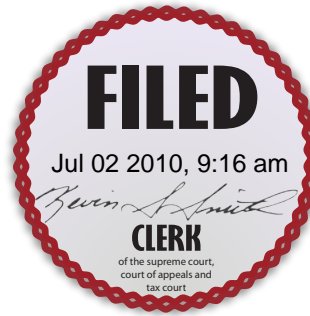


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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CLIFTON MAURICIO,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 02A03-1002-PC-130

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable John F. Surbeck, Jr., Judge  
Cause No. 02D04-0902-PC-7

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**July 2, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Clifton Mauricio (“Mauricio”) filed a petition for post-conviction relief in Allen Superior Court claiming that he was denied the effective assistance of appellate counsel. The post-conviction court denied the petition, and Mauricio appeals. We affirm.

### **Facts and Procedural History**

The facts underlying Mauricio’s convictions were set forth in the opinion of this court on Mauricio’s direct appeal:

The facts most favorable to the verdict reveal that Mauricio was to meet his twin brother, Clayton, at a local car wash. While waiting for his brother, Mauricio talked with Arasteed Hughes. When Clayton arrived, Hughes walked to his car and suggested that Clayton fight with Raymond Britt. The two began fighting and the fight ended when Clayton kned Britt in the groin. Britt returned to his car. Hughes then began fighting with Clayton. Hughes, who was larger than Clayton, wrestled Clayton to the ground and began punching him in the head.

Mauricio then pulled out a gun and shot Britt who was still standing by his car. Britt sustained gunshot wounds in his elbow and foot. Mauricio then ran to where Hughes and Clayton were fighting and shot Hughes three times from close range. Hughes sustained gunshot wounds in the back, the abdomen, and the hip. The shot in the back was fatal.

Mauricio v. State, 683 N.E.2d 1329, 1331 (Ind. Ct. App. 1997).

The State charged Mauricio with the murder of Hughes and the battery of Britt. The jury found Mauricio guilty as charged. At the sentencing hearing, the trial court found “no mitigating circumstances except perhaps [Mauricio’s] young age.” Appellant’s App. p. 25. The trial court found Mauricio’s lack of remorse and “deterrence to this community and sending a message to this community” as aggravating circumstances. *Id.* The State requested that Mauricio receive the maximum sentences for his convictions, but the trial court stated that it did not believe that was appropriate.

Instead, the trial court sentenced Mauricio to “50 years, the presumptive sentence on count I [i.e., murder] and for a period of 4 years, the presumptive on the Battery.” Id. at 25-26. The trial court ordered both sentences to be served consecutively, “for a total of 54 years.” Id. at 26.

Mauricio then filed a direct appeal, claiming that the trial court erred in refusing to instruct the jury regarding the lesser included offense of involuntary manslaughter and that the evidence was insufficient to rebut beyond a reasonable doubt his claim of defense of another. In a decision that produced three written opinions, a panel of this court affirmed Mauricio’s convictions.<sup>1</sup>

On January 29, 2009, this court granted Mauricio permission to file a successive petition for post-conviction relief,<sup>2</sup> and Mauricio filed his petition on February 2, 2009. In his petition, Mauricio alleged, *inter alia*, that his appellate counsel was ineffective for failing to appeal his sentence. The trial court held a hearing on Mauricio’s petition on September 14, 2009, and issued findings of facts and conclusions of law denying the petition on February 16, 2010. Mauricio now appeals.

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<sup>1</sup> The majority opinion, authored by Judge Staton, concluded that Mauricio waived his claim of instructional error by failing to tender a full, written instruction to the trial court, that the evidence did not support instructing the jury with regard to involuntary manslaughter, and that the evidence was sufficient to rebut Mauricio’s claimed defense beyond a reasonable doubt. See Mauricio, 683 N.E.2d at 1331-33. Judge Garrard concurred in part and dissented in part, concluding that Mauricio’s properly tendered his proposed instruction, but that the instructional argument was nevertheless waived by failing to set forth the requested instruction in Mauricio’s appellate brief. See id. at 1333-34. Judge Sullivan dissented, concluding that the tender of the proposed instruction was proper, that the failure to set forth the instruction in the appellate brief was not fatal, and that Mauricio presented sufficient evidence to support instruction the jury with regard to involuntary manslaughter. Id. at 1334-35.

<sup>2</sup> On January 9, 2007, Mauricio filed a petition for post-conviction relief, arguing that his appellate counsel was ineffective for failing to challenge his sentence. The post-conviction court denied this petition, and Mauricio appealed. However, we dismissed this appeal with prejudice on March 12, 2008.

## Standard of Review

As explained by our supreme court in Henley v. State, 881 N.E.2d 639 (Ind. 2008):

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, [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 643-44 (citations and internal quotation omitted).

Ineffective assistance of appellate counsel claims are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). One of the most important strategic decisions made by appellate counsel is the decision of what issue or issues to raise on appeal. Id. at 193. Therefore, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id. The defendant must overcome the strongest presumption of adequate assistance to show that counsel was deficient for failing to raise an issue on direct appeal, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000). And even if our analysis demonstrates deficient performance by appellate counsel, we must still determine whether “the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new

trial.” Bieghler, 690 N.E.2d at 194. After all, “the ultimate issue under the prejudice prong is ‘whether, but for counsel’s errors, there is a reasonable probability that the outcome of the proceeding [i.e., the direct appeal], would have been different.’” Id.

### **Discussion and Decision**

Mauricio claims<sup>3</sup> that his appellate counsel was ineffective for failing to raise on direct appeal the issue of whether the trial court applied the correct statute when it imposed a fifty-year sentence on the murder conviction. To address this claim, we must discuss in some detail a confusing period in the history of Indiana’s murder sentencing statute, Indiana Code section 35-50-2-3.

As detailed by our supreme court in Smith v. State, 675 N.E.2d 693, 695 (Ind. 1996), the Indiana General Assembly amended the murder sentencing statute twice in 1994. The first amendment raised the presumptive sentence for murder from forty to fifty years, but reduced the possible enhancement from twenty to ten years. Id. (citing P.L. 164-1994). In other words, the presumptive sentence was raised, but the maximum sentence remained unchanged. See id. at 697. The second amendment “allowed for the exclusion of mentally retarded individuals from the death or life imprisonment without parole sentencing option of the sentencing statute, but did not incorporate the raised presumptive sentence of the first amendment. Id. at 695 (citing P.L. 158-1994).

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<sup>3</sup> On appeal, Mauricio claims only that the post-conviction court erred in rejecting his claim that he was denied the effective assistance of appellate counsel; he does not challenge the post-conviction court’s rejection of the other claims presented in his petition.

This situation was corrected on May 5, 1995, when the General Assembly incorporated the higher presumptive sentence from the first amendment with the other provisions of the second amendment. Id. But for those who committed murder after the amendments became effective but before the situation was corrected, “there were two different [murder sentencing statutes] in effect, each with a different presumptive sentence.” Id. The question before the court in Smith was which statute to apply to those who committed murder when both statutes were in effect.

The defendant in Smith pleaded guilty to murder, and the parties agreed that the defendant would receive a sentence of no more than fifty years executed. At the plea hearing, the parties appeared to agree that the fifty-year presumptive sentencing statute applied. Id. at 696. At sentencing, however, the defendant argued that the forty-year sentencing statute was appropriate. Id. On appeal, our supreme court agreed with the defendant, noting that that penal statutes must be construed against the State and holding that the forty-year presumptive sentencing statute controlled. Id. at 697. Applying that rule to the facts before it, the Smith court held that the trial court was “incorrect insofar as it may have employed a fifty-year presumptive sentence for murder.” Id. The court therefore remanded to the trial court for a new sentencing statement using the forty-year presumptive sentence.<sup>4</sup> Id.

Shortly after Smith, in Jones v. State, 675 N.E.2d 1084, 1086-87 (Ind. 1996), the court remanded for resentencing “because the record suggest[ed] that the trial court used

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<sup>4</sup> The court also held that the defendant’s sixty year sentence was not improper because the trial court relied on two, valid aggravating factors. Id. at 698.

[the fifty-year presumptive sentencing statute].” Similarly, in Alvarado v. State, 686 N.E.2d 819, 824 (Ind. 1997), the court remanded for new sentencing where the trial court enhanced the defendant’s sentence, “but did not specify whether the enhancement was from a presumptive sentence of forty or fifty years[,] and it [wa]s not clear which sentencing statute the court applied.” See also Crain v. State, 736 N.E.2d 1223, 1241-42 (Ind. 2000) (remanding for “resentencing on the record” where trial court clearly applied fifty-year presumptive sentencing statute); Williams v. State, 733 N.E.2d 919, 925 (Ind. 2000) (remanding for new sentencing hearing where record clearly indicated that trial court applied fifty-year presumptive sentencing statute); Ellis v. State, 707 N.E.2d 797, 805 (Ind. 1999) (remanding for resentencing where record suggested that trial court used fifty-year presumptive sentencing statute in imposing enhanced sentence of sixty years); Bufkin v. State, 700 N.E.2d 1147, 1152 (Ind. 1998) (remanding for resentencing where trial court applied fifty-year presumptive sentencing statute and the court on appeal could only speculate as to what sentence trial court would have imposed had it applied the correct statute).

But in Jackson v. State, 697 N.E.2d 53, 56 (Ind. 1998), the court explained that, even in those cases where the trial court clearly applied the wrong presumptive sentence, remand for resentencing was unnecessary if “the trial court showed a clear intent to impose a specific term of imprisonment.” This is so because, “the maximum sentence under either statutory scheme is sixty years.” *Id.* (citing Beason v. State, 690 N.E.2d 277, 285 n. 21 (Ind. 1998); Birdsong v. State, 685 N.E.2d 42, 47 n.2 (Ind. 1997) (both holding

that remand was unnecessary where the trial court's intent to impose the maximum sentence was clear)).

Mauricio argues that, as in Smith, Jones, and Alvarado, the trial court appears to have used the improper presumptive sentence and that, had this issue been presented on direct appeal, the court on appeal would have remanded for resentencing under the proper sentencing statute. The State argues that, even if we presume that Mauricio's appellate counsel was ineffective, there was no resulting prejudice because, as in Jackson, Birdsong, and Beason, the trial court showed a clear intent to impose a specific term of imprisonment and remand would have been unnecessary. The State further argues that, even if the court on appeal had remanded for resentencing under the proper sentencing statute, Mauricio has not shown that his sentence would have been different after remand.

When the trial court imposed Mauricio's sentence, it stated that it was not comfortable with the State's request that Mauricio receive the maximum sixty-year sentence. Appellant's App. p. 25. Still, concluding that the aggravating circumstances outweighed the mitigating circumstances, the trial court decided that it would sentence Mauricio to fifty years, which it identified as "the presumptive sentence." Id. at 25-26. Thus, it appears that the trial court was operating under the incorrect sentencing statute.

However, the record indicates that the trial court intended to impose a specific term of fifty years. In its written sentencing order, the trial court made no mention of Mauricio's fifty-year sentence as a presumptive sentence. Further, the court specifically stated it was not comfortable imposing the maximum sentence, but did identify aggravating circumstances to justify an enhanced sentence. Therefore, even if the issue



had been raised on direct appeal, remand for resentencing would have been unnecessary because the trial court clearly intended to impose a fifty-year sentence. See Jackson, 697 N.E.2d at 56. For this reason alone, we cannot say that the post-conviction court erred in concluding that Mauricio was not denied the effective assistance of appellate counsel.

Moreover, even if we assume for the sake of argument that the court on appeal would have remanded for resentencing under the forty-year presumptive sentencing statute, Mauricio has still not shown that his sentence would have been different after remand. The trial court found “no mitigating circumstances here except perhaps [Mauricio’s] young age.” Appellant’s App. p. 25. The trial court did, however, find aggravating circumstances, including Mauricio’s lack of remorse.<sup>5</sup> Mauricio now claims that this was an improper aggravator because he had the right to maintain his innocence. However, our supreme court has held that “it is not error for a trial court to consider as an aggravating factor the lack of remorse by a defendant who insists upon his innocence. Georgopoulos v. State, 735 N.E.2d 1138, 1145 (Ind. 2000) (citing Bacher v. State, 722 N.E.2d 799, 802 n. 6 (Ind. 2000)). Considering the defendant’s lack of remorse is only improper where the defendant maintains his innocence and the only evidence against him was the victim’s uncorroborated testimony. Dinger v. State, 540 N.E.2d 39, 40 (Ind. 1989) (citing Dockery v. State, 504 N.E.2d 291, 297 (Ind. 1987)). This is not the case here.

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<sup>5</sup> The trial court also identified as an aggravating factor the need to “send a message to the community.” Appellant’s App. p. 25. The post-conviction court, however, noted that this was an improper aggravating factor. See Scheckel v. State, 655 N.E.2d 506, 210 (Ind. 1995) (noting that trial court’s desire to send a message is not a proper aggravator).

Still, “the lack of remorse is regarded only as a modest aggravator.” Georgopoulos, 735 N.E.2d at 1145 (citing Bacher, 722 N.E.2d at 802 n.6). But Mauricio did not receive the maximum sentence, rather, he was sentenced to fifty years, which is ten years less than the maximum and ten years more than the correct presumptive sentence. “A single aggravating circumstance is adequate to justify a sentence enhancement.” Hawkins v. State, 748 N.E.2d 362, 364 (Ind. 2001) (citing Georgopoulos, 735 N.E.2d at 1146).

Also, at the time of Mauricio’s sentencing, trial courts were statutorily required to consider the defendant’s character and the nature and circumstances of the crime when imposing sentence, see Ind. Code § 35-38-1-7.1(a)(2), (3) (1994), and the trial court did so when sentencing Mauricio. Here, the court specifically rejected Mauricio’s claim that he was simply trying to shoot Hughes in the arm or leg to stop him from attacking Mauricio’s brother. The court noted that, to the contrary, the evidence showed that instead of physically trying to stop the fight between his brother and Hughes, Mauricio shot Hughes several times at close range. Even though the trial court did not explicitly identify this as an “aggravating factor,” the nature and circumstances of Mauricio’s crime support the trial court’s original decision to impose a sentence of fifty years.

Under the facts and circumstances of the present case, we cannot conclude that Mauricio has shown that he would have received a different sentence had his case been remanded for resentencing under the forty-year presumptive sentencing statute.

### **Conclusion**

Mauricio has not demonstrated that the post-conviction court committed clear error when it determined that Mauricio was not denied the effective assistance of

appellate counsel because he has not shown that he was prejudiced by counsel's alleged errors. The trial court intended to impose a specific term of fifty years, not simply the presumptive sentence. As such, remand would not have been required had Mauricio's counsel presented this issue on direct appeal. Further, even assuming that the court on appeal would have remanded for resentencing under the forty-year presumptive sentencing statute, Mauricio has not shown that his sentence would have been different after remand. Under these facts and circumstances, the post-conviction court did not clearly err when it concluded that Mauricio was not denied the effective assistance of appellate counsel.

Affirmed.

RILEY, J., and BRADFORD, J., concur.