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IN THE
COURT OF APPEALS OF INDIANA

Harry C. Hobbs,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

March 15, 2023

Court of Appeals Case No. 22A-PC-1885

Appeal from the Marion Superior Court

The Honorable Anne Flannelly, Magistrate

Trial Court Cause No. 49D30-2106-PC-17538

Opinion by Judge Crone
Judges May and Weissmann concur.

Crone, Judge.

Case Summary

[1] In 1994, Harry C. Hobbs was convicted of class A felony rape, two counts of class A felony criminal deviate conduct, and class B felony burglary, and was sentenced to an aggregate term of 120 years. The original cause number for the four counts was 49G04-9309-CF-119274 (hereafter, Cause CF-119274). Hobbs challenged his convictions and sentence on direct appeal without success in 1995. Thereafter, he filed a motion to correct erroneous sentence, which was denied. Hobbs appealed, and in 2015 we affirmed in part and reversed in part and remanded for resentencing. Following resentencing, which also resulted in a 120-year-sentence, another panel of this Court affirmed in 2017. Hobbs petitioned for post-conviction relief (PCR). The post-conviction court granted his petition and remanded the case to the trial court to resentence Hobbs. After the trial court resentenced Hobbs to a forty-five-year aggregate term, he appealed. We affirmed in 2020. Hobbs then filed another petition for PCR. Following a hearing, the post-conviction court denied relief. Hobbs appeals that denial. Finding no clear error, we affirm.

Facts and Procedural History

[2] More than thirty years ago, Hobbs "broke into the victim's house, held a gun to her head, inserted his fingers into her vagina, performed cunnilingus upon her, and raped her." *Hobbs v. State*, No. 49A02-9410-CR-614, slip op. at 2, (Ind. Ct. App. May 25, 1995) (*Hobbs I*). "In addition to the victim's testimony, Hobbs was identified by DNA evidence." *Id.* "In September 1993, the State charged Hobbs with Count 1, class A felony rape; Count 2, class A felony criminal

deviate conduct; and Count 3, class B felony burglary, and subsequently amended the charging information to add Count 4, class A felony criminal deviate conduct." *Hobbs v. State*, 161 N.E.3d 380, 381 (Ind. Ct. App. 2020) (*Hobbs IV*), *trans. denied*. A jury found Hobbs guilty as charged.

[3] Lengthy but pertinent facts follow:

> On July 12, 1994, the trial court sentenced Hobbs to fifty years for Count 1, thirty years for Count 2, twenty years for Count 3, and fifty years for Count 4. The court ordered Counts 1 and 2 to run concurrent with each other and Counts 3 and 4 to run consecutive to each other and to Count 1, for an aggregate sentence of 120 years. Hobbs appealed his convictions and sentence, arguing that the evidence was insufficient to support his convictions, his convictions violated double jeopardy principles, and his sentence was manifestly unreasonable. This Court affirmed his convictions and sentence. [*Hobbs I*], slip op. at 7.
>
> On March 27, 2015, Hobbs filed a motion to correct erroneous sentence pursuant to Indiana Code Section 35-38-1-15, which the trial court denied. He appealed, arguing that his sentence violated Indiana Code Section 35-50-2-4, as amended July 1, 1994, because the amended version limited the maximum term for a class A felony to forty-five years. He also argued that his aggregate sentence exceeded the limitation in Indiana Code Section 35-50-1-2, as amended effective July 1, 1994, because his crimes constituted an episode of criminal conduct. We concluded that under the doctrine of amelioration, Hobbs was entitled to be sentenced pursuant to the July 1, 1994 version of Section 35-50-2-4. *Hobbs v. State*, No. 49A04-1505-CR-314, 2015 WL 9286721, at *2 (Ind. Ct. App. Dec. 21, 2015) (*Hobbs II*), *trans. denied* (2016). We reversed his fifty-year sentences and remanded for them to be revised to forty-five-year sentences, but advised the trial court that it was permitted to rearrange Hobbs's sentences to effectuate

> a 120-year aggregate sentence because his 120-year sentence was not facially erroneous. *Id.* We also concluded that Hobbs's claim that his crimes constituted an episode of criminal conduct was inappropriate for a motion to correct erroneous sentence and declined to address it. *Id.* at n.3.
>
> In August 2016, the trial court conducted a resentencing hearing and reduced Hobbs's fifty-year sentences to forty-five years each, imposed sentences of fifteen years for each of the other two counts, and ordered each count to be served consecutively, for an aggregate sentence of 120 years. Hobbs appealed this new sentence, arguing that the aggregate sentence exceeded the limitation for consecutive sentences for offenses arising out of a single episode of criminal conduct pursuant to Indiana Code Section 35-50-1-2. Another panel of the Court agreed with *Hobbs II* that Hobbs's argument that his crimes constituted an episode of criminal conduct was not an appropriate claim for a motion to correct erroneous sentence. *Hobbs v. State*, 71 N.E.3d 46, 49 (Ind. Ct. App. 2017) (*Hobbs III*), *trans. denied*. Accordingly, the Court affirmed Hobbs's sentence. *Id.* at 50.
>
> In April 2017, Hobbs filed a petition for post-conviction relief, arguing in relevant part that his appellate counsel in *Hobbs I* provided ineffective assistance by failing to argue that Hobbs's aggregate sentence exceeded the statutory maximum allowed under Indiana Code Section 35-50-1-2, as amended effective July 1, 1994, which was in effect when he was sentenced on July 12, 1994.

Id. at 381-82 (footnote omitted).

[4] The first post-conviction court addressed Hobbs's claim as follows:

> [T]he version of [Indiana Code Section 35-50-1-2], which became effective July 1, 1994, and remained in effect until July 1, 1995,

imposed a previously nonexistent limitation upon the trial court's authority to impose consecutive sentences, and specifically provided:

> (a) except as provided in subsection (b), the court shall determine whether terms of imprisonment shall be served consecutively or concurrently. The court may consider the aggravating and mitigating circumstances in I.C. 35-38-1-7.1(b) and [I.C.] 35-38-1-7.1(c) in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for murder and felony convictions for which a person receives an enhanced penalty because the felony resulted in serious bodily injury if the defendant knowingly or intentionally caused the serious bodily injury, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under I.C. 35-50-2-8 and I.C. 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

a. "Generally, the statute to be applied when arriving at the proper criminal penalty should be the one in effect at the time the crime was committed." *Bell v. State*, 654 N.E.2d 856, 858 (Ind. Ct. App. 1995). .... An exception to the general rule, however, is termed the doctrine of amelioration, and states that "a defendant who is sentenced after the effective date of a statute providing for more lenient sentencing is entitled to be sentenced pursuant to that statute rather than the sentencing statute in effect at the time of the commission or conviction of the crime.[" *Id.*] Limiting Hobbs' consecutive sentences to the presumptive sentence of the next highest felony would be a more lenient sentence than the

> sentence he is now serving; thus, he was entitled to receive the benefit of the 1994 version of I.C. 35-50-1-2.
>
> [T]he parties are in agreement that appellate counsel was ineffective for not arguing that I.C. 35-50-1-2 applied to the crimes in the instant cause and imposed a limit on his consecutive sentences of the presumptive sentence for murder – the felony which is one class of felony higher than the most serious of the felonies for which Hobbs was convicted.
>
> ....
>
> c. Lastly, this Court finds that the appropriate remedy in granting post-conviction relief is to order a resentencing hearing in the instant cause. [Hobbs] and the State both request a resentencing hearing as the proper remedy.
>
> This Court notes the extensive aggravating circumstances found by the original sentencing court as well as by this court during the sentence revision in 2016. The resentencing court pursuant to the granting of this post-conviction relief shall have the discretion to order that Hobbs' new sentencing order in the instant cause be served [consecutive] to Hobbs' other eligible sentences. .... The resentencing court may also consider new evidence that Hobbs wishes to present as potential mitigating evidence.

Id. at 382-83 (citing supplemental appendix from *Hobbs IV*). Consequently, the post-conviction court granted Hobbs's PCR petition as to his claim regarding appellate counsel's ineffectiveness and ordered a new sentencing order to be issued following a resentencing hearing.

[5] In November 2019, the trial court held a resentencing hearing and admitted evidence. The court resentenced Hobbs to forty-five years each for Counts 1 and 4, and fifteen years each for Counts 2 and 3, all to run concurrently for an aggregate term of forty-five years. The trial court also ordered that his sentence on the four counts of Cause CF-119274 would be served consecutive to Hobbs's sentences in cause numbers 49G01-9303-CF-30398 (Cause CF-30398) and 49G01-9303-CF-31558 (Cause CF-31558) (collectively, other causes).[1] Hobbs appealed the sentencing order, contending that the trial court erred by ordering his new sentence to run consecutive to his sentences in the two other causes. Concluding that the trial court "had authority to order his sentence to run consecutive to his sentences in the other causes and that it did not violate ex post facto" prohibitions, we affirmed. *Id.* at 381.

[6] Thereafter, Hobbs filed a pro se PCR petition, secured counsel, and filed an amended petition. Following a March 2022 evidentiary hearing, the post-conviction court issued a nineteen-page order denying relief. Specifically, the court found no merit to Hobbs's challenge to consecutive sentencing, was unpersuaded by claims of ineffective assistance of trial and appellate counsel, and determined that it had no jurisdiction to review an Appellate Rule 7(B) claim. Hobbs appeals.

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[1] Hobbs was sentenced for Cause CF-30398 in January 1994. Appellant's App. Vol. 3 at 2. Hobbs was sentenced for Cause CF-31558 in April 1994. Ex. Vol. 1 at 17.

Discussion and Decision

[7] Hobbs asserts that the post-conviction court erred in denying his PCR petition. "Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence." *Bautista v. State*, 163 N.E.3d 892, 896 (Ind. Ct. App. 2021) (quoting *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *cert. denied* (2020)). "A defendant who files a petition for post-conviction relief 'bears the burden of establishing grounds for relief by a preponderance of the evidence.'" *Id.* (quoting Ind. Post-Conviction Rule 1(5)). "Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment[.]" *Id.* "Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Id.* (quoting *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013)). "In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did." *Id.* "We review the post-conviction court's factual findings for clear error, but do not defer to its conclusions of law." *Wilkes*, 984 N.E.2d at 1240.

[8] At the outset, Hobbs cautions that the "court below adopted verbatim the State's proposed findings of fact and conclusions[.]" Appellant's Br. at 25. "It is not uncommon for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party." *Prowell v. State*, 741 N.E.2d 704, 708 (Ind. 2001). While our supreme court does not encourage post-conviction court judges to adopt wholesale the findings and conclusions of

either party, it recognizes the practical advantages of doing so and declines to "find bias solely on that basis." *Pruitt v. State*, 903 N.E.2d 899, 940 (Ind. 2009) (internal quotation marks and citation omitted). Similarly, we reiterate, "[t]he critical inquiry is whether the findings adopted by the court are clearly erroneous." *Id*.

Section 1 – Hobbs has not demonstrated clear error in the conclusion that he did not receive ineffective assistance based upon *Sizemore*.

[9] Hobbs asserts that the court erred by denying his claims of ineffective assistance of trial and appellate counsel based on their failure to cite *Sizemore v. State*, 531 N.E.2d 201 (Ind. 1988), which Hobbs maintains would have precluded consecutive sentencing. Hobbs contends that neither trial nor appellate counsel realized that his sentence for the other causes had been fully served before the 2019 resentencing. Thus, his attorneys did not think to mention *Sizemore* or advocate that a fully served sentence may not be changed.

[10] "The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). "First, the defendant must show that counsel's performance was deficient." *Id*. "This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they

resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment." *Id*. (citations omitted). "There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption." *Peaver v. State*, 937 N.E.2d 896, 900 (Ind. Ct. App. 2010), *trans. denied* (2011).

[11] "Second, the defendant must show that the deficient performance prejudiced the defense." *Perez*, 748 N.E.2d at 854. "To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Although the two parts of the *Strickland* test are separate [inquiries], a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). "*Strickland* declared that the 'object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed.'" *Id*. (quoting *Strickland*, 466 U.S. at 697).

[12] We reiterate: "Hobbs's case was remanded for a comprehensive resentence under the amended version of Section 35-50-1-2(a), which is what the trial court did." *Hobbs IV*, 161 N.E.3d at 388. At the sentencing hearing on remand,

Hobbs's counsel vigorously argued against consecutive sentencing in his case.[2] His counsel highlighted Hobbs's attempts to better himself, the positive role model he has become, that he had very few conduct reports (with the most recent being seventeen years prior), and his general rehabilitation. His counsel did not cite *Sizemore* or delve into whether Hobbs had finished serving his sentences for the other causes. However, as we explain below, this did not constitute deficient performance.

[13] The defendant in *Sizemore* was sentenced to eight years on each of three counts of forgery, to run concurrently. 531 N.E.2d at 201. Sizemore was also sentenced to four years for theft, enhanced by thirty years due to his habitual offender status, for a total of thirty-four years. The thirty-four-year theft sentence was to run consecutive to the eight-year forgery sentence. Four years later, the Department of Correction discharged Sizemore after he served his forgery sentences. Three years thereafter, Sizemore filed a motion to correct erroneous sentence following the vacation of a prior felony that served as the basis for his habitual enhancement. The court "purported to then re-sentence" Sizemore on the three forgery counts, ordering eight years on each and "ordering them to be served consecutively." *Id.* at 202. Because the forgery sentences "had been fully served and satisfied," our supreme court concluded that the forgery sentences "could not be the subject of a re-sentencing." *Id.*

[2] To be clear, there was no dispute regarding the general proposition that consecutive sentencing may be appropriate when convictions result from separate trials of separate incidents.

Rather, the "sole jurisdiction of the trial court [three years after the forgery sentences were fully served] was to re-sentence [Sizemore] on the theft charge." *Id*. Our supreme court did *not* conclude that the fact that the forgery sentences were fully served and satisfied precluded the trial court from resentencing Sizemore on the theft charge. To the contrary, the *Sizemore* court stated: "Inasmuch as [Sizemore] originally had a thirty-four (34) year sentence on this charge due to the habitual offender enhancement, the trial court was authorized to re-sentence [Sizemore] on that charge consistent with the governing statutes for sentencing under a conviction" of theft. *Id*.

[14] Applied here, the fact that Hobbs had fully served and satisfied his sentences for the other causes ensured that the court could not alter those sentences. And, indeed, the court did not modify the sentences for the other causes. Rather, the court resentenced Hobbs in 2019, utilizing the sentencing framework applicable as of Hobbs's original July 12, 1994 sentencing hearing as instructed. The court considered the new evidence of Hobbs's rehabilitation and family support, weighed it against the "enormous" juvenile and criminal history "startling in its entirety" as noted previously, and ultimately ordered that he serve his sentence consecutive to those of his other causes. Appellant's App. Vol. 3 at 60-62. Accordingly, the court's resentencing of Hobbs does not conflict with *Sizemore*'s teachings.

[15] Hobbs also cites *Wampler v. State*, 168 N.E.3d 1026 (Ind. Ct. App. 2021), which we find similarly unavailing. We excerpt the pertinent conclusions of *Wampler*:

> Because Wampler has served his sentence for the burglary convictions and has been released from the Department of Correction, the trial court had no authority to resentence him. Trial courts are limited to imposing sentences that are authorized by statute. *Wilson v. State*, 5 N.E.3d 759, 762 (Ind. 2014). There is no statute authorizing trial courts to resentence a defendant who has served his sentence and been released from the DOC.
>
> In addition, it would be manifestly unfair for the trial court to call Wampler back into court and potentially resentence him to additional time for the burglary conviction when he had already served his sentence for that conviction and been released from the DOC.

Id. at 1029. The court here did not resentence Hobbs regarding the other causes, which would have been inconsistent with *Wampler*. Rather, the court resentenced him on the four counts of Cause CF-119274.

[16] While we appreciate Hobbs's submission of *Jenkins v. State*, 492 N.E.2d 666 (Ind. 1986), as additional authority for our consideration, we find it likewise distinguishable from his case. Hobbs relies upon this language: "We further find *sua sponte* that because there is no longer a sentence to which it can be consecutively served, the instant sentence should commence from the date appellant would have been initially incarcerated for this conviction." *Id*. at 669. However, *Jenkins* did not involve a sentence that was fully served and satisfied but rather a prior conviction that was reversed in a separate appeal. The sua sponte statement in *Jenkins* simply notes that when a conviction gets reversed, its attendant sentence is vacated and thus cannot be the springboard for a

consecutive sentence. The convictions in Hobbs's other causes were not reversed, nor were the sentences vacated. Hence, *Jenkins* does not apply.

[17] Hobbs has not demonstrated that his attorneys at trial or on appeal were deficient in failing to cite *Sizemore* or other cases, which do not apply to his situation. Because he has not shown that their representation fell below an objective standard of reasonableness, we do not reach the second prong of the *Strickland* analysis. *Grinstead*, 845 N.E.2d at 1031. Accordingly, the post-conviction court did not err in finding no merit to this particular claim of ineffective assistance of counsel.

Section 2 - Hobbs has not demonstrated clear error in the conclusion that he did not receive ineffective assistance based upon *Richards.*

[18] Hobbs contends that the court erred by denying his claims of ineffective assistance of trial and appellate counsel based on the failure to cite *Richards v. State*, 681 N.E.2d 208 (Ind. 1997), which Hobbs maintains would have changed the outcome of his sentence. He argues that had either trial or appellate counsel cited this case, his sentence would have been capped at forty rather than forty-five years. We disagree.

[19] A close reading of *Richards* reveals that it does not assist Hobbs. Richards committed his crimes in 1992 but was convicted and originally sentenced in April 1995 for class A felony rape (forty-five years), class A felony criminal deviate conduct (forty-five years minus five suspended), class B felony burglary,

and class C felony criminal confinement.[3] The court found Richards to be a habitual offender (thirty years) and ordered the two class A felonies to run consecutive, for a total of 115 years. *Id.* at 208. Our supreme court found that the trial court erred when it did not follow the "clearly ameliorative" 1994 version of Indiana Code Section 35-50-1-2(a). *Id.* at 213. The *Richards* court highlighted the statutory language "consecutive term" and "arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." *Id*. Noting that at that time the presumptive sentence for murder (the felony one class higher than the class A felony) was forty years,[4] our supreme court remanded Richards's case for entry of a sentence of seventy years (forty years plus thirty years for the habitual offender finding).

[20] The *Richards* court dealt with an error due to a court's failure to apply the 1994 version of Indiana Code Section 35-50-1-2(a) when that court imposed consecutive sentencing. In contrast, while the four felony convictions for which Hobbs was being resentenced arose out of an episode of criminal conduct, the court on remand did not order those four sentences to be served consecutively.

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[3] At the outset, *Richards* referenced the B and C felonies, did not provide the term of either sentence, and simply mentioned they "were concurrent." 681 N.E.2d at 208. The opinion zeroed in on the issue of the consecutive sentences. *Id*. at 212-13.

[4] The *Richards* court cited *Smith v. State*, 675 N.E.2d 693 (Ind. 1996), which had examined the legislature's two 1994 conflicting amendments to the murder statute and concluded that during the relevant timeframe, forty, rather than fifty, years was the presumptive term for a murder sentence. 681 N.E.2d at 213 n.10.

Instead, the court on remand ordered Hobbs to serve each of the four sentences of Cause CF-119274 concurrently. *Richards* does not mandate a different result because it did not concern concurrent sentencing. As such, Hobbs has not demonstrated how his counsel's failure to cite a case that would not have assisted his defense could constitute deficient performance.[5] Indeed, Hobbs's counsel at resentencing raised the argument that the murder sentence at that time was either forty or fifty years, advocated for the former, and highlighted the myriad positive strides Hobbs had made. However, because the resentencing court chose to impose concurrent sentences, the forty- versus fifty-year murder sentence never came into play.

[21] Hobbs has not shown that his counsel's representation fell below an objective standard of reasonableness in this regard. Thus, we do not reach the second prong of the *Strickland* analysis. We conclude that the post-conviction court did not err in finding no merit to this particular claim of ineffective assistance of trial or appellate counsel.

[5] We find *Wilkerson v. State*, 728 N.E.2d 239 (Ind. Ct. App. 2000), inapposite as it dealt with counsel's failure to sever charges and a pre-1994 version of Indiana Code Section 35-50-1-2, which provided that consecutive sentences may be ordered only if multiple sentences were imposed at the same time.

Section 3 – Hobbs has not demonstrated clear error in the conclusion that he did not receive ineffective assistance of appellate counsel based upon *Blakely*.

[22] Hobbs argues that his appellate counsel was ineffective for not raising a challenge under *Blakely v. Washington*, 542 U.S. 296 (2004). Hobbs asserts that the court in 2016 cited his criminal history and the nature of the offense as aggravating circumstances but that the 2019 resentencing court justified its forty-five-year sentence by mentioning only the impact of the crime on the victim. Hobbs characterizes this as an improper aggravator pursuant to *Blakely*, a mistake that should have been raised by appellate counsel in *Hobbs IV* and allegedly constituted fundamental error.

[23] Initially, we note that in his proposed findings of fact and conclusions of law submitted to the post-conviction court, Hobbs simply listed *Blakely* as one of several claims within his amended PCR petition. Appellant's App. Vol. 2 at 128. Yet, later in his proposed findings and conclusions, Hobbs labeled the *Blakely* claim "moot" and stated it "need not be addressed." *Id.* at 133. Whether he believed that his other contentions would compel reversal, or assumed that the lengthy *Blakely* argument previously submitted in his brief in support of his amended petition for PCR would suffice, is unclear. Our supreme court has agreed that the failure to address an issue in one's proposed post-conviction findings of fact and conclusions of law waives the claim. *Isom v. State*, 170 N.E.3d 623, 639-40 (Ind. 2021). However, as in *Isom,* and like the post-conviction court in Hobbs's case, we choose to examine the issue more fully.

[24] Per the June 2004 *Blakely* decision,

> a trial court may not enhance a sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant has waived *Apprendi [v. New Jersey*, 530 U.S. 466, 490 (2000)] rights and consented to judicial factfinding.

Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007). When Hobbs was originally sentenced in 1994, Indiana operated under a different sentencing scheme, which was subsequently amended to "resolve the Sixth Amendment problem *Blakely* presented." *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. 2007) *clarified on reh'g* 875 N.E.2d 218. Our supreme court provided the following guidance:

> First, as a new rule of constitutional procedure, we will apply *Blakely* retroactively to all cases on direct review at the time *Blakely* was announced. Second, a defendant need not have objected at trial in order to raise a *Blakely* claim on appeal inasmuch as not raising a *Blakely* claim before its issuance would fall within the range of effective lawyering. Third, those defendants who did not appeal their sentence at all will have forfeited any *Blakely* claim.

Smylie v. State, 823 N.E.2d 679, 690-91 (Ind. 2005), *cert. denied*.

[25] Hobbs committed his crimes in 1992 and was originally sentenced in 1994. His first direct appeal was decided in 1995. *Blakely* was decided in June 2004. Hobbs was resentenced in 2016 and 2019. The fact that Hobbs's "crimes and original sentencing hearing took place pre-*Blakely* does not preclude him from

being entitled to the *Blakely* protections upon resentencing post-*Blakely*." *Spurlock v. State*, 106 N.E.3d 1046, 1049 (Ind. Ct. App. 2018), *trans. denied*; *see also Ben-Yisrayl v. State*, 908 N.E.2d 1223, 1230-31 (Ind. Ct. App. 2009) (holding that defendant was entitled to resentencing hearing that complied with *Blakely* dictates even though he committed crimes long before *Blakely* and was resentenced after *Blakely*), *trans. denied*. Having determined that Hobbs was entitled to the protections of *Blakely* at his resentencing, we turn to his counsel's failure to raise a *Blakely* objection during the resentencing process.

[26] While counsel could not be expected to anticipate the holding of *Blakely* before it was issued, Hobbs's resentencing occurred more than a decade after the *Blakely* decision. As the issue was settled and well known by the time of Hobbs's resentencing hearing, we conclude that an objection was required to preserve the issue for appeal. *See Smylie*, 823 N.E.2d at 689 (stating it is entirely possible for defendant to waive or forfeit ability to appeal sentence on *Blakely* grounds). Because Hobbs's counsel during resentencing failed to object, the *Blakely* issue was waived. While failing to raise a waived issue would not constitute deficient performance by appellate counsel, Hobbs attempts to circumvent the waiver, arguing that appellate counsel should have argued fundamental error.

[27] "A claim that has been waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that a fundamental error occurred." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). The fundamental error rule is "extremely narrow" and

available only in "egregious circumstances." *Id.* The rule "applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002).

[28] At the 2019 resentencing, following the defense's argument as to the proper sentence, the court asked if there was any objection to incorporating its statements from the 2016 resentencing "as to my recognition of the aggravators and mitigators that [the court] believed existed at the time of the offense[.]" Appellant's App. Vol. 3 at 144. The excerpt below is from the 2016 resentencing:

> I did review the Court's file, the transcript of the original sentencing hearing, and the of course pre-sentence investigation. And there are aggravating circumstances and mitigating circumstances that the Court should take into consideration in fashioning a sentence, specifically juvenile true findings, September -- it's 1978 for burglary. And these are the dates of arrest not dates of conviction. December of 1978, a theft -- theft arrest and conviction; February 1979, theft arrest and conviction; 6 of '79, theft arrest later resulting in a conviction; February of 1981 a fleeing, and all those are true findings as juvenile. March of 1982 he was arrested for trespass but it was just an arrest, okay. As an adult, August of 1981 a violation of the conviction for 1935 firearms act; a 1981 conviction for theft; a 19[8]3 conviction for trespass; a 1984 conviction for disorderly conduct and impersonating a police officer, possession of a police radio; another 1984 conviction and this is for battery; 1985, possession of marijuana. There was an arrest for burglary and battery in '85 in July. And then in September of 1985 an arrest for rape; both of those were only arrests not resulting in convictions. There were no charges filed. August of '86, he was arrested and later

> convicted for burglary as a B felony and then arrested September of '86 for burglary, later convicted as a B felony. November of 1991 arrested and later convicted for public indecency and indecent exposure. January of 1991 arrest for operating a vehicle while intoxicated; convicted as a misdemeanor. June of 1992 arrest and later conviction for residential entry as a D felony; December of 1992 arrest for theft, which was a conviction; March of 1993 he was arrested for three different cases -- or three different offenses. He was arrested for attempt murder as an A felony where he fired at a police officer, another case of confinement and robbery, and then another case of attempt murder. And then in September of 1993, he was arrested for this case for rape, criminal deviate conduct, burglary, and then another count of criminal deviate conduct. *So the criminal history is startling in its entirety. There's – it's an enormous criminal history.*

Id. at 60-62 (emphasis added). Hobbs's counsel affirmatively stated that he had no objection but asked that "any mitigators or anythings [sic] that have changed since that hearing be incorporated into that as well which is the completed programs Mr. Hobbs has continued to do." *Id*. at 144. The court confirmed that it would incorporate the additional mitigating evidence, recognized that Hobbs was making positive strides in the DOC, rehashed the serious negative long-term impacts that the instant crimes had upon the victim, then set out the new sentencing. *Id*. at 144-47.

[29] Given that the court specifically stated that it would consider its prior sentencing statements, which detailed Hobbs's lengthy and varied criminal history, Hobbs cannot seriously contend that the 2019 court relied only upon victim impact in making its resentencing determination. While the court's soliloquy regarding the impacts of the crimes upon the victim contradicts the

teachings of *Blakely*, we are confident that the court would have imposed the same sentence if it considered only Hobbs's myriad convictions. *See Robertson*, 871 N.E.2d at 287 ("Where the use of some aggravators violates *Blakely* and others do not, we will remand for resentencing unless we can say with confidence that the trial court would have imposed the same sentence if it considered only the proper aggravators.").

[30] Hobbs has not convinced us that the trial court should have raised a *Blakely* issue sua sponte and corrected the situation due to a blatant violation of basic and elementary principles, undeniable harm or potential for harm, and prejudice, thus no fundamental error was shown. Accordingly, we see no clear error in the court's finding that Hobbs has shown no reasonable probability of a more favorable outcome on appeal of his 2019 resentencing had his appellate counsel included a *Blakely* claim.

Section 4 – Hobbs has not demonstrated that *Stidham* requires review per Appellate Rule 7(B).

[31] In his amended PCR petition, Hobbs recounted that his challenge to the reasonableness of his sentence pursuant to former Appellate Rule 17(B) was denied in 1995, and he argued that pursuant to *State v. Stidham*, 157 N.E.3d 1185 (Ind. 2020), his 2019 resentencing should be reconsidered under Appellate Rule 7(B). He faults the post-conviction court for not permitting him to introduce extensive evidence of his rehabilitation. The post-conviction court concluded that Hobbs would need permission from an appellate court to pursue a successive PCR claim, denied that it had authority or jurisdiction to review

Hobbs's sentence under Appellate Rule 7(B), noted that Appellate Rule 7(B) took effect in 2003 (well before Hobbs's 2017 PCR petition), and pointed out that *Stidham* "did not involve a second PCR or a resentencing." Appealed Order at 19.

[32] Briefly, we note that when squarely faced with whether a post-conviction petition should be considered a "second" or "successive" petition if the errors asserted arose from the proceedings on remand, our supreme court answered negatively. *See Shaw v. State*, 130 N.E.3d 91, 93 (Ind. 2019) ("the issues and events Shaw raises in his second petition for post-conviction relief had not yet occurred when he filed his first post-conviction petition in April 2007"). Hobbs filed his first PCR petition in 2017. His current PCR petition challenged his 2019 resentencing on remand, which had not yet occurred in 2017, thus he was entitled to pursue his current post-conviction petition without seeking leave from this Court pursuant to Post-Conviction Rule 1(12). *See Shaw*, 130 N.E.3d at 93.

[33] We next turn to whether the post-conviction court here had authority or jurisdiction to review Hobbs's sentence under Appellate Rule 7(B). Appellate Rule 7(B) "authorize(s) an *appellate court* to revise a sentence if it finds after due consideration of the trial court's decision that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006) (emphasis added; internal citation omitted). While the plain language of the rule would seem to argue against the

authority of a post-conviction court to address an Appellate Rule 7(B) claim, *Stidham* requires that we examine the issue more closely.

[34] Seventeen-year-old Stidham "committed a brutal murder and several other crimes in 1991." *Stidham*, 157 N.E.3d at 1187. He was found guilty, successfully appealed, but was found guilty upon retrial. In a 1994 direct appeal, our supreme court rejected Stidham's argument that his 141-year sentence was "unreasonable" and "disproportionate to the crime committed." *Id*. at 1191. Eventually, Stidham sought PCR, challenging the propriety of imposing the maximum term-of-years sentence on him for crimes committed as a juvenile and submitting evidence of his rehabilitation since his first trial. PCR relief was granted, and Stidham's sentence was decreased to sixty-eight years. Citing res judicata, a panel of this Court reversed and reinstated a 138-year sentence.

[35] On transfer, the *Stidham* court affirmed the post-conviction court's order granting relief, revisited its prior decision regarding the appropriateness of Stidham's sentence, and revised his sentence downward by fifty years. *Id.* at 1198. In explaining its rationale, our supreme court stated the general rule, "when a reviewing court decides an issue on direct appeal, the doctrine of *res judicata* applies, thereby precluding its review in post-conviction proceedings." *Id*. at 1191 (citing *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006)). Yet, it went on to say that notwithstanding res judicata, "a court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance." *Id*. (alterations and citations omitted). However, our supreme court stressed

that this power "should be exercised *only* in 'extraordinary circumstances such as where the initial decision was clearly erroneous and would work manifest injustice.'" *Id*. (emphasis added; citation omitted).

[36] The *Stidham* court found the requisite "extraordinary circumstances" existed to overcome res judicata's bar on revisiting and revising a juvenile's sentence under Article 7, Section 4 of the Indiana Constitution. *Id*. at 1192-93. The *Stidham* court observed two fundamental shifts in sentencing law between 1994, when a panel of this Court first evaluated whether Stidham's sentence should be revised, and 2020, when our supreme court considered the matter on post-conviction relief. *Id.* The first major shift was that Indiana's standard for reviewing and revising sentences under Article 7, Section 4 of the Indiana Constitution changed. *Id*. (noting change from "manifestly unreasonable" standard to existing "inappropriate in light of the nature of the offense and character of the offender" standard under Appellate Rule 7(B)). The second major shift between 1994 and 2020 was the evolution in the way that we evaluate juvenile offenders, informed by U.S. Supreme Court precedent from the 2000s. *Id.* at 1193 (citations omitted); *see also Conley v. State*, 183 N.E.3d 276, 288 (Ind. 2022) (discussing *Stidham*).

[37] Because both the easing of the standard by which our supreme court exercises its power to review and revise sentences and the limiting of the applicability of the most severe sentences to children "render[ed] suspect Stidham's maximum sentence for crimes he committed as a juvenile," the *Stidham* court reconsidered the appropriateness of Stidham's sentence in light of the nature of the offenses

and Stidham's character. *Stidham*, 157 N.E.3d at 1187. The court acknowledged the brutal nature of the crimes but also recognized "Stidham's steps toward rehabilitation and the impact of the abuse and neglect he suffered earlier in his childhood." *Id*. at 1188. "Most importantly, [the *Stidham* court] reinforce[d] the basic notion that juveniles are different from adults when it comes to sentencing and are generally less deserving of the harshest punishments." *Id*. The court "ultimately conclude[d] that the maximum 138-year sentence imposed on Stidham for crimes he committed as a juvenile [was] inappropriate," and therefore "revise[d] it to an aggregate sentence of 88 years." *Id*.

[38] Recently, a panel of this Court followed *Stidham* and revised a 100-year sentence to eighty-five years for a defendant who "committed the offenses over the course of one day, with peers, at the age of seventeen." *Anderson v. Stat*e, No. 22A-PC-1785, 2023 WL 380475, at *1 (Ind. Ct. App. Jan. 25, 2023).[6] The *Anderson* panel stated that in *Stidham*, "our Supreme Court held that juvenile defendants convicted of and sentenced for offenses prior to the 2003 implementation of our current version of Indiana Appellate Rule 7(B) may raise a freestanding claim to have their sentences reviewed and revised in a petition for" PCR. *Id*. at *7. Thus, "just as *res judicata* did not preclude the *Stidham* Court from proceeding to the merits of the petitioner's request for relief, neither does the doctrine preclude Anderson's claim from being heard." *Id*. at *8.

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[6] Hobbs offered *Anderson* as additional authority pursuant to the recently amended Indiana Appellate Rule 65(D), which states that memorandum decisions are not binding precedent for any court and may be cited only for persuasive value.

Additionally, in his appellate brief, Anderson added a freestanding argument that his sentence should be revised under Appellate Rule 7(B) based on the disparity between his sentence and those of his partners in crime. However, the panel doubted "this argument could have been raised by Anderson in the post-conviction court, as it is not a juvenile-specific argument, which was at issue in *Stidham*." *Id*. at *6 n.1.

[39] Returning to the case at hand, Hobbs was not a juvenile when he committed class A felony rape, two counts of class A felony criminal deviate conduct, and class B felony burglary. The defendant's juvenile status at the time of his offenses was one of the two pivotal keys to the decisions in *Stidham* and *Anderson*. Indisputably, the appellate standard for reviewing sentences did ease between the time that Hobbs was first sentenced and first directly appealed and the time when he was most recently resentenced. However, since his first sentence and appeal, and after various trial and appellate proceedings, his sentence has changed from 120 years to forty-five years. Moreover, although we commend Hobbs's efforts to rehabilitate himself and hope his hard work will serve him well, his situation simply does not present the same extraordinary circumstances that our supreme court found that justified its revision of Stidham's prior sentence. Hobbs has not overcome the "rigorous standard of review" for evaluating post-conviction determinations. *Cf. Conley*, 183 N.E.3d at 289 (affirming sentence of juvenile where appellate review standard was unchanged and extraordinary circumstances not presented). Finding no clear error, we affirm.

[40] Affirmed.

May, J., and Weissmann, J., concur.