Attorneys for Appellant	Attorneys for Appellee
Stephen T. Owens Public Defender of Indiana	Curtis T. Hill, Jr. Attorney General of Indiana
Joanna L. Green Deputy Public Defender Indianapolis, Indiana	Jodi Kathryn Stein Ellen Hope Meilaender Deputy Attorney General Indianapolis, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Larry W. Newton, Jr., *Appellant-Defendant*, v. State of Indiana, *Appellee-Plaintiff*	September 6, 2017 Court of Appeals Case No. 18A05-1612-PC-2817 Appeal from the Delaware Circuit Court The Honorable Linda Ralu Wolf, Judge Trial Court Cause No. 18D01-9410-CF-46

May, Judge.

In 1994, seventeen-year-old Larry W. Newton, Jr. ("Newton") murdered nineteen-year-old Christopher Coyle ("Coyle"). Newton pled guilty to the murder and, per the terms of a plea agreement, the trial court sentenced Newton to life without the possibility of parole ("LWOP"). Newton now appeals the denial of his successive petition for post-conviction relief. Newton

raises several arguments on appeal, which we consolidate and restate as:

(1) Whether Newton's sentence of LWOP violates the Eighth Amendment's prohibition against cruel and unusual punishment; and

(2) Whether Newton waived his right to challenge his sentence under the Eighth Amendment when he entered into a plea bargain agreeing to serve LWOP.

We affirm.[1]

Facts and Procedural History

On September 23, 1994, Newton and a fellow member of the "Fly Gang," (Plea Hr'g Tr. at 78),[2] Duane Turner ("Duane"), attended a party on the Ball State University campus. Duane was kicked out of the party. The following night, Newton, Duane, and other members of the gang were gathered in a graveyard

---

[1] We held oral argument on this case on July 10, 2017, in the Court of Appeals Courtroom. We thank counsel for their oral advocacy.

[2] This appeal concerns Newton's second, or successive, petition for post-conviction relief. We refer to the transcript from the Change of Plea Hearing held October 16, 1995, as "Plea Hr'g Tr." We refer to the transcript from the December 29, 1995, Sentencing Hearing as "Sent. Tr." We refer to the transcript from the July 7, 2016, hearing on Newton's successive petition for post-conviction relief as "Tr." We refer to all appendices from Newton's former post-conviction relief appeal, Appellate Case No. 18S00-0804-CR-00151, as "CR-151 App." Finally, we refer to all appendices from Newton's current successive post-conviction appeal, Appellate Case No. 18A05-1612-PC-2817, as "PC-2817 App."

discussing the previous night's events. Newton decided he "felt like killing somebody" in retaliation for Duane being kicked out of the party, (*id.* at 80), and said he was "hyped and wanted to get revenge." (*Id.*) Newton borrowed a handgun from another gang member, Scott Turner ("Scott"). Duane agreed to participate in Newton's idea, and their friend Chad Wright ("Wright") agreed to drive them.

In the early morning hours of Sunday, September 25, 1994, Wright drove Newton and Duane to Ball State's campus. Newton and Duane spotted Coyle, a Ball State student whom they did not know, walking alone near the university's campus. Newton and Duane ran up to Coyle and forced Coyle into Wright's car. Once Coyle was in the car, Newton and Duane attempted to rob him, but he had no money. They took Coyle to an alley where Newton shot Coyle in the back of the head, killing him.[3] Police found Coyle's body at approximately 2:46 A.M. on Sunday, September 25, 1994, in the alley where he was shot.

After the murder, Newton and the others retreated to a friend's house where Scott was staying. Newton was "smiling" and told Scott he "shot someone." (*Id.* at

---

[3] After Newton shot Coyle in the back of the head, Duane also shot Coyle in the head. Duane was charged and proceeded to a jury trial on the same charges filed against Newton. Duane was convicted of murder, Class B felony criminal confinement, and Class A felony attempted robbery resulting in serious bodily injury, and the trial court sentenced Duane to LWOP for murder. Our Indiana Supreme Court affirmed Duane's convictions. *Turner v. State*, 682 N.E.2d 491 (Ind. 1997).

82.) Newton returned the gun to Scott and requested he destroy it. Scott attempted to destroy the gun by throwing the grips out of a car window, throwing some parts of the gun into the White River, and putting the remainder of the gun in the Prairie Creek Reservoir. A few days later, Newton confessed to the murder.

On October 19, 1994, the State charged Newton under Cause Number 18D01-9410-CF-46 with murder, a felony,[4] Class B felony criminal confinement,[5] Class A felony conspiracy to commit robbery resulting in serious bodily injury,[6] and Class A felony attempted robbery resulting in seriously bodily injury.[7] The State requested the court impose the death penalty based on the facts Newton intentionally killed Coyle: (1) "while committing or attempting to commit robbery against [Coyle]," and (2) "while committing or attempting to commit criminal gang activity by intentionally actively participating in a criminal gang." (CR-151 App. Vol. 1 at 46.)

Initially, Newton pled not guilty. In November 1994, Newton filed a petition alleging he was "mentally retarded" as defined by Indiana Code section 35-36-9-2 (1994) and requested the court dismiss the death penalty against him. Additionally, Newton filed notice of his intent to use the defense of mental disease or defect under Indiana Code section 35-41-3-6 (1984).

[4] Ind. Code § 35-42-1-1(1) (1993).

[5] Ind. Code § 35-42-3-3(1) (1989).

[6] Ind. Code §§ 35-42-5-1(1) (1984); 35-41-5-2 (1977).

[7] Ind. Code §§ 35-42-5-1(1) (1984); 35-41-5-1 (1977).

Three court-appointed mental health experts and a neuropsychologist examined Newton. Based on their reports, in September 1995, the court determined Newton was "not a mentally retarded individual" under the statute, (CR-151 App. Vol. 4 at 773-76), and denied Newton's request to dismiss the death penalty allegation.

In October 1995, Newton's counsel negotiated a plea agreement with the State. The terms of the plea agreement provided Newton would plead guilty to murder and serve a sentence of LWOP therefor, in exchange for the State's dismissal of its request Newton receive the death penalty. The agreement further provided Newton's sentences for confinement, conspiracy to commit robbery, and attempted robbery would be determined by the trial court.

On October 16, 1995, the court held a hearing on Newton's change of plea. The court questioned Newton thoroughly to ensure his understanding of the plea agreement, noted it would order a presentence investigation report, and "only after receiving and reviewing that report" would the court "decide whether or not to accept the plea agreement." (Plea Hr'g Tr. at 40.)

On December 29, 1995, the court held a sentencing hearing. The court heard testimony from Newton's mother Peggy Newton, Scott, and Detective Paul Singleton of the Muncie Police Department. The court also heard statements from members of Coyle's family and Erica Miller, Coyle's girlfriend. The court heard counsels' arguments on mitigating and aggravating

circumstances. The court made findings regarding mitigating and aggravating factors before sentencing Newton. The court accepted the plea agreement and, in accordance with that agreement, sentenced Newton to LWOP for Coyle's murder. The trial court sentenced Newton to forty-five years for Class A felony conspiracy to commit robbery and twenty years for Class B felony criminal confinement.[8] The court ordered those sentences served consecutive to each other and to the LWOP sentence. Newton did not, at that time, file a direct appeal from his sentencing.

In October 2001, Newton filed a petition for post-conviction relief alleging ineffective assistance of counsel and involuntary guilty plea. The post-conviction court held a hearing on July 18, 2002, and denied Newton relief on October 21, 2002. Newton did not appeal that decision.

On April 9, 2007, Newton filed a "Verified Petition for Permission to File a Belated Notice of Appeal," (CR-151 App. Vol. 6 at 1134) ("First Belated Petition"), under Indiana Post-Conviction Rule 2 from the trial court's December 29, 1995, sentencing order. The trial court appointed counsel to represent Newton. On September 6, 2007, the court held a hearing on Newton's First Belated Petition, and on October 5, 2007, the court denied the petition. Newton did not perfect an

---

[8] The court determined the attempted robbery charge "merged" with the conspiracy to commit robbery conviction, and it dismissed the attempted robbery charge. (Sent. Tr. at 127.)

appeal of the denial of that petition within thirty days as required by Indiana Appellate Rule 9(A)(1).

Then, on November 15, 2007, Newton filed a "Request for Permission to File a Belated Appeal," (*id*. at 1182) ("Second Belated Petition"), from the court's October 5 denial of his First Belated Petition, stating "it was through inadvertence and mistake of this Public Defender that a Notice of Appeal was not filed in a timely manner." (*Id*.) The trial court initially granted Newton's Second Belated Petition, and on December 3, 2007, Newton filed that notice of appeal. But then, on December 10, 2007, the trial court *sua sponte* entered an order setting aside its order granting Newton's Second Belated Petition, finding it lacked authority under Post Conviction Rule 2 to grant the Second Belated Petition. Newton proceeded with appeal of the trial court's December 10 denial of his Second Belated Petition from the trial court's October 5 denial of First Belated Petition. Our Indiana Supreme Court affirmed the trial court's order setting aside its grant of Newton's Second Belated Petition. *Newton v. State*, 894 N.E.2d 192 (Ind. 2008).

On June 28, 2013, Newton filed, *pro se*, a petition for permission to file a Successive Verified Petition for Post-Conviction Relief in the Indiana Court of Appeals under Cause Number 18A02-1307-SP-580. (PC-2817 App. Vol. 2 at 32-33.) Newton claimed his LWOP sentence had become unconstitutional under the changed legal landscape regarding sentences of LWOP for juveniles, and thus his sentence should be modified. On July 22, 2013, our Court granted

permission for Newton to file his successive petition for post-conviction relief.

Newton filed his successive petition in the trial court on September 11, 2013. The State filed its answer on September 17, 2013. Indiana Deputy Public Defender Joanna Green entered her appearance on Newton's behalf on September 19, 2013, and she notified the court of her inability to investigate Newton's case at that time due to her caseload. Newton requested the court stay all proceedings until counsel was ready to proceed. The court granted Newton's request to stay the proceedings.

On February 1, 2016, Newton, via counsel, filed an amended successive petition for post-conviction relief. The court held a hearing on Newton's petition on July 7, 2016. At the hearing, Newton's counsel argued Newton "has matured and shown moral growth" while in prison, (Tr. at 4), and offered evidence of Newton's extensive participation in a Shakespeare for Offenders program during his time in prison. On December 7, 2016, the trial court denied Newton's successive request for post-conviction relief.

Discussion and Decision

"The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence." *Humphrey v. State*, 73 N.E.3d 677, 681 (Ind. 2017). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative

judgment." *Id*. To prevail on appeal from the denial of post-conviction relief, the petitioner must show the evidence leads "unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court." *Id.* We do not defer to the post-conviction court's legal conclusions, but "a post-conviction court's 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." *Id.* at 682.

Post-conviction proceedings do not afford defendants the opportunity for a "super-appeal." *Conner v. State*, 711 N.E.2d 1238, 1244 (Ind. 1999), *reh'g denied*, *cert. denied sub nom Conner v. Indiana*, 531 U.S. 829 (2000). "Rather, post-conviction proceedings provide defendants the opportunity to raise issues that were not known at the time of the original trial or that were not available to the defendant on direct appeal." *Id.* They are not a substitute for direct appeals, but "provide a narrow remedy for subsequent collateral challenges to convictions." *Id*. All grounds for relief available to a petitioner must be raised in his original petition. Ind. Post-Conviction R. 1(8). "Claims that could have been, but were not, raised in earlier proceedings and otherwise were not properly preserved are procedurally defaulted; we do not authorize the filing of successive petitions raising forfeited claims." *Matheney v. State*, 834 N.E.2d 658, 662 (Ind. 2005). "Claims that have already been decided adversely are barred from re-litigation in successive post-conviction proceedings by the doctrine of *res judicata*." *Id.*

I. Waiver of Eighth Amendment Claim

We begin with the post-conviction court's finding, and the State's argument, that Newton waived his right to challenge the constitutionality of his LWOP sentence when he voluntarily entered a plea agreement that required he serve a sentence of LWOP. Newton claims he could not have waived a right "that was unknown or unavailable to him at the time he pled guilty."[9] (Appellant's Br. at 17.)

Newton agreed to plead guilty and serve a sentence of LWOP in exchange for the State agreeing to

---

[9] Other courts have addressed the issue of waiver of this particular constitutional claim and have reached varying results. Some held the plea agreement did not waive the constitutional claim. *See, e.g.*, *Moore v. State*, 749 S.E.2d 660, 661 (Ga. 2013) (holding defendant, who avoided death sentence by voluntarily entering into plea agreement in which he consented to imposition of LWOP and waived all rights to post-conviction review, did not "waive or 'bargain away' right to challenge an illegal and void sentence"); *Malvo v. Mathena*, ___ F. Supp. 3d ___, No. 2:13-CV-375, 2017 WL 2462188, at *11 (E.D. Va. May 26, 2017) (concluding, in order to find petitioner, a juvenile offender, knowingly and intelligently waived his right to challenge his LWOP sentence, the court "would have to find Petitioner implicitly or indirectly waived the Eighth Amendment right announced in *Miller*" when he agreed to be sentenced to LWOP, which was "not likely" "given the fact petitioner was sentenced more than eight years before *Miller*"), *appeal docketed*, No. 17-6758 (4th Cir. Jun. 14, 2017). Others held the plea agreement waived the constitutional claim. *See, e.g.*, *Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016) (juvenile defendant who chose to plead guilty and serve life with parole in order to avoid death penalty or LWOP received the "present benefit" under the law as it existed at the time, and *Roper* did not undermine the voluntariness of his plea), *cert. denied*, 137 S. Ct. 2094, 197 L. Ed.2d 897 (2017).

dismiss its request for the death penalty. In challenging the validity of this plea agreement, Newton argues, because subsequent statutory revision and case law rendered the death penalty an illegal sentence for juvenile offenders, he did not receive any benefit from his plea bargain. *Compare* Ind. Code § 35-50-2-3(b)(1) (1995) *with* Ind. Code § 35-50-2-3(b)(1) (2002) (changing the statutorily-required age from sixteen to eighteen for death sentence to be available as punishment); *see also Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005) (rendering death penalty unconstitutional punishment for juveniles). We are unpersuaded by Newton's argument.

In *Stites v. State*, our Indiana Supreme Court held "a defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence." 829 N.E.2d 527, 529 (Ind. 2005), *reh'g denied.* Newton claims the *Stites* rationale does not apply to him because he "did not receive a significant benefit" through his plea bargain by "avoiding . . . a sentence he would have been ineligible for seven years later." (Appellant's Br. at 17.) However, since *Stites*, we have made clear a petitioner receives the benefit of a plea agreement *at the time* the agreement was entered, and cannot later challenge the sentence as illegal, despite later case law that would have rendered the sentence illegal. *See Fowler v. State*, 977 N.E.2d 464, 468 (Ind. Ct. App. 2012), *aff'd on reh'g*, 981 N.E.2d 623 (Ind. Ct. App. 2013), *trans. denied*.

In *Fowler*, the State charged Fowler with felony unlawful possession of a firearm by a serious violent felon along with a host of other charges. *Id*. at 465-66. Fowler entered into a plea agreement wherein he agreed to plead guilty to the unlawful possession of a firearm charge and a habitual offender enhancement, and in exchange, the State dismissed the other charges and Fowler's sentence was capped at thirty-five years. *Id*. at 466. The trial court ultimately sentenced Fowler to thirty years: fifteen for the firearm charge and fifteen for the habitual offender enhancement. *Id*. Subsequently, our Indiana Supreme Court held "a defendant convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a 'serious violent felon.'" *Mills v. State*, 868 N.E.2d 446, 450 (Ind. 2007). Fowler then filed a petition for post-conviction relief asserting his sentence was illegal. That petition was denied.

In our opinion affirming the denial of Fowler's petition for post-conviction relief, we cited *Stites* and held that, even if Fowler's sentence would have been illegal under the *Mills* rule, Fowler forfeited the right to challenge it by entering into his plea agreement. *Id*. at 466-467. In so holding, "we decline[d] Fowler's invitation to measure Fowler's 'benefit' at a time after he entered into the plea agreement," *id.* at 467, because at the time he entered into the agreement, "he faced as many as fifty-six years and he bargained for a maximum of thirty-five." *Id.* In support of our position, we cited the

general principle of contract law that "all applicable law in force *when the agreement is made* impliedly forms a part of the agreement without any statement to that effect." *Id*. at 468 (citing *Ethyl Corp. v. Forcum-Lannom Assocs., Inc.*, 433 N.E.2d 1214, 1220 (Ind. Ct. App. 1982)) (emphasis added). We thus concluded that, because Fowler received a benefit at the time he entered into the plea bargain, he could not later challenge the sentence as illegal. *Id*.

The same principle applies here. At the time Newton entered into the plea agreement, Newton could have been sentenced to death. *See* Ind. Code § 35-50-2-3(b)(1) (1994). Newton received a very significant benefit because the State dismissed its request for the death penalty. Put differently, Newton gained the certainty, *at that time*, of knowing he would not be put to death. Although this plea bargain would have been illusory under the subsequent version of section 35-50-2-3, this fact is of no consequence because Newton received the benefit of his bargain at the time he entered into the plea agreement. *See Fowler*, 977 N.E.2d at 468 ("As Fowler received a benefit at the time he entered into his plea bargain, he may not now challenge the sentence as illegal.").

Nonetheless, we acknowledge "Newton's sentence has never received appellate scrutiny," *see Newton*, 894 N.E.2d at 195 (Rucker, J., dissenting), and "the appellate rules and legal neglect have conspired" against Newton obtaining such review. *Id*. at 193 (Shepard, C.J., concurring). Given the important interest at stake here – the possibility that Newton's sentence of LWOP

violates the Eighth Amendment's prohibition of cruel and unusual punishment – we choose to exercise our appellate discretion and address the merits of the issue. *See In re D.J. v. Indiana Dep't of Child Servs.*, 68 N.E.3d 574, 579 (Ind. 2017) (reviewing courts have discretionary authority over the appellate rules, which "allows us to achieve our preference for deciding cases on their merits rather than dismissing them on procedural grounds") (internal quotations omitted).

II. Constitutionality of Newton's LWOP Sentence

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 567 U.S. 460, 469, 132 S. Ct. 2455, 2463 (2012) (quoting *Roper*, 543 U.S. at 560, 125 S. Ct. at 1190). That right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Id*.

> In order to determine whether a punishment is cruel and unusual, the [United States] Supreme Court "look[s] beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. The applicability of what is

> cruel and unusual punishment changes "as the basic mores of society change."

Conley v. State, 972 N.E.2d 864, 877 (Ind. 2012) (internal citations omitted).

"[C]hildren are constitutionally different from adults for purposes of sentencing," and "these differences result from children's diminished culpability and greater prospects of reform." *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016). Therefore, it is cruel and unusual punishment for an individual under the age of eighteen to be sentenced to LWOP for a non-homicide crime. *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010). In addition, sentencing schemes that impose mandatory LWOP on juveniles are unconstitutional under the Eighth Amendment. *Miller*, 567 U.S. at 487, 132 S. Ct. at 2473; *Conley*, 972 N.E.2d at 877. Finally, under the Eighth Amendment, before sentencing a juvenile to LWOP, the sentencing judge must take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Montgomery*, 136 S. Ct. at 734. The Supreme Court created these special rules for juveniles because a sentence of LWOP is a disproportionate sentence for "all but the rarest of juvenile homicide offenders," those whose crimes reflect "irreparable corruption" rather than the "unfortunate yet transient immaturity of youth." *Id*.

Newton argues his LWOP sentence violates the Eighth Amendment of the United States Constitution under the recent United States Supreme Court

decisions of *Miller* and *Montgomery*. The State argues the holdings of *Miller* and *Montgomery* do not apply to Newton's sentence because Newton agreed to serve a LWOP sentence under the terms of a plea agreement, and thus his sentence does not fall within the meaning of "mandatory" in *Miller* and *Montgomery*. To decide these issues, we begin with a detailed review of those cases.

1) *Miller* and *Montgomery*

In *Miller*, the U.S. Supreme Court held statutory sentencing schemes requiring mandatory life without parole for juvenile homicide offenders violate the Eighth Amendment's prohibition on "cruel and unusual punishments." 567 U.S. at 465, 132 S. Ct. at 2460. There, the Court addressed two cases, one from Alabama and one from Arkansas, each involving a fourteen-year-old convicted of murder and sentenced to a mandatory term of LWOP. *Id*. In the Arkansas case, the petitioner, Jackson, was involved in a video store robbery that resulted in one of his co-conspirators shooting and killing the video store clerk. *Id*. at 465-66, 132 S. Ct. at 2461. In the Alabama case, the petitioner, Miller, along with his friend, beat Miller's neighbor to death and set fire to his trailer after drinking and using drugs. *Id.* at 468, 132 S. Ct. at 2462. Both Miller and Jackson were tried and convicted by juries, and their respective trial courts imposed statutorily mandated sentences of LWOP. Both states' Supreme Courts upheld the LWOP sentences.

The U.S. Supreme Court granted certiorari and declared mandatory LWOP sentencing schemes are unconstitutional under the Eighth Amendment. In so holding, the Court rested its analysis on a line of decisions that included *Roper*, 543 U.S. 551, 125 S. Ct. 1183 (holding it was cruel and unusual punishment to sentence an individual under the age of eighteen to death), and *Graham*, 560 U.S. 48, 130 S. Ct. 2011 (declaring it is cruel and unusual punishment to sentence an individual under the age of eighteen to LWOP for a non-homicide crime).

The Court noted *Roper* and *Graham* collectively established that "children are constitutionally different from adults for purposes of sentencing," 567 U.S. at 471, 132 S. Ct. at 2464, and that "[b]ecause juveniles have diminished culpability and greater prospects for reform, . . . they are less deserving of the most severe punishments." *Id*. The Court then noted its reliance on not only common sense, but "developments in psychology science and brain science," *id*., to support its opinion that three fundamental differences exist between juvenile and adult minds: children's "transient rashness, proclivity for risk, and inability to assess consequences." *Id.* The Court noted these "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id*. at 472, 132 S. Ct. at 2465. "Because the heart of the retribution rationale relates to an offender's blameworthiness," the Court reasoned, "the case for retribution is not as strong with a minor as an adult." *Id*.

The Court then applied these previously-adopted rationales to demonstrate the "flaws of imposing mandatory LWOP sentences on juvenile homicide offenders." *Id*. at 476, 132 S. Ct. at 2467. The Court stated:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 477-78, 132 S. Ct. at 2468 (internal citations omitted).

Applying this reasoning to the two cases before it, the Court noted both Jackson and Miller were only fourteen years old and both had troubled childhoods, which were facts that "[a]t the least, a sentencer

should look at" before imposing a LWOP sentence. *Id*. at 478, 132 S. Ct. at 2469. The Court reasoned: "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 479, 132 S. Ct. at 2479. In remanding both cases, the Court noted, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," and concluded the mandatory sentencing schemes therefore "violate[d] [that] principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Id*. at 489, 132 S. Ct. at 2475.

Last year, in *Montgomery*, the U.S. Supreme Court held the rule announced in *Miller* – that a sentencing scheme mandating LWOP for juvenile homicide offenders violates the Eighth Amendment – is a substantive rule of constitutional law, and thus is retroactive. 136 S. Ct. at 736. In *Montgomery*, the petitioner, Montgomery, was seventeen years old in 1963 when he killed a deputy sheriff. *Id*. at 725. Montgomery was tried and found "guilty without capital punishment" by a jury. *Id*. Under Louisiana law, the verdict required the trial court to impose an LWOP sentence, which it so imposed. *Id*. at 726. After the U.S. Supreme Court issued its *Miller* decision, Montgomery sought review of his mandatory LWOP sentence by filing a motion to correct an illegal sentence. *Id*. The trial court denied Montgomery's motion, finding "*Miller* is not retroactive on collateral review." *Id.*

In its review of the trial court's decision, the U.S. Supreme Court determined *Miller*'s prohibition on mandatory LWOP announced a new substantive rule that must be retroactive under the federal Constitution. *Id*. at 732. The Court noted that, although *Miller*'s holding has a "procedural component," *id.* at 734, "*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole." *Id*.

> [I]t established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity."

Id. (internal citations omitted). The Court thus reasoned, because *Miller* determined that sentencing a child to LWOP is excessive "for all but the rare juvenile offender whose crime reflects irreparable corruption," *id., Miller* established a substantive rule because it established "a *class* of defendants because of their status," *id*. (emphasis added), for whom LWOP sentences were unconstitutional: "juvenile offenders whose crimes reflect the transient immaturity of youth." *Id*. The Court explained, "when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to a protected class." *Id*. at 735. The Court therefore reasoned, "The

hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id*.

Applying this framework to Montgomery's circumstances, the Court noted Montgomery's submission of his "evolution from a troubled, misguided youth to a model member of the prison community." *Id.* The Court concluded "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored." *Id*.

2) Indiana's Application of *Miller* Principles

Our Indiana Supreme Court applied *Miller* when addressing the constitutional implications of LWOP for a seventeen-year-old convicted of murder in *Conley*, 972 N.E.2d at 864.[10] In *Conley*, seventeen-and-a-half-

[10] We also note in 2014, our Indiana Supreme Court discussed *Miller* in the context of inappropriate sentencing under Indiana Appellate Rule 7(B) in two companion cases: *Brown v. State*, 10 N.E.3d 1 (Ind. 2014), and *Fuller v. State*, 9 N.E.3d 653 (Ind. 2014). For reasons set forth below, we will not undertake to analyze Newton's sentence under Indiana Appellate Rule 7(B). *See infra* n.13. However, *Brown* and *Fuller* bear mentioning because, in those cases, our Indiana Supreme Court applied the *Miller* reasoning.

Brown and *Fuller* arose out of an incident in which three teenagers, sixteen-year-old Brown, fifteen-year-old Fuller, and eighteen-year-old Smith murdered Stephen Streeter and his girlfriend, Keya Prince, while robbing the couple in their home. The

year-old Conley brutally murdered his ten-year old brother while babysitting him. *Id*. at 869. Conley pleaded guilty to murder without a plea agreement, and following a sentencing hearing, the trial court sentenced Conley to LWOP.

On direct appeal, the Indiana Supreme Court affirmed Conley's LWOP sentence, holding a sentence of LWOP for a juvenile does not violate the Eighth Amendment's prohibition of cruel and unusual

---

trial court sentenced both Brown and Fuller to two maximum terms of sixty-five years (one for each murder) and to a maximum term of twenty years for Class B felony robbery. The court ordered the sentences served consecutively, resulting in an aggregate 150-year sentence for both Brown and Fuller. *Brown*, 10 N.E.3d at 3; *Fuller*, 9 N.E.3d at 655.

In reducing both of their sentences, our Indiana Supreme Court gave significant weight to Brown's young age of sixteen and Fuller's young age of fifteen. Citing *Miller*'s holding that mandatory LWOP sentences for those under eighteen are unconstitutional, the Court noted *Miller*'s "general recognition that juveniles are less culpable than adults and therefore are less deserving of the most severe punishments." 10 N.E.3d at 7; 9 N.E.3d at 657. The Court then reasoned, "similar to a life without parole sentence, a 150-year sentence forswears altogether the rehabilitative ideal." 10 N.E.3d at 8; 9 N.E.3d at 658. The Court also found a "particularly important" factor in that while Brown was an accomplice, Fuller was "one of the actual shooters." 9 N.E.3d at 658. The Court reduced Brown's murder sentences to sixty years for each murder, to be served concurrent to each other and consecutive with the twenty-year sentence for robbery, resulting in an aggregate sentence of eighty years. 10 N.E.3d at 8. The Court reduced Fuller's sentence to the maximum sixty-five years for each murder, to be served concurrent to each other and consecutive to the twenty-year sentence for robbery, for an aggregate sentence of eighty-five years. 9 N.E.3d at 659.

punishment.[11] *Id*. at 879. In so holding, the Court noted the U.S. Supreme Court's explicit statement in *Roper*, that while sentencing someone under the age of eighteen to death was cruel and unusual punishment, "life without parole was still a viable sentence for juveniles, noting the LWOP sentence was a severe enough sanction to not need the death penalty for juveniles." *Id*. (citing *Roper*, 543 U.S. at 572, 125 S. Ct. at 1183). The Court reasoned, "the implication of *Roper* then, is that a sentence of life without parole for a juvenile convicted of homicide is constitutional." *Id.*

The Court "underscored" its position that the *Miller* decision "deal[t] solely with the issue of mandatory sentencing schemes requiring life-without-parole for juveniles," *id*. at 879, and that, in fact, the U.S. Supreme Court specifically noted "Indiana was one of fifteen states where life without parole was discretionary." *Id*. Thus, the Court reasoned, its holding that an LWOP sentence in Indiana is not unconstitutional "was not altered by *Miller*." *Id.*

3) Constitutionality of Newton's LWOP Sentence under *Miller* and *Montgomery*

Before we can undertake a discussion of whether Newton's LWOP sentence is constitutional under *Miller* and *Montgomery*, we note the parties initially dispute whether *Miller* and *Montgomery* are even

[11] In *Conley*, our Indiana Supreme Court also found Conley's LWOP sentence constitutional under the Indiana Constitution. 972 N.E.2d at 880.

applicable to Newton's particular circumstance. Newton characterizes his LWOP sentence as "mandatory," (Appellant's Br. at 15), and thus argues it is unconstitutional under *Miller* and *Montgomery*. The State argues, and the successive post-conviction court concluded, "the holding in *Miller* does not apply to [Newton's] LWOP sentence" because he "was not sentenced under a mandatory sentencing scheme nor even a discretionary one[.]" (Appellee's Br. at 26.)

Thus, we must first determine whether the scope of *Miller* and *Montgomery* extends to this case. That is, whether the rule established in *Miller* and *Montgomery* – that a sentencer must undergo individualized sentencing, taking into account a juvenile offender's youth and its attendant characteristics before imposing LWOP on a juvenile – extends only to sentences imposed under mandatory sentencing schemes, or whether the rule is applicable anytime a juvenile will potentially serve LWOP, regardless of whether under a mandatory or discretionary sentencing scheme or by way of a plea agreement, so long as the offender had the "opportunity" to present mitigating circumstances.

We briefly note other courts have recently considered the limits of *Miller* and *Montgomery*. Some courts have interpreted the scope of *Miller* and *Montgomery* broadly, holding proportionality requires individualized sentencing anytime a court imposes an LWOP sentence, regardless of whether under a mandatory or discretionary sentencing scheme. *See Commonwealth v. Batts*, ___ A.3d ___, No. 45 MAP 2016, 2017 WL 2735411 at *18 (Pa. June 26, 2017) (finding, "in the

absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will forever be incorrigible, without any hope for rehabilitation," a LWOP sentence is illegal); *Malvo v. Mathena*, ___ F. Supp. 3d ___, No. 2:13-CV-375, 2017 WL 2462188, at *3 (E.D. Va. May 26, 2017) (concluding "the rule announced in *Miller* applies to all situations in which juveniles receive a LWOP sentence," regardless of whether imposed under mandatory or discretionary sentencing schemes), *appeal docketed*, No. 17-6758 (4th Cir. Jun. 14, 2017).

Other courts have construed *Miller* and *Montgomery* narrowly. For example, the Supreme Court of Virginia recently held *Miller* and *Montgomery* inapplicable where the Virginia sentencing scheme gave a juvenile offender the "opportunity" to present mitigating evidence at a hearing, but the offender agreed to the sentence through a plea bargain, forgoing the opportunity for the "certainty of a plea agreement." *See Jones v. Commonwealth*, 795 S.E.2d 705, 713 (Va. 2017), *petition for cert. filed*, (U.S., May 5, 2017) (No. 16-1337). In concluding *Miller* held that a judge or jury must merely have "the *opportunity* to consider mitigating circumstances before imposing the harshest possible penalty for juveniles,'" *id.* at 708, the Court expressly disagreed with the dissent's position that "*Montgomery* requires a *Miller* hearing . . . regardless of whether the sentence is mandatory or discretionary." *Id.* at 721.

We hold the rule announced in *Miller* and *Montgomery* is not applicable to the narrow circumstance,

such as here, where a juvenile defendant agrees to serve LWOP pursuant to a plea agreement that is accepted by a trial court. While the *Miller* court concluded, "a judge or jury must have the *opportunity* to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," 567 U.S. at 489, 132 S. Ct. at 2475 (emphasis added), and the *Montgomery* court explained, "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence," 136 S. Ct. at 734, neither of those cases addresses the narrow circumstance at hand: Two parties agreeing the sentencing court – which would otherwise retain statutorily-provided discretion in imposing a sentence – would not have discretion at sentencing, because the sentence is provided in a plea agreement.

"A plea agreement is contractual in nature, binding the defendant, the State, and the trial court." *Jackson v. State*, 968 N.E.2d 328, 332 (Ind. Ct. App. 2012). "Trial courts have discretion to accept or reject plea agreements." *Hunter v. State*, 60 N.E.3d 284, 288 (Ind. Ct. App. 2016) (citing *Pannarale v. State*, 638 N.E.2d 1247, 1248 (Ind. 1994)); Ind. Code § 35-35-3-3. However, once the trial court accepts a plea agreement, "it is strictly bound by its sentencing provision and is precluded from imposing any sentence other than required by the plea agreement." *Jackson*, 968 N.E.2d at 332.

Here, Newton would have had an opportunity to present evidence of mitigating factors at his sentencing

hearing prior to the court imposing the LWOP sentence. *See* Ind. Code § 35-38-1-7.1 (1994). However, Newton chose to forego this opportunity, when he agreed to plead guilty for the certainty of serving LWOP instead of the possibility of a death sentence. We agree with the State that Newton's sentence here is not "mandatory" within the meaning of *Miller*. *See Jones*, at 795 S.E.2d at 711 ("Only where the General Assembly has prescribed a mandatory minimum sentence imposing an inflexible penalty has it divested trial judges of all discretion respecting punishment.").

Even if we were to assume, in an abundance of caution, the rationale of *Miller* and *Montgomery* applies here, Newton nonetheless cannot demonstrate his sentence violates the Eighth Amendment because his sentencing court refused to accept his plea agreement calling for LWOP until it had given thorough consideration to whether the evidence demonstrated an LWOP sentence was proper for Newton.

At the change of plea hearing on October 16, 1995, the trial court emphatically explained it was up to the court's discretion whether to accept the parties' plea agreement. First, the court thoroughly questioned Newton to ensure his understanding of the charges against him and the terms of the plea agreement. The court also specifically asked Newton's counsel whether there was "any reason to believe [Newton] did not understand the terms of the plea agreement," (Plea Hr'g Tr. at 36), whether there had been "some consultation with family members," (*id.* at 37), and whether Newton's counsel was "satisfied . . . [he] had sufficient time

to discuss the matter with [Newton's] family and with [Newton]." (*Id.*) Finally, the court noted it would order a presentence investigation report, review it, and "only after receiving and reviewing that report" the court would "decide whether or not to accept the plea agreement." (*Id.* at 40.) The court did note, however, if it accepted the plea agreement, it would be "bound to sentence [Newton] as the agreement provide[d]." (*Id.* at 41.)

At the sentencing hearing, the trial court heard evidence on mitigating factors and specifically made findings regarding Newton's youth and his prospect of rehabilitation prior to accepting the plea agreement. Newton submitted a mitigation timeline. The trial court heard testimony from Peggy, Newton's mother, on Newton's troubled childhood and the instability of Newton's relationship with his father. Peggy testified in July 1994, roughly two months before Newton murdered Coyle, she moved homes with Newton's stepfather and told Newton he could no longer live with her. (Sent. Tr. at 37.) She testified Newton was sexually molested by a relative from roughly "first through the third grade." (*Id.* at 38.) She testified Newton was physically abused by his stepfather. (*Id.* at 42.) She also testified, at the age of twelve, Newton began running away from home and would sometimes be gone for "weeks at a time." (*Id.* at 43.) Peggy admitted that, on occasion, she encouraged this behavior, and testified when Newton would call home, she would "tell him not to come home that day." (*Id.* at 44.) Peggy testified Newton was involved with drug and alcohol counseling

at a Youth Services Bureau, was on juvenile probation, and attended the Indiana Boys' School from roughly the ages of ten to twelve. The court also heard testimony from Detective Paul Singleton, a police officer for the Muncie Police Department, and Scott, who was in the Fly Gang with Newton. Detective Singleton and Scott both testified about the Fly Gang's activities generally and about the specific events leading to the murder.

After hearing evidence, the court asked counsel to present comments on issues that had formerly been taken under advisement, including "whether or not the submitted plea agreement should be accepted." (*Id*. at 96.) Newton's counsel urged the court to accept the plea agreement, citing mitigating circumstances that had "not been heretofore considered . . . that justif[ied] the plea agreement." (*Id.* at 104-05.) Both Newton's counsel and the prosecution made lengthy arguments encouraging the court to accept the plea agreement. After hearing testimony and comments from counsel, the court stated it would accept the plea agreement. The court said it would "incorporate all evidence offered on behalf of the Defendant up until now into the sentencing hearing along with [counsel's] comments previously made[.]" (*Id.* at 128.)

Next, the court heard statements from Coyle's mother, brother, father, and girlfriend. Newton's counsel then made arguments on mitigating circumstances. Counsel argued "Newton's growth and development psychologically has affected his adult psychology and personality[,]" (*id.* at 174), his "criminal activity was

caused by various psychological factors and alcohol-related factors that could be treated and would diminish with age," (*id.* at 176), that "at a very young age, [Newton] exhibited signs of mental or emotional disturbance that went untreated," (*id.* at 177), that, "if treated, [Newton] can be productive in prison society," (*id.* at 177-78), and that Newton suffered from "serious personality disorders." (*Id.* at 178.) Lastly, counsel argued Duane "used [Newton]" and was "the man responsible" for the crime. (*Id.* at 181.) Yet still, counsel acknowledged "it does not mean that [Newton] should get anything less than life without parole." (*Id.* at 175.) After both sides presented arguments regarding mitigators and aggravators, the court gave Newton the opportunity to address the court before sentencing, but Newton declined the opportunity to do so.

The court noted, "in support of its conclusion this was an intentional killing while committing criminal gang activity," (*id.* at 211), the court considered "evidence submitted at the change of plea hearing and today's [sentencing] hearing." (*Id.*) The court then stated:

> In any criminal sentence [the] Court considers, Mr. Newton, the risk as to whether or not you would commit other crimes, the nature and the circumstances of the crime that you have committed, your prior criminal record, if any, character and condition, whether or not the victim was less than 12 or at least 65 years of age, whether you violated any type of protective order. Court also considers any oral or written statements made by the victim of the

> crime. In this case the Court has considered all those factors.

(*Id*. at 212.)

Although the court acknowledged "in his written plea agreement, [Newton] [had] admitted the existence of both aforementioned aggravators and further admitted that those aggravators outweigh[ed] potential mitigators," (*id*.), the court was required to make a determination as to whether the aggravators outweighed the mitigators in sentencing Newton for confinement and conspiracy. The court then made the following comments about aggravating circumstances:

> Court has considered and considered and considered the relative youth of this Defendant. Age is always considered in any sentencing hearing. It's particularly troubling that one so young can commit such a vicious and unprovoked attack. You had time in this case, Mr. Newton, to contemplate your actions. You had time to avoid inflicting any injury at all on Christopher Coyle. This was not a killing done during the heat of battle or during any type of confrontation. What you did, Mr. Newton, was you coldly and deliberately executed Christopher Coyle. When I see such a total disregard for human life at such a young age it is, as Mr. Arnold points out, both shocking and it is to me indicative that if placed in a similar situation as this, you would respond in a similar manner.
>
> Secondly, the Court has considered whether or not this Defendant can be rehabilitated by

incarceration in rehabilitative treatment. In assessing any person's chance at rehabilitation[,] the Court must look to the Defendant's past behavior. I also look, Mr. Newton, at what prior attempts at rehabilitation have been made. I consider whether or not a Defendant has voluntarily sought any rehabilitative treatment. In determining whether or not rehabilitation could be successful, it's especially difficult to make that kind of determination when you're dealing with a younger person. I don't see any evidence that you have made any voluntary effort at rehabilitation. In most of your prior actions, Mr. Newton, you have acted both impulsively and unfortunately without regard for harm to any other people. You have displayed total resistance to any type of authority, and you have continually demonstrated disdain for the justice system in its entirety. This Court cannot conclude that rehabilitation is a strong possibility here in your case. Consequently[,] the Court cannot find this to be a mitigating circumstance.

*   *   *

This process of alleging aggravating circumstances in a murder case enables society to identify and distinguish those most heinous type of murders. This is one.

Mr. Newton, this was the act of a coward. It was senseless and in a very real sense, as I pointed out, it was an execution. The tragedy is that the fact that this act is magnified by the fact that Christopher Coyle was minding his own business, he didn't cause you any

> trouble. The only reason he was on the street, as his father has pointed out, trying to get a friend home safely [sic]. This crime is aggravated even more by the impact it has had on our community and the community of Pendleton.
>
> Court is also aware of the impact this had on our students in this community only trying to get an education, and as we heard today, trying not to live in fear. I don't think the students out there can ever feel the same about campus life.
>
> You made a conscious choice and a deliberate choice, and you made the choice to kill Christopher Coyle. When you made that choice, Mr. Newton, it seems to me that you have forfeited your right to be a part of our society. It seems to me this is precisely the kind of case the legislature had in mind when the life without parole statute was passed. Frankly[,] society should not have to put up with people like Mr. Newton.
>
> From what I've heard today and what I heard the last time we were in Court, Mr. Newton, it seems to me you were a bomb waiting to explode. To lead a person into an alley and to put a bullet in his head and leave him there to die in the dirt takes a very different kind of person. It seems to the Court it takes a person filled with hate, and a person who is genuinely evil, and in my opinion, Mr. Newton, beyond rehabilitation.

(*Id*. at 220-25.)

The court then noted it found as mitigating circumstances Newton's age of seventeen at the time of the crimes, that the crimes were Newton's first felony convictions, and that Newton had "a strong family support group." (*Id*. at 225.) The court also noted Newton "had been subjected to a dysfunctional family," "poor parenting," abuse, and a "lack of proper discipline." (*Id*.) However, the court noted these mitigating circumstances were "slight" in comparison to the aggravating factors. (*Id.* at 225-26.)

After discussing the mitigating and aggravating circumstances, the court stated: "The issue still remains, Mr. Newton, as to whether or not life imprisonment without the possibility of parole [is] an appropriate punishment. Court concludes that it is an appropriate punishment." (*Id.* at 226.) The court supported this conclusion by stating: "This was a thrill killing, this act was totally random, it was unprovoked, and it was senseless. It was also savage. Anyone who would commit such an act has stepped outside the bounds of civilized society and should not be welcomed back." (*Id.*) The court noted Newton "demonstrated absolutely no regard for the consequences of any of [his] actions," (*id*. at 227), "demonstrated no regard for human life," (*id*.), "the risk that [Newton] would kill again is too great," (*id*.), and that it was "a risk this community should not have to take." (*Id*.) The court concluded "the only appropriate penalty for the offense of murder as alleged is a sentence of life imprisonment without parole." (*Id*.)

Thus, in determining whether to accept the sentence of LWOP as punishment for Newton, the trial

court underwent the very considerations the U.S. Supreme Court prescribed seventeen years later in *Miller* and twenty years later in *Montgomery*. The trial court explicitly made determinations, based on evidence, regarding Newton's youth and its attendant characteristics, yet still reached the conclusion Newton should never be given the opportunity for parole. We note the U.S. Supreme Court was reluctant to impose a strict procedural requirement on courts in sentencing, such as requiring trial courts "to make a finding of fact regarding a child's incorrigibility." *See Montgomery*, 136 S. Ct. at 735 ("When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."). Nevertheless, because the trial court did in fact explicitly make those determinations here, we hold Newton's sentence was safeguarded against any possibility it violated the Eighth Amendment of the Constitution. *See id.* (holding a sentencing hearing "does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity").

Furthermore, to the extent Newton can now show he has rehabilitated himself while in prison, this does not render his sentence unconstitutional. The *Miller* and *Montgomery* holdings require "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors to separate those juveniles who

may be sentenced to life without parole from those who may not." 136 S. Ct. at 735. Implicit in this holding is the notion that the individualized determination, taking into account the prospect of rehabilitation, is made *at the time of sentencing.* In *Montgomery*, the U.S. Supreme Court remanded Montgomery's case for resentencing because Montgomery was never given the opportunity to present evidence that his crime did not reflect irreparable corruption. However, here, unlike in *Montgomery*, Newton was given the opportunity at sentencing to present evidence of his prospect for rehabilitation. Because the trial court heard that evidence and made the individualized determination at the sentencing hearing, it is irrelevant whether Newton has in fact made progress towards rehabilitating himself while in prison.[12]

---

[12] We also note Newton's claim on appeal that the successive post-conviction court erred in excluding certain evidence he submitted of his rehabilitation in prison. At the post-conviction hearing, Newton offered multiple exhibits as evidence of his participation in the Shakespeare for Offenders program in the Special Confinement Unit at Wabash Correctional Facility. The post-conviction court heard expert testimony from James E. Aiken, a consultant in prison security management, regarding Newton's rehabilitation in prison. The trial court excluded other evidence, including workbooks Newton wrote in the Shakespeare for Offenders program, and letters written to Newton from various individuals who were positively influenced by Newton's work.

Newton argues the excluded evidence showed his successful involvement in a prison program and that this evidence was relevant to show his crime "was the product of transient youth rather than irreparable corruption." (Appellant's Br. at 48.) However, we hold Newton's sentence is not unconstitutional because the trial court complied with the procedural safeguards mandated by

We acknowledge the *Montgomery* court's cautioning that "*Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution." 132 S. Ct. at 736. To this point, we reiterate, as our Indiana Supreme Court did in *Conley*, that Newton is only one of four juveniles to have ever been sentenced to LWOP in Indiana. *See Conley*, 972 N.E.2d at 880 (noting Andrew Conley was the fourth juvenile sentenced to LWOP after Larry Newton in 1995, Daniel Boyd in 1997, Greg Dickins in 2001). We believe this serves as further evidence that Indiana indeed has historically exercised a policy of reserving LWOP for use "in only the most heinous of crimes." *Id*. at 880.

The U.S. Supreme Court did not categorically bar LWOP for juveniles, but instead effectively carved out an exception, allowing LWOP for "the rarest of juvenile offenders." 132 S. Ct. at 734. Because Newton's sentencing court gave extensive consideration to whether LWOP was appropriate for Newton and, in the process, explicitly found Newton was "beyond rehabilitation," (Sent. Tr. at 225), even if Newton had not waived his Eighth Amendment right by signing a plea agreement that called for LWOP sentencing, we could not say the

---

Miller and *Montgomery* before imposing LWOP on Newton. As the evidence Newton sought to admit would not have been available to the sentencing court, we cannot find the post-conviction court erred in excluding irrelevant evidence. *See Barnhart v. State*, 15 N.E.3d 138, 143 (Ind. Ct. App. 2014) ("Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party.").

imposition of LWOP violated his Eighth Amendment right to be free of cruel and unusual punishment.[13]

Conclusion

We hold the mandate of *Miller* and *Montgomery* does not apply to the narrow circumstance, such as here, where a juvenile defendant voluntarily enters into a plea agreement to serve LWOP. Even so, in determining whether to accept the plea agreement, the trial court complied with the procedural safeguards contemplated by *Miller* and *Montgomery.* These safeguards ensured Newton does not fit within the "vast majority of juvenile offenders" for whom a sentence of LWOP is disproportionate. Newton's sentence of LWOP is thus not unconstitutional under the Eighth

[13] Newton also claims that his sentence is inappropriate and he was denied the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. Both of these claims are procedurally barred.

Newton raises the issue of ineffective assistance of counsel in his Appellant's Brief. Newton raised this claim in his prior post-conviction petition, and that post-conviction court found Newton's counsel were effective. This claim is thus barred by the doctrine of *res judicata. See Matheney*, 834 N.E.2d at 662 (claims that have already been decided adversely are barred from re-litigation in successive post-conviction proceedings by the doctrine of *res judicata*).

Similarly, Newton's claim that his sentence is inappropriate was available to him in his prior petition for post-conviction relief, but he failed to raise it. Thus, this claim too, is barred. *See id.* ("Claims that could have been, but were not, raised in earlier proceedings and otherwise were not properly preserved are procedurally defaulted; we do not authorize the filing of successive petitions raising forfeited claims.").

Amendment of the United States Constitution. Accordingly, we affirm the judgment of the successive post-conviction court.

Affirmed.

Brown, J., and Pyle, J., concur.

STATE OF INDIANA	)	**IN THE DELAWARE**
	) **SS:**	**CIRCUIT COURT**
DELAWARE COUNTY	)	**NO. 3**

STATE OF INDIANA

VS

LARRY NEWTON JR.
Defendant/Petitioner

CAUSE NO.
18D01-9410-CF-000046

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT ON PETITION FOR POST-CONVICTION RELIEF

COMES now the Petitioner by legal counsel Joanna Green and the State of Indiana by Jeffrey L. Arnold, Prosecuting Attorney of the 46th Judicial District, and Eric M. Hoffman, Chief Deputy Prosecuting Attorney, all upon a Petition and an Amended Petition for Post-Conviction Relief filed by the Petitioner. The Court, having heard the evidence and argument, having considered the applicable statutes and case law, and now being duly and sufficiently advised in the premises, hereby finds as follows:

FINDINGS OF FACT

1) In 1994, the Petitioner and several other individuals, including Scott Turner and Duane Turner, were members of a local gang called The Fly Gang. Defendant's PCR Exhibit A (COP TR 105, 106).[1] The Fly

[1] "COP TR" refers to the transcript of October 16, 1995 change of plea hearing.

Gang had approximately 20 to 25 members. Defendant's PCR Exhibit A (SE TR 55, 58).[2] One of the purposes of the gang was to retaliate against others for perceived wrongs to gang members. Defendant's PCR Exhibit A (COP TR 106). The gang had been known to wear blue bandannas and arm themselves with weapons. *Id.* Gang members had perpetrated battery on various victims and had committed various other crimes including auto thefts and burglaries. *Id.* at 106; Defendant's PCR Exhibit A (SE TR 68).

2) On September 23, 1994, various members of The Fly Gang went to a party in a neighborhood surrounding the campus of Ball State University. Defendant's PCR Exhibit A (COP TR 78); Defendant's PCR Exhibit A (SE TR 64-65). During the party, a dispute erupted between the gang members and the Ball State students. Defendant's PCR Exhibit A (COP TR 78). As a result, the Ball State students kicked the gang members out of the party. *Id.* 70-71. Duane Turner, a gang member and co-defendant of the Petitioner, pulled a gun and fired it at a door frame. *Id* at 71-72.

3) The next evening, September 24, 1994, various members of The Fly Gang were having a party in a cemetery. Defendant's PCR Exhibit A (SE TR 64, 76). During the party, the Petitioner was made aware of what happened the previous night at the Ball State party. Defendant's PCR Exhibit A (COP TR 78). Duane Turner told the Petitioner what had happened.

[2] "SE TR" refers to the transcript of December 29, 1995 sentencing hearing.

Defendant's PCR Exhibit A (SE TR 72). After having heard what occurred the previous night, the Petitioner became angry. The Petitioner felt that the Ball State students had disrespected his fellow gang members. The Petitioner said "he was going to get revenge for this because they had screwed us over" and "we'll get those mother fuckers." Defendant's PCR Exhibit A (COP TR 79); Defendant's PCR Exhibit A (SE TR 73). The Petitioner asked fellow gang member Scott Turner if he could borrow Turner's pistol. Defendant's PCR Exhibit A (COP TR 77). The Petitioner told Turner that he was going to go out to Ball State and get revenge for what had happened the night before. Defendant's PCR Exhibit A (SE TR 74). Turner loaned his .25 caliber handgun with plastic pearl colored grips to the Petitioner. Defendant's PCR Exhibit A (COP TR 80-81). He did so because the Petitioner was a fellow gang member. *Id.* at 107. The Petitioner was "hyped up" and "wanted to get revenge." *Id.* at 80. The Petitioner said "I feel like killing somebody . . . let's go do this." *Id.* at 80. The Petitioner and Duane Turner set out that night with the specific purpose of robbing and killing someone. *Id.* 63.

4) Chad Wright drove the Petitioner and Duane Turner to the Ball State area. Defendant's PCR Exhibit A (COP TR 52, 54). Sometime around 1:30 a.m. on September 25, 1994, the Petitioner and his confederates saw 19-year old Ball State student Christopher Coyle walking down the 900 block of Neely Avenue. *Id.* at 54-55, 98, 104. The Petitioner told Wright to stop the car. *Id.* at 96. The Petitioner and Turner confronted

Coyle and forced him at gunpoint into Wright's car. *Id.* at 54-55, 89-99. At some point, the Petitioner asked Coyle if he had any money. *Id.* at 56, 66. Coyle pulled a set of keys and a nickel out of his pocket. *Id.* at 56, 57. Petitioner told Coyle to put his keys and nickel back into his pocket. *Id.* at 58, 66. Wright drove for a couple of minutes and stopped in an alley. *Id.* at 56.

5) Petitioner and Duane Turner got out of the car with Coyle. *Id.* at 65. The Petitioner told Coyle to get on his knees. *Id.* at 84. The Petitioner then put the gun to the back of Coyle's head and pulled the trigger. *Id.* at 53, 67, 84, 86, 97, 100. After having been shot in the back of the head, Coyle fell to the ground. The Petitioner gave the gun to Turner. *Id.* at 67, 84, 97. Turner then pointed the gun at Coyle as he lay on the ground and pulled the trigger. *Id.* at 53, 67, 97, 101. In the Petitioner's own words, "we found this dude and we was going to rob him but he didn't have nothing. So we brought him with us down the street, got him in the car and brought him down the street. We was walking through this alley and [I] just shot him. And Duane shot him." *Id.* at 52-53. The Petitioner later stated that it didn't matter whether Coyle had money or not because they had set out that night to kill somebody. *Id.* at 59. "That's what we had planned to do." *Id.* at 59, 68. Petitioner had it made up in his mind that he was going to shoot and kill somebody. *Id.* at 68, 70. Petitioner and Duane Turner got back into Wright's car. As they fled the scene, Turner gave the Petitioner back the gun.

6) At approximately 4:00 a.m. on September 25, 1994, the Petitioner came to a residence wherein Scott

Turner was staying. Defendant's PCR Exhibit A (COP TR 81). Petitioner returned the gun to Turner and told him that he had shot someone. Id at 81-82. When he did so, the Petitioner was "smiling" and "grinning." *Id.* at 82. The Petitioner then relayed the facts and circumstances of the murder to Turner. *Id.* at 84-85. Later in the evening on September 25, the Petitioner approached Scott Turner and asked to borrow his gun again. *Id.* at 88. The Petitioner said that he "wanted to do that shit again. I want to go make some money." *Id.* Unlike the prior evening, Turner did not loan him the gun. *Id.* On Monday, September 26, 1994, the Petitioner went to a Village Pantry and purchased a newspaper. *Id.* at 87. He then went to Scott Turner and showed him the front page. *Id.* He pointed to the front page and laughed. *Id.* The article on the front page was about a man found shot to death in an alley. *Id.* at 89.

7) The Petitioner later asked Turner to destroy the gun. *Id.* at 92. Turner attempted to alter the serial number and disassemble the gun. *Id.* Turner decided to throw the gun in Prairie Creek Reservoir. On the way, Turner threw the grips of the pistol out of the car window. *Id.* He threw part of the gun into the White River at the Inlow Springs Bridge. *Id.* He then put the remainder of the gun in a yellow M & M bag and threw it into the reservoir. *Id.* at 92. The pieces of the gun were later recovered by police. *Id.* at 102. The projectiles that were recovered from Coyle's body were tested by the Indiana State Police Laboratory. *Id.* at 103. The projectiles were found to have been fired by Scott Turner's gun that was recovered by the police. *Id.*

8) On September 28, 1994, the Petitioner was interviewed by the police. Prior to answering any questions the Petitioner was advised of his Miranda rights and was permitted to have a meaningful consultation with his mother. Thereafter, the Petitioner waived his rights and submitted to questioning. During the interviews the Petitioner made a full confession to the confinement, robbery, and murder of Christopher Coyle. State's PCR Exhibit 1 (Transcript of Larry Newton's Audiotaped interview) (Transcript of Larry Newton's Videotaped interview);[3] State's PCR Exhibit 2;[4] State's PCR Exhibit 3.[5]

9) On October 19, 1994, the State charged the Petitioner with Count 1: Murder, a Felony; Count 2: Criminal Confinement, a Class B Felony; Count 3: Conspiracy to Commit Robbery Resulting in Serious Bodily Injury, a Class A Felony; and Count 4: Attempted Robbery Resulting in Serious Bodily Injury, a Class A Felony. Defendant's PCR Exhibit A (Appellate Appendix, p. 41-44). On the same date, the State filed an Allegation of Capital Offense and Request for Death Penalty. *Id.* at 46. Pursuant to I.C. 35-50-2-9 and in support of its request for imposition of the death penalty, the State alleged two (2) statutory aggravating circumstances: that the Petitioner intentionally killed

[3] Previously admitted as Defendant's Exhibit A during the Petitioner's sentencing hearing.

[4] Previously admitted as State's Exhibit 1 at the Petitioner's change of plea hearing.

[5] Previously admitted as State's Exhibit 2 during the Petitioner's change of plea hearing.

Christopher Coyle (1) while committing or attempting to commit robbery, and (2) while committing or attempting to commit criminal gang activity by intentionally participating in a criminal gang. *Id.*

10) Pursuant to Indiana Criminal Rule 24, the trial court appointed attorneys Joe Lewis and Bruce Elliott. *Id.* at 52, 67. Counsel retained the services of an investigator and a mitigation specialist. *Id.* at 109. During the course of representation of the Petitioner, counsel filed various motions on the Petitioner's behalf including: motion to suppress the Petitioner's seizure, search, and confession; and motion to dismiss request for death penalty.

11) On October 16, 1995, the parties filed a written plea agreement with the Court. *Id.* at 873-880. On the same day, the Court held a change of plea hearing. The Petitioner agreed to plead guilty to Count 1: Murder, a Felony; Count 2: Criminal Confinement, a Class B Felony; Count 3: Conspiracy to Commit Robbery Resulting in Serious Bodily Injury, a Class A Felony; and Count 4: Attempted Robbery Resulting in Serious Bodily Injury, a Class A Felony. *Id.* at 873. The Petitioner agreed to receive a sentence of life in prison without the possibility of parole (LWOP). *Id.* In exchange, the State agreed to dismiss its request to seek the death penalty. *Id.* In the Agreement, the Petitioner specifically admitted "the material allegations of the [charging] informations herein, including the allegations of [the capital] aggravating circumstances alleged by the State . . . and further agrees that said aggravating

circumstances outweigh any mitigating circumstances which exist." *Id.*

12) Prior to the Defendant offering a plea of guilty, the Court thoroughly advised the Petitioner of his constitutional and statutory rights. Defendant's Exhibit A (COP TR 11-13). The State read the charging information and the Petitioner indicated he understood each and every charge. *Id.* at 13-18. The Court advised the Petitioner of the essential elements and the potential penalties of each charged offense. *Id.* at 19-30. The Court reviewed the terms of the plea agreement with the Petitioner. *Id.* at 38-44. The Court repeatedly asked the Petitioner if he understood that he was agreeing to an LWOP sentence. *Id.* at 30-32, 110, 114. The Petitioner acknowledged that he had reviewed and discussed the agreement with his attorneys and his family. *Id.* at 36-37. Defense counsel advised the Court that the Petitioner understood the nature of the charges and the plea agreement. *Id.* at 9. Counsel advised the court that the Petitioner did not suffer from any mental or emotional disability that would prevent him from entering a plea of guilty. *Id.* at 36. Counsel stated that the Petitioner "fully understands the importance of what he's doing today and the consequences of it." *Id.* at 37. Defense counsel stated that there was no advantage for the Petitioner to proceed to trial. *Id.* at 117-118.

13) During the change of plea hearing, the State presented an extensive factual basis in support of the Petitioner's plea of guilty. The factual basis consisted of testimony from Detective Steven Stanley, as well as

a statement from the State outlining what the evidence would show if the cause proceeded to trial. Defendant's PCR Exhibit A (COP TR 48-101 and 101-107) respectively. Additionally, State's Exhibits 1 and 2 were admitted into evidence. *Id.* at 74 and 75 respectively. State's Exhibit 1 was a copy of the Defendant's September 28, 1994 videotaped confession. State's Exhibit 2 was a copy of the Defendant's September 28, 1994 audiotaped confession. Transcripts of the audiotaped interview and the videotaped interview were later admitted into evidence during the Petitioner's sentencing hearing. See State's PCR Exhibit 1. During a later hearing and in furtherance of a factual basis for the Petitioner's plea, the State presented additional evidence in the form of testimony from Detective Paul Singleton and co-defendant Scott Turner. See Defendant's PCR Exhibit A (SE TR 3-61 and 63-95) respectively.

14) The Petitioner told the Court that the testimony of Detective Stanley and the statements by the prosecution were true and accurate to best of his knowledge. Defendant's PCR Exhibit A (COP TR 115). The Petitioner admitted that he committed each and every one of the charged offenses. *Id.* at 115-117. The Petitioner stated that no one forced or threatened him to plead guilty. *Id.* at 119-120. The Court took the Petitioner's change of plea under advisement and set the matter for further hearing. Defendant's Exhibit A (COP TR 120-121). Prior to the plea acceptance/sentencing hearing, the court's probation officer filed a presentence investigation report. Defendant's PCR

Exhibit A (Appellate Appendix p. 28). Additionally, defense counsel filed a mitigation timeline. State's PCR Exhibit 6; Defendant's PCR Exhibit A (Appellate Appendix p. 25, 906-985).

15) On December 29, 1995 the court held a plea acceptance/sentencing hearing. The Court found that a sufficient factual basis existed and that the pleas of guilty were freely and voluntarily made. Defendant's PCR Exhibit A (COP TR 125). The Court found that the capital aggravating circumstances were proven by the State beyond a reasonable doubt. *Id.* at 126. The Court accepted the Plea Agreement and entered judgement on Counts 1, 2, and 3. Witnesses were called and the parties made arguments on the issue of sentence. The Court imposed sentence on the non-capitol offenses. *Id.* at 198-208.

16) The Court again found that the two (2) aggravating circumstances alleged by the State had been proven beyond a reasonable doubt. *Id.* at 210-212. The Court considered all of the mitigating circumstances. *Id.* at 213-220, 222, 225. The Court independently weighed and balanced the aggravating and mitigating circumstances. *Id.* at 222-226. The Court said that:

> When [the mitigating factors] are viewed and balanced and evaluated in comparison with the aggravating factors here proven by the State of Indiana, it seems to the Court that their weight pales and is slight, Mr. Newton. The Court concludes the aggravating factors alleged and proven by the State of Indiana beyond a reasonable doubt outweigh the

> identifying mitigating factors. Court also does not find the mitigating factors outweigh the aggravating factors alleged.

Id. 225-226. The Court then specifically found that "the only appropriate penalty for the [Petitioner's] offense of murder as alleged, is a sentence of life imprisonment without parole." *Id.* at 227. Accordingly, the Court sentenced the Petitioner to LWOP. Defendant's PCR Exhibit A (Appellate Appendix p. 1018).

17) On November 20, 1997, the Petitioner filed a petition for Post-Conviction Relief. *Id.* at 31, 1054. The Petitioner alleged ineffective assistance of counsel and a due process violation. On November 27, 2000, the Petitioner withdrew the Petition. *Id.* at 33, 1094.

18) On October 30, 2001, the Petitioner filed a second petition for post-conviction relief. The Petition alleged ineffective assistance of counsel and that the Petitioner's plea of guilty was not voluntarily or knowingly made. State's PCR Exhibit 7. The post-conviction relief court denied the Petition finding that counsel were not ineffective and that the Petitioner's plea of guilty was knowingly and voluntarily made. *Id.* The Petitioner did not appeal the court's ruling.

19) On April 9, 2007, the Petitioner filed a Verified Petition for Permission to File Belated Notice of Appeal. Defendant's PCR Exhibit A (Appellate Appendix p. 1134-1137). The Petition indicated that he wished to appeal the issue of "whether the trial court erred when sentencing the Defendant to consecutive sentences totaling 65 years and consecutive to a

sentence of life without parole." *Id.* at 1136. On October 5, 2007, the Court entered a lengthy order denying the Petition finding that the Petitioner failed to demonstrate that he was diligent in pursuing his appellate rights. *Id.* at 1174-1181.

20) On November 17, 2007, the Petitioner filed a Request to File a Belated Appeal. *Id.* at 1182-1183. The Request did not specify whether the Petitioner sought to belatedly appeal, for the second time, the sentencing order or the court's October 5, 2007 denial of the first request to file a belated appeal. In any event, the Court granted the Request on November 30, 2007. *Id.* at 1184. However, on December 10, 2007 the Court, *sua sponte*, set aside the November 30, 2007 order and denied the Petition. *Id.* at 1187-1188. Citing PC Rule 2, the order stated that "after due consideration and reflection, the Court is now of the opinion that this Court has no authority to grant counsel's request to file a belated notice of appeal." *Id.* at 1188. The Petitioner then took a direct appeal of this order to the Indiana Supreme Court. The Supreme Court dismissed the Petitioner's appeal. *Newton v. State*, 894 N.E.2d 192 (Ind. 2008).

<u>Current Procedural Posture</u>
<u>And Issues Before The Court</u>

21) On July 2, 2013, the Petitioner, *pro se*, filed a request to file a successive petition for post-conviction relief. On July 22, 2013, the Indiana Court of Appeals

granted the Petitioner's request.[6] The State answered the Petition on September 17, 2013. On February 2, 2016 the Petitioner, by counsel, filed an Amended Petition supplementing the original *pro se* petition by adding various claims. The State answered the Amended Petition on June 21, 2016.

22) The Petition and the Amended Petition raises the following issues:

A. Freestanding claims concerning the Petitioner's guilty plea and agreed upon sentence of LWOP.

1. Whether LWOP is constitutionally inappropriate for juvenile offenders. Petition ¶¶ 8(b), 9(b).

2. Whether the Defendant's agreed upon LWOP sentence does not constitute an unconstitutional "mandatory sentence" imposed on a juvenile as prohibited by *Miller v. Alabama*, 132 S.Ct. 2455 (2012). Petition ¶¶ 8(a), 9(a).

3. Whether the trial court unconstitutionally relinquished its sentencing discretion. Amended Petition ¶¶ 8(c), 9(c).

4. Whether the trial court considered impermissible factors at sentencing. Amended Petition ¶ 9(e)(1).

[6] The mere fact that the Court of Appeals has authorized the filing of a successive petition "is not a determination on the merits for any other purpose." Ind. Post-Conviction Rule 1 § 12(c).

5. Whether the trial court failed to engage in individualized sentencing. Amended Petition ¶ 9(e)(2).

6. Whether LWOP is disproportionate to the Petitioner's offense. Amended Petition ¶ 9(e)(4).

7. Whether LWOP is inappropriate. Amended Petition ¶ 9(e)(5).

B. Ineffective assistance of trial counsel. Amended Petition ¶8(d).

1. Whether counsel erred in advising Newton to accept the plea agreement which divested the trial court of sentencing discretion. Amended Petition ¶ 9(d)(1).

2. Whether counsel erred in advising Newton to waive his right to meaningful appellate review under Indiana Constitution. Amended Petition ¶ 9(d)(2).

3. Whether counsel erred in conceding the statutory aggravator IC 35-50-2-9(b)(1)(l) that Newton intentionally killed Coyle while committing or attempting to commit criminal gang activity. Amended Petition ¶ 9(d)(3).

23) On July 7, 2016, the Court held a hearing on the Amended Successive Petition for Post-Conviction Relief.

CONCLUSIONS OF LAW

24) Criminal defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction relief petition. *Stevens v. State*, 770 N.E.2d 729, 745 (Ind. 2002). Post-conviction relief is a collateral attack on the validity of a criminal conviction. *Timberlake v. State*, 735 N.E.2d 591, 597 (Ind. 2001). This collateral challenge to the conviction is limited to the grounds enumerated in the post-conviction rules. *Id.* (citing Ind. Post-Conviction Rule 1(1)). The post-conviction procedure, however, is not a "super-appeal," and not all issues are available. *Stevens v. State*, 770 N.E.2d at 745. Rather, the post-conviction procedures create a special remedy whereby the convicted person can present errors which, for various reasons, were not available or known at the time of the original trial or appeal. *Lowery v. State*, 640 N.E.2d 1031 (Ind. 1994). Post-Conviction Relief proceedings are civil proceedings, and the petitioner bears the burden to establish his claims by a preponderance of the evidence. *Stevens v. State*, 770 N.E.2d 729, 745 (Ind. 2002); *Lowery v. State*, 640 N.E.2d 1031 (Ind. 1994).

Freestanding claims of constitutional error relating to guilty plea and agreed upon sentence of LWOP

25) The Petitioner makes multiple collateral freestanding claims of error in this post-conviction action. One claim asserts that imposition of LWOP upon a juvenile offender is unconstitutional. See Petition

¶ 9(b). The Petitioner makes a second set of claims alleging that imposition of LWOP under the facts of his particular case is unconstitutional. See Petition ¶¶ 9(a), 9(c), and 9(e).

26) The Court finds and concludes that the Petitioner's ability to raise these claims has been forfeited and waived for purposes of review in this action because he knowingly and voluntarily pled guilty[7] and agreed to a specific sentence. "Defendants who plead guilty to achieve favorable outcomes in the process of bargaining give up a plethora of substantive claims and procedural rights." *Games v. State*, 743 N.E.2d 1132, 1135 (Ind. 2001). "Defendants waive a whole panoply of rights by voluntarily pleading guilty." *Mapp v. State*, 770 N.E.2d 332, 334-35 (Ind. 2002). For example, the Supreme Court has said these rights include the right to a jury trial, the right against self-incrimination, the right of appeal, and the right to collaterally attack one's plea based on double jeopardy. *Id.* Indiana courts have long held that where a plea agreement includes a defendant's agreement to a specific sentence, such defendant may not challenge the sentence by means of a timely or belated direct appeal. *Sholes v. State*, 878 N.E.2d 1232, 1235 (Ind. 2008) (specifically holding that defendant forfeited the ability to challenge LWOP sentence in a direct appeal because he

[7] In the Petitioner's first Petition for Post-Conviction Relief, he alleged that his plea of guilty was not voluntarily or intelligently made. After a hearing on the merits, the trial court rejected that allegation. The Order denying post-conviction relief was not appealed.

specifically agreed to the imposition of that sentence). This was acknowledged in 2008 when the Supreme Court dismissed the Petitioner's belated appeal. Justice Sullivan's concurring opinion noted that "if the basis of Newton's request had been to challenge his [LWOP] sentence for murder, permission would have been properly denied because, since the term of his sentence was fixed by the plea agreement, it could not be challenged on direct appeal." *Newton v. State*, 894 N.E.2d 192, 194 (2008) (citing *Sholes v. State*, 878 N.E.2d 1232, 1234 (Ind. 2008)).

27) The Petitioner herein entered into plea negotiations with the sole goal of getting the request for the death penalty dismissed. Ultimately, the Petitioner was successful in that endeavor. The Petitioner agreed to imposition of LWOP and in exchange, the State dismissed its request for death. The Petitioner received the benefit of his bargain and now seeks to back out of his agreement. It has long been the law in this state that when a defendant with adequate counsel enters into a plea agreement to achieve an advantageous position, he must be bound by the bargain. *Games v. State*, 743 N.E.2d 1132, 1135 (Ind. 2001) (citing *Lutes v. State*, 401 N.E.2d 671, 674 (Ind. 1980)). Retaining a benefit while relieving oneself of the burden of the plea agreement "would operate as a fraud upon the court." *Games v. State*, 743 N.E.2d at 1135 (citing *Spivey v. State*, 553 N.E.2d 508, 509 (Ind. Ct. App. 1990)).

28) Given the fact that the Petitioner cannot challenge his sentence in a direct or belated appeal, he now attempts to do so in this post-conviction relief

action. The Petitioner raises multiple freestanding claims of constitutional error. However, a petitioner may not raise freestanding claims of error in a post-conviction proceeding. *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002). Uncorrected errors of law that were available to the defendant at the time of direct appeal, but are first raised in a petition for post-conviction relief, are not available in the post-conviction action. *Lowery v. State*, 640 N.E.2d 1031, 1036 (Ind. 1994). A waived issue is not available as a freestanding claim in post-conviction relief. *Timberlake v. State*, 753 N.E.2d 591, 598 (Ind. 2001). The post-conviction procedure is not a "super-appeal," and not all issues are available. *Stevens v. State*, 770 N.E.2d at 745; *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010).

29) Moreover, this is not the Petitioner's first petition for post-conviction relief. In 2001, the Petitioner filed a petition for post-conviction relief. The Court conducted a hearing on the petition and ultimately denied relief. The Petitioner has now filed this successive Petition alleging freestanding constitutional claims that could have been brought in the first petition. Rule 1, Section 8 of Indiana's Rules for Post-Conviction Remedies provides that "all grounds for relief available to a petitioner under this rule must be raised in his original petition." If an issue was known at the time of the first petition but was not raised it is waived and not available in subsequent successive petitions. See *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989); *Resnover v. State*, 547 N.E.2d 814 (Ind. 1989); *Gosnell v. State*, 483 N.E.2d 445 (Ind. 1985). See also *Daniels v. State*, 741

N.E.2d 1177 (Ind. 2001) ("we reaffirm the sound and long-established principle that considerations of finality preclude re-litigation of previously available contentions in successive post-conviction proceedings"). The freestanding constitutional claims alleged in the now pending successive Petition where known and available at the time he filed his original petition. Consequently, they are considered waived and not available for review in this action.

30) However, out of an abundance of caution, the Court will nonetheless address the merits of the Petitioner's claims.

Claim 9(B) – LWOP is not constitutionally inappropriate for juvenile offenders.

31) The Petitioner argues that his LWOP sentence is fundamentally unfair in light of the significantly changed legal landscape since the time of his plea and sentencing. Petition ¶ 9(B). In support of this argument, the Petitioner asserts that since the imposition of his sentence, "constitutional jurisprudence regarding capital punishment for juveniles has been dramatically altered by a trilogy of cases from the U.S. Supreme Court." The "trilogy of cases" the Petitioner is referring to are as follows: *Roper v. Simmons*, 543 U.S. 551 (2005) which held that the death penalty is unconstitutional for juveniles; *Graham v. Florida*, 560 U.S. 48 (2010) which held that imposition of LWOP upon a juvenile offender for an non-homicide offense is unconstitutional; and *Miller v. Alabama*, 132 S.Ct. 2455

which held that statutes that require or mandate imposition of LWOP upon conviction for juvenile offenders are unconstitutional.

32) The Petitioner concedes that " . . . the juvenile trilogy falls short of categorically barring a LWOP sentence for a juvenile offender . . . " Petition pg. 6. The Petitioner is correct. Imposition of LWOP on a juvenile offender who has been convicted of murder does not violate the constitution. See *Graham v. Florida*, 560 N.E.2d 48 (2010); *Conley v. State*, 972 N.E.2d 864 (Ind. 2012). In *Conley*, the Indiana Supreme Court specifically held that imposition of LWOP for a conviction of murder that was committed when the defendant was 17 years, 6 months, and 2 weeks old did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. *Id.* at 877-880. Moreover, the Court specifically noted that "our holding that the life without parole sentence is not unconstitutional is not altered by *Miller [v. Alabama]*." *Id.* at 879.

33) Accordingly, the Court finds and concludes that there is nothing unconstitutional about imposition of LWOP upon a defendant who was 17 years, 10 months, and 16 days of age at the time of his crimes. The Petitioner herein is requesting this Court to change the law, not follow the law as it now exists. Thus, the Petitioner's claim should fail.

Claims 8(A) and 9(A) – The Petitioner's agreed upon LWOP sentence does not constitute an unconstitutional "mandatory sentence" imposed on a juvenile as prohibited by *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

34) In *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the U.S. Supreme Court held that imposing a mandatory LWOP upon a juvenile violates the Eighth Amendment because it precludes consideration of the defendant's youth and various issues related to youth. The Petitioner argues that his LWOP sentence is a "mandatory" sentence imposed upon a juvenile offender, thereby violating the Eighth Amendment to the U.S. Constitution. See Petition ¶¶ 8(A) and 9(A).

35) In *Miller*, the U.S. Supreme Court reviewed two defendants' convictions (*Jackson* and *Miller*) from two separate states (Arkansas and Alabama). In *Jackson*, the defendant, 14 years old at the time, along with his confederates, robbed a store in Arkansas. Jackson's accomplice shot and killed the clerk. Jackson was convicted of capital felony murder. At the time of sentencing, Arkansas law provided that any person convicted of capital murder shall be sentenced to either death or LWOP. In *Miller*, the defendant, 14 years old at the time, robbed and killed the victim. At the time of sentencing, Alabama law imposed a mandatory minimum punishment of LWOP upon conviction for murder. In both cases, the defendants were sentenced to LWOP. On *certiorari* to the U.S. Supreme Court, the defendants argued that statutes imposing mandatory LWOP

sentences for juvenile officers violate the Eighth Amendment.

36) The Supreme Court began its analysis by reviewing Eighth Amendment precedent relating to juveniles. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held the Eighth Amendment prohibits imposition of the death penalty on all offenders under the age of 18. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that LWOP imposed on juvenile offenders convicted of non-homicide offenses violates the Eighth Amendment. The *Miller* Court specifically acknowledged that *Roper* and *Grahm* did not impose a categorical ban on LWOP sentences for juveniles. *Miller* at 2465. Rather, *Graham* merely held that LWOP cannot be imposed upon juvenile offenders who are convicted of non-homicide offenses. *Id.*

37) Drawing on *Roper* and *Graham*, the *Miller* Court ultimately held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469. In so holding, the Court said "children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464. Precedent insists "that a sentencer have the ability to consider the mitigating qualities of youth." *Id.* at 2466.

> . . . [M]andatory penalty schemes . . . prevent the sentencer from taking account of these central considerations. By removing youth from the balance – by subjecting a juvenile to the same life-without-parole sentence applicable to an adult – these laws prohibit a

> sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

Id. at 2466. Under mandatory penalty schemes, every juvenile "will receive the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Id.* at 2467-68. The Court made clear that its holding does not preclude an LWOP sentence for a juvenile offender so long as it is not mandatorily imposed pursuant to statute. "Our holding [merely] requires factfinders to . . . take into account the differences among defendants and crimes." *Id.* at 2469, n. 8.

38) The *Miller* case does not provide the Petitioner in the case at bar with the relief requested. First, *Miller*, did not address instances where a defendant, like the Petitioner herein, pleads guilty and agrees to LWOP. Rather, the defendants in *Miller* were tried and convicted and then, by virtue of that conviction, the applicable law at the time mandated imposition of LWOP. Second, at the time of the Petitioner's sentencing, as is the case now, Indiana law did not have any provision that required or mandated imposition of an LWOP sentence upon conviction. Rather, Indiana Code § 35-50-2-9 explicitly provided the jury and/or the

sentencing court with the discretion to impose death, LWOP, or a term of years based upon the existence of any mitigating facts, including the defendant's age. The *Miller* Court specifically acknowledged that Indiana does not have a statute mandating an LWOP sentence. *Id.* at 2472, n. 10. To be sure, the Indiana Supreme Court has specifically held that Indiana's LWOP statute is discretionary, not mandatory, like the unconstitutional Arkansas and Alabama statutes at issue in *Miller.* See *Conley v. State*, 972 N.E.2d at 877-880. Consequently, Indiana's LWOP statute does not run afoul of the Eighth Amendment as articulated by *Miller*, and the Petitioner is not entitled to relief.

39) The Petitioner seems to acknowledge that the holding in *Miller* does not control the outcome here. Paragraph 9(A) of the Petition discusses *Miller* and then states that "Newton's LWOP plea agreement creates a similar dilemma. The mandatory terms of the plea bound the trial judge to impose a LWOP sentence." *Id.* However, nothing about this case is "similar" to the facts in *Miller.* First, the defendants in *Miller* were 14 years of age. The Petitioner herein was a mere forty-seven days shy of turning 18 when he shot and killed Christopher Coyle. Additionally, the holding of *Miller* is clear: a statute that requires or mandates imposition of LWOP on a juvenile offender upon conviction is unconstitutional. At the time of the Petitioner's conviction, as is the case now, Indiana has no such statute. The fact that the Petitioner pled guilty and agreed to an LWOP sentence does not render his sentence a "mandatory sentence" within purview of *Miller.* The

court was not required to accept the plea agreement. The court had the inherent statutory authority to reject the plea agreement and set the matter for trial. Instead of asking the Court to follow or enforce the law as it exists, the Petitioner is seeking to expand and broaden the scope of *Miller* in an attempt to gain relief here.

40) The Petitioner further argues that the plea agreement "did not allow the court to give Newton's youth and its attendant factors the constitutional consideration found lacking in *Miller.* Accordingly, Newton's LWOP sentence is unconstitutional." Petition ¶ 9(A). Even if it were true that by accepting and becoming bound by the plea agreement, the court was precluded from considering the Petitioner's "youth and its attendant factors," it was only done at the Petitioner's behest. The Court finds no error or prejudice to the Petitioner by accepting a plea agreement that the Petitioner asked to Court to accept.

41) More importantly, the Petitioner's contention that the Court did not consider his "youth and attendant factors" is factually inaccurate. After the Petitioner's Change of Plea hearing, but before the plea acceptance and sentencing hearing, the Petitioner filed a Motion to use Mitigation Timeline In Connection with Sentencing of Larry Newton. Defendant's Exhibit A (Appellant's Appendix, pg. 902-904). Attached to the Motion was an eighty (80) page Mitigation Timeline. *Id.* at 906-985. The Court subsequently granted the Petitioner's Motion and admitted the Mitigation Timeline into evidence. *Id.* at 28-29, 996. This Timeline

quite began with the facts and circumstances surrounding the birth of the Petitioner's mother and father (*Id.* at 922-923) and ended with the Petitioner's crime (*Id.* at 985). The sixty (60) pages in-between contain detailed factual accounts concerning every aspect of the Petitioner's life. *Id.* at 924-984.

42) Additionally, the Court's probation officer prepared and filed a Pre-sentence Investigation Report. *Id.* at 28, 890-96. The Pre-sentence investigation contained information regarding the Petitioner's family background, education, employment, physical health, mental health, and substance use. *Id.* at 894-895. Additionally, the Report identifies as a mitigating circumstance the defendant's age. *Id.* at 895.

43) Consequently, the Court finds that prior to the plea acceptance and sentencing hearing, the Petitioner and the probation department provided the Court with a copious amount of information concerning the Petitioner's youthful age and the attendant circumstances. The Court had the inherent ability to reject the plea agreement had the Court determined, in light of these facts and circumstances, LWOP was not warranted. The Court determined then, as it does now, that the statutory aggravating circumstances substantially outweigh all of the mitigating evidence in this case. Life without the possibility of parole is the only appropriate sentence for this Petitioner and his crime.

44) The Petitioner quotes *Miller*, for the proposition that "unlike an adult, a juvenile has limited

control over his own environment and lacks the ability to extricate himself from a crime-producing environment." Amended Petition ¶ 9(E)(1)(d). While this may be true in some circumstances, it certainly is not in this case. The Indiana Supreme Court has said that "chronological age for people in their teens and early twenties is not the sole measure of culpability. There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful." *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2000). The Petitioner was a mere 47 days from becoming an "adult." The evidence indicates that he was certainly more "hardened and purposeful" than "clueless." The Court finds that there is no evidence in the record to support the notion that he was coerced by other, older persons into committing these crimes. Rather, he was an eager and willing participant. The Petitioner voluntarily chose to join and associate with a criminal gang. The Petitioner chose to attend the gang party in the cemetery. It was the Petitioner's idea to rob and execute a Ball State student. It was the Petitioner's choice to arm himself with a gun. It was the Petitioner who said "I feel like killing somebody . . . let's go do this." The Petitioner chose the victim. The Petitioner chose to put his gun at the back of Christopher Coyle's head and pull the trigger. The uncontradicted evidence in this case shows beyond a shadow of a doubt that the Petitioner had absolute control over his environment and had the complete ability to extricate himself from a crime-producing environment.

Claim 8(C) – The trial court did not unconstitutionally relinquish its sentencing discretion.

45) The Petitioner alleges that by accepting his plea agreement, the trial court unconstitutionally relinquished its sentencing discretion. See Amended Petition ¶¶ 8(C), 9(C).

46) This particular argument really is procedural in nature. In cases where the parties have tendered a plea agreement, Indiana law provides that a court cannot impose a sentence unless and until it accepts the agreement. Once a plea agreement is accepted, the court is bound by its terms. Take for example a non-capital case of a convenience store robbery. Suppose the defendant and the State enter into a plea agreement wherein the defendant agrees to plead guilty to robbery and receive a four year prison sentence. Procedurally, the trial court must first determine whether or not to accept the agreement. If so, the court becomes bound by the agreement and must impose the four year prison sentence. The problem arises, according to the Petitioner, in capital cases where the defendant enters into a plea agreement and agrees to either a death sentence or LWOP. Before a court can impose a capital sentence, it must consider any available mitigating factors, such as youth, balance them against the statutory aggravators and then make certain findings.[8] The Petitioner claims that these

[8] For example, the trial court must: (i) identify each mitigating and aggravating circumstance found, (ii) include the specific facts and reasons which lead the court to find the existence of each such circumstance, (iii) articulate that the mitigating and

constitutional and legal requirements become meaningless because, procedurally, the act of accepting the plea agreement binds the trial court to impose the capital sentence. Consequently, the court is deprived of the ability to actually consider mitigating factors and precluded from imposing anything other than the agreed upon capital sentence. The Court finds several problems with this argument.

47) First, this argument is somewhat circular. One of the fundamental purposes of a plea agreement, wherein the defendant agrees upon a set sentence, is to remove discretion of the sentencing court. The parties have negotiated a resolution to the case and they are asking the court to enforce the agreement. Accordingly, there is no discretion for the court to exercise.

48) Second, the Petitioner fails to recognize that the Court is not required to accept a plea agreement. In this case, if the Court had determined that the State had not proven the existence of at least one statutory aggravating circumstance, that the mitigators outweighed the aggravators, or that LWOP was not an appropriate sentence, the Court had the ability to reject the plea agreement.

49) Finally, and most importantly, the argument that the Petitioner makes here is similar to one that

---

aggravating circumstances have been evaluated and balanced in determination of the sentence, and (iv) set forth the trial court's personal conclusion that the sentence is appropriate punishment for this offender and this crime. *Harrison v. State*, 644 N.E.2d 1243, 1262 (Ind. 1995).

was made and rejected in *Smith v. State*, 686 N.E.2d 1264, 1270-1272 (Ind. 1997). In *Smith*, the defendant and the State entered into a negotiated plea agreement wherein the defendant agreed to plead guilty to murder and the death penalty would be imposed. During a change of plea hearing, the trial court found that the State had made a prima facie showing of guilt and withheld entering judgment of conviction until after it heard evidence concerning the sentence. Ultimately, the trial court accepted the agreement and sentenced the defendant to death. Defense counsel initiated an appeal, however the defendant elected to proceed *pro se* and terminate all appellate proceedings. The court appointed amicus counsel who argued that Indiana's death penalty and plea agreement statutes, when read together, do not permit negotiated plea agreements for the death penalty because it places trial courts in a "peculiar catch-22." For example, according to Smith's amicus counsel:

> [i]f judgment of guilt is first entered by the acceptance of the plea agreement, the plea agreement statute prevents the court from deviating from the agreement. Therefore, the sentencing hearing is meaningless, since the court has already legally committed itself to the death sentence. On the other hand, if the court in order to determine whether to accept the plea agreement, conducts a sentencing hearing to access the propriety of the death penalty before entering judgment of guilty, it violates the part of the death penalty statute

> providing that a sentencing hearing only occurs after a person is convicted of murder.

Id. at 1270. More specifically, amicus counsel argued that Smith's death sentence could not stand because the trial court did not enter judgment of conviction before the trial court conducted the sentencing proceedings and imposed the death penalty. The Supreme Court was ultimately unpersuaded.

> This Court has long held that we should, if possible, so construe the two acts before us as to harmonize the same and give full force and effect to each. Finding no indication in either statute of legislative intent to proscribe negotiated plea agreements for the death penalty, we will abide by this principle of statutory interpretation. . . . Our review of the careful and extensive procedure employed in Smith's case indicates, for the most part, a proper harmonizing of the two statutes . . . Nothing in this procedure warrants reversal of Smith's sentence.

Id. at 1270-1271. In discussing the chronological order of events in change of plea and sentencing hearings in capital cases, the Supreme Court said:

> Under our interpretation of the plea agreement statute, conviction could be entered on the basis of a plea agreement for the death penalty without tying the hands of the trial court as to its sentencing determination

> required by subsection (k),[9] thus making unnecessary the Sullivan Circuit Court's withholding entry of conviction the second time until after the sentencing hearing. We do not read the phrase in the death penalty statute at issue as demonstrating legislative intent to *mandate* entering a conviction before a court can review the propriety of the death sentence. Rather, we believe this phrase indicates the intent of the legislature to divide the death penalty process into guilt and sentencing phases, whereby entrance of conviction would almost always be the line of demarcation between the two. Such division was accomplished in this case, even though Judge Pierson reserved entering judgment of conviction until after hearing evidence on the sentence.

Id. at 1272 n.5.

50) The Petitioner is essentially trying to make the same form over function argument that was rejected by the Supreme Court in *Smith.* The fact that the Court accepted the Petitioner's plea agreement and entered judgment did not "t[ie] the hands of the trial court as to its sentencing determination required by subsection (k)" thereby relinquishing its sentencing

[9] When accepting a plea agreement calling for imposition of a capital offense, I.C. § 35-50-2-9(k) requires the trial court to find that (1) the State has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists and (2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances. At the time of the Petitioner's crime, this provision was codified at I.C. § 35-50-2-9(i).

discretion. The record is clear that the trial court engaged in a lengthy sentencing statement wherein it found beyond a reasonable doubt the existence of two statutory aggravating circumstances, identified all potential mitigating circumstances, weighed the aggravators against the mitigators, found that the aggravators outweigh the mitigators and concluded that LWOP was the appropriate penalty. Defendant's Exhibit A (SE TR 126, 210-227). As was the case in *Smith*, the trial court here properly harmonized the guilty plea statute with the death penalty statute and nothing in this procedure warrants reversal of the Petitioner's sentence.

51) Therefore, there is nothing unconstitutional or impermissible about a negotiated plea agreement that calls for imposition of the death penalty (and by statutory extension, LWOP). See *Smith v. State*, 686 N.E.2d 1264, 1270-1272 (Ind. 1997). The Petitioner is not entitled to relief.

Claim 9(E) – The Petitioner's LWOP sentence does not violate statutory and constitutional requirements nor is it disproportionate.

52) The Petitioner claims that his LWOP sentence violates statutory and constitutional requirements, and is inappropriate and disproportionate in five (5) separate ways. See Petition ¶ (9)(E).

1. Impermissible factors considered at sentencing.

53) The Petitioner alleges that his LWOP sentence violates statutory and constitutional requirements and is inappropriate because the trial court considered impermissible factors in sentencing him to LWOP. Amended Petition ¶ 9(E)(1). Preliminarily, the Court notes that the Petitioner pled guilty and specifically agreed to imposition of LWOP. The Petitioner also agreed that the two charged aggravating circumstances existed beyond a reasonable doubt. That agreement was accepted by the Court. The Court finds and concludes that the Petitioner cannot now claim that the Court somehow inappropriately imposed a sentence that was specifically agreed upon by the Petitioner.

The Court will nonetheless address each of the Petitioner's claims.

54) Generally speaking, a death or LWOP sentence can only be imposed if certain statutory aggravators are proven beyond a reasonable doubt. When the death or LWOP sentence is sought, courts must limit the aggravating circumstances eligible for consideration to those specified in the death penalty statute. *Bivins v. State*, 642 N.E.2d 928, 955 (Ind. 1994).

a. Effect of the crime on the community.

55) The Petitioner alleges that the trial court impermissibly relied upon the effect his crime had on the

community. Amended Petition ¶ 9(E)(1)(a). During the sentencing hearing, two witnesses, without any objection from the Petitioner, gave testimony relating to the effect the crime had on the community. See Sentencing TR 147, 164. Generally speaking, victim impact testimony is a non-statutory aggravating circumstances that cannot be considered when deciding whether to impose a sentence of death or LWOP. *Bivens v. State*, 642 N.E.2d 928 (Ind. 1994).

56) It is doubtful that the challenged evidence falls within the definition of "victim impact evidence." Historically, victim impact evidence that has been found to be erroneously admitted consisted of testimony relating to how a murder affected the victim's grieving spouse or extensive heart wrenching narratives about how the offense impacted the murder victim's minor children. See *Bivens v. State*, 642 N.E.2d 928, 957 (Ind. 1994); *Lambert v. State*, 675 N.E.2d 1060, 1062 (Ind. 1996). Admission of this type of evidence may result in the death penalty being imposed based upon the perceived value of the victim's life. The Court here made no such reference to "victim impact" evidence in its sentencing dialogue or sentencing order. This Court did not impose LWOP based upon Victim impact evidence or the perceived value of the victim's life. Rather, LWOP was imposed based on the existence of two (2) statutory aggravating factors that were proven beyond a reasonable doubt which far outweighed any potential mitigating factors. During the Court's discussion of why in the court's own judgment a sentence of LWOP is the only appropriate sentence,

the Court made a very brief reference to the Defendant's predatory behavior and fact that students should not have to worry about being robbed and killed. The Court was merely describing why, in its own judgment, such a severe sentence was appropriate.

57) Additionally, the Petitioner's argument fails to take into consideration that the Court conducted a combined sentencing hearing on all counts; capital and non-capital offenses alike. Aside from the evidence relating to the charged statutory aggravating circumstances for the State's LWOP request, the evidence that was offered during the sentencing hearing was relevant and admissible for the Court's consideration on imposition of sentence on Count 2, Criminal Confinement and Count 3, Conspiracy to Commit Robbery. While the Court's finding of aggravating circumstances supporting LWOP was constrained by the charged statutory aggravating circumstances, the Court was not so constrained in considering other facts, aggravating and mitigating, as they related to Counts 2 and 3. The Supreme Court addressed the identical issue in *Veal v. State*, 784 N.E.2d 490 (Ind. 2003). There, the court found that victim impact testimony was offered in a sentencing hearing, in which the defendant was sentenced for both the capital murder and the other, non-capital, counts. *Id.* at 493. The Court held that although the family's opinions are not statutory aggravating factors under the death penalty/LWOP statute, the court can consider such evidence when imposing sentence on the non-capital offenses. *Id.*

58) The Petitioner's argument also fails to recognize that the challenged evidence was received not by a jury but rather by the Court. "There is a presumption that a court in any proceeding that is tried before the bench rather than before a jury renders its decision solely on the basis of relevant and probative evidence. The same is true of a sentencing hearing." *Veal v. State*, 784 N.E.2d at 493 (internal citations omitted). The Court's oral sentencing statement in its entirety as well as its written sentencing order relating to the LWOP sentence focused on the overwhelming evidence demonstrating the commission of the crime and the Petitioner's responsibility for it. Therefore, the challenged evidence was not improperly admitted or considered.

59) Even if it was error to admit or consider such evidence, such error is harmless beyond a reasonable doubt and does not require a new penalty phase hearing. Admission of improper **victim impact evidence** is harmless beyond a reasonable doubt where there is strong evidence of the charged aggravating circumstance. *Wrinkles v. State*, 749 N.E.2d 1179, 1196 (Ind. 2001) (*citing Bivens v. State*, 642 N.E.2d 928, 957 (Ind. 1994)). Erroneously admitted victim impact testimony does not mandate reversal when the admission of that evidence can be construed as harmless error. *Lambert v. State*, 675 N.E.2d at 1065. Errors may be deemed harmless only if the reviewing court can say with some assurance that the error had no substantial influence upon the verdict or decision. *Id.* (citing *O'Neal v. McAninch*, 513 U.S. 432, (1995).

60) The Court engaged in a rather lengthy and detailed oral sentencing statement. Defendant's PCR Exhibit A (SE TR TR 206-228). The Court found beyond a reasonable doubt that at least one (1) of the charged statutory aggravating circumstances existed, thereby rendering the Petitioner legally eligible to receive an LWOP sentence. *Id.* at 210. The Court then reviewed all of the potential mitigating circumstances. *Id.* at 213-220, 222, 225. The Court engaged in the statutory weighing process and found that the aggravators far outweighed any mitigating circumstances. *Id.* at 222. Finally, the Court determined in its own judgment a sentence of LWOP was the only appropriate sentence. *Id.* at 226-227.

61) Juxtaposed against the strong evidence of the charged aggravating circumstances, the fact that the Petitioner specifically agreed to an LWOP sentence, the fact that the sentencing determination was made by the Court rather than to a jury, and considering the Court's sentencing statement as well as the formal sentencing order, the Court finds that limited victim impact evidence did not have a substantial influence upon the Court's decision to impose an LWOP sentence. Moreover, it is important to note that the Petitioner specifically agreed to imposition of the LWOP Sentence. He agreed as to the existence of the two (2) aggravating circumstances and that those circumstances outweigh the mitigating circumstances warranting imposition of LWOP. Consequently, the Court finds that any error of admission or consideration of

the challenged evidence is harmless beyond a reasonable doubt.

b. Defendant's age as an aggravating factor.

62) The Petitioner alleges that the trial court committed error by considering his age as an aggravating factor. Indiana Code § 35-50-2-9(c)(7) provides that in death penalty and LWOP cases, "the mitigating circumstances that may be considered . . . are as follows: The defendant was less than eighteen (18) years of age at the time the murder was committed."

63) In support of his argument, the Petitioner cites *Miller v. Alabama*, 132 S.Ct. 2455 (2012) and *Graham v. Florida*, 560 U.S. 73 (2010). The defendants in *Miller* were 14 years of age at the time of their offenses and the defendant in *Graham* was 16. The Petitioner herein was 17 years, 10 months, and 16 days of age at the time he executed Christopher Coyle. These cases stand for the proposition that, in determining whether to impose a capitol sentence, the court is required to consider the defendant's age. A review of the record indicates that the trial court did consider the Defendant's age at the time of the murder. Defendant's PCR Exhibit A (SE TR 214, 220, 222, 225). However, the Court gave the Petitioner's age little weight given other facts and circumstances in the case.

64) During the sentencing hearing,[10] the Court considered the Petitioner's youthful age and found it "troubling that one so young can commit such a vicious and unprovoked attack." Defendant's PCR Exhibit A (SE TR 220). The Court said the Petitioner's "total disregard for human life at such a young age is both shocking and indicates that if placed in a similar situation, you would respond in a similar manner." *Id.* at 221. Additionally, the Court found that the Petitioner was "beyond rehabilitation." *Id.* at 225.

65) Although the sentencing court must consider the Defendant's age, the court is not required to ascribe the same weight to the mitigating evidence that the defendant requests. *Stevens v. State*, 691 N.E.2d 412, 428 (Ind. 1997). The Indiana Supreme Court has specifically held that a trial court was not required to give the same weight to mitigating circumstances as defendant in determining whether to impose the death penalty. *Saylor v. State*, 686 N.E.2d 80 (Ind. 1997). In *Conley v. State*, 972 N.E.2d 864 (Ind. 2012), the defendant alleged the trial court improperly weighed the aggravating and mitigating factors in determining whether to impose LWOP. One of the statutory mitigating circumstances in the case was that Conley was under 18 at the time of the offense. The Supreme Court found that the trial court gave age "some" weight and held there was no abuse of discretion to the little

---

[10] The Petitioner erroneously asserts that at the time of sentencing he was 17 years of age. See Amended Petition, ¶ (9)(e)(1)(b). On the date sentence was imposed, the petitioner was a little over 19 years of age.

weight assigned given the fact that Conley was nearly 18 years old at the time of the offense as well as other factors in the case. *Id.* at 874.

c. Future dangerousness.

66) The Petitioner alleges that the trial court improperly considered the Petitioner's future dangerousness. Amended Petition, ¶ 8(E)(1)(c). The Court again reminds the Petitioner that he pled guilty and agreed to imposition of LWOP sentence. Further not one but two statutory aggravators were found by the Court to impose LWOP. By doing so, the Petitioner asked the Court to impose LWOP. Accordingly, whether or not the Court considered the Petitioner's future dangerousness would at the most be harmless error.

d. Whether Newton voluntarily sought rehabilitation.

67) The Petitioner asserts that the fact that he never voluntarily sought rehabilitation was used by the Court as a non-statutory aggravator when imposing LWOP. However, a close review of the record demonstrates that the Court did no such thing. Rather, the Court discussed this subject when it was considering the potential mitigation evidence.

68) As the Petitioner has previously observed, prior to imposition of sentence, the court was required to make findings of fact in connection with the plea. See Defendant's PCR Exhibit A (Appellate Appendix,

p. 903). Before imposition of LWOP, the court is required to consider any relevant mitigating circumstances. Indiana Code § 35-50-2-9(c) provides a list of mitigating factors the court may consider. However, that list is not exhaustive. Subsection (c)(8) is a catchall mitigator that provides "any other circumstances appropriate for consideration." On December 12, 1995, in anticipation of plea acceptance and sentencing, the Petitioner sought leave and filed an eighty (80) page mitigation outline that "summarized pertinent facts that would be offered in mitigation at the trial of this case . . . " See Defendant's Exhibit A (Appellate Appendix, p. 906-985). In accordance with its statutory duty, the Court reviewed any potentially relevant mitigating circumstances. It was during this discussion that the Court considered whether the Petitioner had made any attempt at voluntary rehabilitation. This becomes clear when reviewing the Court's Order on Plea Acceptance and Sentencing. Defendant's PCR Exhibit A (Appellant's Appendix p. 1010-1015). Specifically, the Court was considering whether there was any evidence of voluntary rehabilitation that could be considered under the statutory catchall mitigator. *Id.* at 1015. Thus, the Court committed no error.

e. Failed to consider the guilty plea mitigating.

69) The Petitioner alleges that the Court failed to consider the fact that he pled guilty a mitigating factor. "A guilty plea deserves mitigating weight." Amended Petition, ¶ 9(E)(1)(e). The Petitioner

presented the Court with a plea agreement wherein the Petitioner not only pled guilty but also agreed to an LWOP sentence. The Petitioner now suggests that the fact that he pled guilty should have been given mitigating weight. The Petitioner seems to suggest that the fact that he pled guilty was a mitigating factor against imposing the very sentence that the Petitioner specifically agreed upon. The fact that the Court may not have considered the guilty plea a mitigating circumstance is a fact without consequence.

2. Failed to engage in the individualized sentencing. Am Pet ¶ 9(e)(2).

70) The Petitioner alleges that the court failed to conduct individualized sentencing as required by the Eighth Amendment. Amended Petition ¶ 9(e)(2).

71) A capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is "appropriate." *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991). Statutes that call for a mandatory capital sentence are unconstitutional because they fail to consider the individual characteristics of the defendant and his crime. See *Sumner v. Shuman*, 483 U.S. 66 (1987). As noted above, the Petitioner's sentence was not mandatorily imposed as a result of conviction for a certain offense.

72) As proof of his allegation that the Court did not conduct an individualized sentencing, the Petitioner points to the fact Court's sentencing order is

allegedly "nearly identical" to the sentencing order for the Petitioner's co-defendant, Duane Turner, who was sentenced approximately six months earlier. Even if the Court's sentencing order is similar to that of his co-defendant, that fact does not violate the Eighth Amendment's requirement of individuality. The Petitioner's argument fails to acknowledge that he and Duane Turner were co-defendants from the same criminal gang. They both stood in the alley in the early morning hours of September 25, 1994 and both shot Christopher Coyle, one right after the other. Consequently, it is entirely reasonable and appropriate that the sentencing language would be similar. The Court's sentencing statement and sentencing order, in their totality, reflect an individualized sentence based on the character and record of this particular Petitioner.

3. There has been no appellate review of the sentence. Am Pet ¶ 9(e)(3).

73) The Defendant argues that he has an automatic right to have his sentence reviewed by an appellate court. In *Judy v. State*, 416 N.E.2d 95 (Ind. 1981) the Supreme Court held that although a defendant can waive review of any issue regarding his convictions, I.C. § 35-50-2-9(h) precludes any waiver of review of a death sentence. *Id.* at 102. At the time of the Petitioner's crime, I.C. § 35-50-2-9(h)[11] provided that "a **death sentence** is subject to automatic review by the [Indiana] supreme court." (emphasis added). The plain

[11] This provision is currently codified at I.C. § 35-50-29-(j).

language of subsection (h) demonstrates that automatic appellate review applies only to cases where a death sentence has been imposed. A "death sentence" means just that, an order by a trial court sentencing a defendant to death. Neither Subsection (h), nor any other statute, requires automatic review of LWOP sentences. Indeed, the *Judy* Court specifically said "**the death sentence** cannot be imposed on anyone in this State until it has been reviewed by this Court and found to comport with the laws of this State and the principles of our state and federal constitutions." *Id.* at 102 (emphasis added). The subsequent cases of *Vandiver v. State*, 480 N.E. 910 (1985) and *Smith v. State*, 686 N.E.2d 1264 (Ind. 1997) reaffirmed the holding in *Judy* that a defendant may not waive review of "a death sentence." 480 N.E.2d 911-912; 686 N.E.2d at 1274. No case or statute prevents a defendant from pleading guilty to murder, agreeing to imposition of an LWOP sentence, and waiving appellate review. Quite the contrary. As noted above, the Supreme Court has specifically held that a defendant who pleads guilty and agrees to imposition of an LWOP sentence, cannot later appeal that sentence. *Sholes v. State*, 878 N.E.2d 1232, 1234 (Ind. 2008). In 2008, Justice Sullivan noted that the Petitioner's ability to challenge his LWOP sentence on appeal was forfeited when he pled guilty and agreed to that specific sentence. *Newton v. State*, 894 N.E.2d 192, 194 (2008) (Sullivan concurring). The Petitioner is requesting the Court to change the law, not follow law as it now exists.

4. LWOP is disproportionate. Am Pet ¶ 9(e)(4).

74) The Petitioner argues that his LWOP sentence is disproportionate. He asserts that he is "not the worst of the worst." In support of his argument, the Defendant asserts that only (4) juveniles in Indiana have been sentenced to LWOP arguing that,

> this is the harshest sentence that can be imposed upon a juvenile. Newton is not among the worst of the worst. Newton was with his older friend when he committed the crime and, as a juvenile, was more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.

Am Pet. ¶ 9(e)(4).

75) The Petitioner has not specified whether the sentence is allegedly disproportionate under the Federal constitution or the State constitution. The Eighth Amendment's bar on cruel and unusual punishments has been held to implicitly prohibit grossly disproportionate punishments. *Knapp v. State*, 9 N.E.3d 1274, 1289 (Ind. 2014) (citing *Solem v. Helm*, 463 U.S. 277 (1983). "The Supreme Court has rarely held the Eighth Amendment to prohibit LWOP as disproportional in any case, and never in any intentional homicide case. *Id.* The U.S. Supreme Court has recognized that murderers are "categorically [more] deserving of the most serious forms of punishment" than "defendants who do not kill, intend to kill, or foresee that life will be taken." *Id.* at 1291. Imposition of LWOP is not disproportionate to the crime of intentional murder committed while

committing or attempting to commit robbery. Consequently, the Petitioner's sentence is not disproportionate under the Eighth Amendment to the U.S. Constitution.

76) "Though Article 1, Section 16 [of Indiana's Constitution] sweeps somewhat more broadly than the Eighth Amendment, its protections are still narrow." *Knapp v. State*, 9 N.E.3d 1274, 1289 (Ind. 2014). The nature and extent of penal sanctions are primarily legislative considerations and courts are not at liberty to set aside a legislatively sanctioned penalty because it may seem too severe to the court. *Clark v. State*, 561 N.E.2d 759, 765 (Ind. 1990). Indiana's proportionality clause which is contained in Article 1, Section 16 of the Indiana Constitution is violated "only when the criminal penalty is not graduated and proportioned to the nature of the offense." *Knapp v. State*, 9 N.E.3d at 1290. A defendant's sentence cannot be "so severe and so entirely out of proportion to the gravity of the offenses actually committed as to shock public sentiment and violate the judgment of a reasonable people." *Id.* (citing *Clark v. State*, 561 N.E.2d 561, 765 (Ind. 1990)). There is no case that holds that imposition of LWOP for the intentional killing during the course of a robbery or attempted robbery violates the Indiana Contusion. Quite the contrary. It is indisputable that "the nature and gravity any intentional murder is the gravest offense known to Indiana law and involves the ultimate harm to its victim." *Id.* at 1290. A life sentence is proportional to the offenses of murder and robbery. *Dunlop v. State*, 724 N.E.2d 592, 596-597 (Ind. 2000).

5. LWOP is inappropriate. Am Pet ¶ 9(e)(5).

77) The Petitioner asserts that his sentence of LWOP is inappropriate. Our Supreme Court has said:

> A sentence authorized by statute can be revised where it is inappropriate in light of the nature of the offense and the character of the offender. Appellate Rule 7(B) analysis is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate. It is not a matter of second guessing the trial court sentence. Sentence review under Appellate Rule 7(B) is very deferential to the trial court. The burden is on the defendant to persuade the appellate court that his sentence is inappropriate.
>
> Therefore, when reviewing a sentence, our principal role is to leaven the outliers rather than necessarily achieve what is perceived as the correct result. We do not look to determine if the sentence was appropriate; instead we look to make sure the sentence was not inappropriate.

Conley v. State, 972 N.E.2d 864, 876 (Ind. 2012) (internal citations omitted).

78) The Petitioner's sentence of LWOP is not inappropriate given the nature of the offense and character of the offender.

79) The Petitioner seems to concede that the nature of the offense warrants imposition of LWOP. See Petition, p. 7 (citing the fact that "the nature of the case reveals that Newton shot Christopher Coyle in the

head during an attempted robbery). The nature of the Petitioner's offense can only be described as cold, calculated, and premeditated. The Petitioner and his fellow gang members drove to the Ball State University campus for the sole purpose of robbing and killing a Ball State student. The robbery was not all that important to the Petitioner. As he admitted to the police, it didn't matter whether his intended victim had money. The Petitioner was going to kill the first helpless person they found. The Petitioner and his confederates drove through campus under the cover of darkness like a predator in search of prey. When they set their sights on Christopher Coyle, he was walking a friend home. Once he was alone, the Petitioner pulled his gun and forced Coyle into their car. When asked by Petitioner whether he had any money, Coyle pulled out a set of keys and a nickel from his pocket. The Petitioner then walked Coyle down a dark alley, pointed his gun at the back of his head, and pulled the trigger. The Petitioner had multiple opportunities to stop and abandon his murderous plan. Instead, he chose to execute Coyle in cold blood and leave him in the dark alley to die.

80) The Petitioner asserts LWOP is inappropriate in light of his character. More specifically, the Petitioner argues that LWOP is inappropriate given the fact that he allegedly had a "horrific" childhood. Our Supreme Court has consistently held that evidence of a difficult childhood "warrants little, if any, mitigating weight." *Ritchie v. State*, 875 N.E.2d 706, 725 (Ind. 2007). See also *See Coleman v. State*, 741 N.E.2d 697,

703 (Ind.2000) (rejecting the claim that evidence of childhood abuse and neglect if presented to the sentencing court would have resulted in a sentence other than death); *Peterson v. State*, 674 N.E.2d 528, 543 (Ind.1996) (mitigating weight warranted by a difficult childhood is in the low range); *Loveless v. State*, 642 N.E.2d 974, 977 (Ind.1994) (showing such evidence is occasionally declared not mitigating at all). The Indiana Supreme Court has specifically held that a trial court was not required to give the same weight as defendant to evidence of the defendant's difficult experiences in childhood and adolescence or recognize them as mitigating circumstances in determining whether to impose the death penalty. *Saylor v. State*, 686 N.E.2d 80 (Ind. 1997). While it appears to the Court that the Petitioner had a difficult childhood, that fact does not any way mitigate or weigh against imposition of LWOP under these facts and circumstances.

81) Similarly, the Petitioner claims he should be given leniency due to his age. He claims to have been a "juvenile" at the time of his offense. While he may have legally been a juvenile based on his date of birth, he deserves no leniency. This Petitioner was not a child. He was a mere forty-seven days away from his eighteenth birthday. From a very young age he demonstrated a complete and total disregard and distain for the law, for law enforcement personnel, and any type of persons in authority. He showed a shocking disregard for the rights of other people. The evidence in the record indicates that he has a depraved character. When he told Scott Turner about how he had executed

Christopher Coyle, he was smiling and grinning. Defendant's PCR Exhibit A (COP TR 81-82). Later that evening, the Petitioner approached Scott Turner and asked to borrow his gun again. *Id.* at 88. The Petitioner said that he "wanted to do that shit again. I want to go make some money." *Id.* The next day, the Petitioner showed Turner the front page newspaper article detailing the murder and when he did so laughed. *Id.* at 87. After he was arrested, jailed, and awaiting trial on a capital offense, the Petitioner was planning the execution of Scott Turner because he was willing to testify on behalf of the State of Indiana. Defendant's PCR Exhibit A (SE TR, p. 168-169, 173-713); State's PCR Exhibit 5.[12] At the time he was consulting with his attorneys, court appointed psychiatrists and psychologists, he was plotting the death of a witness in this case. The Petitioner is truly depraved and irredeemable.

82) The sentence is not inappropriate in light of the Petitioner's character and the nature of the offense. The Petitioner made the conscious and deliberate choice to execute Christopher Coyle and accordingly he forfeited his right to be a part of our society. As the Court said during the Petitioner's sentencing hearing:

> This is precisely the kind of case the legislature had in mind when the life without parole statute was passed. . . . To lead a person into an alley and to put a bullet in his head and leave him there to die in the dirt takes a very

[12] This exhibit was originally admitted during the Petitioner's sentencing hearing as State's Exhibit 1.

> different kind of person. It seems to the Court that it takes a person filled with hate, and a person who is genuinely evil, and in my judgment, Mr. Newton, beyond rehabilitation.
>
> *****
>
> This was a thrill killing, this act was totally random, it was unprovoked, and it was senseless. It was also savage. Anyone who would commit such an act has stepped outside the bounds of civilized society and should not be welcomed back. When I was reviewing the items that were submitted at the change of plea hearing, Mr. Newton, the statements that you made, your own words to the police, 'looking to kill somebody' seemed to me to be just a matter of fact recitation of what happened. I put the gun on the back of his head and shot. It wouldn't' have mattered if the victim had any money. Just gonna kill somebody. You have demonstrated no regard for human life. Frankly, Mr. Newton, I don't believe you have a conscience. . . . The only appropriate penalty for the offense of murder as alleged is a sentence of life imprisonment without parole.

<u>Ineffective assistance of counsel</u>

83) The Petitioner alleges ineffective assistance of trial counsel. This is not the first time the Petitioner has filed a petition for post-conviction relief alleging ineffective assistance of trial counsel. On October 30, 2001, the Petitioner filed a petition for post-conviction relief alleging ineffective assistance of counsel. The

post-conviction relief court denied the Petition finding that counsel were not ineffective and that the Petitioner's plea of guilty was knowingly and voluntarily made. State's PCR Exhibit 7. The Petitioner did not appeal the court's ruling. On July 22, 2013 the Indiana Court of Appeals authorized the Petitioner to file this successive petition.

84) Rule 1, Section 8 of Indiana's Rules for Post-Conviction Remedies provides that "all grounds for relief available to a petitioner under this rule must be raised in his original petition." Well established Indiana law provides that if the ineffective assistance claims were decided adversely in the first petition, the doctrine of *res judicata* bars the petitioner from raising them again in a successive petition. Similarly, if the petitioner raises ineffective assistance of counsel on some issues in the first petition for post-conviction relief, the doctrine of waiver prevents him from raising other issues of ineffective assistance of counsel in a successive petition.

85) "If a convicted person wishes to challenge the performance of his defense counsel at a trial upon criminal charges [in a post-conviction relief petition], he may do so. If such challenge is included in the second petition for post-conviction relief, the claim then is properly subject to waiver or *res judicata*." *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989). In *Gosnell v. State*, 483 N.E.2d 445 (Ind. 1985), the petitioner raised the issue of effective trial counsel in his first post-conviction petition, and again in his second petition for post-conviction relief stating other grounds for

ineffective counsel. The Indiana Supreme Court affirmed the denial of post-conviction relief finding that the issue of trial counsel competence was or could have been resolved in the first proceeding. *Id.* at 448.

86) In *Resnover v. State*, 547 N.E.2d 814 (Ind. 1989), the defendant filed a petition for post-conviction relief that alleged ineffective assistance of counsel. That petition was adjudicated on its merits. Resnover then filed a successive petition again alleging ineffective assistance of counsel on different grounds than what was raised in the first petition. The Supreme Court held that Resnover could not be heard on this issue in the second petition because he had raised it in his first. Petition. *Id.* at 816.

> Ineffective assistance of counsel as an issue is known and available to a party on his direct appeal or in his first post-conviction petition if his trial counsel was involved in his first attempt at appellate relief. Here, Resnover did raise the issue of ineffectiveness of counsel who handled his trial and his direct appeal and the issue was decided adversely to his petition. He was not entitled to be heard on this issue in this second petition and the trial court properly denied him relief without a factual hearing.

Id. See also *Schiro v. State*, 533 N.E.2d 1201, 1205 (Ind. 1989); *Lane v. State*, 521 N.E.2d 947, 949 (Ind. 1988).

87) In *Daniels v. State*, 741 N.E.2d 1177 (Ind. 2001) the petitioner filed a petition for post-conviction relief that included several claims including that trial

counsel rendered ineffective assistance of counsel. That petition was denied. Subsequently the petitioner filed a successive petition that alleged ineffective assistance. The post-court denied relief finding that the claims were barred by *res judicata* and waiver. The Supreme Court affirmed stating that "the post-conviction court correctly held that Daniels' new claims of trial counsel ineffectiveness were barred by res judicata and waiver. As this Court [has] observed . . . the Indiana Rules of Procedure for Post-Conviction Remedies require that all grounds for relief available to a petition[er] under the post-conviction rules must be raised in the original petition." *Id.* at 1184. The Court went on to say:

> We must mean what we say in our rules, that a defendant is entitled to one post-conviction hearing and one post-conviction opportunity to raise the issue of ineffectiveness of trial counsel in the absence of newly discovered evidence or a *Brady* violation. Viewed in hindsight, any trial could have been handled differently. As time passes it becomes increasingly speculative why a given strategy was or was not employed.
>
> *****
>
> In sum, we reaffirm the sound and long-established principle that considerations of finality preclude re-litigation of previously available contentions in successive post-conviction proceedings.

Id. at 1185.

88) Consequently, the Petitioner's ineffective assistance of counsel claims herein are barred by *res* judicata and waiver and should be denied without any further analysis. The Court will nonetheless address the merits of the Petitioner's claims of ineffective assistance of trial counsel.

89) To prove that counsel performed ineffectively, a petitioner must show (1) deficient performance and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind.2007); *Massey v. State*, 955 N.E.2d 247, 253 (Ind. Ct. App. 2011).

90) The first prong of *Strickland* requires a post-conviction relief petitioner to prove by a preponderance of the evidence that counsel's performance, as a whole, fell below "an objective standard of reasonableness" based on "prevailing professional norms." *Baer v. State*, 942 N.E.2d 80, 90 (Ind. 2011). Counsel's performance is presumed effective. *Id.* "[A] Petitioner must offer strong and convincing evidence to overcome this presumption." *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007); *Garrett v. State*, 965 N.E.2d 115, 120 (Ind. Ct. App. 2012). Judicial scrutiny of counsel's performance is highly deferential and should not be exercised through the distortions of hindsight. *Timberlake v. State*, 753 N.E.2d 591, 605 (Ind. 2001) (quoting *Spranger v. State*, 650 N.E.2d 1117, 1121 (Ind. 1995); *Pennycuff v. State*, 745 N.E.2d 804, 811 (Ind. 2001). "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not

necessarily mean that representation was ineffective." *State v. McManus*, 868 N.E.2d 778, 790 (Ind. 2007), cert. denied, 128 S. Ct. 1739 (2008); *Grinstead v. State*, 845 N.E.2d 1027, 1036 (Ind. 2006). Accordingly, a petitioner must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience; the defense as a whole must be inadequate. *Slusher v. State*, 823 N.E.2d 1219, 1221 (Ind. Ct. App. 2005); *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003).

91) The second prong of *Strickland* requires a post-conviction petitioner to prove that he was prejudiced by counsel's constitutionally deficient performance. "Prejudice exists when a petitioner shows there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ward v. State*, 969 N.E.2d 46 (Ind. 2012) (quoting *Strickland*, 466 U.S. at 694); *Suarez v. State*, 967 N.E.2d 552, 555 (Ind. Ct. App. 2012).

92) The two prongs of *Strickland* are separate and independent inquiries. Both must be proven by the Petitioner to obtain relief. Thus, if the court can "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Timberlake*, 753 N.E.2d at 603 (citing *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999)).

93) The Petitioner in this case pleaded guilty. "There are two different types of ineffective assistance of counsel claims that can be made in regards to guilty pleas: (1) failure to advise the defendant on an issue that impairs or overlooks a defense and (2) an incorrect

advisement of penal consequences." *Manzano v. State*, 12 N.E.3d 321, (Ind. Ct. App. 2014).

Advising Newton to accept the plea agreement which divested the trial court of sentencing discretion. Am. Pet. ¶ 9(d)(1).

94) The Petitioner alleges that counsel rendered deficient performance by advising him to accept a plea agreement that divested the Court of sentencing discretion. Am. Pet. ¶ (9)(d)(1).

95) The Petitioner correctly points out that before imposition of death or LWOP, the sentencing court must find that he State proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists and any mitigating circumstances that exist are outweighed by the aggravating circumstances. See. I.C. § 35-50-2-9(k).[13] The Court clearly made those requisite findings prior to imposition of sentence. See Defendant's PCR Exhibit A (SE TR 210-214, 221-227) (Appellant's Appendix, p. 1008-1018). Likewise, as discussed above, the Court made the requisite findings pursuant to the holding of *Harrison. Id.*

96) The Petitioner states that "[d]espite the lip service the trial court gave to consider mitigation and weighing it against the aggravating circumstances, the trial court had no discretion at the time it pronounced those findings." Amended Petition ¶ 9(d)(1). The

[13] At the time of the Defendant's crime and sentencing, this requirement was codified at I.C. § 35-50-2-9(i).

Petitioner is technically correct in his assertion that at the time the Court made these findings, it had already accepted the plea agreement and thus had become bound by its terms. However, that is the nature of the statutory plea agreement procedure. A court cannot make findings with regard to sentencing unless and until it accepts the plea agreement and adjudges the defendant guilty. As discussed in detail *supra*, the Petitioner is essentially trying to make the same form over function argument that was rejected by the Supreme Court in *Smith v. State*, 686 N.E.2d 1264 (Ind. 1997). Consequently, the Court did not merely provide "lip service" when it entered the required statutory findings. Rather the Court was abiding by the requirements imposed under the law.

97) The bottom line is that the Court never relinquished its discretion. The Court had the discretion and the authority to reject the plea agreement altogether. Consequently, counsel's representation was not deficient when counsel advised the Petitioner to plead guilty.

98) Even if counsel was ineffective, the Petitioner has not proven prejudice. Our Supreme Court has determined that trial counsel's incorrect advice as to penal consequences falls into two categories: (1) claims of promised leniency and (2) claims of incorrect advice as to the law. *Segura v. State*, 749 N.E.2d 496 (Ind. 2001). A petitioner making this claim is required to establish, by objective facts, circumstances that support the conclusion that trial counsel's erroneous advice as to penal consequences were material to his or

her decision to plead. *Willoughby v. State*, 792 N.E.2d 560 (Ind. Ct. App. 2003). An assertion that a petitioner would not have pleaded guilty had the correct advice been given is insufficient to prove the claim. *Id.* Specific facts, in addition to the claim, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea. *Id.* The Petitioner must establish that there is an objectively credible factual and legal basis from which it may be concluded that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001); *Graham v. State*, 941 N.E.2d 1091, 1102 (Ind. Ct. App. 2011). Although the Petitioner alleges that counsel incorrectly advised him to enter into a plea agreement where the trial court "relinquished sentencing discretion", the Petitioner makes no claim that this advice was material to his decision to plead guilty. Moreover, there is no evidence that but for this incorrect advice, he would not have pled guilty.

Advising Newton to waive his right to meaningful appellate review under Indiana Constitution. Am Pet ¶ 9(d)(2).

99) The Petitioner alleges that trial counsel were ineffective for advising the Petitioner to waive his right to meaningful appellate review. Amended Petition ¶ 9(d)(2). In Paragraph 6 of the Petitioner's Plea Agreement, he waived his right to appeal. Defendant's Exhibit A (Appellate Appendix, p. 874). During the

PCR hearing, trial counsel, Joe Lewis, testified on direct examination during the negotiation of the plea agreement, the State insisted that an appellate waiver be included in the plea agreement to assuage the concerns of the victim's mother. However, on cross examination, counsel Lewis conceded that the appellate waiver in the plea agreement was superfluous because under well-established Indiana law, when a defendant pleads guilty and agrees to a fixed sentence, the defendant cannot later appeal the imposition of that sentence.

100) The Defendant is correct that *Smith v. State*, 686 N.E.2d 1264, 1274 (Ind. 1997), *Vandiver v. State*, 480 N.E.2d 910 (Ind. 1985), and *Judy v. State*, 416 N.E.2d 95, 102 (Ind. 1981) stand for the proposition that appellate review of "death sentences" cannot be waived. However, as noted above, there is no such right with respect to LWOP sentences. The Supreme Court has specifically held that a person who pleads guilty and agrees upon LWOP cannot later challenge that sentence on appeal. *Sholes v. State*, 878 N.E.2d 1232 (Ind. 2008). Thus, there is no right to mandatory appellate review of an agreed upon LWOP sentence. Again, this very issue was addressed by the Indiana Supreme Court when it considered the Petitioner's petition to file a belated appeal. In discussing whether the Petitioner could bring a belated appeal, Justice Sullivan noted that "if the basis of Newton's request had been to challenge his sentence for murder, permission would have been properly denied because, since the term of his sentence was fixed by the plea

agreement, it could not be challenged on direct appeal." *Newton v. State*, 894 N.E.2d 192, 194 (2008) (citing *Sholes v. State*, 878 N.E.2d 1232, 1234 (Ind. 2008)).

101) Consequently, the Petitioner cannot establish deficient performance under *Strickland v. Washington.*

Conceding the statutory aggravator IC 35-50-2-9(b)(1)(l) that Newton intentionally killed Coyle while committing or attempting to commit criminal gang activity. Am Pet ¶ 9(d)(3).

102) Finally, Petitioner alleges that counsel failed to advise him on an issue that impaired or overlooked a defense relating to the criminal gang activity aggravator. Amended Petition ¶ 9(d)(3).

103) At the time of the Petitioner's crime, the State could seek a death sentence or LWOP if it proved that the defendant committed a murder by intentionally killing the victim while committing or attempting to commit criminal gang activity. I.C. § 35-50-2-9(b)(1)(l). Criminal gang activity was defined by statute as knowingly or intentionally actively participate in a criminal gang. See I.C. § 35-45-9-3. A criminal gang was defined as a group with at least five (5) members that specifically either promotes, sponsors, assists or participates in or requires as a condition of membership or continued membership, the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery. I.C. § 35-45-9-4.

104) The Court finds that the Petitioner has not proven that counsel overlooked a defense relating to the criminal gang activity aggravator. During the hearing on the first PCR petition, trial counsel testified that the defense team "investigated every aspect of the case." PCR Tr. 17. They attempted to investigate and raise a challenge to each and every one of the allegations. *Id.* at 16. Counsel "talked to more witnesses than I can imagine on whether or not the fly constituted a gang. We had an enormous amount of research on that subject alone." *Id.* at 17. Additionally, during the plea acceptance hearing, counsel admitted that there was sufficient evidence of both aggravating circumstances. Defendant's Exhibit (A) (SE TR 98). Specifically, with regard to the gang activity aggravator, counsel stated "we think that there is sufficient evidence for the Court to find aggravation on that ground. And so we don't dispute the evidence . . . we do not wish to argue against that aggravating circumstance." *Id.*

105) Trial counsel is correct, the evidence was sufficient to support the criminal gang activity beyond a reasonable doubt. The evidence in the record demonstrates that in 1994, the Petitioner and several other individuals, including Scott Turner and Duane Turner, were members of a local gang called The Fly Gang. Defendant's PCR Exhibit A (COP TR 105, 106). The Fly Gang had approximately 20 to 25 members. Defendant's PCR Exhibit A (SE TR 55, 58). One of the purposes of the gang was to retaliate against others for perceived wrongs to gang members. Defendant's PCR Exhibit A (COP TR 106). The gang had been known to

wear blue bandannas and arm themselves with weapons. *Id.* Gang members had beat people up and had committed various other crimes including auto thefts and burglaries. *Id.* at 106; Defendant's PCR Exhibit A (SE TR 68).

106) One of the reasons Christopher Coyle, a Ball State student, was confronted, confined, robbed and ultimately killed, was in retaliation for a perceived injustice perpetrated by Ball State students upon fellow gang members the night before. Defendant's PCR Exhibit A (COP TR 79) (SE TR 73). The Petitioner asked fellow gang member Scott Turner if he could borrow Turner's pistol. Defendant's PCR Exhibit A (COP TR at 77). The Petitioner told Turner that he was going to go back out to Ball State and get revenge for what had happened the night before. Defendant's PCR Exhibit A (SE TR 74). Turner loaned his .25 caliber handgun with plastic pearl colored grips to the Petitioner. Defendant's PCR Exhibit A (COP TR 80-81). He did so because the Petitioner was a fellow gang member. *Id.* at 107. The Petitioner was "hyped up" and "wanted to get revenge." *Id.* at 80. The Petitioner said "I feel like killing somebody . . . let's go do this." *Id.* at 80.

107) More importantly, in the Petitioner's plea agreement, he specifically admitted "the material allegations of the informations herein, including the allegations of aggravating circumstances alleged by the State . . . " Defendant's PCR Exhibit A (Appellant's Appendix, p. 873). Therefore, he cannot now challenge the existence of the criminal gang aggravator.

108) Additionally, the Petitioner cannot prove prejudice. When a post-conviction claim of ineffective assistance of counsel relates to an impaired or overlooked defense, the prejudice from that impaired or overlooked defense must be measured by evaluating the probability of success of that defense at trial. See *Willoughby v. State*, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003) (citing *Segura*, 749 N.E.2d at 499). To prove prejudice, the petitioner must be show that there is a reasonable probability that a more favorable result would have obtained in a competently run trial. *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001). In order to set aside a conviction because of an attorney's failure to raise a defense, a petitioner who has pled guilty must establish that there is a reasonable probability that he or she would not have been convicted had he or she gone to trial and used the omitted defense. *Soucy v. State*, 22 N.E.3d 683, 685-86 (Ind. Ct. App. 2014).

109) The evidence cited above, clearly demonstrates the existence of the criminal gang aggravator. More importantly, the Petitioner fails to recognize that the criminal gang activity aggravator was but one of two charged statutory aggravating circumstances. The State also alleged that the Petitioner intentionally killed Christopher Coyle while committing or attempting to commit robbery. The evidence establishing this statutory aggravator is overwhelming. Moreover, the Petitioner confessed to the police that when he shot and killed Coyle, he was doing so while he was committing or attempting to commit robbery. Therefore, the

Petitioner cannot prove that had he gone to trial he would not have received an LWOP sentence.

JUDGMENT

Upon all issues raised, the law is with the State of Indiana and against the Petitioner. Consequently judgment should be entered in favor of the State of Indiana and against the Petitioner.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by, his Court that the Petition and the Amended Petition for Post-Conviction Relief are now Ordered DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Judgment is entered in favor of the State of Indiana and against Petitioner.

SO ORDERED this 7th day of December, 2016.

/s/ Linda Ralu Wolf
LINDA RALU WOLF, JUDGE
DELAWARE CIRCUIT COURT NO. 3

Distribution:

Eric Hoffman, Chief Trial Deputy Prosecuting Attorney

Jeff Arnold, Prosecuting Attorney

Joanna Green, Attorney for Defendant/Petitioner

In the
Indiana Supreme Court

Larry W. Newton, Jr. Appellant(s), v. State Of Indiana, Appellee(s).	Court of Appeals Case No. 18A05-1612-PC-02817 Trial Court Case No. 18D01-9410-CF-46

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 12/19/2017

/s/ Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.