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IN THE COURT OF APPEALS OF INDIANA

Thomas L. Hale,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

June 9, 2021

Court of Appeals Case No. 20A-PC-1887

Appeal from the Huntington Superior Court

The Honorable Jennifer E. Newton, Judge

Trial Court Cause No. 35D01-1804-PC-4

Tavitas, Judge.

Case Summary

[1] After Thomas Hale was convicted of manufacturing methamphetamine within one thousand feet of a youth program center, he successfully appealed. On remand, after a second jury trial, Hale was again convicted. On his second

direct appeal, Hale argued that his forty-year aggregate sentence was inappropriate in light of the nature of his offense and his character, but this Court declined to revise his sentence. After the Indiana Supreme Court denied transfer, Hale filed a petition for post-conviction relief ("PCR") in the trial court, arguing that Hale had received ineffective assistance from both his trial and appellate counsel. Hale claims that he had a meritorious argument regarding the constitutionality of Indiana Code Section 35-48-4-1.1 and Indiana Code Section 35-31.5-2-357 ("sentencing enhancement provision") in effect at the time of Hale's second trial. The sentencing enhancement provision more than doubled the length of the maximum sentence that could have otherwise been imposed on Hale, and neither of Hale's attorneys raised a constitutional challenge. The post-conviction court ("PC court") denied Hale's petition for PCR. Hale now appeals. We conclude that the PC court did not err in concluding that Hale suffered no prejudice stemming from the foregone challenge. Accordingly, we affirm.

Issues

[2] Hale raises two issues which we restate as:

I. Whether Hale received ineffective assistance of trial counsel.

II. Whether Hale received ineffective assistance of appellate counsel.

Facts

[3] On May 19, 2014, the Huntington Police Department received a tip that led them to a residence on East Franklin Street. Approximately ten people were at the residence, including Hale. Specifically, Hale was located on the second floor of the residence, apparently attempting to dispose of evidence of a methamphetamine manufacturing operation. Hale was not the primary orchestrator of the operation, but he participated in various ways, including the purchase of pseudoephedrine, a critical ingredient for the manufacture of methamphetamine.

[4] The State charged Hale with manufacturing methamphetamine within one thousand feet of a "youth program center," then a Class A felony. App. Vol. III pp. 22-3. The State alleged that Hale's offense occurred "[s]ometime during the time period of January 1, 2014 through May 20, 2014." Appellant's App. Vol. II p. 22. In 2014, manufacturing methamphetamine would ordinarily have been a Class B felony with a maximum sentence of twenty years. But the governing statute contained an enhancement provision: if the offense occurred within one thousand feet of, among other things, a youth program center, the offense became a Class A felony. The statute then in effect, under which Hale was charged, was Indiana Code Section 35-48-4-1.1 (2013), which read:

> A person who . . . knowingly or intentionally . . . manufactures . . . methamphetamine, pure or adulterated . . . [commits] dealing in methamphetamine . . . . The offense is a Class A felony if . . . the person manufactured, delivered, or financed the delivery of

> the drug . . . in, on, or within one thousand (1,000) feet of . . . a youth program center.

"Youth program center" was defined at the time by Indiana Code Section 35-31.5-2-357 as: "a building or structure that on a regular basis provides recreational, vocational, social or other programs or services for persons less than eighteen (18) years of age. . . ."

[5] During a jury trial in November 2014, Attorney Stanley Campbell ("Attorney Campbell") represented Hale. Witness testimony established that the Franklin Street residence was nine hundred and forty feet from the property line of a Boys and Girls Club and approximately nine hundred and fifty feet from the property line of the Trinity United Methodist preschool. A jury found Hale guilty as charged, and the trial court sentenced Hale to forty years in prison. Attorney Jeremy Nix ("Attorney Nix") represented Hale on appeal, and the Indiana Supreme Court overturned Hale's conviction. *Hale v. State*, 54 N.E.3d 355 (Ind. 2016).[1]

[6] The State tried Hale again in March 2017. This time, Attorney Campbell stipulated that the Franklin Street residence was within one thousand feet of a "youth program center." P.C. Tr. Vol. II pp. 9-10. Once again, the jury found

[1] The Supreme Court's reversal was based on Hale being denied the opportunity to depose certain witnesses at public expense.

Hale guilty as charged, and the trial court sentenced him to forty years in prison.

[7] Hale, again represented by Attorney Nix, argued a single issue in a second direct appeal: that Hale's sentence was inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). Given Hale's "fifteen felony convictions, four misdemeanor convictions, and nine petitions to revoke his probation[,]" as well as his consistent substance abuse and failure to take advantage of treatment opportunities, this Court affirmed Hale's sentence in an unpublished memorandum opinion. *Hale v. State*, No. 35A04-1704-CR-889, slip op. at 1 (Ind. Ct. App. Sept. 7, 2017), *trans. denied*.

[8] On April 12, 2018, Hale, pro se, filed a verified petition for PCR. The PC court appointed the state public defender to represent Hale, and the state public defender filed amended petitions which alleged that Hale received: (1) ineffective assistance of trial counsel ("IATC") during his second trial; and (2) ineffective assistance of appellate counsel ("IAAC") during his second direct appeal. Such ineffective assistance, Hale contended, violated his due process rights under the Sixth and Fourteenth Amendments to the United States Constitution as defined in *Strickland v. Washington*, 466 U.S. 668 (1984). *See* U.S. Const. amend. VI, XIV.

[9] Specifically, Hale argued that his attorneys failed to make a facial challenge to the sentencing enhancement provision on the grounds that it was constitutionally void-for-vagueness. Hale cited *Johnson v. United States*, 576 U.S.

591 (2015), for the proposition that facial challenges can be made even to criminal statutes that include some constitutional applications within their ambit. Hale further cited *Whatley v. Zatecky*, 833 F.3d 762 (7th Cir. 2016). The *Whatley* court found that the phrase, "on a regular basis[,]" in the definition of "youth program center" was unconstitutionally vague—albeit in the context of an as-applied vagueness challenge—and ruled that the Indiana Supreme Court unreasonably applied federal law when it found otherwise.

[10] At a hearing on Hale's petition for PCR on June 16, 2020, Attorney Campbell testified as follows:

> [ ] I guess the way I thought about *Whatley* at the time, was that it's—there was language in *Whatley* that could have provided an argument for [ ] dismissal of—of the A Felony[.] [ ] [O]n the other hand, [ ] *Whatley* I thought [ ] in its analysis and looking at *Whatley*'s situation specifically as to him, [ ] I was doubtful if that would've been successful in arguing it . . . .

PC Tr. Vol. II p. 13 (cleaned up). The following colloquies ensued:

> Q. Did you look at the language in *Johnson*, I'm gonna [sic] quote here, "our holdings and [sic] squarely contradict theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provisions of grasp", had you looked at that particular language?
>
> A. Yeah, [ ] I remember that language from the case.
>
> Q. Okay. [ ] What applicability did that language have, in your opinion, to Hale's case?

> A. [ ] [I]n the way I looked at *Johnson* and *Whatley*, [ ] as I said there were— there was language, [ ] in those decisions that could've been used to argue, [ ] for [ ] the vagueness of the statute has [sic] applied to [ ] Hale, but there in was the problem as it applied to Hale. [ ] [M]y reading of *Johnson* was that it was a case that was [ ] a lot of it based upon the structure of The Armed [Career] Criminal Act [ ] as Congress had passed it and the analysis had a lot to do with that particular statute.
>
> * * * * *
>
> Q. What did you have to lose by not filing a Motion to Dismiss the enhancement prior to the second Trial?
>
> A. There would not have been anything to lose. [ ] [I]n other words if you're asking [ ] would there have been any downside or anything, a loss to [ ] Hale by filing a Motion, the[ ] answer would be, no, there wouldn't have been.

Id. at 14, 20 (cleaned up).

[11] Attorney Nix also testified at the hearing:

> Q. Back in 2017/2018, what was your analysis of whether or not *Whatley* applied to Hale's case?
>
> A. I thought it was pretty directly on point and held that an entity like the Boy's and Girl's Club or a YMCA, would fit the definition of a Youth Program Center.
>
> * * * * *

Q. [ ] Did you consider raising a challenge to the enhancement based on the statute being vague on its face?

A. I did not.

* * * * *

Q. Did *Whately* [sic] prohibit raising an unconstitutional on its face challenge?

A. I don't believe so.

Q. When you reviewed the case, had Trial Counsel filed a Motion to Dismiss the Youth Program Center Enhancement?

A. No, I believe they had stipulated to it.

Q. Okay. Did that fact come into what you raised on the Appeal?

A. Yes.

Q. How did the fact (INDISCERNIBLE)?

A. If they stipulated to that fact, uh, I would've had to of [sic] alleged that it was fundamental error on the Appeal, which is a much more difficult standard [ ] or burden to overcome.

PC Tr. Vol. II pp. 24-28.

[12] On September 16, 2020, the PC court entered its order denying Hale's petition for PCR and found, in part, as follows:

30. . . . Based on *Cook*, *Kashem*, and *Bramer*,[2] this Court finds that Petitioner is not entitled to bring a facial vagueness challenge to the youth program statute because his behavior clearly falls within the core of the statute. If his behavior had not fallen within the core, he would have mounted a vagueness challenge that the statute was vague as applied to him, as Whatley did, but he would not have been successful with that claim.

* * * * *

36. Petitioner's trial counsel did not file a motion to dismiss prior to the start of his second jury trial. His trial Counsel testified at the evidentiary hearing that he was aware of the *Whatley III* decision at the time of the second trial but did not believe it would benefit his client. Counsel did not think *Whatley III* would apply to his client because of the language in the opinion about the Boys and Girls Clubs.[3] Even if he had filed a motion to dismiss, Petitioner has not shown the Motion would have even been successful and thus was not prejudiced by this decision.

* * * * *

40. By failing to file a motion to dismiss to challenge the constitutionality of the statute due to vagueness, Petitioner did not preserve the issue for appeal. Although the Court of Appeals could have decided to review the issue anyway, the Court was not required to do so. Furthermore, Petitioner was not

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[2] *United States v. Cook*, 970 F.3d 866, 876 (7th Cir. 2020); *Kashem v. Barr*, 941 F.3d 358, 375 (9th Cir. 2019); *United States v. Bramer*, 832 F.3d 908 (8th Cir. 2016).

[3] "Had Whatley possessed drugs within 1000 feet of a YMCA or a Boys and Girls Club, there would be no doubt that his conduct was within the core of the law." *Whatley*, 833 F.3d at 783. The Seventh Circuit was addressing a State's argument about which conduct falls within the core of the statute, a determination that did not dictate its decision in *Whatley* and would not have been dispositive of a facial challenge by Hale. Rather, this dicta would have been pertinent to an *as-applied* challenge, had Hale made one.

> prejudiced because he would not have been successful even if he had raised the issue . . . .

PC App. Vol. II pp. 103-105 (bold emphasis removed). Hale now appeals.

Analysis

[13] Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *reh'g denied, cert. denied*; Ind. Post-Conviction Rule 1(1)(b). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Gibson*, 133 N.E.2d at 681. "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are res judicata." *Id.* The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.;* P.-C.R. 1(5).

[14] When, as here, the petitioner "appeals from a negative judgment denying post-conviction relief, he 'must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision.'" *Gibson*, 133 N.E.2d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). When reviewing the PC court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," and the "findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019). When a

petitioner "fails to meet this 'rigorous standard of review,' we will affirm the post-conviction court's denial of relief." *Gibson*, 133 N.E.2d at 681 (quoting *DeWitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001)).

I. Ineffective Assistance of Trial Counsel (IATC)

[15] Hale argues that his trial counsel rendered IATC. To prevail on his IATC claim, Hale must show that: (1) Attorney Campbell's performance fell short of prevailing professional norms; and (2) Attorney Campbell's deficient performance prejudiced Hale's defense. *Gibson*, 133 N.E.3d at 682 (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064).

[16] A showing of deficient performance "requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007)). We strongly presume that counsel exercised "reasonable professional judgment" and "rendered adequate legal assistance." *Id.* Defense counsel enjoys "considerable discretion" in developing legal strategies for a client. *Id.* This "discretion demands deferential judicial review." *Id.* Finally, counsel's "[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.*

[17] "To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Id.* "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

a. Prejudice

[18] We begin by analyzing *Strickland*'s prejudice prong. Hale argues that *Johnson* opened the door to facial vagueness challenges to criminal statutes, an avenue previously unavailable to the criminal defendant. Given the apparent split of authority between the Indiana Supreme Court and the Seventh Circuit Court of Appeals with respect to whether the sentencing enhancement provision was unconstitutionally vague, Hale contends that his trial counsel erred by failing to raise a facial challenge.

[19] For a *Strickland* prejudice analysis, the question we must answer is: if Attorney Campbell had raised the facial challenge, is there a reasonable probability that it would have succeeded? As we noted, in this context, "reasonable probability" has a specific definition: a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. The PC court concluded that a facial challenge made by Hale would not have succeeded, and that, therefore, Hale was not prejudiced by Attorney Campbell's failure to raise one. In order to reverse, we must be convinced that the evidence "unmistakably and unerringly" points to the opposite conclusion. *Gibson*, 133 N.E.2d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). We are not so convinced.

[20] There are two types of constitutional vagueness challenges that can be made to a given criminal statute: as-applied and facial. An as-applied challenge requires a court to focus not on the language of the statute itself, but rather whether that statute is unconstitutionally vague as applied to the conduct of the particular challenger. *See, e.g., State v. Thakar*, 82 N.E.3d 257, 259 (Ind. 2017) (an as-applied challenger "'need only show the statute is unconstitutional on the facts of the particular case'") (quoting *State v. Zerbe*, 50 N.E.3d 368, 369 (Ind. 2016)). In other words, an as-applied constitutional challenge need only demonstrate that a statute failed to provide notice of proscribed conduct to a particular challenger, or that the statute was susceptible to arbitrary enforcement in that specific case, even if the same statute might have permissible constitutional applications in other scenarios. Traditionally, as a general practice, vagueness challenges to criminal statutes were required to take an as-applied form. *See, e.g, United States v. Powell*, 423 U.S. 87, 92, 96 S. Ct. 316, 319 (1975) ("[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.") (quoting *United States v. Mazurie*, 419 U.S. 544, 550, 95 S. Ct. 710, 714 (1975)); *see also Davis v. State*, 476 N.E.2d 127, 130-31 (Ind. Ct. App. 1985).

[21] A facial challenge, on the other hand, looks directly to the text of the law and argues that the law is vague ". . . not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'"

Coates v. City of Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688 (1971) (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126 (1926)).

[22] A facial challenge raised by Hale would have faced several significant obstacles. First, though *Johnson* may have opened the door to facial challenges to criminal statutes, it left open several attendant questions, such as: (1) which *types* of criminal statutes may be challenged; (2) on *what grounds* they may be challenged as facially vague; and (3) *who* may or may not raise such challenges. Several lower courts have identified these open questions. *See United States v. Cook*, 970 F.3d 866, 876 (7th Cir. 2020) ("It is not clear how much *Johnson*—and the Court's follow-on decision in *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204 (2018), which invalidated similar language in the Immigration and Nationality Act—actually expand the universe of litigants who may mount a facial challenge to a statute they believe is vague.").

> [A]s a general matter, a defendant who cannot sustain an as-applied vagueness challenge to a statute cannot be the one to make a facial vagueness challenge to the statute. We recognize that this rule is not absolute. In *Johnson*, for example, the Supreme Court "looked past [the] as-applied challenge directly to the petitioner's facial challenge." *Henry v. Spearman*, 899 F.3d 703, 709 (9th Cir. 2018). Thus, the general rule that a litigant whose conduct is clearly prohibited by a statute cannot be the one to make a facial vagueness challenge is subject to exceptions.

Kashem v. Barr, 941 F.3d 358, 375 (9th Cir. 2019).

[23] Second, the *Whatley* case did not feature a facial challenge, but rather an as-applied challenge. At best, the Seventh Circuit's decision in *Whatley* demonstrates that there are some circumstances in which the sentencing enhancement provision is unconstitutionally vague when applied. Hale concedes that his circumstances are not among them—the sentencing enhancement provision is *not* unconstitutionally vague as applied to him. *Whatley* is, thus, materially distinguishable from this case.

[24] Third, substantial doubts exist as to whether Hale would have had the requisite standing to raise a facial claim, precisely because the sentencing enhancement provision is not unconstitutionally vague as applied to him. *See, e.g., United States v. Requena*, 980 F.3d 30, 39-40 (2d Cir. 2020) ("Neither the Supreme Court nor our Court has definitively resolved whether facial vagueness challenges not based on the First Amendment may proceed against statutes that can constitutionally be applied to the challenger's own conduct.") (citing *Copeland v. Vance*, 893 F.3d 101, 111 (2d Cir. 2018), *cert. denied*; *Farrell v. Burke*, 449 F.3d 470, 495 n.12 (2d Cir. 2006)), *cert. pending*. Though the *Johnson* Court did not analyze whether an as-applied challenge would have succeeded, and instead proceeded directly to the facial challenge, it is not clear whether and to what extent *Johnson* abrogated the old rule that a criminal statute must be unconstitutionally vague as applied to a particular defendant in order to confer standing on that defendant to raise a facial challenge.

[25] The PC Court also relied on *United States v. Bramer*, 832 F.3d 908 (8th Cir. 2016), which, though not binding on Indiana courts, held that "our case law

still requires him to show that the statute is vague as applied to his particular conduct." We note that that rule, however, arose from cases in which the United States Supreme Court held that a facially vague law must be so in every circumstance, the rule abrogated by *Johnson*. If a law need not be unconstitutionally vague in every circumstance, however, a simultaneous requirement that a challenger first establish that the law is vague as applied to him exhibits "logical inconsistencies and gaps. . . ." *United States v. Stupka*, 418 F.Supp.3d 402, 407 (N.D. Iowa 2019).

> If a defendant is able to show that a law is unconstitutionally vague as applied—as required by *Bramer*—there would be no need for that defendant to show, or a court to decide, that the law is unconstitutional on its face. But if a defendant could not show that the law is unconstitutional as applied, then he or she would always be prohibited from challenging a law as being void for vagueness on its face.

Id. In other words, no court would ever entertain or resolve a facial challenge to a criminal statute. Nevertheless, the United States Supreme Court has done so on several occasions, without addressing as-applied challenges on those occasions. We do not need to resolve that issue here.

[26] Finally, we are also conscious of the fact that, in the context of constitutional review, "'every statute stands before us clothed with the presumption of constitutionality unless clearly overcome by a contrary showing,'" *Meredith v. Pence*, 984 N.E.2d 213, 1218 (Ind. 2013) (quoting *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999)), and that all doubts are resolved against a challenger. *See,*

e.g., State v. Rendleman, 603 N.E.2d 1333, 1334 (Ind. 1992) ("The burden is on the party challenging the constitutionality of the statute, and all doubts are resolved against that party.").

[27] In the context of an appeal from a denial of post-conviction relief, we do not definitively determine whether the foregone challenge would have succeeded. Rather, we assess likelihood of success of such a challenge only insofar as it aids us in faithfully applying the specific questions that *Strickland* requires us to answer. The combination of obstacles detailed above leads us to the conclusion that the trial court did not err in assessing the likelihood that Hale could have prevailed on a facial challenge.

[28] As we have detailed *supra*, this case presents difficult and still-undecided questions. We are ever-mindful that "[t]he vagueness doctrine is more subtle and difficult to grasp than it might appear." *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir. 1984). It is possible that, under somewhat different facts, another litigant would prevail on a *Strickland* claim such as this. Given the specifics of Hale's case, however, we are not left "with a definite and firm conviction that a mistake has been made" by the PC Court with respect to *Strickland* prejudice. *Bobadilla*, 117 N.E.3d at 1279. Accordingly, it was not clear error to determine that Hale failed to meet *Strickland*'s prejudice prong. Because we dispose of Hale's claim on the prejudice prong, we need not address whether Attorney Campbell's performance fell short of the objective standards of reasonableness.

II. Ineffective Assistance of Appellate Counsel (IAAC)

[29] We next address Hale's IAAC claim. Once more, however, we find that Hale was not prejudiced by Attorney Nix's decision to forgo a facial challenge to the sentencing enhancement provision. The significant obstacles impeding such a challenge at the trial level would have no less force at the appellate level. Moreover, "[t]he constitutionality of statutes is reviewed *de novo.* Such review is highly restrained and very deferential, beginning with [a] presumption of constitutional validity, and therefore the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional." *Pittman v. State*, 45 N.E.3d 805, 816 (Ind. Ct. App. 2015) (internal quotations and citations omitted). Furthermore, if the facial challenge was indeed waived for purposes of appeal—given that it was not raised in the trial court—to prevail on a waived challenge, Hale would likely have had to prove fundamental error, a more difficult standard for Hale to meet. *See, e.g., Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014) ("Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to "'make a fair trial impossible.'") (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)). Thus, a facial challenge raised on appeal would have shed none of the previous impediments.

[30] Again, we are not left "with a definite and firm conviction that a mistake has been made" by the PC Court with respect to *Strickland* prejudice. *Bobadilla*, 117 N.E.3d at 1279. Accordingly, it was not clear error to determine that Hale

failed to meet *Strickland*'s prejudice prong with respect to his IAAC claim. Once again, as we dispose of this claim on the prejudice prong, we do not need to consider the performance prong.

Conclusion

[31] The PC court did not clearly err in denying Hale's petition for post-conviction relief. Accordingly, we affirm.

[32] Affirmed.

Pyle, J., concurs.

Najam, J., concurs with opinion.

IN THE
COURT OF APPEALS OF INDIANA

Thomas L. Hale,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

Court of Appeals Case No.
20A-PC-1887

Najam, Judge, concurring.

[33] I concur in the majority's analysis that Hale fails to undermine our confidence in the outcome of his conviction. I write separately to emphasize that Hale's reliance on *Johnson v. United States*, 576 U.S. 591 (2015), is misplaced. The premise of Hale's argument is that *Johnson* gave him standing to raise a facial challenge to the sentencing enhancement provision. But that premise is not plausible, to say nothing of not having "a probability sufficient to undermine our confidence in the outcome." *Wilson v. State*, 157 N.E.3d 1163, 1177 (Ind. 2020). *Johnson* is a limited opinion that expressly did *not* open the door to facial challenges to penal statutes that are merely imprecise.

[34] In *Johnson*, the Supreme Court of the United States, for the fifth time in eight years, considered whether the "residual clause" of the federal Armed Career Criminal Act of 1994 was void for vagueness. The Act used the residual clause within its definition of "violent felony" as follows:

> any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

Id. at 594 (quoting 18 U.S.C. § 924(e)(2)(B)).

[35] The Court held that the residual clause was facially void for vagueness due to uncertainty both in "*how to estimate the risk* posed by a crime" and in how to determine "*how much risk it takes* for a crime to qualify as a violent felony." *Id.* at 597-98 (emphases added). The Court also emphasized that arbitrariness in trying to apply the residual clause was "pervasive" in the judiciary. *Id.* at 601. As the Court stated, "[t]he most telling feature of the lower courts' decisions is . . . *pervasive disagreement about the nature of the inquiry one is supposed to conduct*" in determining how to even apply the residual clause. *Id.* (emphasis added).

[36] Significantly, the Government in *Johnson* argued that striking the residual clause would open the door to having any number of imprecise penal statutes

challenged for vagueness, such as statutes using "terms like 'substantial risk[.]'" *Id.* at 603. The Court responded, "Not at all," adding:

> The phrase "shades of red," standing alone, does not generate confusion or unpredictability; but the phrase "fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red" assuredly does so. . . . *As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree*" . . . .

Id. at 603-04 (emphasis added; cleaned up). In other words, the Court made it a point to say that its holding did not extend to statutes that are merely imprecise.

[37] The Court in *Johnson* decided the facial challenge without determining if the defendant had standing to raise an as-applied challenge. Thus, if Hale's circumstances were even plausibly analogous to those in *Johnson*, his trial or appellate counsel may have been able to raise a facial challenge to the sentencing enhancement provision.

[38] But Hale's circumstances are nothing like those in *Johnson*. To invoke *Johnson*, Hale would have had to show that the word "regular" was more like the language of the residual clause at issue in *Johnson* than the merely imprecise, qualitative standards such as "substantial risk," which the Court in *Johnson* expressly said were not put at risk by its holding. *See id.* Hale does not assert that the word "regular" presents a level of confusion anywhere close to the two-tiered uncertainty of the residual clause. *See* Ind. Appellate Rule 46(A)(8)(a).

Nor could he; at the time of his trial and appeal, our case law was clear that "principles of statutory interpretation instruct . . . to read a reasonableness standard" into imprecise statutory language that might otherwise "lead to absurd results and exceedingly broad discretion in enforcement." *Morgan v. State*, 22 N.E.3d 570, 576 (Ind. 2014).

[39] Neither does Hale demonstrate that, at the time of his trial and appeal, there was "pervasive disagreement about the nature of the inquiry one is supposed to conduct" in applying the sentencing enhancement provision. *See Johnson*, 576 U.S. at 601. Whatever else it might be, a single disagreement between the Seventh Circuit and the Indiana Supreme Court is not "pervasive." Moreover, that disagreement was not in relation to "the inquiry one is supposed to conduct" to determine the statute's meaning. Rather, the Indiana Supreme Court's opinion addressed whether a "church" was a building where one might expect youth services to be offered, while the Seventh Circuit's opinion focused instead on the word "regular" as applied to that defendant's specific facts. *See Whatley v. Zatecky*, 833 F.3d 762, 767-68, 778 (7th Cir. 2016).

[40] Accordingly, had Hale's trial or appellate counsel raised a facial challenge to the sentencing enhancement provision under the premise that *Johnson* gave Hale standing to do so, we likely would have held that *Johnson* did not apply to Hale's challenge and, as such, that Hale needed to show that he had a valid as-applied challenge to argue that the statute was unconstitutionally vague. Hale concedes that he does not have a valid as-applied challenge. Accordingly, in addition to the majority's analysis, I conclude that Hale's argument that *Johnson*

gave him standing to raise a facial challenge is not plausible. Thus, I concur with the majority opinion to vote to affirm the post-conviction court's judgment.