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IN THE
COURT OF APPEALS OF INDIANA

Andrew Conley,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

February 23, 2021

Court of Appeals Case No. 19A-PC-3085

Appeal from the Ohio Circuit Court

The Honorable James D. Humphrey, Judge

Trial Court Cause No. 58C01-1302-PC-2

Tavitas, Judge.

Case Summary[1]

[1] Notions of equity and fairness dictate that courts, in imposing sentences upon juvenile offenders, must acknowledge the stark limitations of youth, children's capacity for change, and children's diminished culpability. Acclaimed writer Ambrose Bierce once philosophized: "Childhood [is] the period of human life intermediate between the idiocy of infancy and the folly of youth – tw[ice] remove[d] from the sin of manhood and thr[ice] [removed] from the remorse of age."[2] In this vein, an ongoing jurisprudential shift—led by the United States Supreme Court—counsels for imposing constitutional limits on sentences assessed to juvenile offenders and prescribes a mandatory process whereby sentencing judges should take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before imposing such sentences. *Miller v. Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 2469 (2012).

[2] As a deeply-troubled seventeen-year-old, Andrew Conley did the unthinkable when he killed his ten-year-old brother, Conner, in brutal fashion. Following Conley's guilty plea and a five-day sentencing hearing that inadequately accounted for Conley's age and mental health, the trial court imposed a maximum sentence of life without the possibility of parole ("LWOP").

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[1] We conducted remote oral argument in this matter on November 19, 2020, and we thank counsel for their able presentations.

[2] Ambrose Bierce, The Cynic's Word Book (1906); Ambrose Bierce, The Devil's Dictionary (1911).

[3] Conley now appeals the post-conviction court's ("PC Court") denial of his amended petition for post-conviction relief ("PCR") and raises numerous issues. We affirm the PC Court's rejection of each issue except for the PC Court's denial of Conley's ineffective assistance of trial counsel claim. We conclude that Conley's trial counsel rendered ineffective assistance of counsel by failing to introduce scientific evidence regarding juvenile brain development at Conley's sentencing hearing, by failing to adequately present mitigating evidence, and failing to effectively cross-examine the State's witnesses. Accordingly, we affirm in part, reverse in part, and remand with instructions to conduct a new sentencing hearing.

Issues

[4] Amicus curiae, the Indiana Public Defender Council ("IPDC"), raises one issue, and Conley raises five issues on appeal, which we restate as follows:

I. Whether the Indiana Constitution categorically bans LWOP sentences for all juvenile offenders.

II. Whether Conley's trial counsel rendered ineffective assistance.

III. Whether Conley's guilty plea was knowing, voluntary, and intelligent.

IV. Whether Conley's appellate counsel rendered ineffective assistance.

V. Whether newly-discovered evidence renders Conley's sentence unfair.

VI. Whether the doctrine of res judicata bars Conley's claims of unconstitutionality and inappropriateness of sentence.

Facts

I. The Offense

[5] On November 29, 2009, Conley, age seventeen, walked into the Rising Sun Police Department and confessed that he killed his ten-year-old brother, Conner. Conley voluntarily turned himself in and participated in several interviews with the police. Conley recounted the following facts to the police during the interviews.

[6] The day before he confessed, Conley was babysitting Conner, as he often did while his mother and father worked.[3] Conley and Conner often wrestled for fun. That evening, they were wrestling, and Conley placed Conner in a headlock from behind with Conley's arm around Conner's neck. Conley recounted that, at first, Conley was merely play wrestling, but his arm around Conner's neck got tighter and Conley increased the pressure of his arm on Conner's neck. Conner passed out. While Conner was lying on the floor, Conley placed his hands around Conner's neck and strangled Conner for

[3] Conley's biological father is Charlie King. Conley's mother twice married to Shawn Conley, who adopted Conley.

approximately twenty minutes. Blood was expressed from Conner's nose and mouth. Conley stated that something came over him, and he could not stop himself from strangling Conner. Conley denied being angry for having to watch Conner while his parents were at work or for any other reason. Conley reported that he loved Conner, but he could not stop himself from strangling Conner.

[7] Conley then grabbed a plastic bag, placed it over Conner's head, and wrapped electrical tape around Conner's face to prevent blood from seeping onto the floor. Conley placed a garbage bag around the body and dragged the body down the basement stairs, through the basement, and to the garage. Once in the garage, Conley banged Conner's head on the cement floor to ensure that Conner was indeed dead. Conley loaded Conner's body into the trunk of his car. Conley then changed his clothes and drove to his girlfriend's house with the body in the trunk. After two hours, Conley left, drove to a wooded area, and disposed of Conner's body under brush in the wooded area. Conley went home before his parents returned home from work, washed the blood off the floor, and put his bloody clothes in the closet. His mother and father returned home that morning after work.

[8] While Conley's mother slept on the sofa and his father slept in the bedroom, Conley admitted that he entered their bedroom twice with a knife and stood over his father. He had thoughts of killing his father but decided against it. He could not explain why he felt like killing his father.

[9] Later that day, Conley admitted to two friends that he killed Conner. Conley then drove himself to the Rising Sun Police Department and reported that he "accidentally" killed his brother while they were wrestling. Direct Appeal Tr. Vol. II p. 278. Conley's parents were called. Conley consulted with his mother and agreed to be questioned further by the police. He gave three statements in all, and Conley admitted to killing his brother. When asked repeatedly why he killed Conner, Conley stated that Conley was "sick" and "need[ed] help." Direct Appeal Ex. Vol. I p. 235, 244 (Ex. 493A). Conley said that he "felt like a horrible person" and that he "wanted to stop" but "just couldn't do anything to stop." *Id.* at 225 (Ex. 492A). Conley said, "it just seems like I was stuck there watching that happen and I couldn't do anything." *Id.* Conley denied that he was angry with his brother for having to watch him or for any other reason.

[10] Conley reported during the interviews that he attempted suicide several times, including recently. Conley stated that he has felt that there was something wrong with him since the seventh or eighth grade. Conley admitted having thoughts of "taking a knife and cutting someone's throat or just beating them to death with [his] hands . . . ." *Id.* at 220 (Ex. 492A). At the time of the killing, Conley was a senior in high school but had recently dropped out of school after a suicide attempt.

[11] The State charged Conley as an adult with murder on December 3, 2009. Attorney Gary Sorge was appointed to represent Conley. Attorney Sorge filed a Notice of Defense of Mental Disease or Defect and requested the appointment of two to three psychiatrists to determine whether Conley was

"not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense." Ind. Code § 35-41-3-6. Attorney Sorge later filed a motion for an independent psychological evaluation by Dr. Edward Connor to aid in Conley's defense.

[12] A jury trial was originally set for May 3, 2010, and was continued on the request of Attorney Sorge in order to continue plea negotiations. The trial court granted the continuance. In July 2010, seven months after the charges were filed and two months before the rescheduled jury trial was to commence, the State filed a notice of their intent to seek a sentence of life imprisonment without parole. The trial court then appointed Attorney John Watson as defense co-counsel.

[13] On August 6, 2010, the State moved to exclude Conley's insanity defense, and the State filed notice of their intent to call a psychologist or psychiatrist to testify at trial. Around the same time, Conley's defense team hired an investigator to aid in preparation of the defense. Attorney Watson later testified at the post-conviction hearing that the investigator interviewed several witnesses prior to the scheduled sentencing hearing, but the investigator informed the defense attorneys that more time was needed to investigate. Further investigation was not pursued by the defense team. Conley pleaded guilty without a plea agreement on September 13, 2010, the day his trial was to begin. The five-day sentencing hearing began on September 15, 2010, only two days after Conley pleaded guilty.

II. The Sentencing Hearing

[14] During the sentencing hearing, the State presented testimony from the police officers, detectives, and crime scene investigators detailing Conley's statements to police, Conley's calm demeanor, and the investigation of the murder. Conley's girlfriend, Alexis Murafski, testified that, after murdering Conner, Conley went to her house, watched a movie with her, and gave her a ring he got from his grandmother. On cross-examination, Murafski testified that Conley argued with his parents quite a bit and that Conley had attempted suicide. Conley's mother and father testified that Conley was a good student and did not cause problems, that Conley had a good relationship with Conner, that Conley's mother did not believe Conley actually attempted suicide, and that Conley dropped out of school to join the military.

[15] The State also presented evidence from Dr. Dean Hawley, the pathologist who examined Conner's body, who testified that Conner died as a result of manual strangulation and suffocation. Dr. Hawley also testified that Conner sustained "a blunt force injury made by a very violent pressure into the body," was involved in a "violent struggle," had a "remarkably swollen" brain, and was alive for hours after he was strangled. Direct Appeal Tr. Vol. II p. 425, 428, 439. Over the defense's objection, Dr. Hawley testified that Conner sustained a "forcible sexual assault" injury. *Id.* at 446. Defense counsel's cross-examination focused on the lack of evidence of sexual assault and, to a lesser degree, the testimony regarding brain swelling.

[16] Finally, the State presented the testimony of Dr. Don Olive, a psychologist who was court-appointed to evaluate Conley. Dr. Olive diagnosed Conley with a major depressive disorder with a mixed personality disorder with "primary borderline and secondary antisocial features." Direct Appeal Ex. Vol. I p. 260 (Ex. 495). Dr. Olive performed the Minnesota Multiphasic Personality Inventory Adolescent ("MMPI-A") test on Conley and concluded:

> Adolescents with this clinical profile tend to show a pattern of psychological maladjustment. Mr. Conley appears to be quite anxious and depressed. He may be feeling significant tension and somatic stress and may[ ]be seeking relief from situational pressures. He appears to be immature and hedonistic and may have a recent history of acting-out behavior. He expresses some guilt and remorse over his behavior, but does not accept much responsibility for his actions. He may avoid confrontation and deny problems.

Id. at 257-58. Even though Dr. Olive did not diagnose Conley as having a psychopathic personality, much of the State's examination of Dr. Olive focused on the "psychopathic personality" characteristics and the best treatment of psychopathic personality through incarceration. Direct Appeal Tr. Vol. III p. 32. The defense did not cross-examine Dr. Olive.

[17] The defense presented evidence regarding Conley's mental health history and related history of self-harm, including a significant mental health decline in the months and weeks leading up to the murder, multiple suicide attempts, alleged physical and sexual abuse of Conley by step-fathers, and testimony from lay witnesses that Conley's actions were completely out of character. Several

teachers[4] testified that Conley was respectful, intelligent, a good student, well-behaved, and on track to graduate high school and attend college. The teachers were surprised by Conley's murder of Conner. The teachers also testified that Conley's parents were neglectful, refused to pay for Conley to take the SAT, encouraged Conley to quit high school, and told Conley that he would be committed to a psychiatric hospital if he went back to school. Conley's grandmother testified that Conley was a good kid, that Conley's first stepfather was very abusive, that Conley had problems with his mother and adoptive father, and that Conley wanted to live with his grandmother.

[18] Regarding Conley's mental health, the defense first presented the testimony of Dr. Edward Conner, a clinical psychologist, who evaluated Conley regarding his insanity defense. Dr. Connor met with Conley on four occasions, performed testing on Conley, including the adult version of the Minnesota Multiphasic Personality Inventory-2RF ("MMPI-2RF"), and diagnosed Conley with a "schizoaffective disorder, the bipolar type" and a "sleep disorder." Direct Appeal App. Vol. V p. 884. Dr. Connor also concluded that Conley had a "severely abnormal mental condition that grossly and demonstrably impair[ed] [his] perception[.]" Direct Appeal Tr. Vol. IV p. 773. Dr. Connor concluded that "[Conley] was probably around eleven or twelve when he started to have feelings of depression and anxiety, so I believe that was a mental illness that started probably in the pre-adolescent years and just continued and

[4] Nancy Swart, Keith Majewskit, Pam McClure, Bonnie Fancher, and Marsha Louden.

exacerbated over the years. . . . There was [sic] some suicide attempts, so I believe that this was an ongoing and untreated . . . mental health condition." Direct Appeal Tr. Vol. III p. 615. Conley told Dr. Connor that he heard voices and had hallucinations.

[19] Dr. Connor opined that Conley was in a "dissociative state" during the murder. *Id.* at 608. He described a dissociative state as occurring when, during trauma or a traumatic event, the "mind separates from body and they can almost watch what their body is going through." *Id.* The condition is common in children subject to sexual abuse and is a "dangerous type of psychiatric symptom" if a person continues to dissociate because they can "remain very detached and very flat." *Id.* at 608-09.

[20] Dr. Connor's report indicated that he spoke with Diane Monk, Conley's grandmother, and Beth Hurley, the mother of Conley's best friend. They stated that:

> [Conley] told them about his suicide attempt . . . approximately 2 weeks prior to the murder. They stated that [Conley]'s mother and [father] responded to this suicide attempt by taking away his cell phone for one week. They stated that [Conley] had engaged in self-mutilation previously and conveyed to them his suicidal tendencies. Ms. Hurley stated that she would try to convince [Conley]'s mother to get him psychiatric help and his mother stated that she tried but that "everybody was too booked up." Ms. Hurley stated that [Conley]'s mother called her after [Conley]'s suicide attempt. Ms. Hurley also encouraged [Conley] to talk to people at school about his suicidal tendencies but [Conley]'s mother discouraged him from doing so by stating that the school personnel could "have him locked up for a long

> time" and therefore, [Conley] did not talk to anyone. [ ] Ms. Hurley was quite concerned about [Conley] and felt that he was in grave need of psychiatric intervention. However, they believe that [Conley]'s mother and [father] did not put forth more effort to get him psychiatric care because they were afraid that they would get in trouble with Child Protective Services for neglect and his [father's] physical abuse of [Conley].

Direct Appeal App. Vol. V p. 874.

[21] Dr. Connor asked Conley to recount the most "traumatic experience[s] in his life." *Id.* at 881. Conley's responses did not include a claim of sexual abuse. Conley denied or failed to disclose any history of sexual abuse to the police and to defense counsel until a witness shared that Conley previously reported being raped by his first stepfather on his seventh or eighth birthday. Dr. Connor then interviewed Conley again, and Conley disclosed that he had, in fact, been sexually abused.

[22] On cross-examination, the State asked Dr. Connor many questions regarding psychopathic personalities over defense counsel's objection. Dr. Connor testified that he performed the Hare Psychopathy Checklist regarding Conley and that Conley scored only five and the "cut-off score is eighteen." Direct Appeal Tr. Vol. III p. 704.

[23] The defense also called Dr. George Parker, a neuropsychologist, to testify regarding Conley's mental health. Dr. Parker diagnosed Conley with "major depression with psychotic features." Direct Appeal Tr. Vol. IV. p. 780. Dr. Parker detailed Conley's long history of depression, his five alleged suicide

attempts, four of which were "serious attempts," thoughts of death, and hearing voices for many years. *Id.* at 791. Dr. Parker noted that it is possible to become psychotic due to a mood disorder, such as depression, and that depression combined with hallucinations is a "fairly severe form of the disease." *Id.* at 783. Dr. Parker found no evidence of malingering, found that Conley's lack of range of emotion was consistent with significant depression, and noted that Conley's description of the murder was consistent with dissociation. Dr. Parker opined that his diagnosis was "closely related" to Dr. Connor's diagnosis. *Id.* at 785. According to Dr. Parker, Conley was "under the influence of extreme mental or emotional disturbance at the time the murder was committed." *Id.* at 800. On cross-examination, over the defense's objection, the State again questioned Dr. Parker regarding psychopathic characteristics.

[24] In the State's rebuttal at the sentencing hearing, Conley's friend, Rachel Thomas, testified that, "a week before [Conley] tried to kill himself, [and] maybe three weeks before" Conley murdered Conner, Conley told Thomas that, when he was nine years old, "one of his mom's boyfriends. . . raped him and that his mom locked him in his room." Direct Appeal Tr. Vol. IV p. 890. Conley's then-girlfriend, Alex Murafski, testified that Conley's problems with his parents were so serious that Murafski thought Conley was going to "snap."

Id. at 888. Murafski also testified that Conley likes crime shows, like Dexter[5] and CSI, and that Conley "wanted to be just like [Dexter]." *Id.* at 881.

[25] The State then called Dr. James Daum, a psychologist specializing in "public safety psychology." *Id.* at 927. Dr. Daum did not examine Conley and, consequently, was unable to determine whether Conley qualified as a psychopathic personality under the Hare Psychopathy Checklist. Dr. Daum, however, testified that Conley exhibited "evidence of psychopathy." *Id.* at 938. Over defense counsel's objections, Dr. Daum testified extensively regarding Conley's statements and "psychopathic personality" traits despite the fact that he did not evaluate Conley and never met with Conley.

[26] At the close of the sentencing evidence, the defense proffered several mitigating factors, including: (1) Conley's age of seventeen at the time of the murder; (2) Conley's lack of a juvenile criminal history and significant history of prior criminal conduct; (3) Conley's mental health at the time of the murder; (4) Conley's cooperation, acceptance of responsibility, and remorse; and (5) Conley's guilty plea. The State argued the existence of a statutory aggravating factor for LWOP—that Conner was under twelve years old. The State encouraged the trial court to impose a sentence of LWOP or, if not, a term of sixty-five years based upon the nature and circumstances of the crime, Conley's

[5] Dexter is a crime drama and focuses on a forensic analyst who leads a secret life as a serial killer targeting other murderers.

position of trust, Conley's lack of remorse, and the impact on the victim, Conley's family, and the community.

III. The Sentence

[27] After a delay for the preparation of a presentence investigation report ("PSI"), the trial court held a pronouncement of sentence hearing on October 15, 2010. The trial court found one statutory LWOP aggravating factor: that Conner was less than twelve years old at the time of his murder. The trial court then found the following mitigating factors: (1) Conley's lack of a significant history of prior criminal conduct[6], which the trial court gave "some weight"; (2) Conley's mental disturbance or defect, but the court did not place "significant" weight on this factor; (3) Conley's age of less than eighteen years old; (4) Conley's cooperation and guilty plea, which the trial court afforded "some, but not significant, weight" due to the "overwhelming evidence of guilt and the likelihood of the discovery of the crime through independent means." Direct Appeal App. Vol. I pp. 156, 160, 165.

[28] The trial court considered, but rejected, the following as mitigators: (1) that Conley's mental condition substantially impaired his ability to appreciate the criminality of his conduct; (2) Conley's alleged remorse; and (3) the nature and

[6] The trial court noted that Conley admitted to consuming alcoholic beverages and smoking marijuana and cigarettes.

circumstances of the offense.[7] The trial court then found that the *only* aggravating circumstance—the age of the victim—"far outweigh[ed]" the mitigating circumstances and imposed a sentence of LWOP. *Id.* at 171. In particular, in discussing Conley's mental health, the trial court noted the inconsistencies between Conley's statements to various doctors, found the inconsistencies to be "significant and beyond what would normally be expected to be made in a case of this nature." *Id.* at 167. The trial court noted that, regardless of Conley's diagnosis, Conley "retained the mental capacity to control his conduct." *Id.*

IV. The Appeal

[29] Conley pursued a direct appeal. Attorney Leanna Weissmann represented Conley on appeal[8] wherein Conley argued that: (1) the trial court abused its discretion in allowing the testimony of the State's mental health expert witness, Dr. Daum, who testified that Conley showed evidence of psychopathy; (2) the trial court failed to properly consider the only aggravating circumstance and the myriad mitigating circumstances; and (3) Conley's sentence was inappropriate pursuant to Indiana Appellate Rule 7(B). Shortly before our Supreme Court heard oral argument on November 14, 2011, the United States Supreme Court

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[7] The trial court noted that Conley argued "that the nature and circumstances of the crimes should be considered as a mitigating circumstance" because "the manner in which the crime was committed was not a 'worst case scenario' and that there is no evidence of premeditation, lying in wait, or similar action by the Defendant." Direct Appeal App. Vol. I p. 169.

[8] In September 2020, Attorney Weissmann was sworn in as a Judge on the Court of Appeals of Indiana. Judge Weissmann has had no part in our determination of Conley's PCR appeal.

granted certiorari in *Miller v. Alabama*. After the oral argument, Attorney Weissmann requested and received permission to file an amended brief. The State and Attorney Weissmann filed amended briefs; and Attorney Weissmann specifically challenged Conley's LWOP sentence as violative of the Indiana Constitution and the Eighth Amendment to the United States Constitution's prohibition of cruel and unusual punishment. Thereafter, on June 25, 2012, the United States Supreme Court issued its opinion in *Miller*, wherein it held that mandatory LWOP sentences for juveniles are unconstitutional. *Miller*, 567 U.S. 489, 132 S. Ct. at 2475.

[30] In affirming Conley's sentence on July 31, 2012, our Supreme Court held that: (1) the trial court did not abuse its discretion by allowing Dr. Daum's testimony; (2) the trial court did not abuse its discretion in weighing the aggravating and mitigating circumstances; (3) the trial court properly considered Conley's youth, related issues, and "how children are different, and how those differences counsel against irrevocably sentencing [children] to [LWOP]"; (4) Conley's LWOP sentence was not inappropriate pursuant to Indiana Appellate Rule 7(B); (5) the constitutionality of LWOP in Indiana was "not altered by *Miller*"; and (6) LWOP "is not an unconstitutional sentence under the Indiana constitution under these circumstances." *Conley v. State*, 972 N.E.2d 864, 876-880 (Ind. 2012). The Supreme Court denied rehearing on October 22, 2012.

V. Post-Conviction Petition & Hearing

[31] On February 19, 2013, Conley filed a pro se petition for PCR, which was amended by counsel on July 12, 2018, and October 12, 2018. In Conley's amended petition for PCR, Conley alleged: (1) ineffective assistance of trial counsel; (2) ineffective assistance of appellate counsel; (3) his guilty plea was neither knowing, intelligent, nor voluntary; (4) the LWOP sentence violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 16 and Section 18 of the Indiana Constitution; (5) Conley's rights were violated "where the State failed to disclose evidence of Conley's molestation to the defense"; (6) Conley's rights were violated "where the State created a false impression regarding Conley's credibility"; (7) Conley was denied "his constitutionally protected right to be sentenced on the basis of accurate information"; and (8) newly-available evidence rendered his sentence improper. Appellant's PCR App. Vol. II pp. 142-43.

[32] The PC Court conducted evidentiary hearings on the petition. Conley presented the testimony of Attorney Sorge and Attorney Watson. Of significance, at the time of their representation of Conley, neither Attorney Sorge nor Attorney Watson had prior significant involvement with an LWOP case and no involvement with a juvenile LWOP or juvenile murder case. Attorney Sorge admitted the sentencing hearing did not go as defense counsel thought it would. Attorney Sorge specifically testified:

> I think both Watson and I anticipated it would be more along the lines of a typical sentencing hearing where the prosecution would

> basically present a prima facie case and put on their aggravators. We would basically just go into all our mitigators and put them on. We felt that, as far as the LWOP went, the State only had one aggravator, by law, which we were willing to stipulate, and that was that the victim was under the age of twelve or whatever it was. And they had no other aggravator, as far as LWOP was concerned. We were willing to stipulate that aggravator. And then, his mitigators, which were permitted by law, we had about three mitigators, which was lack of criminal record, presence of a mental illness, and the age of the perpetrator being under eighteen. We felt that was the only things that the Court could consider, as far as LWOP. Then, of course, when you look at the number of years the Judge might sentence him to, that would open the door to a variety of other factors, but we didn't think that it was going to go on as - - basically, I think, five days, but I'm not positive. I think it was about five days.

PCR Tr. Vol. II p. 62. Defense counsel testified that they hired an investigator, and in August 2010, the investigator informed defense counsel that this was:

> A very complex matter. It appears the defendant suffered many years from physical and emotional abuse. There are several matters that require further investigation including but not limited to, a child in need of services for many years, a mother totally lacking of support and possibly abusing prescribed drugs during this period.

PCR Ex. Vol. I p. 101. Defense counsel ultimately did not request further investigation despite the knowledge that further time was needed to investigate mitigating factors.

[33] Appellate Attorney Weissmann testified that the trial court "should have heard more about brain development and gotten some expert opinions on not only

brain development, but how brain development impacts adolescent behavior and especially when you're dealing with an adolescent that has diagnosable - - extremely diagnosable mental illnesses, how that may impact behavior and rehabilitation possibilities." PCR Tr. Vol. II p. 89.

[34] Dr. George Riley Nichols, a forensic pathologist, testified regarding the State's expert witness at the sentencing hearing, Dr. Hawley. Dr. Hawley's testimony was that Conner sustained a "hypoxic ischemic injury to the brain," which "requires being alive . . . with a brain injury for . . . about four hours." *Id.* at 98-99. Dr. Nichols testified this was inconsistent with the photomicrographs taken of Conner's brain. Dr. Nichols testified that "there is no proof that [Conner] survived four hours post[-]irreversible brain injury due to lack of circulating blood and/or lack of oxygen in the blood." *Id.* at 109. Moreover, Dr. Hawley's testimony regarding the cause of enlargement of Conner's brain was inconsistent with the examination of the brain, and Dr. Hawley should have consulted with a neuropathologist but failed to do so. Dr. Nichols also disagreed with Dr. Hawley's diagnosis of a forced anal sexual act. According to Dr. Nichols, a finding of "anal dilation alone does not substantiate any evidence of a sexual act." *Id.* at 101.

[35] Regarding Conley's mental health and the evidence of such presented at the sentencing hearing, Dr. Parker testified that he was retained to determine Conley's competency and sanity. He testified that testifying at sentencing for a mitigation argument is a "different situation entirely." *Id.* at 194. Dr. Parker testified that he was contacted on short notice regarding the sentencing hearing

and was not fully prepared for a sentencing hearing. Prior to the sentencing hearing, Dr. Parker was not given Dr. Daum's deposition testimony, Dr. Olive's report, or Conley's confessions either by audio or transcript. Dr. Parker noted that:

> [T]he stakes are very high in a capital case or a life without parole case and if you're going to understand how and why a person ended up in a situation where they're facing capital punishment or life without parole, you need to know pretty much everything that you can find about that person to understand what got them into that situation in the first place and understand how they're doing at that time. So, you need everything. You cast the net widely and you learn as much as you can about that particular person.

Id. at 196. Dr. Parker stated he would have "wanted to talk to Mr. Conley again to more fully explore what was going on in his life up until that time to more [sic] understand more fully what happened around the time of the offense" for purposes of the sentencing hearing. *Id.* at 208. Dr. Parker also stated that he would have wanted to address more directly the allegations of "signs of psychopathy or anti-social personality disorder." *Id.*

[36] Dr. Parker emphatically testified that Dr. Daum was "eminently unqualified" and had "no experience in criminal evaluations, let alone juvenile criminal evaluations." *Id.* at 199. According to Dr. Parker, it was "inappropriate for [Dr. Daum] to say that Mr. Conley met the criteria for psychopathy or sociopathy." *Id.* at 200. Dr. Parker also disagreed with Dr. Olive's diagnosis

and concluded that the diagnosis of a personality disorder was not supported by the MMPI testing data performed on Conley.

[37] Critical to the defense at the PC hearing, Dr. Parker noted the importance of the *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), and *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010), decisions and the discussion of brain science in those decisions as follows:

> That was - - from the psychiatric perspective, that was the critical part of the decision. It was, I think, the first time the U.S. Supreme Court really took seriously - - took neuroscience seriously into account in an important case. The neuroscience in this issue, which is juveniles and their culpability for capital offenses and then for life without parole, is that it's abundantly clear that, as we all know, teenagers are wired differently from adults. In particular, the frontal lobe is - - the connections between the frontal lobe and the rest of the brain are not fully complete until the mid-twenties, so from teenage into young adulthood, there's a lot of maturing and learning going on and the brains are not fully connected in adolescence. The frontal lobe is the place where we make our executive decisions and teenagers are, unfortunately, well known to not always think things through very well. So, the neuroscience, for the researcher's perspective, was clear, but how the U.S. Supreme Court agreed that it was both clear and pertinent in a criminal setting was - - makes that a landmark case for forensic science.

Id. at 204.

[38] Dr. Connor also testified at the PCR hearing that, before Conley's scheduled trial, he prepared a rough draft of his report regarding Conley and sent it to defense counsel; however, he never heard back from defense counsel regarding

the report. Dr. Connor noted in that report that there were "a number of red flags or alarms" regarding whether a child services investigation was warranted based on the abuse and the lack of response from Conley's parents regarding his mental health issues. PCR Tr. Vol. III pp. 61-62. Dr. Connor believed that this issue should have been addressed with Conley prior to the sentencing hearing. Dr. Connor noted that all of the experts agreed that Conley was mentally ill.

[39] Dr. Charles Ewing, a forensic psychologist, attorney, and expert in interfamilial homicide, performed an examination of Conley. Dr. Ewing diagnosed Conley with "major depression with psychotic features" at the time of the murder, and "major depression" currently. *Id.* at 124. He defined "psychotic features" as "confusion, disorganized thought, irrationality, dissociation, and delusional thinking." *Id.* at 125. Dr. Ewing opined that Conley was in a "dissociative state at the time of the offense and for some time thereafter." *Id.* Dr. Ewing noted that "major mental illness" is usually a combination of nature and nurture, *i.e.* a "biological predisposition toward illness" in combination with environment. *Id.* at 126. Conley grew up in a "family that was marked by extreme dysfunction, tremendous violation," and was exposed to major traumatic episodes, which can create problems with "brain development." *Id.* Dr. Ewing opined, "to a reasonable degree of professional certainty that, due to the family situation in which [Conley] was raised, [Conley] lacked the maturity and sophistication at the age of seventeen to deal with the extraordinary stress of severe mental illness and suicidal ideation that ultimately led him to commit this crime." *Id.* at 133.

[40] Regarding the development of brain development in adolescents, Dr. Ewing testified:

> Over the past couple of decades, there's been a ton of studies that have - - a lot of them are imaging studies, for example, MRI studies and other forms of imaging, that have demonstrated that the juvenile brain is not the adult brain and that the brain continues to develop well into the twenties, at least to age twenty-five, and in some cases beyond twenty-five. What the research seems to show most traumatically [sic] is that the area where there is this lag and then this growth up to the age of twenty-five is in the prefrontal cortex area of the brain. That's the executive area of the brain, the part of the brain that controls impulse control, managing your behavior, being aware of risk, managing risk, all the things that we've sort of known for a long time, psychologically, that teenagers and young adults didn't really have, but now we have an explanation, a scientific explanation, for what we've sort of thought, but didn't really know. And now that this brain research has been disseminated widely, it's begun to affect the way we look at kids. It's certainly affected education, educational policy toward juveniles and legal policy. We've seen major Supreme Court decisions hinge on this brain research and the idea that juveniles are not adults automatically at eighteen or even twenty-one, but more likely twenty-five, in terms of their brain functioning and brain development and ability to control their behavior.

Id. at 129.

[41] Dr. Ewing found the testimony regarding psychopathy at the sentencing hearing to be "alarming" and performed the psychopathy checklist. *Id.* at 123. An "average person might score five or six", and Conley scored six, "which places him at the very low end of the psychopathy scale." *Id.* at 123-24. He

noted that, given the continuation of brain development up to the age of twenty-five, it is inappropriate to assert "[s]ociopathy, psychopathy, [or] anti-social personality" until a person is at least eighteen years of age. *Id.* at 131.

[42] Regarding Conley, Dr. Ewing noted:

> The bulk of opinion that I have read about him from people who knew him was that he was an exemplary young man, very caring, kind, loving, gentle person. He did reasonably well in school until he became so severely depressed. His records since the killing of his brother has been exemplary. If you look at his records from the correctional institute, the only disciplinary report he's ever had was . . . for a suicide attempt.

Id. at 135. Conley had "one major suicide attempt" while incarcerated but has been a "model inmate" otherwise. *Id.* at 127, 136.

[43] Dr. Stephen Goulding, a forensic psychologist specializing in "ethical and professional standards of practice," testified regarding Dr. Daum's sentencing hearing testimony. *Id.* at 163. Dr. Goulding found Dr. Daum's "assessment of characteristics of psychopathy" to be "troublesome" given his lack of involvement in this area for many years. *Id.* at 173-74. Dr. Daum "did not possess current, sufficient and reliable knowledge of the more specialized field of juvenile forensic assessments." PCR Ex. Vol. II p. 216. As such, Dr. Daum "had an affirmative obligation not to allow himself to be qualified to offer the nature of the opinions he did based upon his demonstrable lack of training, knowledge and experience in respect of these issues in the assessment of juveniles in a high stakes forensic context." *Id.* at 217. Dr. Goulding testified

that Dr. Daum's "testimony and his evaluation procedures were not in conformance with the standard of practice." PCR Tr. Vol. III p. 188.

[44] According to Dr. Goulding, defense counsel failed to "carefully examine and vet" Dr. Daum and "did not explore Dr. Daum's knowledge, training and experience to any reasonable degree." PCR Ex. Vol. II pp. 217, 219. Dr. Daum's testimony regarding the presence of psychopathic characteristics was "based upon a misunderstanding of the scoring criteria for the PCL-R, an inadequate database upon which to opine about such criteria, and lack of knowledge of various issues related to the assessment and treatability of psychopathy." *Id.* at 217. He testified that defense counsel failed to "avail themselves of the assistance of experts in distinguishing between legitimate and scientifically based testimony and testimonial differences, and rank mis-statements or misunderstandings or frank ignorance." *Id.* at 223. Dr. Daum and Dr. Olive's testimony that Conley was "faking his alleged mental disorder" was not based on "data from a variety of empirically validated sources" which were available here and did not support a finding of malingering. *Id.* at 220. Defense counsel failed to adequately challenge this suspect testimony, and the trial court relied upon malingering in its sentencing order.

[45] Overall, Dr. Goulding opined that:

> Failures on both accounts, interact to produce evidence and testimony that was inherently unreliable and should have been more forcefully challenged, either via a motion in limine to preclude or limit Dr. Daum's testimony and/or conduct effective cross-examination. The end result was that the trial judge was

> misled and deprived of scientifically sound data that may very well have tipped the balance between mitigating and aggravating factors in Conley's sentencing.

Id. at 216.

[46] Multiple lay witnesses also testified at the post-conviction hearing, including Conley's mother, grandmother, biological father, almost a dozen teachers and school employees, jail employees, five friends, and two mothers of Conley's friends. The evidence demonstrated that, despite years of mental, physical, and, on one occasion, sexual abuse by men in his mother's life and neglect by his mother and stepfathers, witnesses repeatedly testified that Conley was a good student; he was not aggressive; he was struggling and withdrawn during his senior year; the murder was completely out of character and surprising; and Conley "wasn't a monster." PCR Tr. Vol. III p. 12. Regarding Conley's relationship with Conner, multiple witnesses said that they often saw Conley together with Conner and testified that Conley had a good relationship with Conner. Multiple witnesses were aware that Conley had attempted suicide, was cutting himself, suddenly withdrew from high school, and lacked parental support. Jail employees testified that, while Conley was in custody, they observed severe cutting on Conley; staff was worried about Conley harming himself and would not leave him alone with a razor; and Conley was placed in a special area in order to "watch him all the time." *Id.* at 86.

VI. Post-Conviction Court's Order

[47] On December 9, 2019, the PC Court[9] entered findings of fact and conclusions of law denying Conley's amended petition for PCR. In particular, the PC Court found:

> Conley argues that trial counsel deficiently performed by failing to present evidence as to adolescent functioning and development, in line with the reasoning applied by the Supreme Court of the United States in *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010).
>
> a. The State concedes that this information was not elicited during sentencing by trial counsel and trial counsel John Watson testified during the evidentiary hearing that he "didn't know why he didn't include *Roper* or *Graham*."
>
> b. However, Conley has failed to show any prejudice in this omission.
>
> > i. Conley presented no evidence as to how this information would have improved Conley's position.
> >
> > ii. Conley presumably intends to show through Department of Corrections records that he has been a relatively model inmate, thus that his crime reflects not an irreparably corrupt teen but a crime of transient immaturity as contemplated in *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

[9] The judge for the post-conviction proceedings also presided over the sentencing hearing.

iii. Evidence from the sentencing as well as Conley's evidentiary hearing in the PCR proceeding fails to support this proposition and is distinguishable from *Miller* and *Montgomery*.

> 1. Conley had been a caretaker of his brother Conner for some time without any significant issues.
>
> 2. Conley, rather than acting out of an immature rage or under outside pressures, killed his brother in a brutal fashion over a period of at least twenty minutes according to his own statements. These circumstances included not only strangling his brother, but using gloves to avoid forensic evidence, strangling him a second time, placing a bag over his head, dragging him outside and then bashing his head on concrete to ensure he was in fact dead.
>
> 3. Conley then calmly went to his girlfriend's house with Conner in his trunk, stayed long enough to watch a movie and give her a promise ring, before finally disposing of Conner's body off a wooded trail, then going home and conversing with his [father] as though nothing had happened, going so far as to ask for condoms. *See also* factual circumstances outlined in the Court's sentencing order and the Indiana Supreme Court's decision.

c. The Indiana Supreme Court considered this decision in light of *Miller*. The Indiana Supreme Court also found that the trial court had appropriately considered Defendant's age and other surrounding circumstances. The Indiana Supreme Court found that the trial court in this case took into account, "how children are different by taking into account the Defendant's youth and

> various issues relative to Defendant's youth . . . we hold that Judge Humphrey did just that." *See Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012).
>
> d. Insufficient evidence has been presented to show prejudice or that counsel was deficient in this issue.

PCR App. Vol. IV pp. 122-23. Conley then filed a motion to correct error, which the PC Court denied. Conley now appeals.

Analysis

[48] Conley challenges the PC Court's denial of his amended petition for PCR. Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *reh'g denied, cert. denied*, 141 S. Ct. 553 (2020); Ind. Post-Conviction Rule 1(1)(b). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Gibson*, 133 N.E.3d at 681. "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are res judicata." *Id.* The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.;* Ind. Post-Conviction Rule 1(5).

[49] When, as here, the petitioner "appeals from a negative judgment denying post-conviction relief, he 'must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision.'" *Gibson*, 133 N.E.3d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d

253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164, 122 S. Ct. 1178 (2002)). When reviewing the PC Court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," and the "findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019). When a petitioner "fails to meet this 'rigorous standard of review,' we will affirm the post-conviction court's denial of relief." *Gibson*, 133 N.E.3d at 681 (quoting *DeWitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001)).

I. Amicus Arguments

[50] We begin by addressing the arguments presented in the brief of Amicus Curiae, the IPDC. IPDC argues that: (1) pursuant to the Indiana Constitution, LWOP sentencing of juveniles should be categorically abolished in Indiana; (2) res judicata should not bar this argument; and (3) this court should consider these arguments even though they were not raised before the post-conviction court. We agree with the State, however, that this issue is not properly before this Court because the abolishment of LWOP for juveniles based upon the Indiana Constitution was not raised in Conley's petition for post-conviction relief. *See, e.g., Anderson Fed'n of Teachers, Local 519 v. Sch. City of Anderson*, 252 Ind. 558, 582, 254 N.E.2d 329, 330 (1970) (agreeing that "parties seeking to intervene as amicus curiae should not be permitted to so raise a new question for the reason that they are required to accept the case as they find it at the time of their petition to intervene"), *cert. denied*, 399 U.S. 928, 90 S. Ct. 2243 (1970); *Indiana*

State Bd. of Med. Registration & Examination v. Suelean, 219 Ind. 321, 328, 37 N.E.2d 935, 937 (1941) ("The brief of the amicus curiae presents additional reasons why said act in its entirety should be declared unconstitutional, but such reasons are not supported by the evidence in the record, and were not raised by appellee or appellant. Therefore, they present no questions which this court could properly consider."). Accordingly, we do not address IPDC's arguments.

II. Ineffective Assistance of Trial Counsel

[51] Conley alleges that he received ineffective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 12 of the Indiana Constitution. To prevail on his ineffective assistance of counsel claims, Conley must show that: (1) his counsel's performance fell short of prevailing professional norms; and (2) his counsel's deficient performance prejudiced his defense. *Gibson*, 133 N.E.3d at 682 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

[52] A showing of deficient performance "requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *cert. denied*, 555 U.S. 972, 129 S. Ct. 458 (2008)). We strongly presume that counsel exercised "reasonable professional judgment" and "rendered adequate legal assistance." *Id.* Defense counsel enjoys "considerable discretion" in developing legal strategies for a client. *Id.* This "discretion demands deferential judicial review." *Id.* Finally, counsel's

"[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.*

[53] "To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

A. Deficient Performance

[54] Conley asserts numerous claims that his trial counsel's performance was deficient. First, Conley argues that defense counsel misadvised Conley by advising him to plead guilty rather than proceed to trial on a defense of guilty but mentally ill. The PC Court rejected this argument, and we find no support for this argument in the record. Rather, the record is clear that Conley insisted on pleading guilty and the State would not agree to a plea of guilty but mentally ill. Accordingly, we will focus on Conley's other arguments, including: (1) defense counsel failed to fully investigate and present the substantial mitigating evidence that was available at the time of sentencing; and (2) defense counsel failed to properly challenge the State's expert witnesses and prepare the defense's expert witnesses.

[55] We begin by noting "life without parole is the second most severe penalty permitted by law." *Graham v. Florida*, 560 U.S. 48, 69, 130 S. Ct. 2011, 2027, (2010) (internal quotation omitted). Although "[t]he State does not execute the offender sentenced to life without parole, . . . the sentence alters the offender's life by a forfeiture that is irrevocable." *Id.* A life without parole sentence "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." *Id.* at 69-70, 130 S. Ct. at 2027. Such a sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'" *Id.* at 70, 130 S. Ct. at 2027 (quoting *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989)). "Life without parole is an especially harsh punishment for a juvenile." *Id.*, 130 S. Ct. at 2028.

[56] In Indiana, Indiana Code Section 35-50-2-9 governs the imposition of LWOP. Interestingly, and important to our analysis, the same statute applies to death penalty cases. At the time of Conley's offense, the statute provided:

> (a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not proceed against a defendant under this section if a court determines at a

pretrial hearing under IC 35-36-9 that the defendant is an individual with mental retardation.

(b) The aggravating circumstances are as follows:[10]

* * * * *

(12) The victim of the murder was less than twelve (12) years of age.

* * * * *

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

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[10] It is undisputed that the other possible aggravating factors are inapplicable here.

> (5) The defendant acted under the substantial domination of another person.
>
> (6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
>
> (7) The defendant was less than eighteen (18) years of age at the time the murder was committed.
>
> (8) Any other circumstances appropriate for consideration.

Ind. Code § 35-50-2-9. Several of these possible mitigating circumstances were at issue here, including Conley's age, lack of significant history of prior criminal conduct, and the fact that Conley was under the influence of extreme mental or emotional disturbance when the murder was committed.

[57] We begin by discussing Conley's age and defense counsel's failure to raise and advance the ongoing jurisprudential shift toward imposing constitutional limits on sentences assessed to juvenile offenders. At the time of Conley's sentencing, the United States Supreme Court had issued several opinions limiting sentences that could be imposed on juvenile offenders. In *Thompson v. Oklahoma*, 487 U.S. 815, 834, 108 S. Ct. 2687, 2687 (1988), the Court recognized "the importance of treating the defendant's youth as a mitigating factor in capital cases" given that, "[p]articularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults." (internal quotations and citations omitted). The Court

held that "the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." *Thompson*, 487 U.S. at 838, 108 S. Ct. at 2700.

[58] Then, in 2005, the United State Supreme Court decided *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 1200 (2005), which extended *Thompson* and held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." The Court in *Roper* noted:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.
>
> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."

Roper, 543 U.S. at 569-70, 125 S. Ct. at 1195-96 (internal citations omitted).

[59] A few months before Conley's sentencing hearing, the United States Supreme Court, in *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 2034 (2010), held that the "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." The Court again noted:

> *Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'"; they "are more

> vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are " not as well formed." These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult."
>
> No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

Graham, 560 U.S. at 68, 130 S. Ct. at 2026-27 (internal citation omitted).

[60] Likewise Indiana has long recognized the doctrine that juveniles are to be treated differently than adults. At the time of Conley's sentencing hearing, our Supreme Court had reduced maximum sentences for juveniles convicted of murder in several cases. *See, e.g, Carter v. State*, 711 N.E.2d 835, 836-37 (Ind. 1999) (reducing a fourteen-year-old defendant's maximum sixty-year sentence

to fifty years for the brutal murder of a seven-year-old girl); *Walton v. State*, 650 N.E.2d 1134, 1135, 1137 (Ind. 1995) (reducing a sixteen-year-old defendant's maximum 120-year sentence to eighty years for the brutal murder of his parents while they slept); *Widener v. State*, 659 N.E.2d 529, 530 (Ind. 1995) (reducing a seventeen-year-old defendant's seventy-year sentence to fifty years for the murder of a woman during a robbery).

[61] Despite this precedent, defense counsel inexcusably failed to mention *Roper*, *Graham*, or the juvenile brain science regarding the fundamental differences between juveniles and adults outlined in those opinions to the trial court during sentencing. Under questioning at the evidentiary hearing on Conley's petition for PCR, Attorney Watson admitted that the sentencing memorandum that trial counsel prepared for Conley was silent as to *Roper* and *Graham*; in fact, *Roper* and *Graham* were never mentioned during the sentencing. Trial counsel offered no explanation for the omission.

[62] At the PCR hearing, Appellate Attorney Weissmann, Dr. Parker, and Dr. Ewing all noted the importance of presenting evidence of *Roper, Graham,* and the science that supports those opinions. We find that trial counsels' performance was wholly deficient regarding their failure to present mitigating evidence related to Conley's age, specifically the application of the *Roper* and *Graham* cases and Indiana's historical treatment of juveniles, and missed the opportunity to present expert testimony on scientific evidence regarding the juvenile brain and diminished culpability of juveniles.

[63] Defense counsel also missed opportunities to zealously present evidence and challenge the State's evidence regarding Conley's mental health. We note that, although an investigator was available and hired to assist defense counsel, defense counsel did not utilize the investigator despite the investigator's assertion that this was "a very complex matter. It appears the defendant suffered many years from physical and emotional abuse. There are several matters that require further investigation including but not limited to, a child in need of services for many years, a mother totally lacking of support and possibly abusing prescribed drugs during this period." PCR Ex. Vol. I p. 101.

[64] We also note, as significant, that the sentencing hearing took place only two days after Conley pleaded guilty without a plea agreement, and defense counsel seemed unprepared for the State's extensive presentation and failed to grasp the importance of an LWOP sentencing hearing. At the PCR hearing, defense counsel testified they thought the sentencing hearing "would be more along the lines of a typical sentencing hearing where the prosecution would basically present a prima facie case and put on their aggravators." PCR Tr. Vol. II p. 62. The State, however, presented extensive evidence regarding the nature of the offense and Conley's mental health. This testimony demonstrates that the defense was not qualified to handle LWOP cases involving a juvenile.

[65] Moreover, as is evident from the discussion of the evidence presented at the sentencing hearing and PCR hearing, after a lifetime of neglect and physical, mental, and on one occasion sexual abuse, seventeen-year-old Conley was suffering from severe mental issues. Defense counsel, however, failed to call

witnesses that had known Conley for most of his life and could testify regarding his circumstances at home and the significant decline of his mental health. *See, e.g.*, PCR Tr. Vol III pp. 214-224 (testimony of Beth Hurley, mother of Conley's best friend).

[66] Furthermore, defense counsel also failed to properly challenge Dr. Hawley's testimony regarding possible sexual abuse of Conner and regarding Dr. Hawley's assertion that Conner lived for several hours after Conley's assault on him. Dr. Nichols' testimony at the PCR hearing belies Dr. Hawley's testimony regarding both findings.

[67] Perhaps most importantly, however, defense counsel failed to adequately challenge the State's experts regarding Conley's mental health. The State repeatedly raised the characteristics of a psychopath with experts and had their experts testify as to whether Conley possessed those individual characteristics. Dr. Olive diagnosed Conley with a major depressive disorder with a mixed personality disorder with "primary borderline and secondary antisocial features," and defense counsel did not even cross-examine Dr. Olive. Direct Appeal Ex. Vol. I p. 260 (Ex. 495). Dr. Daum testified extensively on rebuttal that Conley possessed the characteristics of a psychopath even though Dr. Daum had never interviewed or examined Conley.

[68] We agree with Conley's assessment that "[t]he characteristics of psychopathy and Daum's testimony thereon were the centerpiece of the State's attack on Conley's mitigation case." Appellant's Br. p. 35. Significant and compelling

testimony was presented at the PCR hearing that Dr. Daum's testimony was improper and that defense counsel failed to effectively cross examine Dr. Daum. Moreover, we note that, at the time of the sentencing hearing, the United States Supreme Court had acknowledged in *Roper* that:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, *this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy*, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev. 2000); *see also* Steinberg & Scott 1015.

Roper, 543 U.S. at 573, 125 S. Ct. at 1197 (internal citation omitted) (emphasis added).

[69] Based on the totality of the failures of defense counsel, we conclude that Conley has presented "strong and convincing evidence" to rebut the strong presumption that trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See McCullough v. State*, 973 N.E.2d 62, 74 (Ind. Ct. App. 2012), *trans. denied*. Thus, we conclude that the PC Court's conclusion that defense counsel's performance was not deficient is clear error that "'leaves us with a definite and firm

conviction that a mistake has been made.'"[11] *See Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *cert. denied*, 534 U.S. 830, 122 S. Ct. 73 (2001)).

B. Prejudice

[70] Next, we proceed to the prejudice prong of Conley's ineffective assistance of trial counsel claim. The PC Court found that Conley was not prejudiced by defense counsel's performance, but we disagree. Although trial courts are presumed to know and follow the law, *Crider v. State*, 984 N.E.2d 618, 624 (Ind. 2013), our review of the sentencing hearing record has given us no indication that the trial court's decision to impose a sentence of LWOP was at all tempered by a consideration of *Roper* and *Graham*. More likely than not, as the United States Supreme Court held in *Roper*, the trial court was influenced more by the heinousness of Conley's crime and testimony discounting Conley's mental health issues rather than by his youth. *See Graham*, 560 U.S. at 78, 130 S. Ct. at 2032 (citing *Roper*, 543 U.S. at 573, 125 S. Ct. at 1183).

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[11] The United States Supreme Court has expounded at length in *Roper*, *Graham*, and *Miller* that juveniles cannot be treated the same under the law as adults based on science. The Indiana judiciary has been slow to accept this burgeoning caselaw and science regarding juveniles. The Indiana Constitution recognizes that juveniles should be treated differently. *See* Ind. Constitution Art. 9, § 2 ("The General Assembly shall provide institutions for the correction and reformation of juvenile offenders."). Rule 24 of the Indiana Rules of Criminal Procedure sets forth requirements for lawyers representing defendants in capital cases. Although this is not a capital case, we note that Indiana Code Section 35-50-2-9 encompasses both death penalty and LWOP cases. A capital defendant is entitled to qualified counsel pursuant to Criminal Rule 24. Yet, Conley, a juvenile facing LWOP, received legal assistance from lawyers not required to understand juvenile and LWOP proceedings. Counsel clearly failed to understand the importance of *Roper* or *Graham* and the critical importance of the sentencing hearings for a juvenile facing LWOP.

[71] "'Errors by counsel that are not individually sufficient to prove ineffective representation may add up to ineffective assistance when viewed cumulatively.'" *White v. State*, 25 N.E.3d 107, 140 (Ind. Ct. App. 2014) (quoting *French v. State*, 778 N.E.2d 816, 826 (Ind. 2002)), *trans. denied*, *cert. denied*, 577 U.S. 1035, 136 S. Ct. 595 (2015). Although some of defense counsel's errors individually may not have prejudiced Conley, the sum of the errors add up to significant prejudice. We conclude that Conley was prejudiced by trial counsel's failure to advance the prevailing mitigating theory of diminished juvenile culpability as taught in *Roper* and *Graham*, failure to fully investigate and present mitigating factors, and failure to effectively cross examine the State's expert witnesses.

[72] A reasonable probability exists that, but for defense counsel's errors, the proceedings at the trial level would have resulted in the imposition of less than the maximum LWOP sentence especially in light of the substantial mitigating factors: Conley's age, the fact that Conley did not have a juvenile or criminal record, and Conley's undisputed significant, severe mental health issues. The foregoing facts, "[taken] as a whole, unmistakably and unerringly point[ ] to a conclusion contrary to the [PC Court]'s decision.'" *See Gibson*, 133 N.E.3d at 681 (quoting *Ben-Yisrayl*, 738 N.E.2d at 258). Accordingly, we conclude that the PC Court clearly erred by rejecting Conley's ineffective assistance of trial counsel claim. *See, e.g., Rondon v. State*, 711 N.E.2d 506, 522 (Ind. 1999) (reversing a death sentence where the evidence presented at petitioner's post-conviction hearing indicated that substantial mitigation evidence was

reasonably available but never presented to the jury or the sentencing court and "the death sentence imposed in such a situation unfair and unreliable").

III. Guilty Plea

[73] Conley argues that his guilty plea was not knowing, intelligent, and voluntary. Specifically, Conley argues that the guilty plea "afforded him no benefit" and that trial counsel misadvised Conley regarding the evidence that the State would submit at the sentencing hearing and the potential of a LWOP sentence. Conley's Br. p. 38.

[74] "A valid guilty plea depends on 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Gibson*, 133 N.E.3d at 697 (quoting *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985)). In furtherance of this objective, Indiana Code Section 35-35-1-2 provides, in part, that the court accepting the guilty plea shall determine whether the defendant: (1) understands the nature of the charges; (2) has been informed that a guilty plea effectively waives several constitutional rights, including trial by jury, confrontation and cross-examination of witnesses, the right to subpoena witnesses, and proof of guilt beyond a reasonable doubt without self-incrimination; and (3) has been informed of the maximum and minimum sentence for the crime charged. *See Diaz v. State*, 934 N.E.2d 1089, 1094 (Ind. 2010).

[75] In assessing the voluntariness of the plea, we review "all the evidence before the post-conviction court, 'including testimony given at the post-conviction trial,

the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits which are part of the record.'" *Id.* (quoting *State v. Moore*, 678 N.E.2d 1258, 1266 (Ind. 1997), *cert. denied*, 523 U.S. 1079, 118 S. Ct. 1528 (1998)). "Under the performance prong, 'the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.'" *Gibson*, 133 N.E.3d at 697 (quoting *Hill*, 474 U.S. at 56, 106 S. Ct. 366).

[76] The record of the guilty plea hearing and the sentencing hearing reflect that trial counsel and the sentencing court advised Conley of his right to a jury trial and his right to trial by jury during the sentencing phase. *See* Direct Appeal Tr. Vol. I pp. 247-48; *see* Direct Appeal Tr. Vol. II p. 253. At the evidentiary hearing, Attorneys Sorge and Watson testified that: (1) Conley insisted on pleading guilty and forgoing a jury trial; (2) trial counsel made the strategic decision that entry of a guilty plea was Conley's best chance at avoiding a sentence of LWOP; and (3) trial counsel advised Conley accordingly. Accordingly, we cannot say the PC Court's denial of this claim is clearly erroneous.

IV. Ineffective Assistance of Appellate Counsel

[77] Conley argues that he received appellate ineffective assistance of counsel. "The standard for gauging appellate counsel's performance is the same as that for trial counsel." *Weisheit v. State*, 109 N.E.3d 978, 992 (Ind. 2018), *reh'g denied, cert. denied*, 139 S. Ct. 2749 (2019). Our Supreme Court has held that appellate ineffective assistance of counsel claims "generally fall into three basic

categories: (1) denial of access to an appeal, (2) waiver of issues, and (3) failure to present issues well." *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013).

[78] Conley maintains that Attorney Weissmann should have "requested permission to re-brief Conley's case" after *Miller* was handed down and should have "presented a *Miller*-based argument in her rehearing brief." Conley's Br. pp. 41, 43. Conley, however, acknowledges that Attorney Weissmann filed an amended brief after certiorari was granted in *Miller* and argued that Conley's LWOP sentence violated the United States Constitution and the Indiana Constitution. The State maintains that: (1) Attorney Weissmann "placed the Eighth Amendment claim squarely before the Indiana Supreme Court, ... [which] discussed *Miller* at some length in its opinion and concluded that *Miller* altered neither the Court's conclusion that [Conley]'s LWOP sentence was constitutional or that it was appropriate"; and (2) *Miller* "declared unconstitutional only mandatory LWOP sentences," whereas Conley's LWOP sentence was not mandatory and was imposed after the trial court considered Conley's age and other age-related factors. State's Br. p. 50 (emphasis in original).

[79] Conley's argument falls under a claim of failure to present an issue well. "Claims of inadequate presentation of certain issues . . . are the most difficult for convicts to advance and reviewing tribunals to support." *Weisheit*, 109 N.E.3d at 992. "[A]n ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance." *Bieghler v. State*, 690 N.E.2d 188, 196 (Ind. 1997), *cert. denied*, 525

U.S. 1021, 119 S. Ct. 550 (1998). "Judicial scrutiny of counsel's performance, already 'highly deferential,' is properly at its highest." *Id.* (internal citation omitted). "Relief is only appropriate when the appellate court is confident it would have ruled differently." *Id.*

[80] The PC Court rejected Conley's ineffective assistance of appellate counsel claim, and we agree with the PC Court. Attorney Weissmann filed amended briefs after certiorari was granted in *Miller* to alert our Supreme Court of this fact. After the *Miller* decision was issued, our Supreme Court addressed *Miller* in its opinion on Conley's appeal. Attorney Weissmann did file a petition for rehearing, which the Court denied. There is no indication that our Supreme Court would have ruled differently had Attorney Weissmann re-briefed the case after *Miller* was handed down or presented a *Miller* argument in the rehearing brief. The PC Court's findings of fact and conclusions of law on this issue are not clearly erroneous.

V. Newly-Discovered Evidence

[81] Conley alleges that newly-available evidence, consisting of his mother's testimony that she now favors a term-of-years sentence for Conley, rather than a sentence of LWOP, renders his sentence improper. The State counters that: (1) Conley's mother's changed opinion was not material, "carries no legal effect[,]" and "was available at the sentencing hearing[,]" at which she testified; (2) Conley cites no authority in support of his claim that "a victim's opinion about a sentence constitutes newly-discovered evidence"; and (3) "there is no

possibility that [Conley's mother's] testimony would produce a different result at a new sentencing hearing." State's Br. pp. 52, 54.

[82] Indiana Post-Conviction Rule 1(1)(a)(4) provides that post-conviction relief is available to any "person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims" that "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."

> [N]ew evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

Kubsch v. State, 934 N.E.2d 1138, 1145 (Ind. 2010). The burden of proving all nine requirements rests with the petitioner for post-conviction relief. *Id*.

[83] The PC Court here found that "[w]hile Mrs. Conley has the right to be heard, her current opinion does not . . . entitle Conley to either a new sentencing hearing or imposition of a term of years . . . ." PCR App. Vol. IV pp. 189-90. We agree. We do not find that Mrs. Conley's new "opinion" regarding the sentence is material, newly-discovered evidence that would probably produce a different result at a new sentencing hearing. The PC Court's finding is not clearly erroneous.

VI. Inappropriate Sentence

[84] Conley requests that we review his sentence under Indiana Appellate Rule 7(B) and impose a term of years sentence.[12] The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. Art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense and the character of the offender."

[85] Appellate Rule 7(B) has been utilized on several recent occasions to revise lengthy juvenile sentences. We have already noted that *Roper* and *Graham*, which were available at the time of Conley's sentencing hearing, emphasized

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[12] At the time of Conley's offense, Indiana Code Section 35-50-2-3 provided:

> (a) A person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years. In addition, the person may be fined not more than ten thousand dollars ($10,000).
>
> (b) Notwithstanding subsection (a), a person who was:
>
> (1) at least eighteen (18) years of age at the time the murder was committed may be sentenced to:
>
> (A) death; or
>
> (B) life imprisonment without parole; and
>
> (2) at least sixteen (16) years of age but less than eighteen (18) years of age at the time the murder was committed may be sentenced to life imprisonment without parole;
>
> under section 9 of this chapter unless a court determines under IC 35-36-9 that the person is an individual with mental retardation.

Because Conley was seventeen years old at the time of the offense, the trial court had the authority to sentence him to LWOP or a term of years ranging from forty-five years to sixty-five years with an advisory sentence of fifty-five years.

the differences between adult and juvenile offenders and limited the possible sentences for juveniles. Following those cases, and during Conley's direct appeal, the United States Supreme Court also decided *Miller v. Alabama*, which held that mandatory LWOP sentences for juveniles were unconstitutional. *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469. The Court held:

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet *transient immaturity*, and the *rare juvenile offender whose crime reflects irreparable corruption*." *Roper*, 543 U.S., at 573, 125 S. Ct. 1183; *Graham*, 560 U.S., at 68, 130 S. Ct., at 2026-2027. *Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison*.

Miller, 567 U.S. at 479-80, 132 S. Ct. at 2469 (emphasis added). Then, in *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016), the Court gave retroactive effect to *Miller*.

[86] Following these United States Supreme Court decisions, our Supreme Court, in an effort to leaven outlier juvenile sentences, pursuant to Appellate Rule 7(B), has recently revised several LWOP sentences and de facto LWOP sentences imposed upon juveniles. *See Wilson v. State*, 157 N.E.3d 1163, 1184 (Ind. 2020) (on post-conviction review, reducing a sixteen-year-old defendant's 181-year

sentence to one hundred years for two gang-related murders and noting that "the main factor weighing in favor of a shorter sentence is Wilson's age"); *State v. Stidham*, 157 N.E.3d 1185, 1191 (Ind. 2020) (on post-conviction review, reducing a seventeen-year-old defendant's 138-year sentence to eighty-eight years for a brutal murder where the victim was stabbed forty-seven times), *reh'g denied*; *Taylor v. State*, 86 N.E.3d 157, 167 (Ind. 2017) (reducing a seventeen-year-old defendant's LWOP sentence to eighty years for a "senseless and heinous" murder), *cert. denied*, 139 S. Ct. 591 (2018); *Fuller v. State*, 9 N.E.3d 653, 659 (Ind. 2014) (reducing a fifteen-year-old defendant's 150-year sentence to eighty-five years for two murders committed during a robbery); *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014) (reducing a sixteen-year-old defendant's 150-year sentence to eighty years for two murders committed during a robbery).

[87] One of the most important considerations in each of these opinions was the defendant's age. The Court in *Wilson* noted that "we are free to apply the developmental science undergirding [the United States Supreme Court] cases more broadly through our unique ability to consider a sentence's appropriateness by looking beyond the aggravators and mitigators relied on by the sentencing court." *Wilson*, 157 N.E.3d at 1182-83.

[88] The State, however, argues that this argument is barred by res judicata because our Supreme Court previously reviewed Conley's sentence under Appellate Rule 7(B) in his direct appeal. Our Supreme Court addressed res judicata in this same context in *Stidham*, 157 N.E.3d at 1191. In *Stidham*, the Court considered on direct appeal seventeen-year-old Stidham's argument that his

sentence was inappropriate. Stidham, however, again asked that his sentence be reviewed in post-conviction proceedings.

[89] The Court noted: "'As a general rule, when a reviewing court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding its review in post-conviction proceedings.'" *Stidham*, 157 N.E.3d at 1191 (quoting *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006)). Thus, according to the *Stidham* Court, res judicata would normally apply and bar its reconsideration of the issue. The Court, however, noted that, notwithstanding res judicata, "'[a] court has the power to revisit prior decisions of *its own or of a coordinate court* in any circumstance.'" *Id.* (quoting *State v. Huffman*, 643 N.E.2d 899, 901 (Ind. 1994)) (emphasis added). "This power, though, should be exercised only in extraordinary circumstances such as where the initial decision was clearly erroneous and would work manifest injustice." *Id.* (internal quotations omitted). Noting major shifts in the law regarding Appellate Rule 7(B) and the United States Supreme Court's decisions in *Roper*, *Graham*, and *Miller*, the Court then reviewed Stidham's 138-year sentence pursuant to Appellate Rule 7(B) and revised the sentence to sixty-eight years.

[90] Here, our Supreme Court reviewed Conley's sentence on direct appeal pursuant to Appellate Rule 7(B), and on post-conviction review, Conley asks that we again review his LWOP sentence under Rule 7(B). In reviewing Conley's sentence on direct appeal, the Court emphasized that "the trial court determined that Conley's mental health was not as dire or disturbed as the defendant claimed. Instead, the evidence suggests a hardened character."

Conley, 972 N.E.2d at 877. We have concluded, however, based on the post-conviction record, that Conley received ineffective assistance of trial counsel regarding defense counsel's presentation of evidence at the sentencing hearing. As a result of that deficient performance evidenced at the post-conviction hearing, our Supreme Court did not have the benefit of the significant and compelling evidence presented at the PCR hearing.[13] Given the ineffective assistance of trial counsel at Conley's sentencing hearing, we would find that extraordinary circumstances and fairness considerations warrant a review of Conley's sentence under Rule 7(B).[14]

[91] We do not, however, have that authority. As noted in *Stidham*, "'[a] court has the power to revisit prior decisions of *its own or of a coordinate court* in any circumstance.'" *Stidham*, 157 N.E.3d at 1191 (quoting *Huffman*, 643 N.E.2d at 901) (emphasis added). We are not a "coordinate court" of our Supreme Court. *See, e.g., State v. Stidham*, 110 N.E.3d 410, 423 (Ind. Ct. App. 2018) (May, J. concurring in result), *vacated by* 157 N.E.3d 1185 (Ind. 2020). Noting Judge May's concurring opinion, our Supreme Court stated in *Stidham*, "because the Court of Appeals cannot revisit decisions of this Court, [Judge May] admittedly

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[13] For example, in *Taylor*, 86 N.E.3d at 167, the Court noted that "Conley committed 'a drawn out crime' of 'unimaginable horror and brutality.'" Dr. Nichols, however, testified at the post-conviction hearing that, contrary to the testimony at the sentencing hearing, "there is no proof that [Conner] survived four hours post irreversible brain injury due to lack of circulating blood and/or lack of oxygen in the blood." PCR Tr. Vol. II p. 109.

[14] The United States Supreme Court's observed in *Roper*: "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 573, 125 S. Ct. 1197.

could not reach the merits to consider the appropriateness of Stidham's sentence, so she concurred in the result of the majority's ruling." *Stidham*, 157 N.E.3d at 1190. Accordingly, while our Supreme Court has the authority to review Conley's sentence under Rule 7(B), we do not. Our review of Conley's sentence under Rule 7(B) is barred by res judicata.

Conclusion

[92] Conley's trial counsel failed to adequately present mitigating evidence, especially with regard to Conley's age; the application of *Roper* and *Graham*; and Indiana's historical treatment of juveniles. Trial counsel also missed opportunities to present expert testimony on scientific evidence regarding the juvenile brain and diminished culpability of juveniles; and missed opportunities to zealously present evidence and challenge the State's evidence regarding Conley's mental health. We find that Conley has shown: (1) his trial counsel's performance fell well short of prevailing professional norms; and (2) his trial counsel's deficient performance prejudiced his defense to the extent there is a probability sufficient to undermine confidence in the outcome. *See Gibson*, 133 N.E.3d at 682 (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). Accordingly, the PC Court's denial of Conley's ineffective assistance of trial counsel claim is clearly erroneous. The PC Court's denial of the remainder of Conley's claims, however, is not clearly erroneous. Accordingly, we affirm in part, reverse in part, and remand with instructions to conduct a new sentencing hearing.

[93] Affirmed in part, reversed in part, and remanded.

May, J., and Pyle, J., concur.