

IN THE  
COURT OF APPEALS OF INDIANA

No. 22A-CR-578

STATE OF INDIANA,  
*Appellant-Plaintiff,*

v.

\$2,435 IN UNITED STATES  
CURRENCY AND ALUCIOUS KIZER,  
*Appellee-Respondent.*

Appeal from the Allen  
Circuit Court,

No. 02C01-2109-MI-825,

The Honorable Wendy W. Davis,  
Judge.

**BRIEF OF APPELLANT**

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## STATEMENT OF THE ISSUE

Whether the trial court abused its discretion by granting Respondent Alucious Kizer's request for a jury trial in this action for *in rem* civil forfeiture of money.

## STATEMENT OF THE CASE

### Nature of the Case

The State appeals the trial court's order granting Kizer's request for a jury trial in an *in rem* civil forfeiture proceeding.

### Course of Proceedings

On September 30, 2021, the State brought an action pursuant to Indiana Code chapter 34-24-1 for forfeiture of \$2,435.00 in currency which was seized from Kizer during a valid arrest (App. 8-9, 14-15). Kizer filed an Answer on October 20, 2021 that included a request for a jury trial (App. 20-24).

On October 25, 2021, the State filed a motion to strike Kizer's request for a jury trial (App. 28-31). The trial court initially granted the State's motion to strike on October 29, 2021, but then vacated that order on January 27, 2022 (App. 34, 37-39).

On February 14, 2022, the State filed its motion to certify for an interlocutory appeal the Order finding a right to a jury trial in civil forfeiture actions (App. 40-42). On February 15, 2022, the trial court granted the State's request to certify the order and noted the certification on the chronological case summary (App. 6, 43).

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On April 18, 2022, this Court accepted interlocutory jurisdiction (Docket; App. 45-46). This appeal follows in due course.

### **STATEMENT OF FACTS**

The State of Indiana is seeking forfeiture of \$2,435 which was seized from Kizer by the Fort Wayne Police Department (App. 14-15). According to the affidavit for probable cause supporting the initial request for seizure, Kizer fled from police on foot during a traffic stop (App. 9). While he was running, officers observed Kizer throw a green “Crown Royal bag” and also drop a significant amount of U.S. currency (App. 9). Kizer was eventually apprehended and was found to be in possession of \$1,410 in U.S. currency (App. 9). An additional \$1,025 in U.S. currency was found in a parking lot where Kizer was seen dropping money (App. 9). Officers also recovered the bag which was found to contain 67.4 grams of fentanyl, 74.6 grams of methamphetamine, 22.7 grams of cocaine, and 10.3 grams of apparent synthetic cannabinoid (App. 9-10). Some of the drugs were packaged in bulk and others appeared to be packaged for individual sale (App. 9). A police officer stated in the affidavit that, based on his training and experience, the amount of drugs was not consistent with personal use (App. 10).

Kizer answered the State’s petition for forfeiture and requested a trial by jury (App. 20-24). The State filed a motion to strike Kizer’s request for a jury trial with a supporting memorandum (App. 28-31). Therein, the State argued that there is no federal right to a jury trial in forfeiture actions and that there is no state law right because forfeiture proceedings are equitable in nature (App. 29-31).

The trial court initially granted the State’s motion to strike but then vacated that order on January 27, 2022 (App. 34, 37-39). The trial court found that Indiana courts have not yet addressed whether the right to a jury trial in Article 1, Section 20 of the Indiana Constitution applies to actions for civil forfeiture (App. 38). The trial court concluded that “until Indiana courts address the issue to give this Court further guidance, this Court finds it appropriate to adopt the approach of the federal courts and err on the side of awarding defendants more rights and due process by honoring the right to jury trial in civil forfeiture cases, if timely requested” (App. 39).

### **SUMMARY OF ARGUMENT**

Parties in *in rem* civil forfeiture actions are not entitled to a jury trial under the Indiana Constitution. Civil forfeitures under Indiana Code chapter 34-24-1 are of purely statutory origin and, therefore, are not controlled by Indiana’s constitutional jury provision. Because the statutes do not provide a right to a jury trial and instead provide for a hearing in front of a judge, there is no right to a jury trial.

Additionally, the constitutional right to a jury trial does not extend to cases in equity. Under Indiana law, *in rem* civil forfeitures are equitable in nature. The nature of an action is established by looking to the essential remedy that is sought. Civil *in rem* forfeitures are akin to the equitable actions of disgorgement and restitution because the purpose is to remove profits that were illegally obtained and

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to deter the use of the item for future criminal acts. The trial court abused its discretion by granting Kizer's demand for a jury trial.

### ARGUMENT

**In Indiana, there is no right to a jury trial for *in rem* civil forfeiture cases.**

The trial court abused its discretion by granting Kizer's request for a jury trial based on its finding that it is unclear if the state constitutional right to a jury trial applies. The Indiana Constitution provides that "[i]n all civil cases, the right of trial by jury shall remain inviolate." Ind. Const. art. 1, § 20. But, "[t]he right to a jury trial in civil cases is guaranteed only in those actions which were triable by jury at common law prior to June 18, 1852." *Midwest Fertilizer Co. v. Ag-Chem Equip. Co.*, 510 N.E.2d 232, 233 (Ind. Ct. App. 1987). "The words 'in all civil actions' mean, in all civil actions at the common law—as debt, covenant, assumpsit, trover, replevin, trespass, action on the case, etc." *Anderson v. Caldwell*, 91 Ind. 451, 453 (1883). Additionally, "[a]ctions of purely statutory origin are not controlled by the constitutional provision, and, unless provided for in the statute, a jury may not be demanded." *Graham v. Plotner*, 87 Ind. App. 462, 151 N.E. 735, 738 (1926); *see also State ex rel. Newkirk v. Sullivan Circuit Court*, 227 Ind. 633, 88 N.E.2d 326, 328 (1949) (finding no right to a jury trial for "special statutory proceedings"). Whether claims are entitled to a trial by "jury presents a pure question of law" and are reviewed *de novo*. *Lucas v. U.S. Bank, N.A.*, 953 N.E.2d 457, 460 (Ind. 2011).



**A. Indiana’s forfeiture statutes provide no right to a jury trial.**

Whether a jury trial is required here is decided by the statute, so there is no need to look to the Indiana Constitution. *In rem* civil forfeitures are a purely statutory procedure so a jury trial is not required. *See Graham*, 151 N.E. at 738 (finding a jury trial may not be demanded in a purely statutory proceeding). Kizer cannot show that civil forfeiture actions like the one in this case—an action seeking forfeiture of funds illegally obtained from criminal activity or intended for future use in criminal activity—existed at common law in Indiana in 1852. Instead, the legislature enacted the predecessor to the present forfeiture statutes in 1981, *see Katner v. State*, 655 N.E.2d 345, 347 (Ind. 1995) (discussing history of the statutes), for certain items—including currency—related to crimes and did not provide a right to a jury trial. Ind. Code §§ 34-24-1-3, -4.<sup>1</sup>

The plain language of the statute outlining the forfeiture procedure shows that the general assembly intended forfeitures under those provisions to be tried to the court. I.C. § 34-24-1-4. The statute provides for a forfeiture “hearing,” does not mention a jury, and empowers a court to enter certain findings awarding forfeiture based on whether the State meets its evidentiary burden. *Id.* As the legislature

<sup>1</sup> Other types of forfeiture did exist in the era of the 1852 constitution, but courts rejected claims of a right to jury trial for *in rem* forfeiture actions. *See, e.g., United States v. La Vengeance*, 3 U.S. 297, 301 (1796) (“It is a process of the nature of a libel *in rem*; and does not, in any degree, touch the person of the offender. In this view of the subject, it follows, of course, that no jury was necessary.”); *Lincoln v. Smith*, 27 Vt. 328, 362–63 (1855) (rejecting jury-trial challenge to *in rem* forfeiture proceedings); *Jones v. Root*, 72 Mass. 435, 438–39 (1856) (same); *Dowda v. State*, 203 Ala. 441, 443 (1919) (same).

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has created the *in rem* forfeiture cause of action and provided for a hearing without a right to jury, “a jury may not be demanded.” *Graham*, 151 N.E. at 738. In contrast, the Federal Rules of Criminal Procedure specifically provide for a right to request a jury in federal forfeiture actions. Fed. R. Crim P. 32.2(b)(5).

While the trial court here was correct that the Indiana Supreme Court has not yet addressed the right to a jury trial under the present forfeiture statutes (App. 38), the Supreme Court has already addressed forfeiture under a prior statutory forfeiture scheme and found no entitlement to a jury trial because the forfeiture was brought in a purely statutory proceeding. *Campbell v. State*, 171 Ind. 702, 87 N.E. 212, 214-15 (Ind. 1909). In *Campbell*, the Court held that an action for the civil forfeiture of liquor did not entitle a party to a trial by jury. *Id.* The Court reasoned that this “is a statutory proceeding, and not a civil case under the common law when the Constitution was adopted, providing that the right to a jury trial shall remain inviolate, and so it has been uniformly held in this state that in statutory proceedings parties are not entitled to trial by jury as a constitutional right.” *Id.* Like in *Campbell*, this Court should find that the statutory cause of action for forfeiture at issue here creates no right to a jury trial.

**B. The legislature has adopted an equitable forfeiture system.**

To any extent this Court could find that Indiana’s forfeiture statutes are a codification of previously existing law, there is still no right to a jury trial because the essential features of an *in rem* forfeiture action are equitable. Even with the state constitutional right to civil jury trials, claims which historically arose in

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equity “are to be tried to the court.” *Midwest Fertilizer Co.*, 510 N.E.2d at 233. This distinction between civil cases and cases in equity has been formally adopted in Indiana Trial Rule 38(a), which states in relevant part: “Issues of law and issues of fact in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable.”

When a specific cause of action did not exist at common law in 1852, “[t]he appropriate question is whether the essential features of the suit are equitable.” *Songer v. Civitas Bank*, 771 N.E.2d 61, 68 (Ind. 2002); *see also Stevens v. Olsen*, 713 N.E.2d 889, 891 (Ind. Ct. App. 1999) (finding that to determine whether a party is entitled to a jury trial a court looks to the “essential character and nature of the claim for relief sought.”). A court “evaluate[s] the nature of the underlying substantive claim and look[s] beyond both the label a party affixes to the action and the subsidiary issues that may arise within such claims.” *Songer*, 771 N.E.2d at 68. “[T]he key determination to be made is whether the claim involved is legal or equitable in character.” *Midwest Fertilizer Co.*, 510 N.E.2d at 233.; *see also Songer*, 771 N.E.2d at 63 (when determining whether there is a right to a jury trial “[t]he appropriate question is whether the essential features of the suit are equitable”).

*In rem* forfeiture—sometimes described as forfeiture of guilty property—is in the nature of the relief from the equitable actions for disgorgement and restitution more than any legal actions such as replevin or conversion. *See United States v. Bajakajian*, 524 U.S. 321, 331 (1998) (observing “[t]raditional *in rem* forfeitures”

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were remedial); *see also State v. Timbs*, 134 N.E.3d 12, 28 n.7, 36 (Ind. 2019) (“*Timbs II*”) (recognizing that in some instances *in rem* forfeiture is entirely remedial such as to disgorge illegally obtained profits).<sup>2</sup> Black’s Law Dictionary defines disgorgement as “[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion,” and restitution as “[a] body of substantive law in which liability is based not on tort or contract but on the defendant’s unjust enrichment.” “Disgorgement,” “Restitution,” Black’s Law Dictionary (10th ed. 2014). Disgorgement and restitution are claims that focus on the improper or illegal act of the defendant and the defendant’s unjust enrichment. Forfeitures under Indiana Code chapter 34-24-1, like these other equitable actions, seek to remove illegally obtained profits from the defendant and deter the defendant’s future illegal acts by removing funds intended to facilitate those acts. *See Katner*, 655 N.E.2d at 347 (describing goals of forfeiture).

This is in contrast to cases at law, which generally claim that a plaintiff is entitled to money damages. Cases at law focus on the harm done to the plaintiff, while equitable claims exist independent of any harm to parties. *See Nichols v. Minnick*, 885 N.E.2d 1, 4-5 (Ind. 2008) (holding equitable claims like restitution can

<sup>2</sup> In *Timbs II*, the Indiana Supreme Court observed that “use-based *in rem* fines may be both remedial and punitive.” 134 N.E.3d 12 at 28. In this case, the money is from drug dealing and subject to forfeiture on a solely remedial basis (App. 9-10). Under the facts of this case, Kizer has not, and cannot, raise a claim regarding other possible circumstances under which the punitive aspect obscures the remedial aspect. Here, the forfeiture of the instrumentality and proceeds of the crime are equitable in nature.

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be measured by a defendant's gain and can exist even when there is no demonstrable harm). Here, the State makes no claim that Kizer is not the owner of the money or that Kizer took the money from the State's coffers (App. 14-15). Instead, the State seeks forfeiture of money that was an instrumentality and proceeds from Kizer's illegal drug trade (App. 14-15). Civil forfeitures under Indiana Code chapter 34-24-1 are equitable claims that exist independent of any direct harm to the State.<sup>3</sup>

While Indiana courts have not previously addressed an *in rem* forfeiture jury request, appellate courts have already recognized that the essential character and nature of a forfeiture action under this statutory chapter lies in equity. In *Caudill v. State*, this Court specifically found that "by denying individuals the ability to profit from ill-gotten gain, an action for forfeiture resembles an equitable action for disgorgement or restitution." 613 N.E.2d 433, 437 (Ind. Ct. App. 1993) (answering the question of whether civil forfeiture is a criminal action). Our Supreme Court has also recognized that civil forfeitures advance equitable interests, including substantial "non-punitive, remedial legislative goals." *Katner*, 655 N.E.2d at 347. These goals include creating an economic disincentive to engage in future illegal acts and advancing the Legislature's intent to minimize taxation by defraying some of the law enforcement expenses incurred battling against drug dealing. *Id.* at 347-

<sup>3</sup> While law enforcement is given the ability to be reimbursed for certain expenses, the claim for forfeiture is in no way premised or dependent on any level of harm or cost to law enforcement. See I.C. §§ 34-24-1-3, -4.

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48.<sup>4</sup> Likewise, forfeitures have the purpose of preventing or “detering those who have engaged in illegal drug activities.” *Id.* at 347. Ultimately the remedies provided by forfeitures under Indiana Code chapter 34-24-1 are equitable—taking items and money to enjoin future criminal activity and to disgorge individuals involved with drug dealing of illegally obtained profits.

In granting Kizer’s request for a jury trial, the trial court noted that our Supreme Court has observed that forfeitures are “not totally divorced from the criminal law” (App. 38). But having some punitive aspect is not dispositive; instead the pertinent question is only “whether the *essential* features of the suit are equitable.” *Songer*, 771 N.E.2d at 63 (emphasis added). That standard, focusing on the essential nature of the action, leaves room for other less-significant interests. While some *in rem* forfeitures may have a non-remedial aspect, the essential nature of the present *in rem* forfeiture—and forfeitures generally—is remedial.

The trial court relied on *Gates v. City of Indianapolis*, 991 N.E.2d 592 (Ind. Ct. App. 2013), *trans. denied* (App. 38) to liken this case to criminal law, but a review of *Gates* shows why the jury request here should have been denied. In *Gates*, this Court considered whether city ordinance violations with mandatory fines were equitable or legal for purposes of a jury right. *Id.* at 594-96. The Court recognized that ordinance violations are “quasi-criminal,” but found dispositive to the jury analysis that “only monetary damages are sought” and that the City was making no

<sup>4</sup> Additionally, some of the proceeds from forfeitures are statutorily apportioned to the State’s common school fund for the benefit of Indiana’s citizens. I.C. § 34-24-1-4(d).

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claim for equitable relief. *Id.* at 595-96. The Court concluded that the “mandatory fines imposed in [that] case are akin to claims for money damages, which were exclusively legal actions in 1852.” *Id.* at 595. Here, however, the State is seeking entirely equitable relief by asking for disgorgement of the funds used in Kizer’s criminal enterprise. Based on the relief sought, the action is equitable and no right to a jury attaches.

Finally, the trial court observed that the Seventh Circuit Court of Appeals once found a Seventh Amendment right to a jury trial for forfeitures in *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 469 (7th Cir. 1980). But *One 1976 Mercedes Benz 280S* is not binding on Indiana courts, and the Seventh Amendment of the United States Constitution is not implicated in this case. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 79 (1989) (“cases brought in state courts are never subject to the Seventh Amendment”); *E.P. v. Marion County Office of Family and Children*, 653 N.E.2d 1026, 1030 (Ind. Ct. App. 1995) (same). Moreover, the Supreme Court of the United States subsequently rejected a claim of entitlement to a jury in forfeiture proceedings—but was only considering the Sixth Amendment. *Libretti v. United States*, 516 U.S. 29, 49 (1995) (“[O]ur analysis of the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection.”). Based on the statutory nature of the present proceeding and the nature of the relief sought, Kizer is not entitled to a jury trial.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the trial court to grant a jury trial and remand for a bench trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on July 1, 2022, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on July 1, 2022, the foregoing document was electronically served upon the following person(s) by First-Class U.S. Mail, postage prepaid::

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