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What Timbs v. Indiana Can Teach Appellate Lawyers About the Question Presented

To reach the right answer, your appellate brief must present the right question.

By Adam C. Reeves

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It is a familiar refrain that the "Question Presented" or "Statement of the Issue" can be the most important yet overlooked portion of an appellate brief. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 83 (Thomson West 2008). In fact, Justice William Brennan once wrote that "[i]n a substantial percentage of cases I find that I need read only the 'Questions Presented' to decide how I will dispose of the case." William J. Brennan Jr., *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 477 (1973). Accordingly, there is no shortage of guidance for how to strike the right balance of detail, persuasion, and pith in a question presented or statement of the issue. *See, e.g.*, Bryan Garner, *How to Frame Issues Clearly and Succinctly for Effective Motions and Briefs*, A.B.A. J. (Mar. 6, 2019). But it's not just how you phrase the question that matters. As the state of Indiana recently learned in *Timbs v. Indiana*, you have to ask the right one.

Timbs: Background

In *Timbs v. Indiana*, Indiana sought to forfeit Tyson Timbs's Land Rover SUV after Timbs pleaded guilty to dealing heroin. 586 U.S. __, 139 S. Ct. 682, 686 (2019). Timbs argued that his vehicle's forfeiture was an excessive fine in violation of the Eighth Amendment to the U.S. Constitution. The trial court and Indiana Court of Appeals agreed. The Indiana Supreme Court, however, did not. It found that the Eighth Amendment's Excessive Fines Clause had never been incorporated against the states and therefore held that it did not protect Timbs or his Land Rover. *State v. Timbs*, 84 N.E.3d 1179, 1184 (Ind. 2017).

The U.S. Supreme Court granted certiorari. Surprisingly, Indiana did not contest Timbs's argument that the Excessive Fines Clause should be incorporated as a general matter. Though it made other arguments against reversal, Indiana's concession on this general point was enough for the Court to rule in Timbs's favor. The Court unanimously held that the Eighth Amendment's Excessive Fines Clause is incorporated against the states, vacated the Indiana Supreme Court's decision, and remanded the case back to the Indiana courts. Exactly how Indiana found itself in this position serves as a valuable lesson in the importance of asking the right question on appeal.

Question Presented: Overview

But first, a word about the "Question Presented" or "Statement of the Issue," as they are slightly different animals.

The U.S. Supreme Court requires petitioners and respondents alike to articulate "the questions presented for review." These questions presented should be "expressed concisely in relation to the circumstances of the case, without unnecessary detail." Sup. Ct. R. 14.1 (a), 24.1(a). While deemed to encompass "every subsidiary question fairly included therein," the "question presented" is fixed when the Court grants certiorari. Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (noting that "we ordinarily do not consider questions outside those presented in the petition for certiorari"). Most state appellate courts of last resort also require similar questions presented of litigants. *See, e.g.*, Cal. R. Ct. 8.516(a)(1).

Intermediate appellate courts, on the other hand, require litigants to articulate "a statement of the issues presented for review." Fed. R. App. P. 28(a)(5); *see also* Ill. S. Ct. R. 341(h)(3) (requiring "statement of the issue or issues presented for review" by intermediate appellate court). Unlike at state supreme courts and the U.S. Supreme Court, appellees before intermediate appellate courts typically have more freedom to raise statements of the issue that vary from those raised by their opponents. *Yee*, 503 U.S. at 535 (noting that "by and large it is the petitioner himself who controls the scope of the question presented").

Notwithstanding their differences, the question presented and statement of the issue both help identify for the reviewing court which questions it must answer to grant or deny the parties relief.

As Indiana learned, the question presented or statement of the issue is not the place to raise new arguments. While a respondent can restate a petitioner's question presented before the U.S. Supreme Court, it cannot expand that question to raise a new argument. *Bray v.*

Alexandria Women's Health Clinic, 506 U.S. 263, 279 n.10 (1993). Parties cannot "smuggle additional questions into a case" before the Supreme Court by creatively drafting the question presented in their merits briefs. *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 164 (2007). The same is also largely true of statements of the issue offered to intermediate appellate courts. *See, e.g.*, *Save the Dunes Council, Inc. v. Lujan*, 899 F.2d 647, 649 n.1 (7th Cir. 1990) (Ripple, J., concurring) ("Appellant's vague references to the contrary in [its] statement of the issue . . . cannot expand, of course, the scope of the complaint."). However, there is occasional wiggle room for review depending on the issue's import. *See* Sanford Hausler, *First-Time Issues on Appeal: May They Ever Be Heard?*, A.B.A. J. (Mar. 6, 2019) (describing rare exceptions to rule requiring preservation of argument on intermediate appeal).

Timbs: Question Presented

In *Timbs*, the petitioner asked the U.S. Supreme Court to decide "[w]hether the Eighth Amendment's Excessive Fines Clause is incorporated against the States." Petition for a Writ of Certiorari at i, *Timbs v. Indiana*, 139 S. Ct. 682 (2019); Brief for Petitioners at i, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091). Before that case, the Court had at least partially incorporated all but the Bill of Rights's Third and Seventh Amendments against the states. At oral argument, Justice Neil Gorsuch openly mused, "[H]ere we are in 2018 still litigating incorporation of the Bill of Rights. Really? Come on." Oral Argument Tr. at 32, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091).

Even to Indiana, the answer seemed obvious, so it asked a different question: "Whether the Excessive Fines Clause . . . is incorporated *against state in rem forfeitures*." Brief for Respondent at i, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091) (emphasis added). While its phrasing might have seemed "fairly included" within the broader

question *Timbs* posed, the Court, as it turns out, had previously answered this question, too. In *Austin v. United States*, the Court held that *in rem* forfeiture fell within the protections of the Excessive Fines Clause when the forfeiture was at least partially punitive. 509 U.S. 602, 604 (1993). This meant that to answer Indiana's question presented by holding that the Eighth Amendment's incorporation against the states did not apply to *in rem* forfeitures, the Court would have to reconsider *Austin*.

Whether it was inclined to do so, the U.S. Supreme Court admitted it could not reach the question. Indiana had not previously argued for *Austin*'s reversal. The Court in *Timbs* held that Indiana's "reformulation" of the question presented could not permit it to "address a question neither pressed nor passed upon below," *Timbs*, 139 S. Ct. at 690, and rejected what Indiana acknowledged was its best argument for affirming the forfeiture of Timbs's Land Rover. Oral Argument Tr. at 53, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091) ("Justice Sotomayor: So, just so I'm clear, you're asking us to overrule *Austin*? . . . Because that's the only way that you can win with a straight face?").

Appellate litigants, then, should consider the implications of their own question presented or statement of the issue and take care that it does not ask a reviewing court to expand its inquiry into previously uncharted (or far too well-charted) waters.

Futile Arguments: Not Always Futile

Litigants should also be wary of forgoing seemingly futile arguments at the trial court; they may do so at the peril of their appeal.

Before merits briefing at the U.S. Supreme Court in *Timbs*, Indiana never challenged Timbs's ability to raise the Eighth Amendment as a

shield against forfeiture. Rather, in the lower courts, Indiana challenged only the merits of the trial court's conclusion that the forfeiture of Timbs's SUV was "grossly disproportionate" to the gravity of his drug offense. Brief of Appellant at 14–18, *State v. Timbs*, 62 N.E.3d. 472 (Ind. Ct. App. 2016) (No. 27A04-1511-MI-1976); Petition for Transfer at 8–14, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017) (No. 27S04-1701-MI-70).

One might forgive Indiana for doing so. At least one Indiana court had already applied the Eighth Amendment's protections to *in rem* forfeitures. *See $100 and a Black Cadillac v. State*, 822 N.E.2d 1001, 1011 (Ind. Ct. App. 2005). What's more, an Indiana appellate court could not have overruled *Austin*—the supreme law of the land—anyway.

But the U.S. Supreme Court has observed that:

> [T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim.

Engle v. Isaac, 456 U.S. 107, 130 (1982); *see also* Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. App. Prac. & Process 522 (Fall 2002) (describing case law requiring litigants to preserve even futile arguments for appeal).

This does not mean that appellate litigants should make each and every possible argument. Rather, learning from Indiana, litigants should instead take the long view when deciding whether to argue that an otherwise binding precedent should be overturned.

Focus Only on Necessary Questions

Finally, be careful what you wish for.

The Indiana Supreme Court allowed the forfeiture of Timbs's SUV because it held that the Eighth Amendment's Excessive Fines Clause had not yet been incorporated against the states. Although this was a desirable end result for Indiana, the ruling conveniently avoided the questions of whether the forfeiture of Timbs's SUV was grossly disproportionate, under which standard the same conclusion might be reached, or even whether the Excessive Fines Clause should be incorporated in the first place. But this also meant that all the U.S. Supreme Court had to do to grant Timbs relief was decide, as a general matter, that the Excessive Fines Clause was incorporated against the states.

In a way, then, the Indiana Supreme Court was responsible for the fact that Indiana did not seriously contest the relief that Timbs sought from the U.S. Supreme Court. But Indiana is not blameless. Indiana did, ostensibly, argue that the Indiana Supreme Court should not address the Excessive Fines Clause's incorporation because the forfeiture of Timbs's SUV was not "unconstitutionally excessive." *State v. Timbs*, 84 N.E.3d at 1184. But in its brief to the Indiana Court of Appeals, Indiana made clear that "[t]here *is* a threshold question of whether the Excessive Fines Clause even applies to the states." Brief of Appellant at 11 n.1, *State v. Timbs*, 62 N.E.3d. 472 (Ind. Ct. App. 2016) (No. 27A04-1511-MI-1976) (emphasis added). And in oral arguments before the Indiana Supreme Court, Indiana argued that "it's difficult to say that the Excessive Fines Clause is enshrined" in our nation's history and traditions and that its incorporation was an "interesting question." Audio Recording of Oral Arguments at 7:17–7:47, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017) (No. 27A04-1511-MI-1976). Whether it intended to

or not, Indiana invited its supreme court to avoid, at least temporarily, answering whether the forfeiture of Timbs's SUV violated the Eighth Amendment.

Other litigants should be wary when raising difficult, "interesting," or undecided legal issues when they have no intention of seeking relief on such grounds. Indiana's experience in *Timbs* shows how a court's decision to answer such questions, even if favorably, can come back to bite litigants on appeal.

Conclusion

Indiana is not finished litigating the forfeiture of Timbs's Land Rover. And this may be the real lesson from the case. Though Timbs crafted a winning question presented, his reward is a remand to the Indiana Supreme Court to relitigate whether his SUV's forfeiture was an excessive fine.

But a win is a win, and Timbs framed the question presented that got him the relief he needed. His appeal, ironically, proves correct Indiana's claim that "[r]eaching the right answer . . . requires first asking the right question." Brief for Respondent at 8, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091).

Adam C. Reeves is a member of Stoll Keenon Ogden, PLLC in Lexington, Kentucky.