Forfeiture Statute, presenting a question of law, which we review de novo. *City of Lawrence Utilities Serv. Bd. v. Curry*, 68 N.E.3d 581, 585 (Ind. 2017).

When interpreting a statute, we give words their plain meaning and consider the structure of the statute as a whole. *ESPN, Inc. v. University of*

Notre Dame Police Dept., 62 N.E.3d 1192, 1195 (Ind. 2016) (citations omitted). To the extent there is ambiguity in the statute, we determine and give effect to the intent of the legislature as best it can be ascertained. *Id.* "We do not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result." *Temme v. State*, 169 N.E.3d 857, 863 (Ind. 2021) (quoting *ESPN*, 62 N.E.3d at 1196). We also "exercise caution so as not to add words or restrictions to a statute where none exist." *West v. Office of Indiana Secretary of State*, 54 N.E.3d 349, 353 (Ind. 2016) (citing *Kitchell v. Franklin*, 997 N.E.2d 1020, 1026 (Ind. 2013)).

In interpreting the Racketeering Forfeiture Statute, the Court of Appeals invoked its equity powers and explained that "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." *Abbott*, 164 N.E.3d at 739.

However, we find this inconsistent with the structure of the Racketeering Forfeiture Statute and the legislative intent underlying our forfeiture scheme. The Racketeering Forfeiture Statute provides, in part:

> (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without a court order only if:
>
> (1) the seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or
>
> (2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter (or IC 34-4-30.5 before its repeal).
>
> (b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:
>
> (1) place the property under seal;
>
> (2) remove the property to a place designated by the court; or

> (3) require another agency authorized by law to take custody of the property and remove it to an appropriate location.
>
> (c) Property seized under subsection (a) (or IC 34-4-30.5-4(a) before its repeal) is not subject to replevin, but 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(a)–(c).

Our main objective is to ascertain what "subject only to order of the court" means—namely, whether it authorizes a court in equity to release seized *res* that is the subject of a forfeiture action to the defendant to defend against the forfeiture.

We first observe that the plain language of the statute does not expressly permit a court in equity to release the *res* to the defendant to defend the forfeiture action. However, we also observe that the statute provides no guidance as to what "subject only to order of the court" means. I.C. § 34-24-2-4(c). Accordingly, we find such phrasing to be ambiguous because it is "susceptible to more than one interpretation." *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc*., 746 N.E.2d 941, 947 (Ind. 2001) (quoting *In re Lehman*, 690 N.E.2d 696, 702 (Ind. 1997)). Therefore, we must determine, give effect to, and implement the legislature's intent in drafting this provision. *ESPN,* 62 N.E.3d at 1196.

The State argues that the General Assembly's "purpose" in enacting the Racketeering Forfeiture Statute was to allow courts to "guarantee the security of the seized assets while in law enforcement custody[.]" Pet. to Trans. at 16. Further, it contends that the nature and dictionary definition of a "seizure" necessarily means that the original owner of seized property lacks access to it. Finally, the State contends that forfeitures are highly regulated by the General Assembly, and a defendant's access to seized money subject to forfeiture is therefore a subject for the General Assembly, not the courts.

In opposing transfer, Abbott argues that the Court of Appeals' interpretation is rooted "squarely" in the Racketeering Forfeiture Statute, and argues that the statute's plain language permits a court to broadly

order the use of the *res* given the statute's lack of any limiting principles. He further argues that the Court of Appeals' holding would not apply to the vast majority of civil forfeitures filed in Indiana, since most are filed only under the general forfeiture statute and not the racketeering statute.[3]

We first analyze the statutory context in which "subject only to the order of the court" appears. Subsection 4(a) provides that "[p]roperty subject to forfeiture under this chapter **shall** be **seized** by [ ] law enforcement[,]" non-discretionary language that the seized property is displaced from its original owner. I.C. § 34-24-2-4(a) (emphases added). Black's Law Dictionary defines a "seizure" as "[t]he act or instance of taking possession of a person or property by legal right or process[.]" *Seizure*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Seizure" is also defined as "the taking possession of person or property by legal process." *Seizure*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/seizure (last visited Mar. 22, 2022) [https://perma.cc/Y75C-6TY3]. Although title may not pass upon seizure, the term's definition infers that such property is displaced from the original owner. Therefore, in the context of the Racketeering Forfeiture Statute, we find that "seized" property is generally unavailable to its original owner while it is still "seized."

Subsection 4(b) then provides instruction for the storage and security of the seized property while the forfeiture action is pending, such as placing the property under seal, removing the property to a place **designated by the court**, or allowing another authorized agency to take custody of the property. I.C. § 34-24-2-4(b) (emphasis added). Then, Subsection 4(c) provides that the seized property "is not subject to replevin, but is considered to be in the custody of the law enforcement officer making the seizure, **subject only to order of the court**." *Id.* § -4(c) (emphasis added).

[3] To rebut some of the concerns the State raises, Abbott directs us to New York, which allows the release of seized funds for "reasonable living expenses," "bona fide attorneys' fees," and other costs. Resp. Br. at 13 (quoting N.Y. C.P.L.R. 1312(4); citing *Schneiderman v. Costa*, 172 A.D.3d 937 (N.Y. App. Div. 2019)). However, we note that New York's statute expressly permits the release of *res* to the forfeiture defendant and therefore has no impact on our de novo review of Indiana's statute.

The recurring theme in subsections 4(a)–4(c) is the security of the seized property in law enforcement's custody while the forfeiture action is pending; the statute gives no indication that a court may broadly distribute the seized property through its equitable power, or even return it to the person from whom it was seized. Therefore, in the context of the statute as a whole, we interpret "subject only to order of the court" to refer to the manner and means in which seized property is to be held in law enforcement's custody during the pendency of the forfeiture action. In other words, we do not find the legislature intended this language to give the court equitable authority to order the seized property released to the defendant to defend the forfeiture action.

The legislative intent underlying Indiana's forfeiture scheme at large also supports today's holding. In *Katner*, we observed that civil forfeiture proceedings advance diverse legislative goals. 655 N.E.2d at 347–48.[4] There, we noted that "forfeiture creates an economic disincentive" for offenders "to engage in future illegal acts," and that forfeitures also seek to "advance[] our Legislature's intent to minimize taxation by permitting law enforcement agencies . . . to defray some of the expense incurred in the battle against drug dealing." *Id.* (citation omitted). And in the specific context of illegal drugs, as here, civil forfeiture actions "are designed to be a relatively efficient means to remove, from its owner, property used to further illegal trafficking in drugs." *Id.* at 347.

Allowing the defendant the use of the *res* subject to forfeiture would hinder each of these legislative goals. It would likely reduce the economic disincentive of our forfeiture scheme by providing an offender with a way to utilize and potentially deplete the seized *res*. It would also necessarily reduce the ability of law enforcement agencies to defray some of the expenses in battling drug dealing as less of the seized *res* would be available for potential forfeiture, thereby impeding the General Assembly's

[4] *Katner* focused on Indiana's prior forfeiture statute in Indiana Code section 34-4-30.1-1 (repealed). 655 N.E.2d at 347. However, because our broad statements regarding the legislative intent of forfeitures generally are equally applicable to our existing forfeiture scheme, we apply our observations from *Katner* here.

goal of minimizing taxation. Therefore, considering the legislative goals underlying forfeitures generally, we conclude that our General Assembly did not intend for the Racketeering Forfeiture Statute to permit a court to release the seized *res* to the defendant to defend the forfeiture action.

In addition, a court will not exercise its equitable powers if the petitioner has an adequate remedy at law. *State ex rel. Hahn v. Howard Circuit Court*, 571 N.E.2d 540, 541 (Ind. 1991). Here, there is already an express statutory mechanism for a trial court to permit an indigent individual to obtain civil counsel in forfeiture cases. *See infra* Part III; *see also* I.C. § 34-10-1-2. In crafting this civil appointment statute, our General Assembly decided to extend eligibility for civil counsel appointment only to litigants who meet the statutory criteria. We therefore decline to interpret the Racketeering Forfeiture Statute in a manner that would allow applicants to potentially circumvent the more stringent civil appointment requirements in Indiana Code section 34-10-1-2.

"[T]he job of this Court is to interpret, not legislate, the statutes before it[,]" *ESPN*, 62 N.E.3d at 1200, and "we exercise caution so as not to add words" to a statute where none exist. *West*, 54 N.E.3d at 353. Therefore, we hold that the Racketeering Forfeiture Statute does not permit the court to order seized funds released to the forfeiture defendant to fund a defense to the forfeiture action.

III. The trial court did not abuse its discretion in denying Abbott's request for appointed counsel, even if "exceptional circumstances" may have existed.

Abbott argues that if he cannot use the funds subject to forfeiture to defend himself in the forfeiture action, he is a "clear candidate for counsel under Section 34-10-1-2" given the "exceptional circumstances" surrounding his case. Resp. Br. at 18–19. We therefore consider whether the trial court abused its discretion by denying's Abbott's request for appointed counsel. *Inman v. State Farm Mut. Auto. Ins. Co.,* 981 N.E.2d 1202, 1204 n.2 (Ind. 2012) (finding an abuse of discretion standard where the language of a statute is permissive). A trial court abuses its discretion

when its decision is "clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law." *Id.* at 1204. We will not reweigh the evidence, and we determine whether the evidence before the trial court can serve as a rational basis for its decision. *DePuy Orthopaedics, Inc. v. Brown*, 29 N.E.3d 729, 732 (Ind. 2015).

When the court is satisfied that the litigant lacks "sufficient means to prosecute or defend the action," the trial court "may, under exceptional circumstances," appoint that litigant civil counsel. I.C. § 34-10-1-2(b). In making this determination, the trial court may consider "(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." *Id.* § -2(c). A court "shall deny" an application for appointment of counsel if it determines that "(1) [t]he applicant failed to make a diligent effort to obtain an attorney before filing the application[,]" or "(2) [t]he applicant is unlikely to prevail on the applicant's claim or defense." *Id*. § -2(d).

The party seeking civil counsel appointment bears the burden to demonstrate that he or she is indigent and without "sufficient means." *Sholes v. Sholes*, 760 N.E.2d 156, 160 (Ind. 2001). Whether the applicant has "sufficient means" goes beyond a mere snapshot of the applicant's financial status. *Id.* at 161. Moreover, "the court should look to the particular issues presented in the action" and "examine the applicant's status in relation to the type of action[.]" *Id.*[5]

In looking at the type of action before us, we note that forfeitures "are not favored, and should be enforced only when within both the letter and

[5] A court's determination of whether a litigant has sufficient means to prosecute or defend an action is reviewed for an abuse of discretion. *See Sholes*, 760 N.E.2d at 161 n.3 (citing *E.P. v. Marion Cnty. Ofc. of Family & Children*, 653 N.E.2d 1026, 1034 (Ind. Ct. App. 1995)). The record is unclear whether the trial court made a specific finding on whether Abbott had "sufficient means to prosecute or defend the action." I.C. § 34-10-1-2(b). For the purposes of our "exceptional circumstances" inquiry, we assume without deciding that Abbott lacked sufficient means to defend the action.

spirit of the law." *Katner*, 655 N.E.2d at 347. We have also observed that while forfeiture actions are properly classified as civil in nature, "civil proceedings may advance punitive and remedial goals[,]" *id.* at 347, and forfeiture actions "have significant criminal and punitive characteristics." *Hughley*, 15 N.E.3d at 1005. Moreover, we have acknowledged that "the punitive nature of some *in rem* proceedings may require us to confront—at some point—questions about whether the procedural requirements of *in rem* forfeitures comport with due process or other constitutional guarantees." *State v. Timbs*, 134 N.E.3d 12, 27 n.5 (Ind. 2019). While Abbott makes no constitutional challenges to Indiana's forfeiture scheme today, it is with this backdrop that we turn to analyze his status in relation to this forfeiture action to determine whether "exceptional circumstances" exist to trigger the court's discretionary ability to appoint civil counsel under Indiana Code section 34-10-1-2(b).

We agree with Abbott that his status in relation to this forfeiture action presents the type of "exceptional circumstances" that would allow a court to appoint civil counsel under Indiana Code sections 34-10-1-2(b) and (c). Here, Abbott requested appointed counsel at public expense, asserting that he was incarcerated, indigent, and lacked the means to hire counsel. He also asserted that this forfeiture action was "complex" and that his only 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. II at 59–61. And while Abbott was attempting to defend the forfeiture action from prison, the trial court admonished him several times for failing to follow proper procedures and advised him to "seek the advice of an attorney." *Id.* at 8, 59-60. Accordingly, in light of the trial court's multiple admonishments and Abbott's indigent and incarcerated status in relation to the "quasi-criminal"[6] nature of this civil forfeiture action, we find that exceptional

[6] *See Timbs*, 134 N.E.3d at 27 n.5 (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) ("[A] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.")).

circumstances do exist on this record which would justify appointment of civil counsel under Indiana Code section 34-10-1-2(b)(2).

However, our analysis does not stop there. The trial court denied Abbott's request for counsel under Indiana Code section 34-10-1-2(d), which plainly states that the "court shall deny" the request for counsel if it determines the "applicant is unlikely to prevail on the applicant's claim or defense."[7] Indiana case law "presumptively treats 'shall' as mandatory . . . 'unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning.'" *Sholes*, 760 N.E.2d at 159 (quoting *Ind. Civil Rights Comm'n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 947 (Ind. 1999)).

Here, the trial court specifically found that Abbott's "likelihood of prevailing on the merits is slim based on the evidence before the court[.]" Appellant's App. Vol II at 14. Given the facts, we cannot say that the trial court erred when finding that Abbott was unlikely to prevail in the forfeiture action, nor was its decision to deny Abbott's request for appointed counsel "clearly against the logic and effect of the facts and circumstances." *See Inman*, 981 N.E.2d at 1204. After two controlled buys with law enforcement, officers searched Abbott's home, finding marijuana, methamphetamine, and hundreds of amphetamine and alprazolam pills, as well as several firearms. Abbott was later convicted of four felonies, two of which were Level 2 drug dealing felonies, largely based on the evidence seized from his home. And because the civil appointment statute requires the trial court to deny a request for counsel if it determines the applicant is unlikely to prevail in the action, the trial court did not abuse its discretion by denying Abbott's petition.

Under our standard of review, we will not reweigh the evidence. *DePuy Orthopaedics*, 29 N.E.3d at 732. Therefore, although Abbott's case may present "exceptional circumstances" that would permit the trial court

[7] The record does not reflect whether the trial court first was "satisfied that [Abbott] . . . does not have sufficient means to . . . defend the action" under Indiana Code section 34-10-1-2(b) before considering if Abbott had a likelihood of succeeding in defending the forfeiture.

to appoint counsel under Indiana Code section 34-10-1-2(b), the trial court did not abuse its discretion by denying Abbott's request after finding that he was unlikely to prevail in his defense of the forfeiture action.

Conclusion

We reverse the grant of summary judgment in the State's favor regarding the $8,923 in cash. We also hold that the Racketeering Forfeiture Statute does not permit the court to release the *res* subject to forfeiture to the defendant to mount a defense to the forfeiture action. Finally, we affirm the denial of Abbott's request for appointed counsel. We therefore remand this case for further proceedings consistent with this opinion.

Massa, Slaughter, and Goff, JJ., concur.
Rush, C.J., concurs in part and dissents in part with separate opinion.

ATTORNEYS FOR APPELLANT
Marie L. Miller
Samuel B. Gedge
Institute for Justice
Arlington, Virginia

ATTORNEYS FOR APPELLEE
Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Supervising Deputy Attorney General
Indianapolis, Indiana

Rush, C.J., concurring in part and dissenting in part.

I concur with the majority's interpretation of Indiana's racketeering forfeiture statute and its determination that the State is not entitled to summary judgment. However, I respectfully dissent from the majority's holding that the trial court did not abuse its discretion in denying Abbott's request for appointed counsel.

To qualify for appointed counsel in a civil proceeding, applicants must be (1) indigent and (2) without sufficient means to defend or prosecute the action. Ind. Code §§ 34-10-1-1, -2(b). Upon satisfying these conditions, the trial court may then appoint counsel "under exceptional circumstances." *Id.* § -2(b)(2). But if the trial court determines that the applicant is "unlikely to prevail on [their] claim or defense," the court must deny the request. *Id.* § -2(d)(2).

As the majority thoughtfully acknowledges, this case presents a host of "exceptional circumstances" that support the appointment of counsel. *Ante*, at 14. In my view, these same circumstances—along with others—must be considered in determining whether the trial court abused its discretion in concluding that Abbott's "likelihood of prevailing on the merits is slim." And after considering the exceptional circumstances in this case, the quintessentially unique features of *in rem* forfeiture proceedings, and the fact that Abbott's defense possesses enough merit to proceed to trial, I am led to one conclusion: denying Abbott's request for counsel is clearly against the logic and effect of the facts and circumstances before the trial court.

I. The trial court's denial of counsel, premised on its merits determination, was an abuse of discretion.

In light of the facts before the trial court surrounding the seizure of the cash, the majority finds no error with the trial court's determination that Abbott lacked a likelihood of prevailing in the forfeiture action. *Ante*, at 15. But whether this determination amounts to an abuse of discretion requires consideration of all relevant "facts and circumstances." And here, this includes not only the exceptional circumstances identified by the

majority, *ante*, at 14, but also (1) the unique characteristics of *in rem* forfeiture proceedings and (2) the fact that Abbott's defense survives summary judgment.

A. Unique characteristics of *in rem* forfeiture actions constrain Abbott's ability to show a likelihood of prevailing in his defense.

It is well settled that *in rem* forfeitures are disfavored in Indiana and that statutes authorizing them are strictly construed against the State. *Hughley v. State*, 15 N.E.3d 1000, 1005 (Ind. 2014); *Chan v. State*, 969 N.E.2d 619, 621 (Ind. Ct. App. 2012). Thus, the State's entitlement to the disputed *res* is far from assumed; instead, the State must establish a "nexus" between the item sought and the criminal activity. *See, e.g.*, *Katner v. State*, 655 N.E.2d 345, 348–49 (Ind. 1995).

Indeed, forfeiture actions are "quasi-criminal," purposefully oriented at imposing punishment—by way of property deprivation—for the commission of a crime. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965); *see also State v. Timbs*, 134 N.E.3d 12, 25 (Ind. 2019). Though the deprivation of property interests generally requires due process, not all deprivations are accompanied by the same procedural protections. *See generally Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976). This is particularly true in the modern civil-forfeiture era, as forfeiture defendants enjoy far fewer procedural protections than their criminal counterparts. *See Leonard v. Texas*, 137 S. Ct. 847, 847–48 (2017) (Thomas, J., respecting denial of certiorari) (noting how as a "result of this distinct legal regime, civil forfeiture has in recent decades become widespread and highly profitable"); *see also Timbs*, 134 N.E.3d at 27 n.5.

As the majority observes, questions regarding the adequacy of existing procedural safeguards are not before the Court today. *Ante*, at 14. Nevertheless, we cannot ignore the constellation of unique characteristics that inform and impede a defendant's ability to show a likelihood of prevailing in an *in rem* proceeding. Because these forfeitures "have significant criminal and punitive characteristics," we have previously

found it "vital" that parties to forfeiture actions are not "denied their day in court." *Hughley*, 15 N.E.3d at 1005. And although Abbott has not been denied his day in court, three aspects of our current system render that day far more onerous.

First, forfeiture defendants have no right to counsel; instead, the appointment of counsel is at the mercy of the trial court. *See, e.g.*, I.C. § 34-10-1-2. *But cf. State v. $1,010.00 in Am. Currency*, 722 N.W.2d 92, 98–99 (S.D. 2006) (holding that indigent defendants have a constitutional due process right to counsel when the State initiates a forfeiture proceeding prior to a criminal proceeding). Without the assistance of counsel, any litigant—especially those unfamiliar with the court system's procedural ins-and-outs, let alone the legal issues involved—is inherently less likely to mount a successful claim or defense. Forfeiture defendants, in particular, are distinctly disadvantaged by the lack of appointed counsel. *See Leonard*, 137 S. Ct. at 848 (Thomas, J., respecting denial of certiorari) (recognizing that "forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings"). And oftentimes these defendants—including Abbott—would be able to afford representation but for the State's seizure of funds.

Second, despite the criminal and punitive characteristics of forfeiture actions, the State's burden of proof in these proceedings is much lower than its burden in criminal cases. *See Timbs*, 134 N.E.3d at 27 n.5. The State need only prove the requisite "nexus" by a preponderance of the evidence, which bolsters its ability to obtain property. *See* I.C. § 34-24-2-2(d); *Serrano v. State*, 946 N.E.2d 1139, 1142–43 (Ind. 2011); *Leonard*, 137 S. Ct. at 847–48 (Thomas, J., respecting denial of certiorari) (noting that a lower burden of proof has, in part, contributed to the increased utility of *in rem* proceedings for states). Further demonstrating the "relative ease" of the State's *in rem* pursuits, a forfeiture defendant "need not be found guilty of a crime—or even charged—to lose permanently their cash, car, home or other property." *Serrano*, 946 N.E.2d at 1141.

Third, when there is a parallel criminal proceeding—such as in Abbott's case—*in rem* defendants face an untenable choice: answer the State's complaint and incriminate themselves by admitting an interest in

the property or not answer the complaint and forfeit the property. *Cf.* *State v. Melendez*, 222 A.3d 639, 647–48 (N.J. 2020) (holding the State cannot use a defendant's statements in an answer to a forfeiture complaint in a later criminal proceeding because the statements "cannot be considered voluntary"). In this way, forfeiture defendants are exposed to risks and wrinkles that are both unfamiliar to other civil litigants and carry far greater consequences—particularly so for the *pro se* defendant.

These three aspects of *in rem* forfeiture proceedings inextricably inform, and effectively constrain, a defendant's ability to show a likelihood of success on the merits of their defense. And when, like Abbott, the defendant is indigent and incarcerated, yet forced to proceed *pro se*, making that showing is uniquely burdensome. We simply cannot ignore the logic and effect of these facts and circumstances when considering whether a trial court abused its discretion in denying appointed counsel based on a forfeiture defendant's likelihood of prevailing on their defense.

B. Abbott's defense, which survives summary judgment, undermines the trial court's merits determination.

The unique characteristics of *in rem* proceedings, combined with Abbott's incarcerated and indigent status, weigh heavily in favor of granting his request for counsel. So, unless Abbott's defense is devoid of legal merit, I would find the trial court's decision stripped of any "rational basis." *See* *DePuy Orthopaedics, Inc. v. Brown*, 29 N.E.3d 729, 732 (Ind. 2015).

The appointment-of-counsel statute provides no guidance as to what supports an "unlikely to prevail" determination. *See* I.C. § 34-10-1-2. Our caselaw, however, reveals that an applicant is unlikely to prevail when their claim or defense either has no legal basis or is procedurally barred. *See, e.g.*, *Smith v. Ind. Dep't of Corr.*, 871 N.E.2d 975, 986–87 (Ind. Ct. App. 2007), *trans. denied*; *Beard v. Dominguez*, 847 N.E.2d 1054, 1063 (Ind. Ct. App. 2006), *trans. denied*; *In re Adoption of J.D.C.*, 751 N.E.2d 747, 752 (Ind. Ct. App. 2001). Abbott's defense does not fall into either category.

As the majority correctly holds, there is a genuine issue of material fact as to the nexus between the seized cash and Abbott's alleged racketeering

activity. *Ante*, at 5–7. To be sure, defeating summary judgment is not the same as showing a likelihood of success at trial. *See Hughley*, 15 N.E.3d at 1004. But surviving summary judgment in this context should not be understated. Our standard is purposely demanding because we err "on the side of letting marginal cases proceed to trial on the merits." *Id.* And here, Abbott will proceed to trial on the crux of his forfeiture defense. I agree that "[t]his does not mean that the State cannot later convince the trier of fact by a preponderance of the evidence that there was a sufficient nexus." *Ante*, at 7. But it seems antithetical for the majority to hold the State to its burden at trial, only to later condone the trier of fact's cursory—though statutorily permitted—conclusion that Abbott has a "slim" chance of prevailing.

Abbott's forfeiture defense is neither frivolous nor procedurally estopped. And though the facts surrounding the seizure of the cash, *ante*, at 15, are relevant, they are not dispositive. Rather, the "exceptional circumstances" identified by the majority, the unique aspects of *in rem* proceedings, and Abbott's ability to survive summary judgment collectively support one conclusion: the trial court abused its discretion in denying Abbott's request for counsel on the basis that he is unlikely to prevail. And, as discussed below, the court's other purported bases for its decision also fail.

II. The trial court's alternative reasons for denying counsel do not withstand even deferential review.

In denying Abbott's request for counsel, the trial court presented two other grounds: (1) Abbott's demonstrated ability to investigate and present his defense without an attorney and (2) his prior ability to afford an attorney. *See* I.C. §§ 34-10-1-1, -2. Neither reason serves as a "rational basis" for the court's decision.

The trial court's first alternative basis for denying counsel was premised on its belief that Abbott—though indigent and incarcerated—was the "most qualified individual to investigate and present information as to why summary judgment is inappropriate." But the court's own

actions belie its conclusion. On several occasions, the court admonished Abbott for failing to follow proper procedures and explicitly advised him to "seek the advice of an attorney." Further, in determining an applicant's ability to "present [their] claims or defenses without an attorney," the court may consider "the type and complexity of the facts and legal issues in the action." *Id.* § -2. But here, there is no evidence that the trial court considered the complex nature of *in rem* proceedings. Simply put, the determination that Abbott was the "most qualified" to represent himself in this forfeiture proceeding was clearly against the logic and effect of the facts and circumstances before the court.

The trial court's second alternative basis for denying counsel was premised on Abbott's prior ability to finance his legal defense. But his past financial circumstances are irrelevant; the proper inquiry is Abbott's "means to . . . defend an action" at the time he submitted the indigency application. *See id.* § -1. Because there is no evidence that the trial court considered the facts surrounding Abbott's then-current financial status, the alternative reason for denying counsel also lacks a rational basis.

At its core, the civil appointment-of-counsel statute anticipates that not all cases should be treated alike. *See id.* § -2. Thus, we need not—and should not—treat incarcerated, indigent, civil-forfeiture defendants like Abbott as akin to all other civil litigants. To be sure, exceptional circumstances surrounding forfeiture actions will not in all cases render a trial court's decision to deny counsel an abuse of discretion. But for the reasons provided above, they do here.