

IN THE

V.

) Appeal from
) The United States District Court
) for the Northern District of Indiana,
) South Bend Division
)
) Case No. 3:22-cv-205-JD-MGG
)
) The Honorable Jon E. DeGuilio,
) Judge
)
)
)
)

Petitioner-Appellant's

Counsel for Donnell Wilson,
Petitioner-Appellant

Federal Habeas Project

Zion Miller, Law Student

Disclosure Statement

Case No. 23-2316

Short Caption: **Donnell Wilson v. Ron Neal**

The undersigned, counsel of record for the Petitioner-Appellant, Donnell Wilson, furnishes the following in compliance with 7th Circuit Rule 26.1:

- (1) The full name of every party or amicus the attorney represents in the case:

Donnell Wilson

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

Not Applicable

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53
P.O. Box 1554
Bloomington, IN 47402
812.322.3218
mausbrook@gmail.com
Counsel for Donnell Wilson,
Petitioner-Appellant

Table of Contents

Disclosure Statement.....	i
Table of Authorities	iv
Jurisdictional Statement.....	1
Statement of the Issues	2
Statement of the Case	3
The Documents in the Case	3
The Historical Facts	4
Trial and Sentencing.....	5
Donnell’s Direct Appeal	5
The State Post-Conviction Litigation	6
The Resentencing by the Indiana Trial Court	8
Donnell’s Attempted Direct Appeal from His Resentencing	9
The Federal Habeas Litigation.....	9
Summary of the Argument.....	11
Argument	13
Standards of Review.....	13
<i>De Novo</i> Review of the District Court Decision	13
Review of Facts Found by the State Courts	13
Review of a State-Court Merits Decision under the AEDPA.....	14
<i>De Novo</i> Review When There is No Merits Decision by the State Courts	14
I. This Court’s review of Donnell’s Eighth Amendment claim is <i>de novo</i> , under 28 U.S.C. § 2243, because there was no state-court merits adjudication of the claim with respect to Donnell’s current 100-year sentence, which was ordered by the Indiana Supreme Court, but imposed by the criminal trial court, and which Donnell was prevented from appealing.	15

Table of Contents (Cont'd)

II. Donnell's 100-year, <i>de facto</i> sentence to life without parole violates the Eighth Amendment under <i>Miller v. Alabama</i> , 567 U.S. 460 (2012), and <i>Montgomery v. Louisiana</i> , 577 U.S. 190 (2016).	17
A. Donnell's entirely new 100-year sentence is a <i>de facto</i> sentence to life without parole, and the Warden has waived any argument to the contrary.	17
B. <i>Miller</i> and <i>Montgomery</i> apply to Donnell's 100-year sentence because Donnell is highly likely to die in prison.	19
C. The mandatory criminal-gang enhancement under Indiana Code § 35-50-2-15 (Burns. Supp. 2014), which doubled the sentence for one of Donnell's murder convictions from 50 to 100 years, violates the Eighth Amendment by making Donnell's sentence a <i>mandatory de facto</i> sentence to life without parole.	20
Conclusion	22
Rule 32(g) Word-Count Certification	23
Certificate of Service	23
Circuit Rule 30(d) Statement	23

Short Appendix: Table of Contents

Opinion and Order Denying Writ of Habeas Corpus, D.E. 23, entered May 31, 2023	2a
Final Judgment, D.E. 24, entered June 1, 2023	23a
Notice of Appeal, D.E. 25, filed June 30, 2023	25a
<i>Wilson v. State</i> ("Wilson III"), 157 N.E.3d 1163 (Ind. 2020), <i>reh'g denied</i>	27a

Table of Authorities

Cases	Page
<i>Browder v. Director</i> , 434 U.S. 257 (1978)	2
<i>Casiano v. Comm’r of Corr.</i> , 317 Conn. 52, 54, 76 (2015)	18
<i>Cone v. Bell</i> , 556 U.S. 449 (2009)	14
<i>Gilbreath v. Winkleski</i> , 21 F.4th 965 (7th Cir. 2021).....	13–14
<i>Hicks v. Hepp</i> , 871 F.3d 513 (7th Cir. 2017)	21
<i>Jensen v. Pollard</i> , 24 F.3d 451 (7th Cir. 2019)	15
<i>Kelly v. Brown</i> , 851 F.3d 686 (7th Cir. 2017)	18, 19
<i>Lentz v. Kennedy</i> , 967 F.3d 675 (7th Cir. 2020)	13, 14
<i>McKinley v. Butler</i> , 809 F.3d 908 (7th Cir. 2016)	19, 19–20
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)	<i>passim</i>
<i>Montgomery v. Louisiana</i> , 577 U.S. 190 (2016)	6, 8, 9, 10, 17
<i>Neff v. State</i> , 849 N.E.2d 556 (Ind. 2006)	15
<i>People v. Buffer</i> , 137 N.E.3d 763 (Ill. 2019) (Burke, J., concurring)	18

Table of Authorities (Cont'd)

Cases	Page
<i>People v. Ward</i> , 2021 Ill. App. Unpub. Lexis 693 (Ill. Ct. App. 1st Dist. April 27, 2021) (<i>mem.</i>)	18
<i>Puffer v. Allstate Ins. Co.</i> , 675 F.3d 709 (7th Cir. 2012)	17
<i>Ramirez v. Tegels</i> , 963 F.3d 604 (7th Cir. 2020)	14
<i>United States v. Nelson</i> , 491 F.3d 344 (7th Cir. 2007)	19
<i>Washington v. Boughton</i> , 884 F.3d 692 (7th Cir. 2018)	14, 15
<i>Wilson v. State</i> , (“ <i>Wilson I</i> ”) 30 N.E.3d 1264 (Ind. Ct. App. 2015), <i>trans. denied</i>	3, 5, 6
<i>Wilson v. State</i> (“ <i>Wilson II</i> ”), 128 N.E.3d 492 (Ind. Ct. App. 2019), <i>trans. granted and vacated by</i> 157 N.E.3d 1163 (Ind. 2020), <i>reh’g denied</i>	3, 4, 6, 7
<i>Wilson v. State</i> (“ <i>Wilson III</i> ”), 157 N.E.3d 1163 (Ind. 2020), <i>reh’g denied</i>	<i>passim</i>

Table of Authorities (Cont'd)

Constitutional Provisions, Statutes, and Rules	Page
U.S. Const. amend. VIII	<i>passim</i>
28 U.S.C. §§ 1291	1
28 U.S.C. § 2241(a)	1
28 U.S.C. § 2241(c)	1
28 U.S.C. § 2243	2, 12, 14, 15
28 U.S.C. § 2253(a)	1
28 U.S.C. § 2254	13
28 U.S.C. § 2254(a)	1
28 U.S.C. § 2254(d)	15
28 U.S.C. § 2254(d)(1)	2, 9, 10, 12, 15
28 U.S.C. § 2254(e)(1)	13–14
Fed. R. App. P. 4(a)(1)(A)	1
Fed. R. App. P. 26(a)(1)(C)	1
Ind. Appellate Rule 7(B)	7, 11, 15
Ind. Code § 35-50-2-3(a) (Burns Supp. 2007)	20
Ind. Code § 35-50-2-15 (Burns. Supp. 2014)	20, 21
 Other Authorities	
ACLU of Michigan, <i>Michigan Life Expectancy Data for Youth Serving Natural Life Sentences</i> (April 2013)	17–18
Patterson, Evelyn J., <i>The Dose-Response of Time Served in Prison on Mortality: New York State, 1989–2003</i> , American Journal of Public Health, (February 6, 2013)	18–19
United States Sentencing Commission, 2006 Sourcebook of Federal Sentencing Statistics, Appendix A	19
Widra, Emily, <i>Incarceration Shortens Life Expectancy</i> , Prison Policy Initiative, (June 26, 2017)	18, 19

Jurisdictional Statement

On March 15, 2022, Donnell Wilson filed his Verified Petition for Writ of Habeas Corpus under 28 U.S.C. §§ 2241(c) & 2254(a). D.E. 1.

On May 31, 2023, the district court entered its Opinion and Order (“Opinion”). D.E. 23; App. 2a. The district court entered its Judgment on June 1, 2023. D.E. 24; App. 23a. In both its Opinion and Judgment, the district court granted Donnell a certificate of appealability. D.E. 23 at 21, App. 22a; D.E. 24 at 1, App. 23a.

On June 30, 2023, Donnell timely filed a notice of appeal. D.E. 25; App. 25a. 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1) & 26(a)(1)(C); *Browder v. Director*, 434 U.S. 257, 265 n.9 (1978).

The district court had original jurisdiction of this case under 28 U.S.C. §§ 2241(a) & 2254(a). This Court has jurisdiction of the appeal under 28 U.S.C. §§ 1291 & 2253(c).

Statement of the Issues

Donnell Wilson was originally sentenced to 181 years in prison, a *de facto* sentence to life without parole, for crimes he committed when he was 16. Having concluded that Donnell's appellate lawyer had been ineffective in Donnell's post-conviction appeal, the Indiana Supreme Court short-circuited normal procedure, did Donnell's new direct appeal inside his post-conviction appeal, and ordered that Donnell's sentence be reduced to 100 years, another *de facto* life sentence; the Indiana trial court, thereafter, resentenced Donnell accordingly. To raise his Eighth Amendment claim with respect to the entirely new, 100-year sentence imposed by the trial court, Donnell filed a notice of appeal from that new, final judgment. The Indiana Court of Appeals dismissed that appeal from a sentencing order for lack of jurisdiction.

The issues presented are:

- I. Whether Donnell's Eighth Amendment claim isre subject to *de novo* review under 28 U.S.C. 2243, and *not* to AEDPA review under 28 U.S.C. § 2254(d)(1), because his Eighth Amendment claim with respect to his entirely new, 100-year sentence—an intervening judgment—stands adjudicated on its merits by any Indiana state court?

and
- II. If Donnell is entitled to *de novo* review under § 2243, whether Donnell's 100-year, *de facto* life sentence violates the Eighth Amendment because it was a mandatory *de facto* life sentence?

Statement of the Case

The Documents in the Case

“**Opinion**” will refer to the district court’s Opinion and Order, D.E. 23, which appears at pages 2a ff. of the Short Appendix.

“**Judgment**” will refer to the district court’s judgment, D.E. 24, which appears at pages 23a ff. of the Short Appendix.

“**App.**” will refer to the Short Appendix.

“**Supp. App.**” will refer to Donnell’s Supplemental Appendix.

There have been three state-court appellate opinions:

“**Wilson I**” will refer to the opinion in Donnell’s direct appeal: *Wilson v. State*, 30 N.E.3d 1264 (Ind. Ct. App. 2015), *trans. denied*.

“**Wilson II**” will refer to the opinion of the Indiana Court of Appeals in Donnell’s post-conviction appeal, *Wilson v. State*, 128 N.E.3d 492 (Ind. Ct. App. 2019), *trans. granted and vacated by* 157 N.E.3d 1163 (Ind. 2020), *reh’g denied*, which appears at pages 2a ff. of Donnell’s Supplemental Appendix.

“**Wilson III**” will refer to the Indiana Supreme Court’s decision on the State of Indiana’s transfer petition from *Wilson II*, *Wilson v. State*, 157 N.E.3d 1163 (Ind. 2020), *reh’g denied*, which appears at pages 27a ff. of the Short Appendix.

The Historical Facts

“Donnell Wilson grew up in an urban war zone and became a gang member at a young age.” *Wilson II*, Supp. App. 2a. He was sixteen years old at the time he committed the crimes for which he was convicted. *Id.* at 3a. “He was the sixth of twelve children and . . . [his] mother did not allow her children to play outside and taught them to fall to the floor or go to the basement if they heard gunshots.” *Id.*

[Donnell] was under threat of serious injury and death nearly every day. When he was seven or eight years old, he saw another child get shot in the head. On another occasion, he saw two friends get shot. His home was firebombed on one occasion and shot at multiple times; he was present when the home was firebombed. Wilson had been shot on at least two occasions.

Growing up in such an area caused [Donnell] to develop a “war zone mentality” characterized by “hypervigilance,” which is manifested as extreme sensitivity to potential threats and a high probability of responding to perceived threats with aggression. PCR Ex. 6 p. 7. As a result of his surroundings, [Donnell] developed post-traumatic stress disorder (PTSD) at a young age.

Id.

In *Wilson III*, Donnell’s post-conviction appeal, the Indiana Supreme Court recited the historical facts of the crimes for which Donnell was convicted as follows:

In March 2013, sixteen-year-old Donnell Wilson, his then-girlfriend, her brother Jonte Crawford, and another of the Crawfords’ relatives were all walking home from playing basketball in their hometown of Gary, Indiana. When the group encountered fifteen-year-old Derrick Thompson, Wilson and Jonte flashed the handguns they were carrying and began harassing and intimidating Thompson, making references to the local Tre 7 gang. The pair then took Thompson’s smartphone and headphones and walked away.

A short time later, the group happened upon brothers Shaqwone Ham and Charles Wood. Wilson and Jonte were

members of several interrelated gangs, including the Get Fresh Boys, Tre 7, and Glen Park Affiliated, which were all at odds with the Bottom Side gang, to which Ham and Wood belonged. Wilson had previously argued in person with the brothers and their disputes had continued online with the brothers threatening to fight Wilson. The groups initially exchanged greetings, but Wilson and Jonte soon began to argue with the brothers. Wilson exclaimed, “Oh, y’all looking for me? I’m in your hood.” Seconds later, he fatally shot Wood in the head. When Ham tried to run, Jonte shot him several times, killing him too. It is unclear from the record if Wilson also shot at Ham. The brothers were unarmed.

Wilson III, App. 28a (cleaned up).

Trial and Sentencing

Donnell was charged as an adult with four crimes: two counts of murder, armed robbery as a Class B felony, conspiracy to commit criminal gang activity, which was a Class D felony. *Wilson I*, Supp. App. 16a. The State also “sought criminal gang sentencing enhancements for the murder and robbery charges.” *Id.*

A jury convicted Donnell for the four crimes with which he had been charged. *Id.* In a separate proceeding, the jury found Donnell “guilty on the criminal gang enhancements.” *Id.*, 16a–17a. The trial court sentenced Donnell to “consecutive terms of sixty years for the first murder conviction, fifty-five years for the second murder conviction, six years for armed robbery, and two years for criminal gang activity, with an additional sixty years pursuant to the criminal gang activity enhancement.” *Id.* at 17a.

Donnell’s total sentence at this point was 183 years. *Id.*

Donnell’s Direct Appeal

Donnell pursued a direct appeal, raising several issues. See *Wilson I*, Supp. App. 17a. The Indiana Court of Appeals affirmed his murder and robbery convictions but, as a matter of state double-jeopardy law, ordered

vacated Donnell's conviction for conspiracy to commit criminal gang activity. *Id.* at 21a.

Because of that *vacatur*, Donnell's sentence became 181 years. *Id.*

The State Post-Conviction Litigation

Having received no meaningful relief in his direct appeal, Donnell pursued state post-conviction relief, raising several claims.

The Post-Conviction Trial Court

In the state post-conviction litigation, the post-conviction trial court denied Donnell relief on his Eighth Amendment and trial and appellate ineffective-assistance claims. *Wilson I*, Supp. App. 5a, 6a. Donnell appealed.

The Indiana Court of Appeals—Wilson II

The Indiana Court of Appeals reversed the denial of post-conviction relief and held that Donnell's trial lawyer had been ineffective for failing "to present any evidence related to youth and its attendant characteristics or to Wilson's own youth, environment, mental health, good character, or prospects of rehabilitation." *Wilson II*, Supp. App. 12a.

The State sought transfer from the *Wilson II* decision, which the Indiana Supreme Court granted.

The Indiana Supreme Court—Wilson III

Having granted the State's transfer petition, the Indiana Supreme Court recounted a split of authority on the question—*Wilson III*, App. 35a–36a—but first held that *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), do not apply to *de facto* life sentences. *Wilson III*, App. 38a ("[Donnell's] sentence does not violate the Eighth Amendment because *Miller*, *Graham*, and *Montgomery* expressly indicate their holdings apply only to life-without-parole sentences.").

The *Wilson III* court then, contrary to *Wilson II*, held that Donnell's trial lawyer had not been ineffective for failing to investigate and present mitigation evidence at sentencing. *Wilson III*, App. 40a.

The Indiana Supreme Court *did* conclude, however, that Donnell's appellate lawyer had been ineffective for failing to argue in Donnell's direct appeal that Donnell's sentence should be reduced under the authority of Indiana Appellate Rule 7(B). *Wilson III*, App. 44a. (Indiana Appellate Rule 7(B) provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.")

Having found Wilson's appellate lawyer ineffective, the *Wilson III* court pointed out: "The correct remedy for this failure, in this instance, is to give [Donnell] a new chance to present an Appellate Rule 7(B) claim." *Wilson III*, App. 44a. But, instead of sending the case back to the Indiana Court of Appeals for a new direct appeal, the Indiana Supreme Court, itself, did Donnell's "new appeal" inside the post-conviction appeal that was *Wilson III*: "But rather than remand for consideration, in the interest of judicial economy, we choose to now conduct a review of the sentence under Appellate Rule 7(B)." *Id.* To dispel any doubt that it was doing the new direct appeal, after finding Donnell's appellate counsel ineffective, the *Wilson III* court said it was conducting its review under Appellate Rule 7(B) while "[e]xamining only the facts available on direct appeal." *Wilson III*, App. 44a.

The result of that review was that Donnell be ordered to serve a total sentence of 100 years: "This includes two concurrent fifty-year sentences for the murders of Wood and Ham, a fifty-year criminal gang enhancement for Wood's murder, and a concurrent six-year robbery sentence." *Id.* at 47a. The Indiana Supreme Court surmised that Donnell "will likely be eligible for release in his mid-to-late sixties, meaning that he has reasonable hope for a life outside prison." *Id.* The bottom line of the *Wilson III* opinion was: "But we

conclude Wilson's appellate counsel performed inadequately when he failed to request appellate review of the sentence's appropriateness under Appellate Rule 7(B). After reviewing Wilson's character and the nature of the offense, we revise Wilson's sentence downward to an aggregate 100 years." *Id.*, App. 48a.

Donnell filed a petition for rehearing, arguing a 100-year sentence is also a *de facto* sentence to life without parole and violated the Eighth Amendment under *Miller* and *Montgomery*. The Indiana Supreme Court was uninterested and denied rehearing without opinion.

Resentencing by the Indiana Trial Court

After the Indiana Supreme Court denied rehearing in January 2021, in February, the Lake County criminal trial court resentenced Donnell to an aggregate sentence of 100 years as instructed by *Wilson III*:

02/12/2021	Sentenced	
	Judicial Officer	Vasquez, Salvador
	1. Murder	
	Confinement to Commence: 08/01/2014	
	Indiana Department of Correction	
	Term: 50 Yr	
	Jail Credit: 435 Days	
	Concurrent with Prior Sentence: II & III	
	Consecutive with Prior Sentence: to Criminal Gang Sentence Enhancement	
	Comment: 50 years DOC	

02/12/2021	Sentenced	
	Judicial Officer	Vasquez, Salvador
	2. Murder	
	Confinement to Commence: 08/01/2014	
	Indiana Department of Correction	
	Term: 50 Yr	
	Concurrent with Prior Sentence: I & III	
	Comment: 50 years DOC	

USDC IN/ND case 3:22-cv-00205-JD-MGG document 7-1 filed 06/06/22 page 13 of 13

02/12/2021

Sentenced

Judicial Officer

Vasquez, Salvador

3. Robbery While Armed

Confinement to Commence: 08/01/2014

Indiana Department of Correction

Term: 6 Yr

Concurrent with Prior Sentence: I & II

Comment: 6 years DOC

02/12/2021 Abstract of Judgment Sent to DOC

Trial Docket, D.E. 7-1 at 12–13.

Donnell’s Attempted Direct Appeal from His Resentencing

After he had been resentenced, to raise his Eighth Amendment claim under *Miller* and *Montgomery* with respect to his new, 100-year sentence, which had now actually been imposed, Donnell filed a notice of appeal from that sentence. The Indiana Court of Appeals dismissed Donnell’s appeal “for lack of jurisdiction,” even though there is little more commonplace than notices of appeal filed after sentencing orders, which are final judgments.

The Federal Habeas Litigation

Having been blocked from appealing his sentence and raising his Eighth Amendment claim under *Miller* and *Montgomery* in state court, Donnell filed a habeas petition in federal court. His argument was straightforward and was the same as it is in this Court now: (1) Donnell’s entirely new, 100-year sentence—a new, intervening judgment—remains unreviewed on the merits of his Eighth Amendment claim by any state court and is therefore not subject to AEDPA review under 28 U.S.C. 2254(d)(1); (2) *Miller* and *Montgomery* apply to *de facto* sentences to life without parole; (3) Donnell’s 100-year sentence *is* a *de facto* sentence to life without parole; and (4) the mandatory criminal gang enhancement, which added 50 years to one of his convictions and made his total sentence 100 years, is unconstitutional as applied to Donnell, because it makes his sentence a mandatory sentence to life without parole.

In its Response, the respondent Warden argued that Donnell's petition was late, barred by the one-year statute of limitations. The district court rejected that defense. Opinion, App. 11a.

But the district court also rejected Donnell's argument that his Eighth Amendment claim were not subject to AEDPA review under § 2254(d)(1). The court said that this Court "has never held that adjudication on the merits requires the State court to consider the claim in exactly the same form and context that it is presented in the habeas petition." Opinion, App. 13a. It then went on to survey three cases in which this Court concluded "State courts have adjudicated the merits of a claim where the State court has considered the habeas claim in a different context." *Id.*, App. 13a, 13a–14a.

Following this line of thought, the district court concluded that Donnell's Eighth Amendment claim was / is subject to AEDPA review:

Here, Wilson's claim contains two essential components: (1) whether *Miller* extends to de facto life sentences; and (2) whether his 100-year sentence qualifies as a de facto life sentence. On post-conviction appeal, Wilson's claim also contained two essential components: (1) whether *Miller* extends to de facto life sentences; and (2) whether his 181-year sentence qualified as a de facto life sentence. In resolving Wilson's claim on post-conviction appeal, the Indiana Supreme Court determined that *Miller* did not extend to de facto life sentences. **As in *Sturgeon*, logic dictates that the Indiana Supreme Court could not have reached a different conclusion on a challenge to the 100-year sentence in light of its resolution of the challenge to the 181-year sentence. Consequently, the deferential standard of review under 28 U.S.C. § 2254(d) applies to Wilson's habeas claim.**

Opinion, App. 14a (emphasis added). The Discussion section that follows this passage is largely superfluous. Because there is no clearly established Supreme Court precedent saying *Miller* and *Montgomery* apply to *de facto* sentences to life without parole, Donnell's Eighth Amendment claim necessarily failed AEDPA review in the district court. See Opinion, App. 17a

(“It is undisputed that no Supreme Court case squarely addresses the issue of whether individualized consideration is required for de facto life sentences for juvenile homicide offenders.”). The district court accordingly denied Donnell’s petition. *Id.*, App. 22a.

The foregoing notwithstanding, the district court issued a certificate of appealability; that certificate of appealability reads:

The certificate of appealability is GRANTED on the issue of whether the Indiana Supreme Court contradicted or unreasonably applied clearly established law as determined by the United States Supreme Court by determining that the Eighth Amendment does not require individualized consideration to sentence juvenile homicide offenders to de facto life sentences.

Judgment, App. 23a (all-caps in the original). Donnell filed in this Court a motion to expand the certificate of appealability to include the issues as stated above in the Statement of the Issues. Doc. 5. This Court issued an order saying that expansion of the certificate of appealability was unnecessary and Donnell “may include the additional arguments he wishes to raise in his briefs.” *Id.*

Summary of the Argument

I. In Donnell’s post-conviction appeal, the Indiana Supreme Court held that Donnell’s appellate lawyer had been ineffective in Donnell’s direct appeal for failing to raise an argument under Indiana Appellate Rule 7(B) that Donnell’s 181-year sentence should be reduced. It thus found Donnell’s original 181-year sentence constitutionally invalid.

Instead of remanding the case to the Indiana Court of Appeals for a new direct appeal, the Indiana Supreme Court did Donnell’s direct appeal inside the post-conviction appeal. Under Appellate Rule 7(B), the Indiana Supreme Court ordered Donnell’s sentence reduced from 181 to 100 years.

As ordered by the Indiana Supreme Court, the Lake County criminal court resentenced Donnell as instructed by the Indiana Supreme Court. To

raise a claim that his new, 100-year sentence violated the Eighth Amendment under *Miller*, Donnell attempted to appeal that new sentence imposed by the trial court. The Indiana Court of Appeals dismissed the appeal for lack of jurisdiction, it said.

Donnell's new, 100-year sentence—a new judgment, pursuant to which he is in custody—stands unreviewed by any Indiana state court. In particular, Donnell's Eighth Amendment claim under *Miller* as it relates to his 100-year sentence has never been adjudicated on its merits by any state court.

This Court should therefore review Donnell's Eighth Amendment claim under *Miller de novo* under 28 U.S.C. § 2243, unconstrained by 28 U.S.C. § 2254(d)(1), which only applies to claims adjudicated on their merits in state-court proceedings.

II. Donnell was sixteen, a child, when he committed the crimes for which he was convicted and, finally sentenced to 100 years in prison. The mandatory criminal-gang enhancement for which Donnell was convicted doubled one of Donnell's murder convictions from 50 to 100 years.

With his 100-year sentence, Donnell will not—cannot—be released to parole until he is 66 years old. Donnell has a life expectancy in prison of about 50 years.

This Court has said that *Miller* applies to *de facto* life sentences—sentences so long it is highly likely a person will die in prison. With an earliest possible release date when he is 66 and a life expectancy well short of that, it is highly likely Donnell will die in prison. *Miller* therefore applies to Donnell's 100-year sentence.

Miller forbids mandatory *actual* life sentences for children. Application of the mandatory criminal-gang enhancement to Donnell made his sentence a mandatory *de facto* life sentence. Under this Court's precedents, Indiana's

criminal-gang-enhancement statute, as applied to Donnell, violates the Eighth Amendment under *Miller*.

Argument

First, Donnell sets out various applicable standards of review. Thereafter, in Part I, Donnell argues that he is entitled to *de novo* review of Eighth Amendment claim, because his 100-year sentence ordered by the Indiana Supreme Court in *Wilson III*, but imposed by the criminal trial court, is an intervening judgment, unreviewed by any Indiana court—*i.e.*, there is no state-court adjudication of his Eighth Amendment claims attacking his 100-year sentence.

Then, in Part II, Donnell argues that his 100-year sentence is a *de facto* life sentence that violates the Eighth Amendment because the criminal gang enhancement, which doubled one of his murder sentences and made his total sentence 100 years, made his sentence a mandatory *de facto* life sentence.

Standards of Review

De Novo Review of the District Court Decision

Generally, the Court reviews *de novo* a district court's disposition of a habeas petition filed under 28 U.S.C. § 2254. *E.g.*, *Lentz v. Kennedy*, 967 F.3d 675, 688 (7th Cir. 2012).

Review of Facts Found by the State Courts

The Court “presume[s] that the factual findings of the state court are correct for the purposes of habeas review unless the petitioner rebuts the

presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).” *Gilbreath v. Winkleski*, 21 F.4th 965, 968 (7th Cir. 2021).

Review of a State-Court Merits Decision under the AEDPA

As *Lentz* said, the Court’s review of a claim decided on its merits by a state court is “significantly limited.” 967 F.3d at 688.

Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal court may grant habeas relief only **if a state court adjudication on the merits** (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C.

§ 2254(d)(1), (2). An unreasonable application of clearly established federal law must be “objectively unreasonable.” *White v. Woodall*, 572 U.S. 415, 419 (2014). We accord great deference to the state courts’ determinations. *Dassey v. Dittmann*, 877 F.3d 297, 301 (7th Cir. 2017) (*en banc*).

Id. (Emphasis added) (parallel citations omitted).

De Novo Review When There is No Merits Decision by the State Courts

Federal courts review *de novo*, under 28 U.S.C. § 2243, habeas claims the state courts did not reach on the merits. *Cone v. Bell*, 556 U.S. 449, 472 (2009); *accord Washington v. Boughton*, 884 F.3d 692, 698–99 (7th Cir. 2018). They ask, for themselves, whether a petitioner is “in custody in violation of the Constitution or laws or treaties of the United States,” §§ 2241(c) & 2254(a), and “dispose[s] of the matter as law and justice require.” 28 U.S.C. § 2243; *Ramirez v. Tegels*, 963 F.3d 604, 612 (7th Cir. 2020).

- I. **This Court’s review of Donnell’s Eighth Amendment claim is *de novo*, under 28 U.S.C. § 2243, because there was no state-court merits adjudication of the claim with respect to Donnell’s current 100-year sentence, which was ordered by the Indiana Supreme Court, but imposed by the criminal trial court, and which Donnell was prevented from appealing.**

The limitations on federal habeas review contained in 28 U.S.C. 2254(d)(1) apply to “a person in custody pursuant to the judgment of a State court” and “to any claim that was adjudicated on the merits in State court proceedings.” 28 U.S.C. 2254(d). The “judgment” pursuant to which Donnell is “in custody” is the February 2021 sentencing order of the Lake County criminal court, imposing the sentences ordered by the Indiana Supreme Court in *Wilson III*. See *Jensen v. Pollard*, 24 F.3d 451, 455 (7th Cir. 2019) (“Jensen’s custody flows from a new judgment reinstating the original conviction . . .”). Even in cases in which a sentence is reduced under Indiana Appellate Rule 7(B), Indiana appellate courts do not impose sentences; Indiana trial courts do. See, e.g., *Neff v. State*, 849 N.E.2d 556, 563 (Ind. 2006) (under Appellate rule 7(B), remanding “to the trial court with instructions to impose a six-year term”).

That sentence stands unreviewed by any state court, leaving his Eighth Amendment claim never “adjudicated on its merits in State court proceedings.” It follows that this Court’s review of Donnell’s Eighth Amendment claim is *de novo* under 28 U.S.C. § 2243. E.g., *Washington*, 884 F.3d at 698–99 (7th Cir. 2018).

There can be no doubt that the sentence imposed by the trial court in February 2021 was a new judgment. The *Wilson III* court had found Donnell’s 181-year sentence constitutionally invalid, because Donnell’s appellate lawyer had been ineffective for failing to raise an argument for appellate review of Donnell’s sentence under Indiana Appellate Rule 7(B). *Wilson III*, App. 44a. The only judgment Donnell *could* be attacking with his habeas petition, then, is the February 2021 sentencing order.

Donnell did attempt to appeal that sentence and raise his Eighth Amendment claim with respect to his new, 100-year sentence. But the Indiana Court of Appeals dismissed that appeal for lack of jurisdiction. To be sure, had Donnell's appeal of the new, February 2021 judgment been permitted to proceed, his *Miller* claim would almost certainly not have prevailed.

But that is not what happened, and the district court's resolution of the problem caused by the bizarre state appellate procedural history was simply incorrect. With respect to the *Wilson III* court saying *Miller* does not apply to term-of-years sentences, the district court said: "[L]ogic dictates that the Indiana Supreme Court could not have reached a different conclusion on a challenge to the 100-year sentence in light of its resolution of the challenge to the 181-year sentence." Well, quite—but only if it had been presented with the claim as it related to Donnell's new, 100-year sentence—a new judgment—which it never was.

The three cases of this Court surveyed by the district court to reach its conclusion—Opinion, App. 13a–14(a)—are simply inapposite. None of those cases involved considering the same claim, applied to different facts, in the context of an entirely new judgment. To take just one of the cases the district court mentioned, the court said: "[I]n *Flint v. Carr*, 10 F.4th 786, 796–97 (7th Cir. 2021), the Seventh Circuit determined that the State court's decision that trial counsel's failure to object on double jeopardy grounds did not cause prejudice equated to an adjudication on the merits on the underlying double jeopardy claim." Opinion, App. 14a. The result in *Flint* is obviously correct because the merits of the ineffective-assistance claim depended *entirely* on the merits of the double jeopardy claim, itself. More importantly, *both* claims were directed at the same judgment.

That is simply not so in Donnell's case. To take the district court's approach would mean that Donnell's Eighth Amendment claim attacking the

judgment pursuant to which he is in custody was “adjudicated on its merits” *before it was entered*.

Donnell’s claim that his new, 100-year sentence violates the Eighth Amendment under *Miller* and *Montgomery* has never been adjudicated on its merits by any state court, and this Court should therefore review that claim *de novo* under 28 U.S.C. § 2243, bypassing § 2254(d)(1).

II. Donnell’s 100-year, *de facto* sentence to life without parole violates the Eighth Amendment under *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

- A. Donnell’s entirely new 100-year sentence is a *de facto* sentence to life without parole, and the Warden has waived any argument to the contrary.

Whether Donnell’s 100-year sentence *is* a *de facto* sentence to life without parole is obviously a threshold question before ever getting to the question of whether *Miller* and *Montgomery* apply to *de facto* life sentences. But the Warden did not contest the issue in the district court. See Response, D.E. 7 at 12 (“Putting aside the questions of whether Petitioner’s sentence is a *de facto* life sentence . . .”). Aware of the issue, the Warden has therefore waived, and not merely forfeited, any argument that Donnell’s sentence does not condemn him to life in prison without parole. *E.g.*, *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (“It is a well-established rule that arguments not raised to the district court are waived on appeal.”)

With day-for-day good-time credit, Donnell’s 100-year sentence makes his earliest possible release date to parole February 16, 2063. Donnell will then be 66 years old.¹ Donnell’s 100-year sentence is therefore a *de facto* sentence to life without parole, because the probability that Donnell will survive to that age in prison is minimal. The life expectancy for a child

¹ Offender Data: Donnell D. Wilson, Indiana Department of Correction <https://www.in.gov/apps/indcorrection/ofs/ofs?offnum=248373&search2.x=47&search2.y=10> (last visited December 17, 2023).

serving a “natural life sentence” is 50.6 years. See ACLU of Michigan, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, at 2.² The ACLU of Michigan further stated that “[m]inimum terms of thirty-five years or longer will not provide a meaningful opportunity for release for these youth who have an average life expectancy of 50 years.” *Id.*

A number of courts have accepted the ACLU of Michigan’s statistics about life expectancy in prison. See *Kelly v. Brown*, 851 F.3d 686, 688 (7th Cir. 2017) (Posner, J., dissenting) (citing ACLU of Michigan statistics with approval); *Casiano v. Comm’r of Corr.*, 317 Conn. 52, 54, 76 (2015) (overturning a *de facto* life sentence imposed on a juvenile using ACLU of Michigan statistics in support); *People v. Buffer*, 137 N.E.3d 763, 778 (Ill. 2019) (Burke, J., concurring) (a *de facto* life sentence for a juvenile is 40 years, citing ACLU of Michigan statistics); *People v. Ward*, 2021 Ill. App. Unpub. Lexis 693 (Ill. Ct. App. 1st Dist. April 27, 2021) (*mem.*) (reversing denial of successive post-conviction petition alleging *Miller* violation for *de facto* life sentence, citing ACLU of Michigan statistics).

The average life expectancy of someone in prison is dramatically lower than that of a person who has never been incarcerated. Emily Widra, *Incarceration Shortens Life Expectancy*, Prison Policy Initiative, (June 26, 2017) (“Widra Article”).³ One study has “identified a linear relationship between incarceration and life expectancy: for each year lived behind bars, a person can expect to lose two years off their life expectancy.” *Widra Article* (citing Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989–2003*, American Journal of Public Health,

² Available at <http://www.lb7.uscourts.gov/documents/17-12441.pdf> (last visited December 17, 2023). While this data was gathered in the Michigan prison system, there is no reason to believe that Indiana prison statistics should be significantly different.

³ https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ (last visited December 17, 2023).

(February 6, 2013)⁴). Further, “five years in prison . . . reduced the expected life span at age 30 by 10 years.” *Widra Article*. Additionally, the United States Sentencing Commission has defined a life sentence as 470 months for federal prisoners, which is 10 months shy of 40 years. United States Sentencing Commission, 2006 Sourcebook of Federal Sentencing Statistics, Appendix A at 3⁵; *see also United States v. Nelson*, 491 F.3d 344, 349 (7th Cir. 2007) (quoting the 2006 Sourcebook).

In light of the foregoing, and in the absence of any argument or evidence to the contrary from the Warden, it really should not be debatable: Donnell’s 100-year sentence makes it highly likely that he will die in prison.

B. *Miller* and *Montgomery* apply to Donnell’s 100-year sentence because Donnell is highly likely to die in prison.

This Court has said: “*Miller* applies not just to sentences of natural life, but also to sentences so long that, although set out as a term of years, they are in reality a life sentence. *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016).” *Kelly v. Brown*, 851 F.3d 686, 687 (2017). Before *Kelly*, in *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016), the Court said:

The Supreme Court said that in deciding on a sentence for a minor (remember that McKinley was only 16 when he committed the murder) “we require [the sentencing judge] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller v. Alabama*, *supra*, 132 S. Ct. at 2469 (footnote omitted).

Id. at 910. The *McKinley* court went on to say: “the ‘children are different’ passage that we quoted earlier from *Miller v. Alabama* cannot logically be

⁴ <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2012.301148> (last visited December 17, 2023).

⁵ http://www.ussc.gov/ANNRPT/2006/appendix_A.pdf (archive captured July 15, 2007 at https://web.archive.org/web/20070715004341/http://www.ussc.gov/ANNRPT/2006/appendix_A.pdf (last visited December 17, 2023)).

limited to *de jure* life sentences, as distinct from sentences denominated in number of years **yet highly likely to result in imprisonment for life.**” *Id.* at 911 (emphasis added).

As a matter of circuit precedent, then, *Miller* applies to *de facto* sentences to life without parole. And because Donnell’s 100-year sentence makes it “highly likely” he will die in prison, the Eighth Amendment as understood by *Miller* applies to his sentence.

- C. The mandatory criminal-gang enhancement under Indiana Code § 35-50-2-15 (Burns. Supp. 2014), which doubled the sentence for one of Donnell’s murder convictions from 50 to 100 years, violates the Eighth Amendment by making Donnell’s sentence a *mandatory de facto* sentence to life without parole.

Donnell was convicted for Indiana’s criminal-gang enhancement, which requires that the greatest single sentence be doubled. Ind. Code § 35-50-2-15(d)(2). That enhancement doubled Donnell’s 50-year murder sentence to 100 years, making Donnell’s a mandatory *de facto* sentence to life without parole. *Miller*, of course, said mandatory *actual* life sentences for children violate the Eighth Amendment. This Court has said that *Miller* applies to *de facto* life sentences, and Donnell’s 100-year sentence is a *de facto* life sentence made mandatory by the criminal-gang-enhancement statute. It follows that the criminal-gang-enhancement statute, as applied to Donnell, violates the Eighth Amendment.

It is actually worse than that. The minimum sentence for murder in Indiana is 45 years. Ind. Code § 35-50-2-3(a) (Burns Supp. 2007). So, the application of the criminal-gang enhancement to even a 45-year sentence, doubling it to 90 years, would violate the Eighth Amendment as applied to Donnell. With good-time credit, Donnell would be released at age 61, having served 45 years. As shown above, that is well beyond Donnell’s life expectancy in prison and would also be a mandatory, *de facto* life sentence. So, not only does Donnell’s 100-year sentence violate the Eighth Amendment

under *Miller* and *Montgomery*, as applied to him, Indiana's criminal-gang enhancement in § 35-50-2-15 will always violate the Eighth Amendment.

The Warden made no argument below that the application of the criminal-gang enhancement to Donnell is constitutionally permissible, so he has waived any argument that is. See *Hicks v. Hepp*, 871 F.3d 513, 526 (7th Cir. 2017) ("By defending this claim on the merits to the district court, while simultaneously arguing to the district court that Hicks had procedurally defaulted on his second claim, the State implicitly waived the defense of procedural default.").

The Court should conclude that application of the criminal-gang enhancement to Donnell's 50-year sentence for murder violates the Eighth Amendment under *Miller* by making Donnell's sentence a mandatory sentence to life without parole.

Conclusion

For the foregoing reasons, Donnell respectfully requests that the Court reverse the judgment of the district court and order that a writ of habeas corpus issue conditioned on the criminal penalties associated the criminal gang enhancement be removed. In the alternative, Donnell requests any other appropriate relief.

Respectfully submitted,

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53

P.O. Box 1554
Bloomington, IN 47402

812.322.3218
mausbrook@gmail.com

Counsel for Donnell Wilson,
Petitioner-Appellant

*Indiana University Maurer School of Law
Federal Habeas Project*

Allie Morris, Law Student
Samuel Hauke, Law Student
Zion Miller, Law Student

Rule 32(g) Word-Count Certification

I hereby certify that, according to the word-count function of Microsoft Word 2016, excluding the items listed in Rule 32(f), the foregoing opening brief of the Petitioner-Appellee contains 5,621 words, which is less than the 13,000 words permitted by Circuit Rule 28.1(e)(2)(A)(i).

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53

Certificate of Service

I hereby certify that on December 26, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53
P.O. Box 1554
Bloomington, IN 47402
812.322.3218
mausbrook@gmail.com
Counsel for Donnell Wilson,
Petitioner-Appellant

Circuit Rule 30(d) Statement

Under Circuit Rule 30(d), undersigned counsel of record for the Petitioner-Appellant, Donnell Wilson, hereby certifies that all material required by Circuit Rules 30(a) & (b), excluding that material exempted by 30(c), is contained in the Required Short Appendix attached to this brief.

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53

Petitioner-Appellant’s Short Appendix
Table of Contents

Opinion and Order Denying Writ of Habeas Corpus, D.E. 23,
entered May 31, 2023 2a

Final Judgment, D.E. 24, entered June 1, 2023 23a

Notice of Appeal, D.E. 25, filed June 30, 2023 25a

Wilson v. State (“*Wilson III*”),
157 N.E.3d 1163 (Ind. 2020), *reh’g denied* 27a

Appendix: Table of Contents

Opinion and Order Denying Writ of Habeas Corpus, D.E. 23,
entered May 31, 2023 2a

Final Judgment, D.E. 24, entered June 1, 2023 23a

Notice of Appeal, D.E. 25, filed June 30, 2023 25a

Wilson v. State (“*Wilson III*”),
157 N.E.3d 1163 (Ind. 2020), *reh’g denied* 27a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DONNELL WILSON,

Petitioner,

v.

CAUSE NO. 3:22-CV-205-JD-MGG

RON NEAL,

Respondent.

OPINION AND ORDER

Donnell Wilson, by counsel, filed a habeas corpus petition to challenge his conviction for murder and armed robbery under Case No. 45G01-1303-MR-4. On post-conviction review, on November 17, 2020, the Indiana Supreme Court resentenced him to one hundred years of incarceration.

FACTUAL BACKGROUND

In deciding this habeas petition, the court must presume the facts set forth by the state courts are correct unless they are rebutted with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The Court of Appeals of Indiana summarized the evidence presented at trial:

In March 2013, sixteen-year-old Donnell Wilson, his then-girlfriend, her brother Jonte Crawford, and another of the Crawfords' relatives were all walking home from playing basketball in their hometown of Gary, Indiana. When the group encountered fifteen-year-old Derrick Thompson, Wilson and Jonte flashed the handguns they were carrying and began harassing and intimidating Thompson, making references to the local Tre 7 gang. The pair then took Thompson's smartphone and headphones and walked away.

A short time later, the group happened upon brothers Shaqwone Ham and Charles Wood. Wilson and Jonte were members of several interrelated gangs, including the Get Fresh Boys, Tre 7, and Glen Park Affiliated, which were all at odds with the Bottom Side gang, to which Ham and Wood belonged. Wilson had previously argued in person with the brothers and their disputes had continued online with the brothers threatening to fight Wilson. The groups initially exchanged greetings, but Wilson and Jonte soon began to argue with the brothers. Wilson exclaimed, “Oh, y'all looking for me? I’m in your hood.” Seconds later, he fatally shot Wood in the head. When Ham tried to run, Jonte shot him several times, killing him too. It is unclear from the record if Wilson also shot at Ham. The brothers were unarmed.

Three hours before the murders, Wilson—who had previously made several gang-related posts on Twitter—sent out a new tweet declaring “Glen Park or get shot,” referring to the Gary neighborhood where he lived. An hour after the murder, he tweeted “Chillen wit my bros #[GetFreshBoys].” Jonte and Wilson were quickly arrested, and police found Thompson’s possessions on Jonte. Wilson was charged with two counts of murder, Class B felony armed robbery, and a Class D felony conspiracy to commit criminal gang activity. The State also sought a criminal gang enhancement.

While Wilson was lodged in the Lake County Jail awaiting trial, he told his cellmate he killed Ham and Wood because they were affiliated with the rival Bottom Side gang. He also explained how his gang affiliation had led to Twitter disputes with members of the Bottom Side gang. Wilson, along with some fellow inmates, later jumped this cellmate because he was from the “other side of the bridge” dividing Gary. During this period, Wilson was also recorded on a jailhouse video conference stating he wanted to “smash” a member of a rival gang incarcerated in the same facility and indicated a desire to continue participating in gang activity.

After a four-day trial beginning in June 2014, a jury found Wilson guilty on all counts. The trial court sentenced Wilson to a term of sixty years for the first murder conviction, fifty-five consecutive years for the second murder conviction, six consecutive years for armed robbery, and two years for criminal gang activity, with an additional sixty consecutive years added under the criminal gang enhancement, for an aggregate sentence of 183 years. Wilson’s trial counsel did not retain any experts in preparation for the sentencing hearing and did not present any witnesses at sentencing. When handing down the sentence, the court cited several aggravating factors, but found Wilson’s youth to be a mitigating factor.

ECF 7-19 at 2-3; *Wilson v. State*, 157 N.E.3d 1163, 1167-68 (Ind. 2020).

In the habeas petition, Wilson asserts that he was a juvenile at the time of his offense and that his sentence amounts to a mandatory de facto sentence of life without parole in violation of the Eighth Amendment as set forth in *Miller v. Alabama*, 567 U.S. 460 (2012).

TIMELINESS

The Warden argues that the petition is untimely. The statute of limitations for habeas corpus cases is set forth in 28 U.S.C. § 2244(d), which provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Here, the parties agree that the limitations period began to run in this case from the final judgment date but disagree as to when the judgment became final. The timeliness analysis is complicated by the atypical procedural history of the State court proceedings. Specifically, on August 5, 2014, the Lake Superior Court entered judgment in the criminal case. ECF 7-1 at 9. Wilson initiated a direct appeal, which culminated in the Indiana Supreme Court's denial of transfer on August 19, 2015. ECF 9-2. On August 11, 2016, Wilson initiated post-conviction proceedings, but the Lake Superior Court denied relief, and he appealed. ECF 7-9 at 8-14. On November 17, 2020, the Indiana Supreme Court issued an opinion, finding that Wilson's appellate counsel was ineffective for failing to challenge Wilson's sentence under Indiana Appellate Rule 7(B). ECF 7-19. In lieu of allowing Wilson to pursue this challenge on a second direct appeal, the Indiana Supreme Court conducted an analysis under the rule and reduced Wilson's sentence from one hundred eighty-one years to one hundred years. *Id.* On January 22, 2021, the Indiana Supreme Court denied Wilson's petition for rehearing. ECF 7-18. On February 12, 2021, the Lake Superior Court issued a sentencing statement in accordance with the Indiana Supreme Court's opinion. ECF 7-9 at 15. On February 22, 2021, Wilson filed a notice of appeal with respect to the sentencing statement, but, two days later, the Indiana Court of Appeals dismissed the appeal with prejudice on the basis that "decisions and rulings by the Indiana Supreme Court cannot be appealed in this court." ECF 7-21; ECF 7-22.

The Warden argues that judgment became final at the conclusion of direct review when the time to petition for writ of certiorari expired on November 17, 2015, and that the time to file a federal habeas petition expired on April 29, 2021. Wilson responds that the sentence modification at the post-conviction stage amounted to a second final judgment that reset the limitations period. According to the Warden, the post-conviction sentence modification was not a new trial court sentencing proceeding and so did not amount to a new final judgment that would reset the limitations.

For this proposition, the Warden relies on two cases. First, in *Magwood v. Patterson*, 561 U.S. 320 (2010), the Supreme Court of the United States considered whether Magwood's habeas petition was a second or successive petition in violation of 28 U.S.C. § 2244(b). His conviction first became final in July 1983, but he was granted habeas relief in federal court, and, in September 1986, the trial court reimposed the death penalty after holding a new sentencing proceeding. *Id.* at 325-26. Magwood then filed a second federal habeas petition challenging his sentence, and the district court found that the resentencing led to a new judgment, so the second habeas petition did not violate Section 2244(b). *Id.* at 327-28. The Supreme Court agreed with the reasoning of the district court. *Id.* at 331-32.

Next, in *White v. U.S.*, 745 F.3d 834 (7th Cir. 2014), the Seventh Circuit considered whether White's sentence reduction under 18 U.S.C. § 3582(c) was a new judgment that would reset the federal limitations period and that would not require prior judicial authorization to pursue a second or successive petition. The Seventh Circuit found that the sentence reduction did not amount to a new judgment, citing several material

differences. *Id.* at 836-37. The appellate court observed that the sentence reduction procedure did not require the trial court “to receive evidence or reopen any issue decided in the original sentencing.” *Id.* It observed that the court that reduced the sentence did not “hold a hearing at which the defendant is present and a new sentence is pronounced.”¹ *Id.* “Instead the judge [took] as established the findings and calculations that led to the sentence and change[d] only the revised Guideline, leaving everything else the same. The penalty goes down, but the original judgment is not declared invalid.” *Id.*

In resentencing Wilson under Ind. R. App. 7(B), the Indiana Supreme Court described the scope of its review as follows:

Examining only the facts available on direct appeal, we conclude that a downward adjustment to Wilson’s sentence is appropriate. We modify a sentence only when we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The principal role of Appellate Rule 7(B) review should be to attempt to leaven the outliers. The point is not to achieve a perceived correct sentence. Rather, appellate review and revision ultimately boils down to the appellate court’s collective sense of what is appropriate. Whether a sentence should be deemed inappropriate turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case. Because the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution, appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.

¹ In the decision below, the district court described the sentence reduction proceedings as follows. “The motion was unopposed by the government and disposed of with a short, one page order reducing Petitioner’s sentence that was careful to note that ‘except as otherwise provided, all provisions of the judgment dated 12/1/06 shall remain in effect.’” *White v. U.S.*, 2013 WL 5323536, at *3 (C.D. Ill. 2013).

ECF 7-19 at 12. The court considered the nature of the offense, noting that it was senseless, reprehensible, and related to ongoing criminal gang activity, but that Wilson did not torture the victims or allow them to linger in pain. *Id.* at 12-13. The court considered Wilson's character, noting that his prior criminal history was not particularly egregious but that his stated desire to continue gang activity during his pretrial detention weighed against him. *Id.* at 13-14. The court further considered Wilson's youth at the time of the offense and compared his sentence to sentences in similar offenses by similarly youthful offenders. *Id.* The Indiana Supreme Court concluded, "[T]he main factor weighing in favor of a shorter sentence is Wilson's age" and reduced the sentence to one hundred years of incarceration. *Id.*

The Indiana Supreme Court's resentencing order on post-conviction review lies somewhere in between a new sentencing hearing described in *Magwood* and the formulaic sentence reduction described in *White*. The Indiana Supreme Court did not consider new evidence but did consider new arguments regarding Wilson's youth and the proportionality of his sentence when compared to similar cases. The Indiana Supreme Court also appeared to independently consider sentencing factors rather than merely deferring to the trial court's assessment and assignment of weight. And, while the Indiana Supreme Court did not hold a sentencing hearing in which Wilson was present and a new sentence was announced, the parties had thoroughly briefed the issues and engaged in oral argument, and the Indiana Supreme Court announced the new sentence in a lengthy well-reasoned opinion -- a far cry from the summary

procedure in *White* that consisted of only an unopposed motion and a single-page order.

The court further observes that the broad principal factors of nature of the offense and the character of the offender appear to fully encompass the more specific sentencing factors set forth by statute for trial courts' consideration. *See* Ind. Code § 35-38-1-7.1. Moreover, the Indiana Supreme Court has observed that appellate review under Ind. R. App. 7(B) is "an exercise of judgment that is unlike the usual appellate process, and is very similar to the trial court's function" in assigning relative weight to sentencing factors. *Cardwell v. State*, 895 N.E.2d 1219, 1223 (Ind. 2008).

Additionally, the Supreme Court of the United States has held that, "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet final for purposes of § 2244(d)(1)(A)." *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009). Here, the Indiana Supreme Court expressly opted to resolve the resentencing claim on post-conviction review as a substitute for allowing Wilson to pursue the claim on a second direct appeal. Consequently, the court finds that resentencing under Ind. R. App. 7(B) more closely resembles the new sentencing hearing in *Magwood* or the out-of-time direct appeal in *Jimenez* than the sentence reduction in *White* and that it thus serves as a new judgment to reset the federal limitations period.

The parties also dispute when the limitations period began to run. The Warden argues that the limitations period began to run on February 12, 2021, when the Lake

Superior Court issued the sentencing statement at the direction of the Indiana Supreme Court. According to the Warden, the sentence became final on that date because Wilson had no valid avenues for appealing it. Wilson argues that limitations period began to run only after the Indiana Court of Appeals dismissed the appeal of the sentencing statement with prejudice and the time for petitioning the Indiana Supreme Court for a transfer expired in March 2021.

To the Warden's point, the Indiana Court of Appeals dismissed the appeal with prejudice by finding that it did not have subject matter jurisdiction to review an order of the Indiana Supreme Court, and Wilson cannot challenge this this jurisdictional finding on habeas review. *See Miller v. Zatecky*, 820 F.3d 275, 277 (7th Cir. 2016) ("A federal court cannot disagree with a state court's resolution of an issue of state law."). Further, given that the Indiana Supreme Court's order was precedential binding authority, it is unclear how the lower courts could have meaningfully considered challenges to it even absent jurisdictional concerns. *See Dragon v. State*, 774 N.E.2d 103, 107 (Ind. App. 2002) ("We are bound by the decisions of our supreme court. Supreme court precedent is binding upon us until it is changed either by that court or by legislative enactment."). And the Indiana Supreme Court conveyed its disinterest in reviewing its own order when it denied Wilson's petition for a rehearing. Accordingly, the record supports that Wilson could not appeal the Indiana Supreme Court's order through the State courts.

Nevertheless, there is a more typical avenue for appealing the decisions of a State court of last resort – a petition for a writ of certiorari to the Supreme Court of the United States. *See* U.S. Sup. Ct. R. 10. In *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009), the

Supreme Court of the United States held that the judgment becomes final for purposes of Section 2244(d)(1)(A) when the time for filing a petition for a writ of certiorari expires. The court sees no reason to deviate from that starting point, particularly given that the Indiana Supreme Court in resentencing Wilson under Ind. R. App. 7(B) acted as an appellate court on direct review.

Therefore, Wilson's sentence became final for purposes of 28 U.S.C. § 2244(d)(1)(A) when the time for petitioning the Supreme Court of the United States for a writ of certiorari expired on April 22, 2021. *See* U.S. Sup. Ct. R. 13(1) (petition for writs of certiorari must filed within 90 days after entry of judgment); *Jimenez*, 555 U.S. at 119. The limitations period expired one year later on April 22, 2022. Wilson filed the habeas petition on March 15, 2022 (ECF 1), so the habeas petition is timely.

STANDARD OF REVIEW

Wilson argues that the Indiana Supreme Court never considered his Eighth Amendment challenge to his sentence, reasoning that the Indiana Supreme Court resentenced him to one hundred years of incarceration and summarily denied his attempt to challenge the new sentence through a petition for a rehearing. The Warden argues that the Indiana Supreme Court adjudicated Wilson's Eighth Amendment challenge to the 100-year sentence because it amounts to a less persuasive version of his challenge to the 181-year sentence.

If a State court adjudicates a claim on the merits, federal courts may grant habeas relief on that claim only if the petitioner demonstrates that the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States” or that the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). These standards require substantial deference to State court decisions and are “intentionally difficult to meet.” *Woods v. Donald*, 575 U.S. 312, 316 (2015). “[C]learly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of [the Supreme Court’s] decisions.” *Id.* “And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice.” *Id.* “To satisfy this high bar, a habeas petitioner is required to show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.*

By contrast, “[w]hen no state court has squarely addressed the merits of a habeas claim, . . . we review the claim under the pre-AEDPA standard of 28 U.S.C. § 2243, under which we dispose of the matter as law and justice require.” *Morales v. Johnson*, 659 F.3d 588, 599 (7th Cir. 2011) “This is a more generous standard: we review the petitioner’s constitutional claim with deference to the state court, but ultimately de novo.” *Id.*

The court acknowledges that Wilson’s argument in the petition for a rehearing and in the habeas petition against the 100-year sentence is different, if only on the margins, than his argument against the 181-year sentence. For example, in his brief directed to the Indiana Court of Appeals, Wilson observed that he could not be released

until age 107 and that the life expectancy for American males was age 76. ECF 7-11 at 24. In the response to the petition to transfer directed at the Indiana Supreme Court, he argued that the Indiana Court of Appeals did not need to provide a detailed definition of a de facto life sentence because a sentence that precludes release until age 107 “clearly is one.” ECF 7-16 at 12. However, the tone of Wilson’s argument shifted after the resentencing – in the petition for rehearing, Wilson argued that the Indiana Supreme Court neglected to consider “the grim reality of an offender’s and especially a juvenile offender’s life, inside prison walls.” ECF 9-20 at 9. He now seeks to tether the definition of a de facto life sentence to the average life expectancy for juveniles serving life sentences. *Id.* at 10; ECF 1 at 10-14.

That said, the Seventh Circuit has never held that adjudication on the merits requires the State court to consider the claim in exactly the same form and context that it is presented in the habeas petition. Instead, the Seventh Circuit has found that State courts have adjudicated the merits of a claim where the State court has considered the habeas claim in a different context. For example, in *Sturgeon v. Chandler*, 552 F.3d 604, 610 (7th Cir. 2009), the petitioner argued that the State court resolved his claim that he was entitled to a competency hearing on State law grounds and did not consider his constitutional argument. The Seventh Circuit disagreed observing that the State court had considered the constitutional argument for a competency hearing in resolving a related ineffective assistance of appellate counsel claim. *Id.* at 611-12. The Seventh Circuit reasoned that the State court could not have reached a different decision on the standalone competency hearing claim and “the merits were effectively reached.” *Id.*

Similarly, in *Murdock v. Dorethy*, 846 F.3d 203, 208–09 (7th Cir. 2017), the Seventh Circuit determined that the State courts’ decision on whether to suppress his pretrial statements equated to an adjudication on the merits of his claim that trial counsel provided ineffective assistance for failing to suppress the pretrial statements. And, in *Flint v. Carr*, 10 F.4th 786, 796–97 (7th Cir. 2021), the Seventh Circuit determined that the State court’s decision that trial counsel’s failure to object on double jeopardy grounds did not cause prejudice equated to an adjudication on the merits on the underlying double jeopardy claim.

Here, Wilson’s claim contains two essential components: (1) whether *Miller* extends to de facto life sentences; and (2) whether his 100-year sentence qualifies as a de facto life sentence. On post-conviction appeal, Wilson’s claim also contained two essential components: (1) whether *Miller* extends to de facto life sentences; and (2) whether his 181-year sentence qualified as a de facto life sentence. In resolving Wilson’s claim on post-conviction appeal, the Indiana Supreme Court determined that *Miller* did not extend to de facto life sentences. As in *Sturgeon*, logic dictates that the Indiana Supreme Court could not have reached a different conclusion on a challenge to the 100-year sentence in light of its resolution of the challenge to the 181-year sentence. Consequently, the deferential standard of review under 28 U.S.C. § 2254(d) applies to Wilson’s habeas claim.

DISCUSSION

Wilson asserts that he was a juvenile at the time of his offense and that his sentence amounts to a mandatory de facto sentence of life without parole in violation of

the Eighth Amendment as set forth in *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller*, the Supreme Court of the United States held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishments.” *Id.* at 465. The Supreme Court reasoned that “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Id.* at 472. The Supreme Court reasoned that mandatory penalty schemes prevent the sentencing court from accounting for youth-related considerations in assessing whether the punishment is proportionate. *Id.* at 474-78, The Supreme Court did not foreclose life without possibility of parole for all juvenile offenders but required sentencing courts “to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 480.

Notably, the term “de facto life sentence” appears nowhere in *Miller*, and Wilson offers no definition. The term appears to arise from *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016), in which the Seventh Circuit considered a 100-year sentence in which the petitioner had no possibility of early release under Illinois law.² The Seventh Circuit distinguished de jure life sentences from de facto life sentences, which are “sentences

² The Seventh Circuit considered this claim in the context of a habeas petition challenging a State conviction. *Id.* at 909. However, the Seventh Circuit did not defer to the decision of the State court under the standard set forth in 28 U.S.C. § 2254(d)(1) because the petitioner had not presented the claim in State court. *Id.* at 912. Therefore, while *McKinley* indicates that the Indiana Supreme Court’s decision here was incorrect, it does not answer the question before this court as to whether the decision was unreasonable.

denominated in number of years yet highly likely to result in imprisonment for life.”³

Id. The Seventh Circuit found no logical distinction between de jure life sentences and de facto life sentence and found that *Miller* extended to de facto life sentences. *Id.*

Nevertheless, the holding of *Miller* applied to only sentences of life without possibility of parole, and the Supreme Court has not extended this holding to de facto life sentences in subsequent related cases. See *Jones v. Mississippi*, 141 S.Ct. 1307 (2021); *Montgomery v. Louisiana*, 577 U.S. 190 (2016). “Circuit precedent cannot refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced.” *Lopez v. Smith*, 574 U.S. 1 (2014).

Against this backdrop, the Indiana Supreme Court considered Wilson’s argument that *Miller* should extend to de facto life sentences. ECF 7-19 at 4-9. The court began by outlining the line of cases in which the Supreme Court of the United States has held that the Eighth Amendment affords juvenile criminals additional protections. *Id.* at 5-6 (citing *Miller*, 567 U.S. 460; *Graham v. Fla.*, 560 U.S. 48 (2010) (no life without possibility of parole sentences for non-homicide juvenile offenders); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (no death penalty for juvenile offenders)). The Indiana Supreme Court observed that a split of authority had formed as to whether *Miller* extended to de facto life sentences or aggregate sentences as opposed to the sentence for a particular

³ In other words, the Seventh Circuit uses the term “de jure” to refer to when a trial court literally imposes a sentence of “life without possibility of parole” and uses “de facto” to refer to sentences that are so long that they are the practical equivalent to life without possibility of parole.

charge, or whether *Miller* applied solely to de jure sentences of life without possibility of parole. *Id.* at 6-7.

The Indiana Supreme Court observed that *Graham* and *Miller* limited their holdings to life without possibility of parole and focused its analysis on that particular type of sentence. *Id.* at 7. The court noted that the Supreme Court of the United States has cautioned lower courts against expanding Eighth Amendment protections and reasoned that “determining the reach of [the Eighth Amendment] is inherently a line drawing exercise best left to the U.S. Supreme Court.” *Id.* at 8. The court further observed that “determining what sentence constitutes a de facto life sentence would be a task completely unmoored” from any guidance provided by the Supreme Court of the United States and that any determination would amount to guesswork likely requiring substantial and potentially unnecessary changes to Indiana’s sentencing scheme. *Id.* On this basis, the Indiana Supreme Court sided with the courts finding that *Miller* applied solely to de jure sentences of life without possibility of parole. *Id.*

Upon careful review of relevant caselaw, this court cannot find that the State court contradicted or unreasonably applied clearly established law as determined by the Supreme Court of the United States. To start, it is undisputed that no Supreme Court case squarely addresses the issue of whether individualized consideration is required for de facto life sentences for juvenile homicide offenders. *Graham* and *Miller* are replete with language suggesting that life without possibility of parole is a particularly harsh sentence for juveniles and limiting their holdings to that specific sentence. For example, in *Graham*, the Supreme Court observed that “life without parole

sentences share some characteristics with death sentences that are shared by no other sentences” and that “[l]ife without parole is an especially harsh punishment for a juvenile.” 560 U.S. at 69-70. The Supreme Court further characterized the holding of *Graham* as a “clear line” that “is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment.” *Id.* at 74; *see also id.* at 124. (Alito, J., dissenting) (“Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.”). In *Miller*, the Supreme Court also focused on the specific sentence of life without parole, referring to it as “the harshest possible penalty for juveniles” and contrasting it with the lesser sentences of “a lifetime prison term with possibility of parole or a lengthy term of years.” 567 U.S. at 489.

Even the courts that have extended this procedural requirement to de facto life sentences appear to recognize the limits of these holdings, often reasoning that they should so extend as a matter of logic. *See e.g., State v. Ramos*, 387 P.3d 650, 660 (Wash. 2017); *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017); *State v. Moore*, 76 N.E.3d 1127, 1140 (Ohio 2016); *Henry v. State*, 175 So. 3d 675, 679 (Fla. 2015); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014). For example, in *Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013), the Ninth Circuit reasoned:

Moore’s sentence of 254 years is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime. Moore’s sentence determines at the outset that Moore never will be fit to reenter society. His sentence results in the same consequences as Graham’s sentence [of life without possibility of parole]. Moore must live the remainder of his life in prison, knowing that he is

guaranteed to die in prison regardless of his remorse, reflection, or growth.

To be sure, the Ninth Circuit's reasoning has persuasive force, but the State court considered this opposing view and rejected it based on the express language of *Graham* and *Miller*. And, as noted by the State court, the Supreme Court must draw the line for constitutional protections for juvenile offenders somewhere, and attempting to discern where that line will be drawn based on prior decisions that do not squarely address the issue necessarily amounts to guesswork. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *see also Lopez v. Smith*, 574 U.S. 1, 6 (2014) ("We have before cautioned the lower courts . . . against framing our precedents at such a high level of generality.").

Further, numerous courts have also declined to extend *Graham* and *Miller* to de facto sentences for the same reasons discussed by the Indiana Supreme Court. *See e.g., U.S. v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019); *State v. Soto-Fong*, 474 P.3d 34, 41 (Ariz. 2020); *State v. Slocumb*, 827 S.E.2d 148, 156 (S.C. 2019); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018); *Lucero v. People*, 394 P.3d 1128, 1134 (Colo. 2017); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017); *Willbanks v. Dept. of Corrections*, 522 S.W.3d 238, 246 (Mo. 2017); *Vasquez v. Cmmw.*, 781 S.E.2d 920, 925 (Va. 2016); *State v. Brown*, 118 So. 3d 332, 342 (La. 2013). The decisions of these courts demonstrate that "there are reasonable arguments on both sides – which is all [the State] needs to prevail in this AEDPA case." *White v. Woodall*, 572 U.S. 415, 427 (2014); *see also Thompson v. Battaglia*, 458 F.3d 614, 619 (7th Cir.

2006) (“The variety in practice among the state courts and the various federal courts shows, unfortunately for Thompson, that there is no standard clearly established by the Supreme Court of the United States that is binding on all.”). Additionally, two other federal circuits have found on habeas review that a State court’s determination that *Miller* did not extend to de facto sentences was not unreasonable. *Ali v. Roy*, 950 F.3d 572, 576 (8th Cir. 2020); *Bunch v. Smith*, 685 F.3d 546, 553 (6th Cir. 2012); *but see Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017) (finding on habeas review that a State court’s determination that *Miller* did not extend to de facto sentences was unreasonable); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (same). On this basis, Wilson cannot persuade the court that the decision of the Indiana Supreme Court was “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”

Wilson argues that his sentence should qualify as a de facto life sentence based on the proposition that incarcerated individuals have lower average life spans than the general population. He relies on statistics indicating that the average life span of an incarcerated juveniles serving life sentences is 50.6 years. Because full consideration of this argument is unnecessary to resolve this case, the court will simply address Wilson’s characterization of the *McKinley* case as “nearly identical” to his own. ECF 1 at 12.

In *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016), in which the Seventh Circuit extended *Miller* to de facto sentences, the petitioner received a 100-year sentence for first-degree murder. *Id.* at 909. Under Illinois law, those convicted of first-degree murder had no opportunity to earn credit time or to otherwise obtain early release. As a

result, the petitioner would be 116 years old on his release date. *Id.* The Seventh Circuit found no need to define the parameters of what constitutes a de facto life sentence with particularity, instead presenting this sentence as an obvious example and finding that it was “--unless there is a radical increase, at present unforeseeable, in longevity within the next 100 years – a de facto life sentence.” *Id.* at 911. The other federal circuits extending *Miller* to de facto sentences did so in the context of even lengthier sentences and similarly found it unnecessary to specifically define de facto sentences. *See Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017) (eligible for parole at age 131); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (eligible for parole at age 144).

The Indiana Supreme Court also sentenced Wilson to 100 years of incarceration, but this sentence is not “nearly identical” to the sentence in *McKinley*. Unlike the petitioner in *McKinley*, Wilson has the opportunity to earn credit time, and he will be sixty-six years old on his earliest possible release date. ECF 1 at 10-11. It is unclear whether this qualifies as a de facto sentence, but it does not obviously qualify like the sentences in *McKinley*, *Budder*, and *Moore*. Stated otherwise, it does not require speculation about scientific development or medical breakthroughs to reasonably believe that an individual might live to age sixty-six. While Wilson’s sentence is substantial, it is materially distinguishable from the sentences that have been recognized by federal circuits as de facto life sentences.

CERTIFICATE OF APPEALABILITY

Pursuant to Section 2254 Habeas Corpus Rule 11, the court must grant or deny a certificate of appealability. To obtain a certificate of appealability under 28 U.S.C. §

2253(c), the petitioner must make a substantial showing of the denial of a constitutional right by establishing “that a reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In light of *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017), and *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013), the court will grant a certificate of appealability on the issue of whether the Indiana Supreme Court contradicted or unreasonably applied clearly established law as determined by the Supreme Court of the United States by determining that the Eighth Amendment does not require individualized consideration to sentence juvenile homicide offenders to de facto life sentences.

For these reasons, the court DENIES the habeas corpus petition (ECF 1); GRANTS a certificate of appealability on the issue of whether the Indiana Supreme Court contradicted or unreasonably applied clearly established law as determined by the Supreme Court of the United States by determining that the Eighth Amendment does not require individualized consideration to sentence juvenile homicide offenders to de facto life sentences; and DIRECTS the clerk to enter judgment in favor of the Respondent and against the Petitioner.

SO ORDERED on May 31, 2023

/s/JON E. DEGUILIO
CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

for the
Northern District of IndianaDONNELL WILSON
Petitioner

v.

Civil Action No. 3:22-cv-205

RON NEAL
Respondent

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one*):

☐ the plaintiff (*name*) _____
recover from the defendant (*name*) _____
the amount of _____ dollars (\$_____
) , which includes prejudgment interest at the rate of _____%, plus post-judgment interest at the
rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (*name*)
_____ recover costs from the
plaintiff (*name*) _____ .

☒ Other: JUDGMENT IS ENTERED in favor of Respondent Ron Neal and against
Petitioner Donnell Wilson. The Petition for Writ of Habeas Corpus is DENIED. The certificate
of appealability is GRANTED on the issue of whether the Indiana Supreme Court contradicted or
unreasonably applied clearly established law as determined by the Supreme Court of the United
States by determining that the Eighth Amendment does not require individualized consideration
to sentence juvenile homicide offenders to de facto life sentences.

This action was (*check one*):

☐ tried to a jury with _____

☐ tried by Judge _____
without a jury and the above decision was reached.

☒ decided by Chief Judge Jon E DeGuilio on Petition for Writ of Habeas Corpus

DATE: 6/1/2023

CHANDA J. BERTA, CLERK OF COURT

by /s/ S. Kowalsky
Signature of Clerk or Deputy Clerk

Certificate of Service

I affirm under penalty for perjury that on June 30, 2023, a copy of the foregoing was served on any opposing party or counsel registered to be served via the Court's electronic filing system.

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53
P.O. Box 1554
Bloomington, IN 47402
Telephone: 812.322.3218
Email: mausbroom@gmail.com
Counsel for Donnell Wilson,
Petitioner

Wilson v. State

Supreme Court of Indiana

November 26, 2019, Argued; November 17, 2020, Decided; November 17, 2020,
Filed

Supreme Court Case No. 19S-PC-548

Reporter

157 N.E.3d 1163 *; 2020 Ind. LEXIS 897 **; 2020 WL 6737226

Donnell Dontrell Wilson, Appellant (Petitioner Below) -v- State of Indiana, Appellee
(Respondent Below)

Subsequent History: Rehearing denied by [Wilson v. State, 2021 Ind. LEXIS 43 \(Ind., Jan. 22, 2021\)](#)

Prior History: **[**1]** Appeal from the Lake County Superior Court, No. 45G01-1608-PC-7. The Honorable Salvador Vasquez, Judge. The Honorable Kathleen A. Sullivan, Magistrate. On Petition to Transfer from the Indiana Court of Appeals, No. 18A-PC-3041.

[Wilson v. State, 2019 Ind. App. LEXIS 295, 128 N.E.3d 492, 2019 WL 2621703 \(Ind. Ct. App., June 27, 2019\)](#)

Counsel: ATTORNEYS FOR APPELLANT: Amy E. Karozos, Public Defender of Indiana; Katherine Province, Mark S. Koselke, Deputy Public Defenders, Indianapolis, Indiana.

ATTORNEYS FOR APPELLEE: Curtis T. Hill, Jr., Attorney General of Indiana; Stephen R. Creason, Chief Counsel, Appeals Division, Indianapolis, Indiana; Ellen H. Meilaender, Monika P. Talbot, Deputy Attorneys General, Indianapolis, Indiana.

Judges: Opinion by Justice Massa. Justices David and Goff concur. Chief Justice Rush concurs in result. Justice Slaughter concurs in Parts I and II.A and dissents from Parts II.B and II.C, with separate opinion.

Opinion

[*1166] Massa, Justice.

Donnell Wilson was sentenced to 181 years for the murders of Charles Wood and Shaqwone Ham; the lengthy term of years also included a sentence for robbery and a criminal gang enhancement. Wilson, who was sixteen when he committed the crimes, now challenges his sentence on post-conviction review after his conviction was affirmed on direct appeal.

[*1167] On post-conviction **[**2]** review, Wilson argues his sentence constitutes a *de facto* juvenile life sentence that triggers additional constitutional sentencing considerations under Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). He also alleges that both his trial counsel and appellate counsel were ineffective.

After a thorough review of U.S. Supreme Court precedent on juvenile sentencing, we reject Wilson's contention that his sentencing falls under *Miller*. We conclude, however, that his appellate counsel was ineffective on direct appeal when counsel failed to bring an Appellate Rule 7(B) challenge to the appropriateness of Wilson's sentence. Conducting this review now, we reduce Wilson's aggregate sentence to 100 years.

Facts and Procedural History.

In March 2013, sixteen-year-old Donnell Wilson, his then-girlfriend, her brother Jonte Crawford, and another of the Crawfords' relatives were all walking home from playing basketball in their hometown of Gary, Indiana. When the group encountered fifteen-year-old Derrick Thompson, Wilson and Jonte flashed the handguns they were carrying and began harassing and intimidating Thompson, making references to the local Tre 7 gang. The pair then took Thompson's smartphone and headphones and walked away.

A short time later, the group happened **[**3]** upon brothers Shaqwone Ham and Charles Wood. Wilson and Jonte were members of several interrelated gangs, including the Get Fresh Boys, Tre 7, and Glen Park Affiliated, which were all at odds with the Bottom Side gang, to which Ham and Wood belonged. Wilson had previously argued in person with the brothers and their disputes had continued online with the brothers threatening to fight Wilson. The groups initially exchanged greetings, but Wilson and Jonte soon began to argue with the brothers. Wilson exclaimed, "Oh, y'all looking for me? I'm in your hood." DA Tr. Vol. 1, p.153.¹ Seconds later, he fatally shot Wood in the head. When Ham tried to run, Jonte shot him several times, killing him too. It is unclear from the record if Wilson also shot at Ham. The brothers were unarmed.

Three hours before the murders, Wilson—who had previously made several gang-related posts on Twitter—sent out a new tweet declaring "Glen Park or get shot," referring to the Gary neighborhood where he lived. DA Ex. Vol. 1, p.43. An hour after the murder, he tweeted "Chillen wit my bros #[GetFreshBoys]." *Id.*, p.42. Jonte and Wilson were quickly arrested, and police found Thompson's possessions on Jonte. Wilson was charged **[**4]** with two counts of murder, Class B felony

¹ "DA" refers to the direct appeal materials from Wilson's original conviction. "PCR" indicates citations to the record in the present post-conviction proceedings.

armed robbery, and a Class D felony conspiracy to commit criminal gang activity.² The State also sought a criminal gang enhancement.³

While Wilson was lodged in the Lake County Jail awaiting trial, he told his cellmate he killed Ham and Wood because they were affiliated with the rival Bottom Side gang. He also explained how his gang affiliation had led to Twitter disputes with members of the Bottom Side gang. Wilson, along with some fellow inmates, later **[*1168]** jumped this cellmate because he was from the "other side of the bridge" dividing Gary. DA Tr. Vol. 2, p.410. During this period, Wilson was also recorded on a jailhouse video conference stating he wanted to "smash" a member of a rival gang incarcerated in the same facility and indicated a desire to continue participating in gang activity. DA Tr. Vol. 4, p.745.

After a four-day trial beginning in June 2014, a jury found Wilson guilty on all counts. The trial court sentenced Wilson to a term of sixty years for the first murder conviction, fifty-five consecutive years for the second murder conviction, six consecutive years for armed robbery, and two years for criminal gang activity, with an additional **[**5]** sixty consecutive years added under the criminal gang enhancement, for an aggregate sentence of 183 years. Wilson's trial counsel did not retain any experts in preparation for the sentencing hearing and did not present any witnesses at sentencing. When handing down the sentence, the court cited several aggravating factors, but found Wilson's youth to be a mitigating factor.

In a separate proceeding, Jonte was initially charged identically to Wilson, but he later pled guilty to a single count of murder and robbery as part of a plea agreement. Jonte's plea deal capped his maximum possible sentence at sixty-five years, and he was ultimately sentenced to sixty-one years of incarceration.

On direct appeal, Wilson challenged his convictions on three grounds, contending that (1) the trial court erred by admitting Twitter messages into evidence without foundation, (2) his conviction for conspiracy to commit criminal gang activity should be vacated because it was duplicative of the gang enhancement, and (3) the trial court erred when it excluded Wilson from a portion of his trial after a violent outburst. The Court of Appeals found in favor of Wilson on the criminal-gang-activity issue and vacated **[**6]** the conviction, thereby reducing his sentence by two years. See [*Wilson v. State*, 30 N.E.3d 1264, 1269 \(Ind. Ct. App. 2015\)](#), trans. denied. Wilson's other arguments were rejected, *id.* at 1268-71, and we denied transfer.

Wilson then sought post-conviction relief arguing that—since he was a juvenile—the criminal gang enhancement was unconstitutional as applied to him under both the U.S. and Indiana constitutions. Second, Wilson argued that both his trial counsel

² See [Ind. Code § 35-42-1-1\(1\)](#) (2013) (murder); [I.C. § 35-42-5-1\(1\)](#) (Class B armed robbery); [I.C. § 35-45-9-3](#) (conspiracy to commit gang activity).

³ [I.C. § 35-50-2-15](#) (criminal gang enhancement).

and appellate counsel were ineffective. Specifically, Wilson argued that (1) both his trial counsel and appellate counsel should have challenged his 181-year aggregate sentence as a violation of the [Eighth Amendment](#), (2) that trial counsel did not present adequate mitigation evidence at sentencing or properly investigate his background, and (3) appellate counsel was ineffective for not raising an [Appellate Rule 7\(B\)](#) appropriateness challenge to his sentence.

When the post-conviction court held an evidentiary hearing in March 2018, both Wilson's trial and appellate counsel testified. Trial counsel testified that he met with Wilson five to eight times in jail and that Wilson had rejected a 100-year plea agreement. To prepare for the sentencing hearing, trial counsel talked to Wilson and his family to investigate his background and learn **[**7]** of any mitigating evidence. He also reviewed the pre-sentencing report with his client, which indicated Wilson was not taking any medication and had no history of mental health issues. Based on his review of the records and these conversations, trial counsel concluded there was no need to hire a mental health expert. Further, since Wilson was not facing a life without parole sentence, counsel testified that the U.S. Supreme Court's *Miller v. Alabama* decision—holding that mandatory **[*1169]** life-without-parole sentences for juvenile offenders are unconstitutional—"wasn't even on my radar." PCR Tr., p.15.

Wilson's appellate counsel testified that he was unfamiliar with *Miller* at the time of the direct appeal. Instead, appellate counsel homed in on the clear error in the duplicity of the gang activity conviction. But in retrospect, he conceded that he should have also challenged the sentence's appropriateness under [Appellate Rule 7\(B\)](#). Appellate counsel also admitted that, at the time, he was unfamiliar with two recent [Appellate Rule 7\(B\)](#) decisions issued by this Court, both addressing the appropriateness of *de facto* life sentences for juvenile double murderers.

At the post-conviction review hearing, new evidence about Wilson's background **[**8]** was introduced. Dr. Charles Ewing, a forensic psychologist who examined Wilson while in prison, concluded that he was suffering from PTSD linked to growing up in a violent neighborhood where someone once attempted to firebomb his childhood home and where he witnessed the shooting of two friends. Dr. Ewing concluded that Wilson's decision to shoot the victims was based in fear stemming from previous traumatic experiences and that he did not appreciate the consequences of his actions. He also testified that Wilson likely had a good chance of being rehabilitated after he reached age twenty-five. But Dr. Ewing conceded that Wilson had never previously been formally diagnosed with a mental health issue and a mental health professional only saw Wilson once. The testimony of developmental psychologist Dr. James Garbarino provided a similar positive outlook on Wilson's chances for rehabilitation.

The post-conviction court, however, denied Wilson's petition for relief. The Court of Appeals reversed, finding that Wilson's trial counsel was ineffective when he failed "to present any evidence related to youth and its attendant characteristics or to Wilson's own youth, environment, mental health, **[**9]** good character, or

prospects of rehabilitation," as it found was required by U.S. Supreme Court precedent for *de facto* juvenile life sentences. [*Wilson v. State*, 128 N.E.3d 492, 502 \(Ind. Ct. App. 2019\)](#), *vacated*. Ordering a new sentencing hearing, the Court of Appeals declined to address Wilson's other arguments. [*Id.* at 503](#).

The State sought transfer, which we granted.

Standard of Review.

A post-conviction proceeding is a civil proceeding in which a defendant may present limited collateral challenges to a conviction and sentence. *Ind. Post-Conviction Rule 1(1)(b)*; [*Gibson v. State*, 133 N.E.3d 673, 681 \(Ind. 2019\)](#), *reh'g denied*, *cert. denied*, 141 S. Ct. 553, 208 L. Ed. 2d 175, 208 L. Ed. 2d 175 (Oct. 13, 2020). Potential relief is limited in scope to issues unknown at trial or unavailable on direct appeal. [*Ward v. State*, 969 N.E.2d 46, 51 \(Ind. 2012\)](#) (citing [*Pruitt v. State*, 903 N.E.2d 899, 905 \(Ind. 2009\)](#)). "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are *res judicata*." *Id.* We do not review a "freestanding claim of error, either 'fundamental' or otherwise," on post-conviction review when it was not raised on direct appeal if the claim was known and available to him. [*Stephenson v. State*, 864 N.E.2d 1022, 1029 \(Ind. 2007\)](#). We have also limited free-standing post-conviction constitutional claims under the [*Eighth Amendment*](#) to only assertions based in "evolving standards of decency, changes in the legal landscape, and the development of a national consensus since [a defendant's previous appeal] such [****10**] that [the] sentence now constitutes cruel and unusual punishment." [*Baird v. State*, 831 N.E.2d 109, 115-16 \[***1170**\] \(Ind. 2005\)](#) (quotation marks omitted).

The defendant bears the burden of establishing his claims by a preponderance of the evidence. *P-C.R. 1(5)*. "When, as here, the defendant 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 \(Ind. 2000\)](#)). "When a defendant fails to meet this 'rigorous standard of review,' we will affirm the post-conviction court's denial of relief." *Id.* (quoting [*DeWitt v. State*, 755 N.E.2d 167, 169-70 \(Ind. 2001\)](#)).

Discussion and Decision.

Wilson's claims for post-conviction relief fall into three main branches. First, he argues that his 181-year cumulative sentence amounts to a cruel and unusual punishment under the [*Eighth Amendment*](#). While Wilson's briefing in the Court of Appeals presented this constitutional argument as both a free-standing constitutional claim and as an ineffective assistance of counsel (IAC) claim, on transfer, he focuses on the IAC rationale. Second, he argues his trial counsel was ineffective for failing to adequately investigate and present mitigation evidence at

his sentencing hearing. Third, Wilson argues [****11**] his appellate counsel was also ineffective because he failed to challenge the appropriateness of the sentence under [Indiana Appellate Rule 7\(B\)](#) on direct appeal. We address each claim in turn.

I. Wilson's 181-year sentence is not cruel and unusual punishment under the [Eighth Amendment](#).

Wilson originally presented his [Eighth Amendment](#) argument as both a free-standing constitutional claim and as an IAC claim based on his counsel's failure to raise the unconstitutionality argument on direct appeal. These arguments both fail because Wilson's sentencing was appropriate under the [Eighth Amendment](#).⁴

The [Eighth Amendment](#) states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [U.S. Const. amend. VIII](#). To determine what constitutes a cruel and unusual punishment, "courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." [Graham v. Florida, 560 U.S. 48, 58, 130 S. Ct. 2011, 176 L. Ed. 2d 825 \(2010\)](#) (citations omitted), *as modified*. "This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment." *Id.* (quotations omitted). What constitutes cruel and unusual punishment changes "as the basic mores of society change." [Kennedy v. Louisiana, 554 U.S. 407, 419, 128 S. Ct. 2641, 171 L. Ed. 2d 525 \(2008\)](#) (quotation omitted).

A. The recent evolution in [Eighth Amendment](#) juvenile sentencing [**12**] requirements.**

The U.S. Supreme Court has recently explained how its evolving [Eighth Amendment](#) [***1171**] standard should be applied to juvenile offenders. In *Roper v. Simmons*, it held that the [Eighth Amendment](#) bars capital punishment for juvenile offenders—which it defined as those who committed the crime before age eighteen. [543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 \(2005\)](#). Finding that the juvenile offenders were categorically less culpable for their crimes than adults due to their (1) lack of impulse control, (2) heightened vulnerability to negative influences from "outside pressures," and (3) "more transitory, less fixed" personalities, the Court held that juveniles were no longer among the narrow class of "worst offenders" deserving of the death penalty. *Id. at 569-70*. In the opinion,

⁴ As we explain in greater detail in Section II below, an IAC claim requires Wilson to prove (1) that his counsel's performance fell short of prevailing professional norms, **and** (2) that counsel's deficient performance prejudiced his defense. [Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#). Since we find the 181-year sentence imposed to be constitutional under our current understanding of the [Eighth Amendment](#), Wilson's constitutional IAC claims necessarily fail the second prong of the *Strickland* test because he cannot be prejudiced by his counsel's failure to bring a constitutional argument on direct appeal that we now conclude to be a losing one.

however, the Court assured the states that life-without-parole sentences would continue to be available for juvenile killers, thereby providing a sufficient deterrent because such a sentence "is itself a severe sanction, in particular for a young person." *Id.* at 572; see also *Conley v. State*, 972 N.E.2d 864, 877-80 (Ind. 2012) (holding that Indiana's scheme of discretionary life without parole sentencing for juvenile murderers—which expressly requires the consideration of aggravating and mitigating factors—is constitutional under both the U.S. and Indiana constitutions). **[**13]**

Echoing *Roper*, the Court soon barred imposing life-without-parole sentences for non-homicide juvenile offenders but allowed the states to develop their own "means and mechanisms for compliance" with its new rule that offenders be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 82, 75. The Court reasoned that the same factors that diminished juveniles' culpability in *Roper* applied to lesser crimes making juveniles "less deserving of the most severe punishments." *Id.* at 68 (citing *Roper*, 543 U.S. at 569). The Court held that life without parole—which it noted was "the second most severe penalty permitted by law" sharing "some characteristics with death **sentences that are shared by no other sentences**"—should not be applied to juvenile "defendants who do not kill" because such defendants are "categorically less deserving of the most serious forms of punishment than are murderers." *Id.* at 69 (quotations omitted) (emphasis added).

Two years later, the U.S. Supreme Court held that the *Eighth Amendment* also "forbids a sentencing scheme that **mandates** life in prison without possibility of parole for juvenile [murderers]." *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (emphasis added). Since "juveniles have diminished culpability and greater prospects **[**14]** for reform, . . . 'they are less deserving of the most severe punishments.'" *Id.* at 471 (quoting *Graham*, 560 U.S. at 68). Because "mandatory [life-without-parole] penalty schemes . . . prevent the sentencer from taking [into] account [the] central considerations" of youth, the mandatory life sentences "contravene[d] *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 474 (citations omitted). Applying the holding, the Court noted that the sentencing court, "[a]t the least, . . . should look at" the "hallmark features" of youth, the defendant's background, and "the circumstances of the homicide offense" before imposing a discretionary life without parole sentence. *Id.* at 477-78. And, the Court predicted, the "appropriate occasions" for imposing "this harshest possible penalty will be uncommon." *Id.* at 479.

[*1172] In 2016, the U.S. Supreme Court held that *Miller* "announced a substantive rule of constitutional law," requiring its retroactive application to juveniles sentenced pre-Miller. *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016), as revised. The opinion required the state to grant the defendant—who was serving a mandatory life without parole sentence for

killing a deputy sheriff **[**15]** at age seventeen in 1963—either a new sentencing hearing or parole eligibility. *Id. at 725, 736*. It was the opinion's description of the procedural sentencing requirements imposed by *Miller*, however, that has since created the most debate in courts. The Court in *Montgomery* concluded that *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole," explaining that

[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the [Eighth Amendment](#) for a child whose crime reflects unfortunate yet transient immaturity. Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

Id. at 734 (citations omitted). Despite this language, the Court in *Montgomery* also acknowledged that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility," writing that states could develop **[**16]** independent procedures to enforce the constitutional requirement. *Id. at 735*.

Montgomery's murkiness has resulted in a split of authority among state high courts as to whether *Miller* requires a court to make a specific factual finding that the juvenile is irreparably corrupt (or permanently incorrigible) before it can issue a life sentence. See [People v. Skinner, 502 Mich. 89, 917 N.W.2d 292, 322 \(Mich. 2018\)](#) (McCormack, J., dissenting) (observing a "split of authority in state courts post-*Miller* on whether a court must make a specific 'finding' of irreparable corruption"); see also Alice Reichman Hoesterey, *Confusion in Montgomery's Wake, Appendix B: Irreparable Corruption Determination*, [45 Fordham Urb. L.J. 149, 190-93 \(2017\)](#) (listing appellate opinions falling on different sides of the debate).

The U.S. Supreme Court seems poised to better define the scope of *Miller*'s procedural requirements in the near future, as earlier this year it granted *certiorari* on a petition asking the Court to determine if the [Eighth Amendment](#) requires the sentencing court to find a defendant to be permanently incorrigible before imposing a sentence of life without parole. See [Jones v. State, 285 So. 3d 626 \(Miss. Ct. App. 2017\)](#), cert. granted, 140 S. Ct. 1293, 206 L. Ed. 2d 374 (2020).⁵ While a decision by the U.S. Supreme Court would certainly clarify some issues, it is unlikely to completely resolve the [Eighth Amendment](#) constitutional questions **[**17]** before us because the defendant in *Jones* was sentenced to life imprisonment for a single murder, not a discretionary term of years sentence for multiple offenses like Wilson. See *id. at 627*.

⁵ The Court heard oral argument in this case on November 3, 2020.

Since *Miller*, a separate split in authority has developed over whether a term of years sentence constitutes a *de facto* life without parole sentence that implicates *Miller*'s procedural sentencing requirements. *Miller* and *Montgomery* both involved [*1173] juveniles who were sentenced to *de jure* life-without-parole sentences for committing single murders. *Miller*, 567 U.S. at 465-66; *Montgomery*, 136 S. Ct. at 725-26. And the defendant in *Graham* had been sentenced to a *de jure* life without parole sentence for a single count of armed burglary, with an additional fifteen years for attempted armed robbery. *Graham*, 560 U.S. at 57. So these opinions do not directly address whether the same heightened fact-finding requirements apply directly to discretionary term-of-years sentences.

Recently, many federal circuit courts and state appellate courts have issued opinions on the *Eighth Amendment's* requirements for *de facto* life-without-parole sentences, falling into three main categories. In the first group are jurisdictions who have held that *Miller*'s required consideration of age and attendant circumstances **is applicable to [**18] term-of-years sentences** long enough to be considered a *de facto* life sentence. See, e.g., *Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013) (*Miller* and *Graham* apply because the defendant's "sentence of 254 years is materially indistinguishable from a life sentence without parole."); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) ("[A] 52.5-year minimum prison term for a juvenile based on the aggregation of mandatory minimum sentences for second-degree murder and first-degree robbery triggers the protections . . . afforded under *Miller*."); *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650, 659, 661 n.6 (Wash. 2017) (finding "*Miller* applies equally to literal and *de facto* life-without parole-sentences[,] and "[i]t is undisputed that [the defendant's] 85-year aggregate sentence is a *de facto* life sentence").

The second view finds *Miller* analysis inapplicable to aggregate sentences **that exceed the juvenile's life expectancy**.⁶ See, e.g., *United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019) (holding that "a term-of-years sentence cannot be characterized as a *de facto* life sentence[;] *Miller* dealt with a statute that specifically imposed a mandatory sentence of life"), *cert. denied*, 140 S. Ct. 1281, 206 L. Ed. 2d 264 (2020); *Bunch v. Smith*, 685 F.3d 546, 547, 553 (6th Cir. 2012) (finding *Miller* inapplicable to an eighty-nine-year aggregate fixed term for robbing, kidnapping, and raping a twenty-two-year-old college student); *Proctor v. Kelley*, 2018 Ark. 382, 562 S.W.3d 837, 839, 841-42 (Ark. 2018) (holding that a 240-year aggregate sentence—for eleven different robbery counts, [****19**] none of which

⁶ To be sure, some courts appear to fall somewhere between these categories. The Seventh Circuit, for instance, recently found that "the logic of *Miller* applies" to a *de facto* life 100-year cumulative sentence (50-year murder sentence enhanced by 50 years for use of a firearm). *McKinley v. Butler*, 809 F.3d 908, 911, 909 (7th Cir. 2016). The opinion, however, does not address its previous decision (also authored by then-Judge Posner), considering successive jailhouse disciplinary sanctions, where the court stated that "**every sentence**[] must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual." *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) (emphasis added). It is unclear if the Seventh Circuit's views on sentence aggregation for *Eighth Amendment* analysis have evolved following *Miller*, or if the two opinions can be harmonized if the 100-year sentence in *McKinley* is viewed as a sentence for one crime: murder with a firearm.

would singularly constitute a *de facto* life sentence—does not fall under the purview of *Graham*, which dealt with a life without parole sentence for a single crime), *cert. denied*, 140 S. Ct. 481, 205 L. Ed. 2d 268 (2019); [State v. Helm, 245 Ariz. 560, 431 P.3d 1213, 1215 \(Ariz. Ct. App. 2018\)](#) (refusing to find *Miller* analysis applicable to juvenile serving consecutive murder sentences because "we do not consider the aggregate sentence [***1174**] when conducting a proportionality analysis under the *Eighth Amendment*" but instead look to the sentence imposed for each specific crime) (citations omitted).

Third, are jurisdictions who have found *Miller*'s requirements **only apply to *de jure* life-without-parole sentences** and therefore are inapplicable to other discretionary sentences, including life with the possibility of parole. See, e.g., [Lucero v. People, 394 P.3d 1128, 1133, 2017 CO 49 \(Colo. 2017\)](#) (finding that "the analysis in *Miller* is limited to the sentence at issue in that case, mandatory life without parole, and does not extend to lengthy aggregate sentences or life sentences with the possibility of parole"); [Veal v. State, 303 Ga. 18, 810 S.E.2d 127, 128-29 \(Ga. 2018\)](#) (upholding six consecutive life-with-parole sentences for rape by juvenile because it found *Miller*'s requirements applied only to *de jure* life-without-parole sentences); [State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148, 156 \(S.C. 2019\)](#) (holding that since the U.S. Supreme Court declined [****20**] to also address a term of years sentence in *Graham*, it would hue to the narrow holding that *Miller* and *Graham* only apply to *de jure* life-without-parole sentences). All told, courts around the country are split approximately evenly on whether *Graham* and *Miller* should be extended to at least some *de facto* life sentences. See [Slocumb, 827 S.E.2d at 156 n.16](#).

B. A term of years sentence does not implicate *Miller*.

Given this split in authority, we take counsel in language from *Miller* and *Graham* suggesting their holdings should be read narrowly, absent further guidance from that Court.⁷

Graham and *Miller* both explicitly state that their holdings are limited to the "particular" penalty of life without parole. See [Lucero, 394 P.3d at 1133](#) (quoting [Graham, 560 U.S. at 61](#); [Miller, 567 U.S. at 483](#)) ("In *Graham*, the Court categorically barred the 'particular' sentence of life without parole for juvenile nonhomicide offenders, saying nothing about consecutive or aggregate sentences. . . . *Miller* likewise speaks only of the sentence of life without parole, calling it a 'particular penalty.'"). The majority in *Graham* explicitly differentiated life-without-parole sentences from other penalties, calling life-without-parole sentences "the

⁷ Due to this holding, we see no need to separately address Wilson's as-applied constitutional challenge to the criminal gang enhancement. To the extent Wilson presents a new constitutional argument differing from the general *Eighth Amendment* challenge we address above, this novel argument was waived by Wilson's failure to bring it on direct appeal, see [Ward v. State, 969 N.E.2d 46, 51 \(Ind. 2012\)](#), and counsel's failure to advance the argument does not constitute deficient performance, see [Bieghler v. State, 690 N.E.2d 188, 194 \(Ind. 1997\)](#).

second most severe penalty permitted by law [after death,]" **[**21]** and noting that they "share some characteristics with death sentences that are shared by no other sentences." [560 U.S. at 69](#) (citations omitted). Indeed, dissenting in *Graham*, Justice Alito noted that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." [Id. at 124](#) (Alito, J., dissenting). Likewise, the Court's analysis in *Miller* "distinguished the mandatory sentencing schemes at issue in *Miller* from the impliedly constitutional alternatives whereby 'a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term **with** the possibility of parole or a lengthy term of years.'" [Lucero, 394 P.3d at 1133](#) (quoting [Miller, 567 U.S. at 489](#)). The implication from **[*1175]** this distinction is that the holding was not meant to extend to these other types of sentences. See *id.*

In fact, in the context of adult offenders, the U.S. Supreme Court has in the past explicitly cautioned against expanding [Eighth Amendment](#) protections by relying on general similarities between sentences. In *Harmelin v. Michigan*, an adult defendant was sentenced to a mandatory life without parole sentence for possessing 672 grams of cocaine despite having no prior felony convictions. [501 U.S. 957, 961, 994, 111 S. Ct. 2680, 115 L. Ed. 2d 836 \(1991\)](#). The defendant argued that before **[**22]** the court imposed such a harsh sentence, he should have received an individualized sentencing hearing, equivalent to what is constitutionally required in death penalty cases. [Id. at 994](#). Writing for the Court, Justice Scalia acknowledged several similarities between the death penalty and a life without parole sentence, but he found such reasoning by analogy would lead to an ever-expanding category of sentences requiring additional protections. [Id. at 996](#) ("It is true that petitioner's [life without parole] sentence is unique in that it is the second most severe known to the law; but life imprisonment **with** possibility of parole is also unique in that it is the third most severe."). Instead, the Court acknowledged it had already "**drawn the line of required individualized sentencing** at capital cases" and chose not to "extend[] it further." *Id.* (emphasis added).

The Court later distinguished juvenile life-without-parole sentences from the holding of *Harmelin* because it found life-without-parole sentences to be a categorically more severe punishment for juveniles—both due to the greater amount of time they would likely serve and juveniles' unique characteristics. See [Miller, 567 U.S. at 480-81](#). However, *Harmelin*'s core lesson regarding **[**23]** the [Eighth Amendment's cruel and unusual punishment clause](#)'s constitutional analysis is still valid. That is, determining the reach of the clause is inherently a line drawing exercise best left to the U.S. Supreme Court.

And determining what sentence constitutes a "de facto life sentence" would be a task completely unmoored from the language of *Miller*. See [Bunch, 685 F.3d at 552](#) ("At what number of years would the [Eighth Amendment](#) become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the

number of crimes matter?") (quotation omitted); [Sparks, 941 F.3d at 754](#) (noting that an attempt at determining what constitutes a *de facto* life sentence would be a line drawing exercise "not bound by law"). Indeed, well-meaning attempts at fully defining *de facto* life sentences can end up creating requirements that would vastly alter sentencing procedures for a large swath of juveniles. See [United States v. Grant, 887 F.3d 131, 150-53 \(3d Cir. 2018\)](#) (proposing a "rebuttable presumption that a non-incorrigible juvenile offender should be afforded an opportunity for release before the national age of retirement" while also requiring trial courts hold a separate hearing **[**24]** to determine an offender's "life expectancy before sentencing him or her to a term-of-years" based on demographic information⁸), *reh'g en banc granted, opinion vacated*; see also [Kelly v. Brown, 851 F.3d 686, 688 \[*1176\] \(7th Cir. 2017\)](#) (Posner, J., dissenting) (arguing, based on third party actuarial data on juvenile prisoners, that a sentence requiring a juvenile to be released after age fifty is a *de facto* life sentence). These examples make clear that any attempt to define a *de facto* life sentence without further guidance from the U.S. Supreme Court would be largely guesswork and would likely require significant (and likely unnecessary) change to Indiana's existing discretionary sentencing scheme.⁹

In sum, "while we are duty-bound to enforce the [Eighth Amendment](#) consistent with the Supreme Court's directives," we must interpret this precedent based "upon case-specific holdings rather than general expressions in an opinion that exceed the scope of any particular holding." [Slocumb, 827 S.E.2d at 153](#). As a result, *Miller*'s enhanced protections do not currently apply to Wilson's 181-year term of years sentence. The sentence does not violate the [Eighth Amendment](#) because *Miller*, *Graham*, and *Montgomery* expressly indicate their holdings apply only to life-without-parole sentences. **[**25]**

C. Wilson's sentencing suffices under *Miller*.

Even assuming the standards in *Miller* apply to a *de facto* juvenile life sentence, the judge adequately considered youth and attendant circumstances during sentencing. Since "*Miller* did not impose a formal factfinding requirement," a sentence cannot "be vacated merely because the [sentencing] court failed to quote certain magic words from the Supreme Court's *Miller* decision." [Sparks, 941 F.3d at 756](#) (quotation omitted).

⁸ In addition to the practical implications of such hearings, we would be deeply concerned by the constitutional implications of sentencing someone to a longer sentence based on their immutable characteristics because of life expectancy differences.

⁹ While U.S. Supreme Court precedent does not currently apply the *Miller* factors to *de facto* life sentences, trial courts would be well served to explicitly consider the factors relied on by *Miller* before imposing a sentence that would certainly result in a juvenile defendant spending the rest of his life incarcerated. This analysis would likely inoculate their sentencing determinations from further scrutiny if the U.S. Supreme Court expands *Miller*'s reach. Such careful analysis would also serve to better explain why the imposed sentence is appropriate if [Appellate Rule 7\(B\)](#) review is sought.

While the sentencing judge may not have used the "irreparable corruption" language of *Miller*, he expressly considered Wilson's youth and immaturity as the main mitigating factor throughout sentencing. He also considered the defendant's background—including his three prior referrals to the juvenile justice system and previous conviction for a possession of a dangerous firearm—as evidence of Wilson's corruption. And testimony was presented that even while awaiting trial, Wilson continued to engage in gang activity and expressed that he hoped to "smash" members of a rival gang also incarcerated at the same facility—evidence he was irreparably corrupted. DA Tr. Vol. 4, p.745. While the sentencing judge did not delve into a detailed discussion of Wilson's **[**26]** home environment at sentencing, such a discussion appeared unnecessary based on what the judge knew of Wilson's background at the time because being raised by a stable two-parent family in a bad neighborhood is not a significant mitigator.

The sentencing judge also knew of the gang-centric neighborhood environment to which Wilson was exposed. The victims were members of the rival Bottom Side gang and significant testimony at trial discussed the activities and disputes between these different gangs. Looking at the information considered by the trial judge, as a whole, the sentencing court sufficiently considered Wilson's background, environment and immaturity before determining that Wilson was sufficiently corrupted and **[*1177]** his crimes so serious that he deserved a long term of years sentence.

II. Wilson's ineffective assistance of counsel claims.

To prevail on his IAC claims, Wilson must show **(1)** that his counsel's performance fell short of prevailing professional norms, and **(2)** that counsel's deficient performance prejudiced his defense. [*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#). "A showing of **deficient performance** under the first of these two prongs requires proof that legal representation lacked 'an objective standard of reasonableness,' **[**27]** effectively depriving the defendant of his [*Sixth Amendment*](#) right to counsel." [*Gibson*, 133 N.E.3d at 682](#) (quoting [*Overstreet v. State*, 877 N.E.2d 144, 152 \(Ind. 2007\)](#)). "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.* (citing [*Wilkes v. State*, 984 N.E.2d 1236, 1240-41 \(Ind. 2013\)](#)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." [*Strickland*, 466 U.S. at 694](#).

When assessing the counsel's performance, we rely on some basic guidelines. First, we start by strongly presuming that, throughout the proceedings, counsel exercised "reasonable professional judgment" and rendered adequate legal assistance. [*Stevens v. State*, 770 N.E.2d 739, 746 \(Ind. 2002\)](#). Second, defense counsel enjoys "considerable discretion" when developing legal strategies for a client, demanding deference during judicial review. [*Id.* at 746-47](#). Third, counsel's "[i]solated

mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." [Id. at 747](#).

Wilson brings two types of IAC claims. First, Wilson argues that his trial counsel was ineffective when counsel failed to adequately investigate Wilson's background so he could present mitigating and aggravating factors at the sentencing hearing. Second, Wilson asserts that appellate counsel **[**28]** was ineffective for failing to raise significant issues on appeal—including the previously discussed [Eighth Amendment](#) constitutional argument—and for failing to seek evaluation of Wilson's 181-year sentence under our inherent revisory authority as part of his direct appeal.

We find his trial counsel's preparation for sentencing were within the bounds of prevailing professional norms. But, given precedent existing at the time, the grounds for relief under [Appellate Rule 7\(B\)](#) should have been significant and obvious to appellate counsel; therefore, we consider and grant [7\(B\)](#) relief reducing Wilson's sentence to 100 aggregate-years.

A. Wilson's trial counsel was not ineffective.

Wilson claims his trial counsel was ineffective for failing to investigate and present mitigation evidence at sentencing. Specifically, he contends that his trial counsel should have presented expert testimony regarding the mitigating qualities of youth and conducted a more thorough investigation of Wilson's background, including his mental health history. The post-conviction court made factual findings rejecting these arguments. It concluded that the trial court had conducted an adequate analysis of Wilson's background in line with prevailing professional **[**29]** norms and that trial counsel did not miss the importance of age as the major mitigating factor and had "argued it competently." Appellant's Corr. App. Vol. 2, p.234.

[*1178] Appealing a factual conclusion by the post-conviction court is an uphill battle requiring Wilson to establish "that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." [Ben-Yisrayl, 738 N.E.2d at 258](#). The evidence here is not that one-sided in Wilson's favor.

Arguing that his trial counsel should have presented expert testimony on how his age reduced his criminal culpability and his prospects for rehabilitation, Wilson cites no evidence that this presentation was required by "prevailing professional norms" in 2014. See [Strickland, 466 U.S. at 688](#). In fact, his brief cites only to American Bar Association guidelines, in effect at the time, applicable to the presentation of mitigation evidence in the **death penalty** context. Wilson simply fails to establish that it was standard practice among defense counsel to present such expert testimony at a sentencing hearing for a juvenile facing a lengthy term of years sentence.

Wilson also claims that his trial counsel's sentencing investigation was inadequate because **[**30]** he failed to uncover Wilson's mental health issues—a PTSD diagnosis discovered by experts hired during the post-conviction investigation. We have previously explained that the Constitution does not demand a "scorch-the-earth strategy" in conducting a mitigation investigation. Ward, 969 N.E.2d at 56 (quotation omitted). Instead, "[w]hat is reasonable depends on the circumstances of each case, including the facts of the crime, information gleaned from the defendant and others, and other readily available sources of information." *Id.* Here, trial counsel investigated Wilson's background by speaking to members of his family, reviewing the pre-sentencing investigation report with his client and making his own observations about Wilson's mental state during their meetings. The investigative report indicated Wilson had no mental illness. Counsel's interview with family and counsel's own observations did not contradict this evaluation. Because sufficient evidence supports the post-conviction court's conclusion—finding trial counsel's investigation to be adequate—we affirm its holding.

B. Wilson was provided ineffective assistance of appellate counsel when his attorney failed to seek relief under Indiana Appellate Rule 7(B).

Wilson is entitled **[**31]** to effective assistance of counsel under the Sixth Amendment not only at trial but also on direct appeal. Timberlake v. State, 753 N.E.2d 591, 604 (Ind. 2001). These claims are also judged under the two-part *Strickland* test. Id. at 603. "Ineffective assistance of appellate 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." Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006) (citation omitted) (emphasis added). Wilson argues that appellate counsel failed to raise significant issues on appeal, which falls into the second category.

"To show that counsel was ineffective for failing to raise an issue on appeal thus resulting in waiver for collateral review, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential." Gallien v. State, 19 N.E.3d 303, 307 (Ind. Ct. App. 2014) (citing Reed, 856 N.E.2d at 1195). "To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: **(1)** whether the unraised issues are significant and obvious from the face of the record and **(2)** whether the unraised issues are clearly stronger than the raised issues." **[**1179]** Reed, 856 N.E.2d at 1195 (quotation omitted) (emphasis added). IAC is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct **[**32]** appeal, in part, because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. Bieghler v. State, 690 N.E.2d 188, 193-94 (Ind. 1997). Though instances of successful claims are "very rare," one ground for past successful IAC claims is appellate counsel's failure "to locate[] and rel[y] upon" recent precedent from this Court that is "not out-of-

date or obscure" and would have directly supported a meritorious argument for relief. [*Hopkins v. State*, 841 N.E.2d 608, 614 \(Ind. Ct. App. 2006\)](#).

Wilson's appellate counsel raised three issues on appeal: (1) whether the trial court properly admitted Twitter messages into evidence, (2) whether Wilson's convictions for conspiracy to commit a criminal gang activity and the resulting enhancement violated double jeopardy, and (3) whether the trial court properly excluded Wilson from the courtroom after an outburst. The Court of Appeals easily affirmed both the admission of tweets and Wilson's removal from the courtroom on direct appeal, and we denied transfer. See [*Wilson*, 30 N.E.3d at 1267-71](#). The Court of Appeals, however, agreed that the conspiracy to commit gang activity charge was impermissibly duplicative and it vacated the conviction and its two-year sentence. [*Id.* at 1269](#). So, Wilson's sentence was only reduced from 183 to 181 **[**33]** years.

Wilson now argues on post-conviction review that his appellate counsel on direct appeal should have brought an independent claim for appellate review under [*Indiana Appellate Rule 7\(B\)*](#). The rule provides that "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." [*Ind. Appellate Rule 7\(B\)*](#). "This appellate review and revise authority derives from Article 4 of the Indiana Constitution, and includes the power to either reduce or increase a criminal sentence on appeal." [*McCain v. State*, 148 N.E.3d 977, 985 \(Ind. 2020\)](#) (quotation omitted) (cleaned up).

At the post-conviction review hearing, Wilson's appellate counsel admitted that in retrospect his appeal strategy was poor. PCR Tr., p.36 ("I saw the clear error in the gang activity [conspiracy] sentence, which surprised me a bit. And I realized, however, that it made virtually no difference in [Wilson]'s sentence. **And I believe I should have gone further and considered more the appropriateness of the sentence** [under [*Appellate Rule 7\(B\)*](#)].") (emphasis added). In short, appellate counsel himself conceded that an [*Appellate Rule 7\(B\)*](#) challenge was clearly stronger than the issues he raised on appeal.

Further, counsel conceded that **[**34]** at the time he was unfamiliar with this Court's recent companion decisions reducing long sentences for juvenile double murderers. See [*Fuller v. State*, 9 N.E.3d 653, 659 \(Ind. 2014\)](#); [*Brown v. State*, 10 N.E.3d 1, 8 \(Ind. 2014\)](#). *Fuller* and *Brown* involved two teenagers—ages fifteen and sixteen years old, respectively—who were convicted of the robbery and murder of an Anderson couple in their own home; both juvenile defendants were originally given 150-year sentences. [*Fuller*, 9 N.E.3d at 654-55](#); [*Brown*, 10 N.E.3d at 2-3](#). However, after reviewing the character of the offenders and the circumstances of their crimes, we found both sentences inappropriate under our [*Appellate Rule 7\(B\)*](#) discretionary review authority. [*Fuller*, 9 N.E.3d at 659](#); [*Brown*, 10 N.E.3d at 8](#). We reduced their aggregate sentences to eighty-five years **[*1180]** and eighty years,

respectively. [Fuller, 9 N.E.3d at 659](#); [Brown, 10 N.E.3d at 8](#). To be sure, Wilson—who also faced an additional gang enhancement—was not necessarily entitled to an identical sentence, but even a cursory reading of *Fuller* and *Brown* shows that the facts of the cases closely track Wilson's crimes and that the reasoning we used to reduce those sentences is also largely applicable to his sentence.

The post-conviction court dismissed Wilson's [Appellate Rule 7\(B\)](#) IAC claim, reasoning that his counsel's failure to bring the claim was harmless because Indiana appellate courts have the power to find a sentence inappropriate *sua* **[**35]** *sponte*. The court cited as an example our decision in *Ritchie v. State*, a death penalty appeal, in support of this proposition. [875 N.E.2d 706 \(Ind. 2007\)](#). In *Ritchie*, we found that "counsel cannot be criticized for failing to raise" an [Appellate Rule 7\(B\)](#) claim on direct appeal because it is "an issue this Court routinely addressed on its own initiative." [Id. at 724](#). A close reading of *Ritchie*, however, makes clear that observation is confined to the context of death penalty cases where—prior to later statutory amendments—"this Court as a matter of course reviewed and revised sentences . . . without the need of counsel raising this claim." *Id.*

A few years later, however, we clarified that a request under [Appellate Rule 7\(B\)](#) to "revise a lawfully entered sentence" requires that outside of capital cases the defendant "persuade the appellate court that his or her sentence has met this inappropriateness standard of review." [Kimbrough v. State, 979 N.E.2d 625, 630 \(Ind. 2012\)](#) (citing [Childress v. State, 848 N.E.2d 1073, 1080 \(Ind. 2006\)](#)) (quotations omitted). Since the defendant in *Kimbrough* "made no such request . . . there was no issue in this regard to be considered by a reviewing court." *Id.* As *Kimbrough* demonstrates, it has not been our custom to *sua sponte* consider a sentence's appropriateness under [Appellate Rule \(7\)\(B\)](#). We do not generally review a sentence's **[**36]** appropriateness unless prompted by the defendant because this policy allows the defendant to challenge specific parts of trial procedure or his sentencing without risking the possibility the appellate court would find his overall sentence inappropriately low and increase it. See [McCain, 148 N.E.3d at 985](#) (noting the appellate court's authority to "either reduce or increase" sentences) (quotation omitted). Any other policy would only chill a criminal defendant's incentive to litigate meritorious appeals.

Despite the high bar required to bring an IAC claim, we find the attorney's failure to bring a claim for [Appellate Rule 7\(B\)](#) constituted deficient performance under *Strickland*. By appellate counsel's own admission, he was ignorant of important recent precedents: *Brown* and *Fuller*—involving juvenile double murderers who also committed armed robbery yet had their sentences significantly reduced. Counsel also conceded he had no other strategic reason for not bringing an argument under [Appellate Rule 7\(B\)](#). Appellate "[c]ounsel should have located and relied upon these cases," and "[w]e also are confident" that had this authority been presented on direct appeal, the Court of Appeals would have revised Wilson's sentence. See [Hopkins, 841 N.E.2d at 614](#). Since requesting review of **[**37]** the

appropriateness of a sentence prompts a review "to either reduce **or increase** a criminal sentence on appeal," [McCain, 148 N.E.3d at 985](#) (quotation omitted) (emphasis added), we would ordinarily be especially hesitant to second guess an appellate counsel's strategic decision to forgo this review. But Wilson's case is different, because even an **[*1181]** upward revision of his sentence by an appellate court would have put him in no worse position since he was already going to die in prison.

In sum, we find that due to the availability of the on-point *Brown* and *Fuller* decisions, a request for review of the sentence's appropriateness had a high likelihood of success. Since the claims appellate counsel brought on direct appeal resulted in an insignificant two-year reduction in Wilson's sentence, his claim for [Appellate Rule 7\(B\)](#) revision was "clearly stronger than the raised issues," as appellate counsel himself conceded. [Reed, 856 N.E.2d at 1195](#) (quotation omitted).

"Based on the Indiana authority available at the time of" his sentencing, there is support for Wilson's argument that an appropriateness challenge to his sentence had a high likelihood of success, and his appellate counsel "should have challenged" his aggregate sentence. [Taylor v. State, 840 N.E.2d 324, 342 \(Ind. 2006\)](#). "We find that failure to do **[**38]** so amounted to deficient performance," and Wilson "was prejudiced and deprived a fair appeal by his counsel's failure to raise his sentence as an issue." *Id.* The correct remedy for this failure, in this instance, is to give Wilson a new chance to present an [Appellate Rule 7\(B\)](#) claim. But rather than remand for consideration, in the interest of judicial economy, we choose to now conduct a review of the sentence under [Appellate Rule 7\(B\)](#).

C. Applying [Appellate Rule 7\(B\)](#) to Wilson's sentence.

Examining only the facts available on direct appeal, we conclude that a downward adjustment to Wilson's sentence is appropriate. We modify a sentence only when we find that "the sentence is inappropriate in light of the nature of the offense and the character of the offender." [App. R. 7\(B\)](#). "The principal role of [[Appellate Rule 7\(B\)](#)] review should be to attempt to leaven the outliers." [Cardwell v. State, 895 N.E.2d 1219, 1225 \(Ind. 2008\)](#). The point is "not to achieve a perceived correct sentence." [Knapp v. State, 9 N.E.3d 1274, 1292 \(Ind. 2014\)](#) (quotation omitted). Rather, "appellate review and revision ultimately boils down to the appellate court's collective sense of what is appropriate." [Brown, 10 N.E.3d at 8](#) (quotation omitted). "Whether a sentence should be deemed inappropriate 'turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and [a] myriad **[**39]** [of] other factors that come to light in a given case.'" [McCain, 148 N.E.3d at 985](#) (quoting [Cardwell, 895 N.E.2d at 1224](#)). Because "the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution[,]. . . appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of

counts, or length of the sentence on any individual count." [Cardwell, 895 N.E.2d at 1225](#).

At sentencing, Wilson was given (1) an enhanced sixty years for the murder of Charles Wood, which was automatically doubled under the criminal gang enhancement, (2) a consecutive (advisory) fifty-five-year sentence for his role as an accomplice in the murder of Shaqwone Ham, and (3) a minimum six-year sentence for armed robbery. See [Wilson, 30 N.E.3d at 1267](#); see also [Ind. Code § 35-50-2-3](#) (2013) (providing for a sentence of forty-five to sixty-five years for murder, with a fifty-five-year advisory sentence); [I.C. § 35-50-2-5](#) (providing for a sentence between six and twenty years for a Level 3 felony, with a ten-year advisory sentence).

i. Nature of the offense.

First, like in *Brown*, "although senseless and reprehensible, . . . there is no evidence [***1182**] that the victims were tortured, beaten, or lingered in pain." [10 N.E.3d at 5](#). Wilson fired a single gunshot at Wood, instantly killing [****40**] him, and was an accomplice to Ham's death—who was shot almost simultaneously. Although shocking, these shootings do not rise to the same level of heinousness of recent murders by juveniles where we found an enhanced sentence appropriate. See, e.g., [Conley, 972 N.E.2d at 876](#) (finding the heinousness of the murder justified a life without parole sentence for a seventeen-year-old because—while babysitting his ten-year-old brother—he strangled the young child to death for over twenty minutes while the victim begged him to stop before slamming the victim's head on the concrete to ensure he was dead).

That said, the crime's gang connection justifies an enhanced sentence, and this is accounted for in the mandatory criminal gang enhancement. The General Assembly has found a crime committed as part of gang activity to be deserving of enhanced punishment and enacted a statute that allows for the proportional doubling of "the longest sentence imposed for the underlying felonies." [I.C. § 35-50-2-15](#). The connection to ongoing gang activity here is legitimate grounds for an enhanced sentence. The conduct of Wilson and his gang and their turf wars likely caused significant harm to his neighborhood and was surely especially harmful to other [****41**] adolescents living there. The sentencing enhancement enacted by the General Assembly more than adequately captures this point. So, the appropriate sentence here will be greater than what we found appropriate for a double murder and robbery in *Fuller*, where the perpetrators were not part of a gang. See [9 N.E.3d at 654-55](#).

ii. Character of the offender.

Weighing against Wilson's character is his previous misdemeanor and his actions while incarcerated, but we find these factors to be outweighed by Wilson's age.

Wilson's juvenile record is not especially egregious: he was convicted of a single misdemeanor for dangerous possession of a firearm, providing little support for a more severe enhancement. See, e.g., [*Prickett v. State*, 856 N.E.2d 1203, 1208-09 \(Ind. 2006\)](#) (finding that a twenty-one-year-old's juvenile convictions for "incurability, burglary, and theft" were not "weighty enough" or "sufficiently similar" to justify a ten-year enhancement to an adult Class A child molestation conviction).

Wilson's conduct while incarcerated and awaiting trial also evinces that he had learned little following his arrest. In a recorded jailhouse conversation, Wilson stated a desire to "smash" a member of a rival gang incarcerated in the same facility, bragged about the **[**42]** murders to a cellmate, and showed a desire to continue to participate in gang activity. DA Tr. Vol. 4, p.745. These facts weigh against his character.

As we have stated repeatedly, when reviewing the appropriateness of a juvenile's term of years sentence that is so long that it "forfeits altogether the rehabilitative ideal" and "means denial of hope," we look closely at "an offender's youth and its attendant characteristics." [*Brown*, 10 N.E.3d at 8, 7](#) (quotations omitted); [*Fuller*, 9 N.E.3d at 658, 657](#) (quotations omitted). Since Wilson was only sixteen, his age is a major factor that requires careful consideration during [*Appellate Rule 7\(B\)*](#) review. Even though the heightened constitutional requirements in *Miller* and *Graham* were limited by the U.S. Supreme Court to life-without-parole sentences, in *Brown* and *Fuller* we made clear that we are free to apply the developmental science undergirding those cases more broadly through our unique ability to consider a sentence's appropriateness **[*1183]** by looking beyond the aggravators and mitigators relied on by the sentencing court. See [*Fuller*, 9 N.E.3d at 658](#) ("Consistent with the Supreme Court's reasoning[,], this Court has not been hesitant to reduce maximum sentences for juveniles convicted of murder."). While we find, just as in *Brown*, that **[**43]** the sentencing court "acted well within its broad discretion in imposing this sentence," [*10 N.E.3d at 4*](#), we today—both here and in [*State v. Stidham*, No. 20S-PC-634, 157 N.E.3d 1185, 2020 Ind. LEXIS 898 \(Ind. 2020\)](#) (reducing a 138-year sentence to an aggregate eighty-eight-year sentence)—use our power of independent appellate review and revision under the Indiana Constitution to leaven this outlier based on our review of other similarly situated teenagers who also committed murder.

As noted above, in both *Fuller* and *Brown*, where the defendants' offenses were largely analogous to Wilson's, we reduced each defendant's aggregate sentence to eighty-five years and eighty years, respectively, which means the defendants both have a realistic chance at release by their early sixties. [*Fuller*, 9 N.E.3d at 659](#); [*Brown*, 10 N.E.3d at 8](#). We have made similar reductions in the past even under the old, more deferential "manifestly unreasonable" standard; for instance, we reduced to fifty years a fourteen-year-old's maximum sixty-year sentence for the brutal murder of a seven-year-old girl, recognizing, among other things, his "very youthful

age."¹⁰ [Carter v. State, 711 N.E.2d 835, 841-43 \(Ind. 1999\)](#). And in the case of a sixteen-year-old who brutally beat and stabbed his adoptive parents to death while they slept, we reduced a maximum 120-year sentence to eighty **[**44]** years when, along with his mental illness and lack of criminal history, we considered the age of "this offender." [Walton v. State, 650 N.E.2d 1134, 1135, 1137 \(Ind. 1995\)](#).

To be sure, lifetime imprisonment may sometimes be appropriate for a juvenile. In *Conley*, for instance, we found a life without parole sentence to be appropriate for the seventeen-and-a-half-year-old who brutally strangled his ten-year-old brother to death while babysitting. [972 N.E.2d at 876-77](#). We found it appropriate due to the especially heinous nature of the crime, the defendant's lack of significant mental health issues reducing his culpability, and evidence suggesting a "hardened character." *Id.* Although technically not a juvenile, the Court of Appeals similarly considered age and maturity when affirming an aggregate 175-year sentence for a twenty-one-year-old who was convicted of multiple crimes, including murder (as an accomplice) with a gang enhancement, attempted murder, and kidnapping. [Armstrong v. State, 22 N.E.3d 629, 636, 644-46 \(Ind. Ct. App. 2014\)](#) (finding defendant's previous six felony and twelve misdemeanor convictions along with the brutal nature of the crime justified an enhanced sentence despite defendant's youth), *trans. denied*.

[Fuller](#) and [Brown](#)—as factually analogous cases—provide us baseline sentences (eighty-five- and eighty-year **[**45]** sentences) for what is appropriate for a sixteen-year-old who committed robbery and a double murder. Comparing the nature of Wilson's offense and his character to these cases, we conclude that Wilson's sentence should be reduced to an aggregate 100 years. This includes two concurrent fifty-year sentences for the murders of Wood and Ham, a fifty-year criminal gang enhancement for Wood's murder, and a concurrent six-year robbery sentence. Unlike *Fuller* and *Brown*, Wilson was also convicted of a **[*1184]** criminal gang enhancement and we must respect the legislature's determination that the corrosive nature of gang activity justifies a higher sentence than what *Fuller* and *Brown* received.

Nevertheless, the main factor weighing in favor of a shorter sentence is Wilson's age. A 100-year sentence means that after receiving good time credit Wilson will likely be eligible for release in his mid-to-late sixties, meaning that he has reasonable hope for a life outside prison. If Fuller, Brown, and Crawford are all able to envision a life outside prison walls, we collectively find it an outlier that Wilson is not provided a similar opportunity and incentive to rehabilitate.

Conclusion.

¹⁰At the time, our appellate rules permitted reviewing courts to revise a sentence if it was "manifestly unreasonable." The current version of [Indiana Appellate Rule 7\(B\)](#), effective January 1, 2003, allows us to revise sentences that are "inappropriate."

We hold that Wilson's **[**46]** original 181-year sentence was not unconstitutional under the [Eighth Amendment](#) because the protections outlined in *Miller* for juvenile life-without-parole sentences are inapplicable to a term of years sentence. Furthermore, we find even if the sentence were subject *Miller*'s requirements—that age and attendant circumstances be considered—the trial court's consideration of such factors in the present case was adequate. But we conclude Wilson's appellate counsel performed inadequately when he failed to request appellate review of the sentence's appropriateness under [Appellate Rule 7\(B\)](#). After reviewing Wilson's character and the nature of the offense, we revise Wilson's sentence downward to an aggregate 100 years.

David and Goff, JJ., concur.

Rush, C.J., concurs in result.

Slaughter, J., concurs in Parts I and II.A and dissents from Parts II.B and II.C, with separate opinion.

Concur by: Slaughter (In Part)

Dissent by: Slaughter (In Part)

Dissent

Slaughter, J., concurring in part, dissenting in part.

I agree with the Court that Wilson's term-of-years sentence does not violate the [Eighth Amendment's](#) ban on cruel-and-unusual punishments. To date, the Supreme Court of the United States has not extended its evolving legal standard for juvenile life-without-parole sentences to "de **[**47]** facto" LWOP sentences. Thus, I concur in Part I of our Court's opinion. I also concur in Part II.A of the opinion because I agree that Wilson's trial counsel was not ineffective. But I respectfully dissent from Parts II.B and II.C. I cannot agree that Wilson's appellate counsel was ineffective and that Wilson is entitled to relief under [Appellate Rule 7\(B\)](#).

Until today, we have never held that counsel's failure to raise [Rule 7\(B\)](#) on direct appeal amounts to constitutionally deficient performance under [Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#). We adopted [Rule 7\(B\)](#) to effectuate the 1970 amendment to our state constitution's Judicial Article, which (among other things) conferred in our Court the power "to review and revise the sentence imposed" in a criminal case. [Ind. Const. art. 7, § 4](#). Conferring a court with the power to act is not the same as bestowing a defendant with a right to relief. Relief in [7\(B\)](#) cases is purely a matter of judicial grace. There would be no violation of a defendant's rights—and the defendant would have no judicial recourse—were we to withhold our prerogative under this provision or were the People to amend the constitution and rescind this provision altogether. I would hold

as a matter of law that counsel is never deficient for failing to argue that a sentence **[**48]** is inappropriate under [Rule 7\(B\)](#).

The practical effect of today's decision will be to encourage the filing of more claims seeking relief under [Rule 7\(B\)](#), even **[*1185]** if there is little or no chance of success, just to avoid the charge that counsel failed to provide the minimal level of competence guaranteed under the [Sixth Amendment](#). At present, there is no shortage of claims seeking this relief. By my count, in 2019 the court of appeals issued 335 written decisions addressing a 7(B) claim, representing nearly one-sixth of its decisions. Of these 335 decisions, 330 denied 7(B) relief; only five found relief under [7\(B\)](#) to be warranted—a success rate of about 1.5 percent.

Today's decision highlights the need for a workable 7(B) standard, especially considering that 7(B) claims—most of which will fail—require an enormous commitment of appellate resources. As we noted in *Cardwell v. State*, our 7(B) decisions show that "we have not adopted a consistent methodology in reviewing sentences." [895 N.E.2d 1219, 1224 \(Ind. 2008\)](#) (cleaned up). Yet crafting a consistent method should be, in my view, our primary task. I would give full weight to *Cardwell*'s charge not only to "leaven the outliers," but also to "identify some guiding principles for trial courts and those **[**49]** charged with improvement of the sentencing statutes". [Id. at 1225](#). Today we lack such "guiding principles". Our prevailing criteria for identifying and remedying an "inappropriate" sentence are not susceptible to clear judicial standards.

Without a consistent framework for applying [7\(B\)](#), I would avoid the discretionary review of sentences like Wilson's altogether. Although reviewing and revising trial courts' lawful sentencing decisions are clearly within our constitutional power, exercising this power is not mandatory but discretionary. As our rule says, "[t]he Court **may** revise a sentence". [App. R. 7\(B\)](#) (emphasis added). To be clear, I am not referring to unlawful sentences. If a criminal sentence is unlawful, then of course the aggrieved defendant should receive all the relief available under law. And our appellate courts stand ready to provide such relief. But where, as here, the trial court's sentence was lawful, providing relief under [7\(B\)](#) amounts to substituting our view of an appropriate sentence for that of the trial judge. Before undertaking the costly process of reconsidering sentencing decisions, I would first provide meaningful "guiding principles" for lower courts. [Cardwell, 895 N.E.2d at 1225](#).

For these reasons, I would **[**50]** hold that Wilson's appellate counsel was not ineffective and affirm the trial court's judgment denying post-conviction relief.