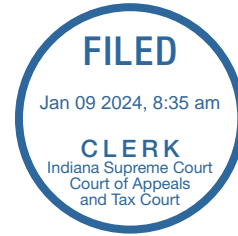


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

David Wayne Smith,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

January 9, 2024

Court of Appeals Case No.
23A-PC-317

Appeal from the
Jasper Circuit Court

The Honorable
John D. Potter, Judge

Trial Court Cause No.
37C01-1208-PC-816

Memorandum Decision by Judge Foley
Chief Judge Altice and Judge May concur.

Foley, Judge.

[1] David Wayne Smith (“Smith”) appeals the denial of his successive petition for post-conviction relief (“PCR”). On appeal, he raises the following restated issues for our review:

- I. Whether the successive PCR court erred when it denied his petition because it found that his counsel on his first PCR was not ineffective; and
- II. Whether Smith’s sentence is inappropriate.

[2] We affirm.

Facts and Procedural History

[3] In February 1977, when Smith was seventeen years old, he and three men, Daniel Stonebraker (“Stonebraker”), Michael Wright (“Wright”), and Roger Drollinger (“Drollinger”), shot five residents of a home in Hollandsburg, Indiana, killing four of them. The four killed were brothers—Gregory Brooks, twenty-two years old; Raymond Spencer, seventeen years old; Reeve Spencer, sixteen years old; and Ralph Spencer, fourteen years old. Smith personally killed at least one of the victims. The general facts underlying the four murders as found by our Supreme Court in an earlier appeal are as follows:

In the afternoon and evening of February 13, 1977, within approximately six to twelve hours before the murders, Drollinger and his companions were “riding around” in Drollinger’s truck. Drollinger stated that he wanted to stop somewhere “to kill some people” for no purpose, “just for enjoyment.” The three shotguns used in the slayings and the .38 caliber revolver were in the truck at that time. Drollinger was driving the truck, and at

one point stopped the truck and shot a dog, to show “how easy it was to kill a person.”

Later that night, Drollinger met with his attorney in a Crawfordsville motel to discuss Drollinger’s ongoing trial in Montgomery County on drug-related charges. After this meeting, Drollinger, Stonebraker, Wright and Smith transferred the weapons into a car which one of them had rented during the previous week. The four men then began to drive around in the country again, looking for a place in which to commit robbery and murder. After they had driven for approximately one hour, Drollinger picked out the Spencer mobile home. The Spencer home apparently was chosen only because there were several late model automobiles in the driveway, leading Drollinger to conclude the occupants might have a great deal of money.

Drollinger then drove the car onto a side road, and the group began to ready themselves for entry into the mobile home. Drollinger passed out a pair of gloves to each of the others. He had earlier fully loaded and checked each of the shotguns. On the Saturday before the killings, Drollinger sawed the barrel off each of the shotguns. Stonebraker testified that Drollinger began to talk about killing the occupants of the trailer and how to search the premises and subdue the people inside. Drollinger suggested that the four men make a pact that each would participate in shooting the occupants or be shot by the other participants. Stonebraker stated that he began to tie a handkerchief around his face when Drollinger told him that was not necessary, because no one would be left alive to identify them.

Once inside the mobile home, the four men forced Betty Spencer and her four sons to lie face down[,] side by side on the living room floor. Drollinger and Wright then searched the home for money and guns, while Stonebraker and Smith guarded the victims. Drollinger then determined from the victims which of

their cars contained the most gasoline. Drollinger obtained the keys, went outside and started that car and the car in which they had arrived. He situated the two vehicles at the end of the driveway, facing the road. Drollinger then proceeded to puncture the tires of the remaining vehicles.

Drollinger went back inside the mobile home, where the others were waiting for his direction. Stonebraker, Wright[,] and Smith were each holding one of the shotguns, and Drollinger was carrying the .38 caliber pistol. After receiving Drollinger's signal, Stonebraker, Wright[,] and Smith began shooting each of the victims in the head or upper body at close range. At some point, one of the victims raised his head up and screamed, "Don't shoot me anymore!" Upon hearing this, Drollinger took Smith's shotgun, grabbed the victim by the hair, held the gun so that the barrel was approximately six inches from the victim, and shot him again in the back of the head. Drollinger then kicked each of the victims to determine if any were still alive. Concluding that Betty Spencer was alive, Drollinger ordered Stonebraker to shoot her again. Stonebraker fired, but the blast struck only a glancing blow and knocked off Mrs. Spencer's wig. The four gunmen then left the scene, two in their car, and two in the car belonging to the victims.

Drollinger v. State, 408 N.E.2d 1228, 1242–43 (1980); *Smith v. State*, 420 N.E.2d 1225, 1227 (referencing the *Drollinger* opinion for the circumstances of the murders because Smith did not raise a sufficiency issue on direct appeal).

[4] The State charged Smith with four counts of first-degree murder. At a jury trial held in October 1977, Smith was identified as one of the shooters by Betty Spencer, the lone surviving victim and the mother and stepmother of the four other victims. Smith was also identified by two of his co-defendants, Wright

and Stonebraker. Smith raised an insanity defense at trial, but the jury found him guilty as charged. Based on the law at the time of the crimes, the trial court was required to impose a sentence of life in prison for each first-degree murder conviction. The trial court, therefore, sentenced Smith to four concurrent life sentences. Additionally, under the law at that time, a person who had multiple life sentences imposed was not eligible for parole. Smith was thus effectively sentenced to life without the possibility of parole.

[5] In May 1981, on direct appeal, Smith raised five issues, none of which related to sentencing, and our Supreme Court affirmed his four murder convictions. *Smith*, 420 N.E.2d 1225–31. On August 9, 2012, Smith filed a pro se petition for PCR based on *Miller v. Alabama*, 567 U.S. 460 (2012), where the United States Supreme Court held that a mandatory sentence of life without parole was unconstitutional for juvenile offenders, running afoul of the Eighth Amendment to the United States Constitution. Subsequently, the State Public Defender’s Office concluded that Smith’s petition had merit, and Deputy Public Defender Jeff Merryman (“Merryman”) appeared on behalf of Smith. Merryman amended the PCR petition, adding that *Miller* should apply retroactively to Smith.

[6] At the hearing on Smith’s PCR petition, held on October 15, 2014, argument focused on whether *Miller* applied retroactively to Smith, and evidence was presented to show Smith’s age at the time of the crimes and his ineligibility for parole because of the statutes in place at the time he committed his crimes. On July 9, 2015, the PCR court issued findings of fact and conclusions of law

denying Smith's petition for relief, ultimately determining that *Miller* was not retroactive to him.

[7] Merryman timely appealed from that order and, within a few weeks, moved for and received a one-year extension of time to file his Appellant's Brief while the United States Supreme Court decided *Montgomery v. Louisiana*, 577 U.S. 190 (2016). In *Montgomery*, the United States Supreme Court held that *Miller* applied retroactively on collateral review to cases that were already final when *Miller* was decided. *Id.* at 212. On February 22, 2016, Merryman, assisted by Deputy Public Defender Gregory Lewis, filed an Appellant's Brief, arguing that under *Montgomery* and *Miller*, Smith was entitled to relief in the form of a new sentencing hearing. In his brief, counsel acknowledged that *Montgomery* allowed "the States to fashion their individual remedy to a *Miller* violation," which could be "making the offender eligible for parole," but argued that "a new sentencing hearing" was the "appropriate remedy." Appellant's App. Vol. II p. 121. On March 23, 2016, the Indiana Parole Board sent Smith a letter, notifying him that he was now eligible for parole based on the decision in *Montgomery* and that a parole hearing was scheduled for August 8, 2016. Thus, Smith's sentence became a sentence of life with the possibility of parole.

[8] Because Smith was now eligible for parole, on April 11, 2016, the State filed a motion to dismiss Smith's appeal as moot. Merryman visited Smith in prison the next day to discuss the motion. Merryman also discussed the State's motion with other attorneys in the Public Defender's Office, including State Public Defender Stephen Owens ("Owens"), and after those discussions,

Merryman determined that the State was correct that Smith's sentence was no longer unconstitutional under *Miller* because the Supreme Court in *Montgomery* had stated that providing the possibility of parole was an appropriate remedy where a juvenile offender had previously been sentenced to mandatory life without parole. Because the State had made the opportunity for parole available to Smith, Merryman believed the appeal was moot, so he decided not to oppose the State's motion to dismiss. Merryman drafted a memo to Owens, and Owens approved the decision. Merryman visited Smith again and talked with him about how to prepare for his parole hearing. Because the issue on appeal was moot, rather than an issue the State Public Defender's Office believed to be meritless, Merryman did not withdraw from representing Smith. Merryman did not remember if he told Smith that Smith could represent himself in opposing the motion to dismiss or on transfer from the dismissal order, but Merryman did not think he did so because he thought further litigation on the amended PCR petition would be "an exercise in futility." Tr. Vol. 2 p. 22. In May 2016, this court granted the State's unopposed motion to dismiss the appeal due to mootness.

[9] Five years later, on July 9, 2021, Smith filed a pro se petition for permission to file a successive PCR petition on the bases that (1) Merryman "ineffectively" agreed with the State "to make him eligible for parole as a juvenile sentenced to life without parole even though the issue was whether he was entitled to be re-sentenced" and (2) the Jasper Circuit Court did not have jurisdiction over Smith's prior PCR petition because the Indiana Supreme Court had exclusive

jurisdiction. Appellant’s App. Vol. II pp. 26–34. In his successive PCR petition, Smith sought to have his original PCR petition reinstated for litigation because, he alleged, “extending parole consideration” did not remedy the Eighth Amendment violation. *Id.* at 31. On August 13, 2021, this court authorized Smith to file his successive PCR petition.

[10] Counsel was appointed to represent Smith, and counsel filed an amended successive petition for PCR, asserting that Smith received ineffective assistance from his prior PCR counsel in the litigation of Smith’s initial PCR petition. Specifically, the successive petition alleged that Smith was denied counsel at a critical stage in the proceedings when PCR counsel declined to respond to the State’s motion to dismiss the appeal. On August 10, 2022, after conferencing with the attorneys, the successive PCR court defined the issue on successive PCR as the “ineffective assistance of PCR counsel” related to whether prior PCR counsel provided ineffective assistance in litigating the first PCR “during pretrial, trial, or on appeal.” *Id.* at 162–63. The successive PCR court specifically found that it was “premature to raise issues and present evidence on the underlying issues in the first PCR attacking the original convictions and sentencing order from 1979.” *Id.* at 164.

[11] Prior to the hearing on Smith’s successive PCR petition, Smith filed an offer of proof of his social history report “in anticipation of raising an Indiana Appellate Rule 7(B) argument” if the successive PCR court denied his petition. *Id.* at 175–77. On September 28, 2022, the successive PCR court held an evidentiary hearing, during which Merryman and Smith testified. Smith testified that he

did not want his original PCR appeal dismissed and that he wanted a resentencing hearing rather than merely the possibility of parole. At no time in either his original PCR petition or in his successive PCR petition did Smith raise a claim that his sentence was inappropriate under Indiana Appellate Rule 7(B) or that it violated Article 1, Section 16 of the Indiana Constitution.

[12] On January 17, 2023, the successive PCR court issued findings of fact and conclusions of law denying Smith’s successive PCR petition. In its order, the successive PCR court found that Smith’s initial PCR counsel was correct to conclude that, because Smith became eligible for parole during the pendency of his first PCR appeal, Smith no longer had a viable claim for relief premised on *Miller*. The successive PCR court also found that, under *Montgomery*, the remedy for a *Miller* violation “would be ‘permitting juvenile homicide offenders to be considered for parole, rather than resentencing them,’” *id.* at 208–09 (quoting *Montgomery*, 577 U.S. at 212), which was the remedy implemented by the State immediately. The successive PCR court stated, “Smith got that relief—he was made eligible for parole and still is eligible for parole.”¹ *Id.* at 209. The court noted that what Smith essentially wanted was to be resentenced in the way sentencing hearings are conducted in the present and to present new evidence on juvenile brain development that did not exist at the time he was

¹ The record reflects that Smith received a parole hearing in 2016, at which Smith appeared and presented a statement and documents. The parole board denied parole at that time. Smith also received a parole hearing in 2021, at which he declined to appear, and which was subsequently denied.

originally sentenced. After acknowledging Smith’s position, the PCR court discussed the practical challenges of Smith’s preferred remedy, stating::

The complexity of resentencing someone 45 years after the crime where witnesses have died including family members of the victims, investigators, police officer[s] would be nigh impossible which is why this Court believes the United States Supreme Court said that simply making a juvenile sentenced to mandatory life in prison eligible for parole would be a proper remedy.

Id. at 209–10 (citing *Montgomery*, 577 U.S. at 212). The successive PCR court then concluded that Smith’s PCR counsel was not ineffective in either the PCR trial or on appeal and denied Smith’s successive petition. Smith now appeals.

Discussion and Decision

I. Denial of Petition

[13] Smith argues that the successive PCR court erred in denying his petition. Because Smith appeals from the denial of his petition, he is appealing from a negative judgment. *Bautista v. State*, 163 N.E.3d 892, 896 (Ind. Ct. App. 2021). Thus, he 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, Smith must convince this court that there is no way within the law that the court below could have reached the decision it did. *Id.*

[14] “Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence.” *Id.* (quoting

Gibson v. State, 133 N.E.3d 673, 681 (Ind. 2019), *cert. denied*). Generally, a person convicted of a crime in an Indiana state court can seek collateral review of that conviction and sentence in a post-conviction proceeding only once. *See Baird v. State*, 831 N.E.2d 109, 114 (Ind. 2005), *cert. denied*); Ind. Post-Conviction Rule 1. To proceed with each “successive” post-conviction claim, petitioners need court permission, which will be granted if they establish a “reasonable possibility” of entitlement to post-conviction relief. P-C.R. 1(12)(a), (b).

[15] In his petition for successive PCR, Smith raised the issue that he received ineffective assistance of counsel in connection with litigation on his first PCR. There is no constitutional right to counsel in PCR proceedings under either the federal or the state constitution. *Graves v. State*, 823 N.E.2d 1193, 1196 (Ind. 2005). Accordingly, courts have “explicitly declined to apply the well-known standard for trial and appellate counsel.” *Id.* Instead of using the constitutional standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), courts judge post-conviction counsel by a “lesser standard responsive more to the due course of law or due process of law principles which are at the heart of the civil post-conviction remedy.” *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989). That is, when evaluating PCR counsel, we look to whether “counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court.” *Graves*, 823 N.E.2d at 1196. Relief is thus available only “in the ‘extraordinary circumstances’” that the lawyer “abandoned the

case and prevented the client from being heard.” *Id.* (quoting *Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004)).

[16] Here, Merryman, as Smith’s PCR counsel, filed a petition seeking PCR, appeared at the PCR hearing, presented evidence at the hearing of Smith’s age and ineligibility for parole, and argued that *Miller* should be applied retroactively to Smith. After the PCR court denied Smith’s petition, Merryman timely filed an appeal of the denial, and in anticipation of the United States Supreme Court’s decision in *Montgomery*, requested and received a stay of the appeal pending the decision. When *Montgomery* was handed down, Merryman filed an appellate brief arguing that, under *Montgomery*, Smith was entitled to relief because his mandatory sentence of life without parole was unconstitutional. While Merryman argued for resentencing as a remedy, he acknowledged in briefing that *Montgomery* held that applying *Miller* retroactively did not require re-litigation of sentences in every case and that a state can remedy a violation by permitting a juvenile offender consideration of parole. Thereafter, the Parole Board notified Smith that he was eligible for parole and of the date of his parole hearing, thus effectively modifying Smith’s sentence to life with the possibility of parole. After the State filed a motion to dismiss Smith’s appeal as moot, Merryman visited Smith in prison the next day to discuss the motion and also discussed the State’s motion with other attorneys in the Public Defender’s Office. Merryman then determined that the State was correct that Smith’s sentence was no longer unconstitutional under *Miller* since the State had made the opportunity for parole available for Smith. Because

Merryman believed the appeal was moot, he decided not to oppose the State's motion to dismiss. Merryman drafted a memo to Owens regarding this decision, who approved the decision. In May 2016, this court granted the State's motion to dismiss the appeal due to mootness. The evidence adduced at the successive PCR hearing indicated that PCR counsel represented Smith throughout the proceedings and did not abandon him. The evidence ultimately indicated that Smith received representation in a procedurally fair setting, which is all that he was entitled to under *Baum*. See *Graves*, 823 N.E.2d at 1197 (applying the less-stringent standard for counsel set forth in *Baum* and determining that, even though PCR counsel failed to perfect an appeal, the petitioner was not deprived of the effective assistance of counsel). Furthermore, although Smith challenges three particular factual findings in the successive PCR court's order regarding Merryman's visitation and consultation with him while the appeal of his initial PCR denial was pending, he does not explain how these challenged findings resulted in a procedurally unfair setting for litigation of his PCR petition.

[17] Smith argues that he was abandoned by Merryman because his PCR appeal was not moot. He contends that even though *Montgomery* held that a state may remedy a *Miller* violation by allowing a juvenile homicide offender consideration for parole rather than resentencing the juvenile, this was not the only way to remedy the violation. However, as we previously stated, under the holding of *Miller*, Smith's mandatory life sentence without the possibility of parole was unconstitutional, and after it was held in *Montgomery* that *Miller* was

to be applied retroactively, the Parole Board granted immediate eligibility for parole, which meant that Smith's sentence was no longer a life sentence without the possibility of parole. Allowing a juvenile offender such as Smith the consideration of parole was expressly identified in *Montgomery* as a proper remedy for a *Miller* violation. *Montgomery*, 577 U.S. at 212. Smith's sentence was thus no longer unconstitutional, and he had received the remedy approved of by the United States Supreme Court. Therefore, because Smith's initial PCR was premised on remedying the constitutional violation identified in *Miller*, Smith's PCR appeal became moot after his sentence was modified to life with the possibility of parole since his sentence was no longer unconstitutional, and there was no longer any *Miller* constitutional error for this court to remedy. A case is deemed moot when no effective relief can be rendered to the parties before the court, and the case will be dismissed when the controversy at issue has been somehow disposed of so as to render it unnecessary to decide the question involved. *T.W. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 121 N.E.3d 1039, 1042 (Ind. 2019). We conclude, as the successive PCR court did, that Merryman was correct in his determination that Smith's PCR appeal was moot.²

² In arguing that his PCR appeal was not moot, Smith relies on *Jones v. Mississippi*, 141 S. Ct. 1307, 1323 (2021) and asserts that case stands for the proposition that he could have received a different remedy for his *Miller* violation because states have many options as to what to choose as a remedy. However, the issue in *Jones* was whether a sentencing court must make a separate factual finding of permanent incorrigibility before imposing a life without parole sentence on a person under the age of eighteen who commits homicide, and the Supreme Court decided that the sentencing court did not. *Id.* at 1318–19. Although the holding in *Jones*

[18] Here, the evidence presented at the successive PCR hearing does not lead “unerringly and unmistakably to a conclusion opposite” that of the successive PCR court. *Bautista v. State*, 163 N.E.3d at 896. We, therefore, conclude that the successive PCR court did not err when it denied Smith’s petition.

II. Inappropriateness of Smith’s Sentence

[19] Smith next argues that this court should determine that his sentence is inappropriate under our independent review authorized under Article 7, section 6 of the Indiana Constitution and implemented pursuant to Indiana Appellate Rule 7(B). However, Smith’s contention is procedurally defaulted for two reasons. Smith has never raised an Appellate Rule 7(B) challenge or any state constitutional challenge, to whether his sentence is inappropriate in any PCR proceeding. His initial PCR petition raised an Eighth Amendment claim under *Miller* arguing that his mandatory life without parole sentence was unconstitutional, and his successive PCR proceeding raised a claim that his initial PCR counsel was ineffective because he abandoned Smith on appeal when he decided not to pursue the initial PCR appeal once the issue became moot. In neither of these proceedings did Smith raise an Appellate Rule 7(B) challenge to his sentence. “All grounds for relief available to a petitioner . . . must be raised in his original petition.” P-C.R. 1(8). Issues not raised in the

does not preclude the states from imposing additional sentencing limits in cases involving defendants under eighteen who are convicted of murder, it does not state that the remedy for a *Miller* violation must be resentencing and further states that the Unites States Constitution, as interpreted by the Court’s precedents, does not demand any of the particular policy approaches listed by the Supreme Court as different remedies. *Id.* at 1323. We, therefore, do not find *Jones* persuasive here.

petition for PCR may not be raised for the first time on PCR appeal. *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001), *cert. denied*. Neither Smith’s original successive petition nor the subsequent amendment by counsel raised an Appellate Rule 7(B) issue. Because he is raising the issue for the first time on PCR appeal, he has waived such claim, and it is unavailable. *See Coleman v. State*, 196 N.E.3d 731, 738 n.3 (Ind. Ct. App. 2022), *trans. denied*.

[20] Further, to proceed with a “successive” PCR claim, a petitioner needs court permission, which will be granted if they establish a “reasonable possibility” of entitlement to post-conviction relief. P-C.R. 1(12)(a), (b). Here, Smith did not raise the issue of whether his sentence is inappropriate in his petition for successive PCR or attempt to make a showing in his petition to this court of a reasonable possibility of entitlement to post-conviction relief on this issue, and we did not grant Smith permission to file a successive PCR petition with regard to this claim. By permitting successive post-conviction petitions only when the petitioner makes some showing of merit, this appellate screening function reduces the burden on trial courts. *Shaw v. State*, 130 N.E.3d 91, 92 (Ind. 2019). Smith’s attempt to circumvent our appellate screening by simply attempting to raise new claims is not well taken and will not be permitted. His contention for the first time on appeal is tantamount to pursuing an unauthorized successive petition for PCR. We, therefore, decline to reach his contention that his sentence is inappropriate.

Conclusion

- [21] We conclude that the successive PCR court did not err in denying Smith's successive PCR petition because he did not receive ineffective assistance of his PCR counsel. We also find that Smith has waived any claim that his sentence is inappropriate because he is raising the issue for the first time on PCR appeal.
- [22] Affirmed.

Altice, C.J., and May, J., concur.