

Does the Excessive Fines Clause Apply to Civil Forfeiture Actions Filed in State Court?

*The Supreme Court hears argument in *Timbs v. Indiana* to decide whether the Excessive Fines Clause of the Eighth Amendment applies to the states in civil forfeiture cases.*

Supreme Court * Defendant, a drug dealer, used his 2012 Land Rover to buy and sell heroin. On two occasions, he used the vehicle to transport two grams of heroin that he sold to an undercover officer. On a third occasion he drove the vehicle intending to make another sale, but he was arrested before the sale occurred.

In the interrogation following his arrest, Defendant admitted that he had driven the vehicle to pick up heroin “several times a week,” and that he had “put a lot of miles” on the vehicle doing so.

After Defendant pled guilty to selling the two grams to the undercover officer in a state criminal case, the State of Indiana brought a separate civil forfeiture action against the vehicle. The trial judge refused to order the forfeiture, however, holding that it would be grossly disproportional to the gravity of the offense to which Defendant pled guilty in violation of the Excessive Fines Clause of the Eighth Amendment.

The State appealed, but the Indiana Supreme Court did not reach the merits of the constitutional argument. Instead, it held that the Excessive Fines Clause does not apply to the states, and that accordingly the proportionality of the forfeiture was not an issue.

Whether the Eighth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment is an issue on which the courts have been divided. The Supreme Court granted *cert.* to resolve that issue. *Timbs v. Indiana*, 138 S. Ct. 2650 (2018).

In the oral argument before the Court on November 28, 2018, Defendant’s counsel avoided discussing the merits of the excessiveness issue: his argument was that the Court should hold simply that the Excessive Fines Clause applies to civil forfeitures in state cases just as it applies in federal cases, and that the merits of the issue would be resolved on remand.

Counsel for the State argued that only those rights that are “historically rooted and fundamental” have been applied to the states, and because there was

no right to assert a disproportionality defense to a civil *in rem* forfeiture until the Supreme Court decided *Austin v. United States*, 509 U.S. 602 (1993), only twenty-five years ago, it was neither historically rooted nor fundamental and should not be imposed on the states.

The majority of the Court seemed inclined to adopt Defendant's position and remand the case to the Indiana courts to apply the Eighth Amendment analysis to the merits. Some expressed uneasiness with notion of dividing the Bill of Rights into separate categories of rights that were or were not "fundamental." Others, like Justice Sotomayor, were more specific, arguing that failure to allow a constitutional defense to an excessive civil forfeiture would mark a "return to the Star Chamber."

Nevertheless, the justices could not help questioning counsel regarding the merits. Justice Alito, for example, wanted to know if it would make a difference if the vehicle, instead of being a Land Rover worth \$42,000, had been a Mercedes or 15-year-old junker. Wouldn't the appropriate test be the nexus of the vehicle to the crime and not its value, he asked.

Other justices asked if the owner's financial status mattered. Would the forfeiture of a \$42,000 vehicle be disproportionate if the defendant were poor but not disproportionate if he were rich? And other justices asked how the Eighth Amendment would apply if the owner were an innocent owner who, like Mrs. Bennis in *Bennis v. Michigan*, 516 U.S. 442 (1996), was not protected by state law.

The Court gave no indication whether it would address any of those issues. The case will be decided early next year. *SDC*

Comment: It seems likely that the Court will rule for the defendant and remand the case to the Indiana courts to apply the Eighth Amendment in the same way that the federal courts have applied it in civil forfeiture cases. At that point, Indiana will likely argue that forfeiture of the vehicle would not be excessive because the proper consideration is not the value of the vehicle but the quality of its nexus to the underlying criminal offense, and that the "criminal offense" in question should be the entire course of conduct to which the defendant admitted, and not the two drug sales that were the basis for his conviction.

The defendant will doubtless object that the only relevant consideration should be the offense on which he was convicted, and that the forfeiture of a \$42,000 vehicle would be grossly disproportional to the sale of two grams of heroin. In the oral argument, his counsel also suggested that the use of the vehicle was

incidental or fortuitous and that the forfeiture would fail even under the State's nexus test.

All of those arguments would be familiar to federal practitioners. See Cassella, *Asset Forfeiture Law in the United States* (2d ed. 2013) and 2016 Supplement, ch. 28. In his briefs, however, the defendant signaled that he has an additional argument which did not come up in the Supreme Court.

In Indiana, unlike other states, civil forfeiture actions are filed by private law firms under a contingency agreement that allows them to retain a portion of the property if the forfeiture is successful. Thus, the defendant will argue that the private law firms have a financial incentive to bring unnecessarily draconian civil forfeiture actions, and that the Eighth Amendment should be vigorously applied in such cases to avoid abuse. *SDC*