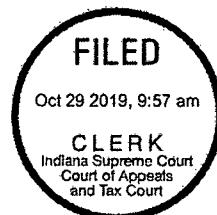


MEMORANDUM DECISION

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.



APPELLANT PRO SE

Curtis Stokes
Carlisle, Indiana

ATTORNEYS FOR APPELLEE

Curtis T. Hill, Jr.
Attorney General of Indiana

Ian McLean
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Curtis Stokes,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

October 29, 2019
Court of Appeals Case No.
18A-PC-2982

Appeal from the Marion Superior
Court

The Honorable Marc T.
Rothenberg, Judge

Trial Court Cause No.
49G02-0812-PC-288158

Mathias, Judge.

[1] Curtis Stokes (“Stokes”) appeals pro se the Marion Superior Court’s order denying his petition for post-conviction relief. Stokes argues that the post-

conviction court erred when it determined that he was not subjected to ineffective assistance of trial and appellate counsel.

[2] We affirm.

Facts and Procedural History

[3] The facts supporting Stokes's convictions were summarized by our court as follows:

On December 18, 2008, Gregory Arnold, Jr., the CEO of Big Engine Entertainment Recording Studio ("the studio") in Indianapolis, was working at the studio. Also present in the studio's building that evening were: Shontez Simmons, Edriese Phillips ("Edriese"), Collin Moore, Fred Winfield, Michael Cameron, Andrew Steele, Earnest Simmons ("Earnest"), Willie Brownleee, Shantell Williams, and Arnold, Jr.'s three minor children. All of the building's occupants were spread throughout the building in separate rooms.

At approximately 7:00 p.m., Simmons exited the studio building to smoke a cigarette, and she saw Antonio Walker ("Antonio") and Antwane Walker ("Antwane") arriving to enter the studio. On their way inside, Antonio and Antwane greeted Simmons, whom they knew. Once inside, they looked around for a minute or so and exited the building. A few minutes later, Antonio and Antwane returned accompanied by Stokes, Johnnie Stokes ("Johnnie"), Terry Lynem, and a man named Marcus. All of the men entered the studio building.

Once inside, Antonio and Antwane entered a room where they found Arnold, Jr., Winfield, Williams, and Steele. Arnold, Jr. greeted the men, whom he knew personally, and Antonio greeted Steele and asked Steele to exit the room with him. Steele followed Antonio outside of the room, and Antwane was waiting outside the room. At that point, Antonio drew a gun from his

person and placed it forcefully against Steele's face and said, "Get down. You know what this is." Meanwhile, in another area of the studio, Lynem and Marcus grabbed Edriese and demanded his money at gunpoint. Marcus took \$200 from one of Edriese's pockets. Also, one or more of the perpetrators ordered Moore to "get down" when gunfire erupted. Moore was shot in the abdomen, but he was not robbed. After approximately six to twelve shots were fired, the Walkers and other perpetrators fled the scene.

The State charged Stokes and his codefendants with eighteen felony counts, including robbery, attempted robbery, unlawful possession of a firearm by a serious violent felon, battery, and criminal recklessness. During trial, several jurors inadvertently saw documents making reference to Stokes' incarceration pending trial, and Stokes moved for a mistrial. The trial court denied that motion. The trial court granted Stokes' motions for directed verdicts on three attempted robbery counts. And a jury found Stokes guilty of six counts of attempted robbery, one as a Class A felony and five as Class B felonies; robbery, as a Class B felony; criminal recklessness, as a Class C felony; carrying a handgun without a license, as a Class A misdemeanor; and of being an habitual offender. The trial court entered judgment accordingly and sentenced Stokes to an aggregate term of eighty-eight years.

Stokes v. State, 919 N.E.2d 1240, 1242–43 (Ind. Ct. App. 2010), *trans. denied* (record citations and footnote omitted).

[4] Stokes appealed his convictions and argued 1) that the trial court abused its discretion when it denied his motion for a mistrial after jurors learned that Stokes and his codefendants were incarcerated pending trial, and 2) that the evidence was insufficient to support each of his Class A felony attempted robbery conviction related to Moore, his five Class B felony attempted robbery

convictions related to Arnold, Jr., Earnest, Steele, Winfield, and Williams, and his Class B felony robbery conviction related to Phillips. Our court concluded that the trial court did not abuse its discretion when it denied Stokes's motion for a mistrial. However, this court concluded that the evidence was only sufficient to support Stokes's Class A attempted robbery conviction of Moore, Class B felony robbery conviction of Phillips, and the Class B felony attempted robbery of Steele. As to the other attempted robbery convictions, our court held that there was no evidence that Stokes or his co-defendants had the specific intent to rob Arnold, Jr., Winfield, or Williams, and there was no evidence that Stokes or his co-defendants attempted to rob Earnest. Therefore, our court reversed those four attempted robbery convictions. This result did not affect Stokes's eighty-eight-year aggregate sentence because his sentences on those four counts were ordered to be served concurrent with the sentences for his remaining convictions.

- [5] On January 2, 2013, Stokes filed a petition for post-conviction relief. The State Public Defender represented Stokes for approximately nine months but was allowed to withdraw its appearance on September 11, 2013. Stokes's first petition was dismissed without prejudice on January 15, 2014. Approximately one month later, Stokes filed a second petition, which he was allowed to withdraw on September 18, 2015. Stokes filed his third petition for post-conviction relief on August 11, 2016.
- [6] The post-conviction court held evidentiary hearings on Stokes's petition on December 8, 2017, and February 20, 2018. Stokes's trial and appellate counsel

testified at the hearing. Stokes's ineffective assistance claims centered around his Class A felony attempted robbery conviction of Moore.

[7] On November 8, 2018, the post-conviction court issued an order denying Stokes's petition for post-conviction relief. The trial court concluded that trial counsel was not ineffective after finding in pertinent part that

Stokes initially claims that he received ineffective assistance because his trial counsel stipulated to the testimony of a victim. . .

During the evidentiary hearings, Stokes pointed to a stipulation that his trial counsel supposedly made regarding State's witness, Collin Moore. . . .

At the evidentiary hearing, attorney Rader (Bogar) testified that she did not specifically remember making any stipulations in the trial, but that generally stipulations were a common way to streamline trials, so as to focus on central, contested issues. On this issue, the Court finds that Stokes has not introduced the specific terms of any such express stipulation, nor has he introduced the witness statement to which he referred, and he has not introduced the transcript of the evidence, so that the Court cannot determine the context, or the gravity or the appropriateness of any stipulation, if one actually occurred. Without more, the Court also cannot evaluate any potential confrontation issue, and consequently, the Court must find that on the issue, Stokes has failed to meet his burden of proof.

Stokes also claims that his trial counsel was ineffective because she did not move to dismiss the charges against him at the outset of the case. . . . In making this argument, Stokes appears to be focused on a notation in the Case Chronology dated December 21, 2008, which seems to indicate that no probable cause was

found, and the defendant was ordered to be released. However, the court notes that [the] second and third entries for the same day, indicate that the Court made a probable cause determination and a bond was set. Additionally, the Court notes that the Case Chronology shows that on December 23, 2008 the Presiding Judge, conducted an initial hearing, and specifically found probable cause. Accordingly, the Court finds that Stokes has simply misinterpreted the Case Chronology, and his argument fails for this reason, alone.

Appellant's App. Vol. 3, pp. 137–139.

- [8] The trial court also concluded that Stokes's appellate counsel was not ineffective for failing to challenge the sufficiency of the evidence on his Class A felony attempted robbery conviction. The trial court specifically found that

Stokes's failure to admit, as post-conviction exhibits, the record of proceedings and the appellate briefs from his direct appeal make a complete review of this issue virtually impossible. Although somewhat ambiguous on this specific issue, his appellate attorney's testimony at the evidentiary [hearing] seems to at least indicate her belief that she did raise the issue. The Court of Appeals opinion is also somewhat contradictory on this narrow point, in that on the one hand the opinion states that Stokes['s] claim was "the evidence is insufficient to support each of his five Class B felony attempted robbery convictions and his robbery conviction," *Stokes* at 1244[,] but on the other hand, the Court of Appeals carefully and separately reviewed the sufficiency of the evidence supporting the A felony attempted robbery of victim Colin Moore, and found, "we hold that the evidence is sufficient to prove that Stokes was an accomplice to the attempted robbery of Moore. The evidence shows that Moore was in a hallway of the recording studio when he was ordered to "get down" and shot in the . . . [omission in the original]. The fact that he was singled out and directly ordered to "get down"

supports a reasonable inference that the perpetrators intended to rob him, but were interrupted when gunfire erupted. We hold that the evidence is sufficient to support Stokes'[s] attempted robbery of Moore." *Stokes* at 1248. Thus the inescapable conclusion is that either Stokes's appellate attorney did raise the issue, or even if the Court of Appeals reviewed the issue, *sua sponte*, then it is difficult to see how the result would have been different if appellate counsel raised the same issue that was rejected by the court. And thus this Court must conclude that Stokes has failed to meet his burden of proof of this issue, either because he is factually incorrect, or because raising the argument would have been meritless, *Vaughn, supra*.

The Court is well aware, that [] [Stokes's] arguments are, [] most likely motivated by the apparent disparate treatment accorded to him and his [co-defendants] in their direct appeals. [Stokes's] four [co-defendants] appealed their convictions . . . A reading of these appellate court[] opinions shows that the results are somewhat diverse and uneven. . . .

In the present Post-Conviction relief context, Stoke[s]'s argument is simple and clear. He assumes that his trial counsel did not raise the sufficiency of the evidence on the A felony attempted robbery count, and he further contends that since one appellate court panel found insufficient evidence [] on that count, his appellate counsel was necessarily ineffective, because she did not also raise the issue or did not achieve the same result. . . .

Appellant's App. pp. 141–145. The post-conviction court ultimately concluded that appellate counsel made strategic choices that did not fall below any objective standard of reasonableness. *Id.* at 146–147.

[9] Stokes now appeals pro se the denial of his petition for post-conviction relief.

Standard of Review

[10] Our standard of review of claims that a post-conviction court erred in denying relief is well settled. That is, post-conviction proceedings are not “super appeals” through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *Manzano v. State*, 12 N.E.3d 321, 325 (Ind. Ct. App. 2014) (citations omitted), *trans. denied*. Instead, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Id.* A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Thus, on appeal from 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 that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.*

[11] As required by Indiana Post-Conviction Rule 1(6), the post-conviction court entered findings of fact and conclusions of law. Therefore, we must determine if the court’s findings are sufficient to support its judgment. *Id.* We review the post-conviction court’s factual findings under a clearly erroneous standard, i.e., we will not reweigh the evidence or judge the credibility of witnesses, and we will consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court’s decision. *Id.* We do not defer to the post-conviction court’s legal conclusions, which are reviewed *de novo*. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002).

I. Ineffective Assistance of Trial Counsel

[12] Stokes argues that his trial counsel was ineffective. In *Timberlake v. State*, our supreme court summarized the law regarding claims of ineffective assistance of trial counsel as follows:

A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The *Strickland* Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the *Strickland* test are separate and independent inquiries. Thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.

753 N.E.2d 591, 603 (Ind. 2001) (citations and quotations omitted).

[13] First, Stokes argues that his trial counsel was ineffective for stipulating to the admission of Collin Moore's statement. Moore was shot during the robbery, and as a result, Stokes was convicted of Class A felony attempted robbery.

[14] Stokes did not introduce the record of his criminal trial into evidence.¹ Therefore, a copy of the stipulation has not been included in the record in the post-conviction proceedings. Stokes's trial counsel had no specific recollection of the stipulation.² Tr. p. 8. Stokes introduced, and the post-conviction court

¹ In his brief, Stokes claims that "[d]uring one of the hearings that was scheduled and continued, the Court took judicial notice of its records and informed Stokes that the trial record would be considered." Appellant's Br. at 12. There is no evidence in the record to support this claim, and the trial court found otherwise. *See* Appellant's App. Vol. 3, p. 138.

² Stokes's co-defendant Lynem raised this same issue in his petition for post-conviction relief, which the post-conviction court denied. Lynem appealed, and our court engaged in a discussion of the stipulation in a nonpublished memorandum decision as follows:

[The post-conviction court] found that Moore was unable to testify at trial; "[i]n lieu of his live testimony, the trial counsels and the State entered into a joint stipulation regarding his testimony" admitted at trial as State's Exhibit 75; the stipulation indicated Moore would have testified that he was present at the incident at the studio, during which he was ordered to the ground, heard multiple gunshots, and suffered a gunshot wound; and the stipulation also provided that no property was taken from Moore and he was unable to identify any of the people who perpetrated the crime. The court found "it is apparent that entering into this stipulation was trial strategy that was pursued by all five attorneys who represented the defendants in the case." It found the stipulation was "a reasonable trial strategy which mitigated as much risk as was possible in the circumstances," the record indicates Moore was unavailable "primarily due to health issues directly stemming from the crimes," and "[f]rom a defense standpoint, ... the stipulation as entered, presented his probable testimony by which he averred to the obvious fact that he was injured in the incident, but while also acknowledging that he was unable to identify any of the [sic] also while removing the specter of possibly emotional impact of video testimony from a paralyzed crime victim."

admitted, Moore's statement to the police and the testimony of the detective who took the statement. Moore's statement does not include any evidence exonerating Stokes as he claims in his brief.

- [15] Specifically, the investigating detective did not ask Moore if he knew Stokes or whether Stokes participated in the robbery. Moore told the detective that he did not know how many men participated in the offense. He stated that he laid down on the ground of the hallway, covered his head, and faced the wall. He tried not to look at the suspects because they had guns. He did not recognize any of the suspects that he saw. The detective then showed Moore several photo arrays. Moore recognized individuals in the photo arrays but stated that those individuals were not the persons who committed the crimes at the recording studio on the date he was shot. Ex. Vol., Petitioner's Ex. A. From Moore's statement, it is reasonable to infer that Moore did not see every individual involved in the commission of the offense.
- [16] Stokes's claim that his trial counsel violated his right to confrontation by stipulating to Moore's testimony cannot be addressed because he failed to introduce his criminal trial record into evidence. Without that record, we are left with Moore's statement to the investigating detective, which does not support Stokes's claims that he was prejudiced. The post-conviction court

Lynem v. State, 18A-PC-1028, 2019 WL 2588282 *3 (Ind. Ct. App. June 25, 2019) (record citations omitted). Our court affirmed the post-conviction court's finding that Lynem was not subjected to ineffective assistance of trial counsel for stipulating to Moore's testimony.

properly found that “the Court cannot determine the context, or the gravity or the appropriateness of any stipulation, if one actually occurred. Without more, the Court also cannot evaluate any potential confrontation issue, and consequently” Stokes has not met his burden of proving ineffective assistance of trial counsel. *See Appellant’s App. Vol. 3, p. 138.*

[17] Stokes also complains that his trial counsel was ineffective because she failed to file a motion to dismiss the charges based on a lack of probable cause. However, as the post-conviction court noted, in support of this argument, Stokes cites to an entry in the Chronological Case Summary that Stokes has misinterpreted. It is clear from the entries that follow that a judicial officer found that there was probable cause to arrest Stokes for the charged offenses. *Appellant’s App. Vol. 2, p. 3.*

[18] For all of these reasons, we conclude that Stokes has not met his burden of proving that his trial counsel was ineffective.

II. Ineffective Assistance of Appellate Counsel

[19] Stokes also claims that the post-conviction court clearly erred by rejecting his claim of ineffective assistance of appellate counsel. When we review claims of ineffective assistance of appellate counsel, we use the same standard we apply to claims of ineffective assistance of trial counsel, i.e., the petitioner must show that appellate counsel’s performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the deficient performance of counsel, the result of the proceeding would have been

different. *Manzano*, 12 N.E.3d at 329 (citing *Harris v. State*, 861 N.E.2d 1182, 1186 (Ind. 2007)).

[20] We also reiterate that when the claim of deficient performance is one of inadequate presentation of issues, the claim of ineffective assistance almost always fails. *Bieghler v. State*, 690 N.E.2d 188, 195 (Ind. 1997). As explained by the *Bieghler* court:

First, these claims [of inadequate presentation of issues] essentially require the reviewing tribunal to re-view specific issues it has already adjudicated to determine whether the new record citations, case references, or arguments would have had any marginal effect on their previous decision. Thus, this kind of ineffectiveness claim, as compared to the others mentioned, most implicates concerns of finality, judicial economy, and repose while least affecting assurance of a valid conviction.

Second, an Indiana appellate court is not limited in its review of issues to the facts and cases cited and arguments made by the appellant's counsel. We commonly review relevant portions of the record, perform separate legal research, and often decide cases based on legal arguments and reasoning not advanced by either party. While impressive appellate advocacy can influence the decisions appellate judges make and does make our task easier, a less than top notch performance does not necessarily prevent us from appreciating the full measure of an appellant's claim, or amount to a breakdown in the adversarial process that our system counts on to produce just results.

* * *

When the issues presented by an attorney are analyzed, researched, discussed, and decided by an appellate court, deference should be afforded both to the attorney's professional

ability and the appellate judges' ability to recognize a meritorious argument.

For these reasons, an ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance. Judicial scrutiny of counsel's performance, already highly deferential, is properly at its highest. Relief is only appropriate when the appellate court is confident it would have ruled differently.

Id. at 195–96 (emphasis added) (citations and internal quotations omitted).

[21] In his direct appeal, our court addressed Stokes's claims of insufficient evidence to support his attempted robbery convictions. *See Stokes*, 919 N.E.2d at 1245–48. This court concluded that the evidence was sufficient to prove that Stokes was an accomplice to the attempted robbery of Moore.³ Specifically, we observed that

³ Co-defendant Antwane Walker raised the same claims in his direct appeal. As in Stokes's direct appeal, our court affirmed his attempted robbery conviction related to victim Moore but reversed the Class B felony attempted robbery convictions related to victims Arnold Jr., Winfield, Williams, and Phillips. *See Antwane Walker v. State*, 49A02-0905-CR-432, 2010 WL 1462065 at *7–10 (Ind. Ct. App. April 13, 2010), *trans. denied*. Only Johnnie Stokes received relief on direct appeal with regard to the Class A felony attempted robbery conviction. Chief Judge Vaidik dissented from that opinion and would have affirmed the conviction for the attempted robbery of Moore. *See Johnnie Stokes v. State*, 922 N.E.2d 758 (Ind. Ct. App. 2010), *trans. denied*. Co-defendant Antwane Walker did not challenge the sufficiency of the evidence in his direct appeal. In post-conviction proceedings, he argued that his appellate counsel was ineffective for failing to raise the issue. The trial court denied his petition, and our court affirmed. *See Antwane Walker v. State*, No. 49A02-1112-PC-1173, 2012 WL 2928474 (Ind. Ct. App. July 19, 2012), *trans. denied*. In his direct appeal, co-defendant Lynem unsuccessfully claimed that victim Edries Phillips's testimony was incredibly dubious and inconsistent. In his post-conviction proceedings, he argued that appellate counsel "was ineffective in his decision not to broaden the insufficiency of the evidence argument as to all of his attempted robbery charges[.]" *Lynem v. State*, 18A-PC-1028, 2019 WL 2588282 (Ind. Ct. App. June 25, 2019). The trial court denied his petition for post-conviction relief, and our court affirmed after concluding that it was not unreasonable "for his appellate counsel to conclude that the evidence supports at least a reasonable inference that the co-defendants had intent to rob Arnold Jr., Winfield, Williams, Ernest Phillips, and Moore[.]" *Id.* at *7.

[t]he evidence shows that Moore was in a hallway of the recording studio when he was ordered to “get down” and shot in the abdomen. The fact that he was singled out and directly ordered to “get down” supports a reasonable inference that the perpetrators intended to rob him, but were interrupted when gunfire erupted. We hold that the evidence is sufficient to support Stokes’ attempted robbery of Moore.

Id. at 1248.

- [22] The insufficient evidence claim was therefore raised and addressed by our court in Stokes’s direct appeal. Stokes argues that his appellate counsel must have been ineffective because another panel of court concluded that co-defendant Johnnie Stokes’s Class A felony attempted robbery conviction relating to victim Moore was not supported by sufficient evidence. Chief Judge Vaidik dissented and would have affirmed the conviction. He also argues that our court should revisit the issue to correct a manifest injustice. *See* Appellant’s Br. at 14.
- [23] Our court does not follow horizontal stare decisis. Therefore, “each panel of this Court has coequal authority on an issue and considers any previous decisions by other panels but is not *bound* by those decisions.” *Smith v. State*, 21 N.E.3d 121, 126 (Ind. Ct. App. 2014) (emphasis in original). This court’s opinion in Stokes’s direct appeal was decided before another panel of our court reversed Johnnie’s Stokes’s Class A felony attempted murder conviction. *See Johnnie Stokes*, 922 N.E.2d at 764. Our supreme court denied transfer in both cases, implicitly declining to address the opposite results reached by two panels of our court. While Stokes is understandably frustrated that Johnnie Stokes obtained the precise relief that he also sought on direct appeal, we cannot

conclude that the differing results constitute manifest injustice or that Stokes was subjected to ineffective assistance of appellate counsel.

Conclusion

- [24] Stokes has not established that he was subjected to ineffective assistance of trial or appellate counsel. We therefore affirm the trial court's order denying Stokes's petition for post-conviction relief.
- [25] Affirmed.

Robb, J., and Pyle, J., concur.

STATE OF INDIANA) IN MARION SUPERIOR COURT
COUNTY OF MARION) CRIMINAL DIVISION 2

CURTIS STOKES)
V.) CAUSE NO. 49G02-0812-PC-288158

STATE OF INDIANA)

FILED
November 8, 2018
Myle & Oldsby
CLERK OF THE COURT
MARION COUNTY
SG

FINDINGS OF FACT AND CONCLUSIONS OF LAW
DENYING POST-CONVICTION RELIEF

Pursuant to Indiana Post-Conviction Rule 1(6) and after reviewing the proposed findings submitted by the Petitioner and State, the Court now enters its specific findings of fact and conclusions of law on all raised issues.

Findings of Fact

1. On December 23, 2008 the Petitioner, Curtis Stokes, was charged with one count of class A felony attempted robbery, one count of class B felony robbery, eight counts of class B felony attempted robbery, one count of class B felony unlawful possession of a firearm by a serious violent felon, and one count of class C felony criminal recklessness. On March 2, 2009 the State also added a request for the habitual offender sentence enhancement.
2. On March 9-13, 2009 the Court held a five day jury trial with Stokes and his co-defendants. At the close of the State's evidence, the trial court granted Stokes's motion for a directed verdict on three of the class B felony attempted robbery counts. The jury found Stokes guilty on all remaining counts.

3. On April 17, 2009, the court sentenced Stokes to an aggregate sentence of seventy-four years.
4. Stokes appealed his conviction and sentence to the Court of Appeals. On March 17, 2010 the appellate court found insufficient evidence, and reversed Stokes' convictions on the five remaining B felony attempted robbery convictions. *Stokes v. State*, 922 N.E.2d 758, 766 (Ind. Ct. App. 2010). The Court of Appeals affirmed his remaining convictions and sentence. On appeal, Stokes alleged that the Court wrongly denied a motion for mistrial, as well as alleging insufficiency of the evidence.
5. As found by the Court of Appeals, the facts supporting Stokes' convictions are as follows:

The relevant facts indicate that on the evening of December 18, 2008, several people were present at Big Engine [**2] Entertainment ("Big Engine"), a recording studio in Indianapolis owned by Gregory Arnold, Jr. At approximately 7:00 p.m., Shontez Simmons, an employee of Big Engine, went outside the studio building to smoke a cigarette. While outside, she saw Antonio Walker ("Antonio") and Antwane Walker ("Antwane"), two of her cousins, arrive and enter the building. The two men went into the building and spoke briefly to another Big Engine employee, Edriese Phillips. Antonio and Antwane then left the building. Minutes later, Antonio and Antwane returned to the building accompanied by Stokes, Curtis Stokes ("Curtis"), Terry Lynem, and an unidentified man referred to as Marcus. Stokes was carrying a black trash bag that contained an assault rifle.

Once inside the building, Antonio and Antwane entered the recording room [**762] where Arnold, Jr. was working. Also present in the room were Andrew Steele, Fred Winfield, and Shantell Williams. Another individual, Earnest Simmons ("Earnest"), was in an adjacent recording booth. Antonio greeted Arnold, Jr. and then asked to speak to Steele in the hallway. Steele walked to the hallway escorted by Antonio and followed by Antwane. Once in the hallway, Antonio pointed [**3] a handgun in Steele's face and said, "Get down, you know what this is." Tr. at 479. Meanwhile, Stokes, who was already in the hallway, pulled the assault rifle out of the trash bag and began firing it, also saying, "Get down, you know what this is." Id. at 480. Arnold, Jr. rushed to the door of the recording room and, after a struggle with Antwane, managed to close the door to the room. Arnold, Jr. then retrieved a handgun and, thereafter, slightly opened the door and fired his gun into the hallway at

Antonio. Elsewhere in the building, Lynem and Marcus grabbed Phillips. At gunpoint, Lynem and Marcus demanded money from Phillips. Phillips refused, and Lynem struck Phillips with his weapon. Lynem and Marcus took \$ 200 from one of Phillips's pockets.

Stokes, Antwane, Antonio, Lynem, Curtis, and Marcus left the building, with Antwane running backward firing a semi-automatic handgun toward the building as he left. After several people present had called 911, Big Engine employee Collin Moore was found in a hallway suffering from a gunshot wound to his abdomen. Soon thereafter, police officers dispatched to the scene apprehended Antwane, Lynem and Curtis walking together near the studio. [**4] Eight days after the incident, Stokes called Arnold, Jr. and offered him \$ 5000 in exchange for Arnold, Jr. agreeing not to "press charges." *Id.* at 524.

Stokes v. State, 922 N.E.2d 758, 761-62 (Ind. Ct. App. 2010)

6. On January 2, 2013, Stokes filed his original *pro se* petition for Post-Conviction Relief. On September 11, 2013, the State Public Defender withdrew representation pursuant to P.C. Rule 1(9)(c), and on January 15, 2014 Stokes withdrew this Petition without prejudice.
7. On February 11, 2014 Stokes filed his second Petition for Post-Conviction Relief which was again withdrawn without prejudice on September 18, 2015.
8. Stokes filed his third, and present Petition for Post-Conviction Relief on August 11, 2016.
9. The Court held evidentiary hearings on the petition on December 8, 2017 and on February 20, 2018. At the hearings Stokes called his trial attorney, Carolyn Rader (Bogar), his appellate counsel, Lisa Johnson and the detective who investigated the case, Det. Brian Schemenaur. Stokes discussed, but did not admit any exhibits in support of his claims.
10. By his current PCR petition, Stokes alleges that he received ineffective assistance from his trial and appellate counsels.

11. After considering the facts and the arguments presented, the Court finds that the facts are with the State and against the Petitioner.

CONCLUSIONS OF LAW

I. Standard of Review

Post-conviction relief is a collateral attack on the validity of a criminal conviction, and the petitioner carries the burden of proof. *Timberlake v. State*, 753 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). In pertinent part, PC Rule 1 reads:

- (a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:
 - (1) That the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;
 - (2) That the court was without jurisdiction to impose sentence;
 - (3) That the sentence exceeds the maximum authorized by law, or is otherwise erroneous;
 - (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
 - (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;
 - (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;

may institute at any time a proceeding under this rule to secure relief.

Thus, in order to grant relief, the Court must find, by a preponderance of the evidence, that Stokes is entitled to relief under one of the provisions enumerated above. For the reasons stated below, the Court finds that Stokes has not met his burden.

Petitioners who proceed *pro se* are held to the same established rules of procedure that trained counsel is bound to follow. *Smith v. Donahue*, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009), trans. denied, cert. dismissed, 558 U.S. 1074 (2009). One risk a petitioner takes when proceeding *pro se* is that he will not know how to accomplish all the things an attorney would know how to accomplish. *Id.* When a party elects to represent himself, there is no reason for the Court to indulge in any benevolent presumption on his behalf or to waive any rule for the orderly and proper conduct of the case. *Foley v. Mannor*, 844 N.E.2d 494, 502 (Ind. Ct. App. 2006).

The law affords a strong presumption that trial counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the petitioner to overcome that presumption. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002); *Gibson v. State*, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. Furthermore, "effective assistance is determined according to the whole of the lawyer's performance and not just on 'the strategy and performance at issue.'" *Azania v. State*, 738 N.E.2d 248, 251 (Ind. 2000) (quoting *Butler v. State*, 658 N.E.2d 72, 79 (Ind. 1995)).

II. Ineffective Assistance of Trial Counsel

In general, to establish a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind.2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), reh'g denied. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel's errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment of the United States Constitution. *McCorker v. State*, 797 N.E.2d 257, 267 (Ind.2003). To meet the appropriate test for prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* That is, Stokes must show that but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *McCorker*, 797 N.E.2d at 267. A reasonable probability for the prejudice requirement is a probability sufficient to undermine confidence in the outcome. *Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind.2003).

The two parts of the *Strickland* test are separate inquiries, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind.2001) (citations omitted). If an ineffective assistance claim can be decided on the prejudice prong, there is no need to address whether counsel's performance was deficient. *Helton*

v. State, 907 N.E.2d 1020, 1023 (Ind.2009).

a. Failure to protect right of confrontation

Stokes initially claims that he received ineffective assistance because his trial counsel stipulated to the testimony of a victim. In general, the decision as to which witnesses the defense shall call is one of trial strategy. *Grigsby v. State* (1986), Ind., 503 N.E.2d 394; *Marsillett v. State* (1986), Ind., 495 N.E.2d 699. Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind.2001), *reh'g denied*. "Absent a clear showing of prejudice, this Court will not declare counsel ineffective for failure to call a particular witness." *Grigsby, supra*. It is well-established that trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) (citing *Garrett v. State*, 602 N.E.2d 139, 142 (Ind. 1992)). This is so even when "such choices may be subject to criticism or the choice ultimately proves detrimental to the defendant." In order to meet his burden of proof, Stokes must show that his counsel's performance was outside the wide range of professionally competent assistance. See, *Sparks v. State* 499 N.E.2d 738, 739 (Ind.,1986), and that such deficient performance prejudiced his case. See, *Sulie v. State* 522 N.E.2d 380, 384 (Ind.,1988). The Court finds that Stokes has failed to meet this burden.

During the evidentiary hearings, Stokes pointed to a stipulation that his trial counsel supposedly made regarding State's witness, Collin Moore. A stipulation has been defined as "an agreement between counsel with respect to business before a

court." This general definition is expanded and explained by case law. In *City of Indianapolis v. Link Realty Co.* (1932), 94 Ind. App. 1, 20, 179 N.E. 574, the court stated that:

"... As we view the stipulation, it meant nothing more than an agreement as to the facts therein contained,..."

Further, in *Schreiber v. Rickert* (1943), 114 Ind. App. 55, 58, 50 N.E.2d 879, it was explained that a stipulation is "an express waiver made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truthfulness of some alleged fact." See also, *Johnson v. State ex rel. Slinkard* (1881), 80 Ind. 220; *Faught v. State*, 162 Ind. App. 436, 440, 319 N.E.2d 843, 846 (1974).

At the evidentiary hearing, attorney Rader (Bogar) testified that she did not specifically remember making any stipulations in the trial, but that generally stipulations were a common way to streamline trials, so as to focus on central, contested issues. On this issue, the Court finds that Stokes has not introduced the specific terms of any such express stipulation, nor has he introduced the witness statement to which he referred, and he has not introduced the transcript of the evidence, so that the Court cannot determine the context, or the gravity or the appropriateness of any stipulation, if one actually occurred. Without more, the Court also cannot evaluate any potential confrontation issue, and consequently, the Court must find that on the issue, Stokes has failed to meet his burden of proof.

b. Failure to dismiss the charges

Stokes also claims that his trial counsel was ineffective because she did not move to dismiss the charges against him at the outset of the case. It is well settled that

in order to prevail on a claim of ineffective assistance of trial counsel due to the failure to file a motion to dismiss, a petitioner must show a reasonable probability that the motion to dismiss would have been granted if made. See *Garett v. State*, 992 N.E.2d 710, 723 (Ind. 2013). In making this argument, Stokes appears to be focused on a notation in the Case Chronology dated December 21, 2008, which seems to indicate that no probable cause was found, and the defendant was ordered to be released. However, the court notes that a second and third entries for the same day, indicate that the Court made a probable cause determination and a bond was set. Additionally, the Court notes that the Case Chronology shows that on December 23, 2008 the Presiding Judge, conducted an initial hearing, and specifically found probable cause. Accordingly, the Court finds that Stokes has simply misinterpreted the Case Chronology, and his argument fails for this reason, alone.

The Court also notes that in making this argument, Stokes has apparently combined and confused several areas of the law regarding probable cause. In general, most criminal cases are initiated by filing an information which describes the crimes being charged. This is a statutory process¹, and there is no legal requirement for the State to also file a probable cause affidavit. It is true that the State routinely files probable cause affidavits contemporaneously with an information, but the affidavit serves a different purpose. Specifically, the affidavit allows the court to make a

¹ I.C. 35-36-1-4
Sec. 1. (a) All prosecutions of crimes shall be brought in the name of the state of Indiana. Any crime may be charged by indictment or information.
(b) Except as provided in IC 12-15-23-6(d), all prosecutions of crimes shall be instituted by the filing of an information or indictment by the prosecuting attorney, in a court with jurisdiction over the crime charged.

determination of probable cause, but this finding relates to the issuance of an arrest warrant or a decision regarding bail, and not to the procedure by which a defendant is charged with a criminal offense. *Gerstein v. Pugh* (1975), 420 U.S. 103, 125 n. 26, 95 S.Ct. 854, 868, 43 L.Ed.2d 54. *State ex rel. French v. Hendricks Superior Court, Hendricks County*, 252 Ind. 213, 247 N.E.2d 519 (1969); *Scott v. State*, 404 N.E.2d 1190; (Ind.App., 1980) *Rhoton v. State* 575 N.E.2d 1006, 1008 (Ind.App., 1991)

The probable cause affidavit and the probable cause determination have no bearing on the ultimate guilt or innocence of a criminal defendant and there is no possibility that a potential defense might be compromised, because this stage of a criminal proceeding is not a "critical stage" triggering constitutional protections. See, *Little v. State*, 475 N.E.2d 677 (Ind., 1985); *Bray v. State*, 443 N.E.2d 310 (Ind., 1982). In this case, Stokes was already in custody so the court did not issue a warrant for his arrest in this case. Therefore his argument concerning the probable cause affidavit is misplaced, *Rhoton, supra*, and now that he has been convicted, beyond a reasonable doubt, Stokes cannot upset his conviction with the argument that no probable cause was shown. *Scott v. State* 404 N.E.2d 1190, 1193 (Ind.App., 1980), or that his trial counsel should have moved to dismiss the charges.

As a final note, it should be pointed out that the Petitioner himself, during the evidentiary hearing, in reference to Attorney Rader's (Bogar's) performance, said the following, "She did -- you know, she did a good (job) but there were just certain facts she didn't get in for me."

III. Ineffective Assistance of Appellate Counsel

Stokes also claims that he received ineffective assistance from his appellate counsel. When appellate counsel, as opposed to trial counsel, is alleged to have been ineffective, the standard of review is nonetheless similar. Thus, to prevail on a claim of ineffective assistance of appellate counsel, a Petitioner must demonstrate by a preponderance of the evidence that appellate counsel's performance was deficient, and that the asserted deficiency effectively deprived him of his right to an appeal. *Stowers v. State*, (1995), Ind. App., 657 N.E.2d 194, *trans. den.*; *Jones v. State*, (1995), Ind. App., 656 N.E.2d 303, *trans. den.*; *Webb v. State*, (1995), Ind. App., 655 N.E.2d 1259, *trans. den.* Additionally, there is the same presumption of competence that surrounds trial counsels, and to succeed on Post-Conviction, this presumption must be overcome by strong and convincing evidence. *Jones, supra*. Appellate counsel's performance was not deficient if she failed to present a claim which would have been meritless.

Vaughn v. State 559 N.E.2d 610 (Ind. 1990).

Specifically, Stokes claims that his trial counsel was ineffective for failing to challenge the sufficiency of the evidence on his class A felony attempted robbery conviction. In this, again Stokes's failure to admit, as post-conviction exhibits, the record of proceedings and the appellate briefs from his direct appeal make a complete review of this issue virtually impossible. Although somewhat ambiguous on this specific issue, his appellate attorney's testimony at the evidentiary seems to at least indicate her belief that she did raise the issue. The Court of Appeals opinion is also somewhat contradictory on this narrow point, in that on the one hand the opinion states that Stokes claim was "the evidence is insufficient to support each of his five Class B felony

attempted robbery convictions and his robbery conviction." *Stokes* at 1244 but on the other hand, the Court of Appeals carefully and separately reviewed the sufficiency of the evidence supporting the A felony attempted robbery of victim Colin Moore, and found, "we hold that the evidence is sufficient to prove that Stokes was an accomplice to the attempted robbery of Moore. The evidence shows that Moore was in a hallway of the recording studio when he was ordered to "get down" and shot in the... [omission in the original]. The fact that he was singled out and directly ordered to "get down" supports a reasonable inference that the perpetrators intended to rob him, but were interrupted when gunfire erupted. We hold that the evidence is sufficient to support Stokes' attempted robbery of Moore." *Stokes* at 1248. Thus the inescapable conclusion is that either Stokes's appellate attorney did raise the issue, or even if the Court of Appeals reviewed the issue, *sua sponte*, then it is difficult to see how the result would have been different if appellate counsel raised the same issue that was rejected by the court. And thus this Court must conclude that Stokes has failed to meet his burden of proof on this issue, either because he is factually incorrect, or because raising the argument would have been meritless, *Vaughn, supra*.

The Court is well aware, that the Stoke's arguments are, in most likely motivated by the apparent disparate treatment accorded to him and his co-defendant's in their direct appeals. Stoke's four co-defendant's appealed their convictions. The appellate decisions are: *Antwane Walker v. State*, slip op., No. 49A02-0904-CR-344, (Ind. App., December 8, 2009); *Johnnie Stokes v. State* 922 N.E.2d 758 (Ind. App., 2010)(decided June 17, 2010); *Terry Lynem v. State*, slip op. No. 49A04-0905-CR-274 (Ind. App., December 17, 2009) and *Antonio Walker v. State*, slip op. No. 49A02-0905-CR-

motion for directed verdict on Counts III, V, VIII and X, which related to the victims, Gregory Arnold Jr., Earnest Phillips, Fred Winfield and Shantell Williams, respectively. Nonetheless the Court of Appeals ultimately adopted its own analysis of the evidence, and held there to be insufficient evidence regarding the intent to commit robbery and reversed as to Counts, III, V, VIII and X. The Court of Appeals considered and rejected similar sufficiency of the evidence claims on the other counts including the SVF charges and the A felony robbery. As a result of the Court's opinion, the defendant's sentence of 105 years executed did not change, because the reversed counts had been ordered to run concurrently with other counts.

As noted above, in this case *Curtis Stokes v. State*, *supra*, the Petitioner appealed based on claims that a motion for mistrial was improperly denied, and insufficiency of the evidence. The Court of Appeals rejected the mistrial issue, and followed the reasoning of *Antonio Walker v. State*, *supra* and found insufficient evidence on Counts III, V, VIII, and X, and affirmed on the remaining counts. As with *Antonio Walker*, the Court's decision had no effect on Curtis Stokes' overall sentence of 88 years executed.

In *Johnnie Stokes v. State*, *supra*, the defendant similarly raised appellate issues concerning the denial of a motion for mistrial and sufficiency of the evidence. The Court of Appeals panel which heard this appeal, essentially adopted the reasoning of the panels in *Curtis Stokes* and *Antonio Walker*, and reversed as to Counts III, V, VIII, and X. However this appellate panel went one step further and found insufficient evidence on Count I, the A felony attempted robbery of Collin Moore. The appellate court disagreed with the State's analysis and disregarded the holdings of the Trial Court and

the jury, and in a 2-1 decision, found that even though during the robbery Moore was ordered to get down on the ground and was subsequently shot during the robbery, there was not enough evidence to find that anyone intended to rob him. As a result of this decision, Johnnie Stokes' sentence was reduced from a total of 74 years to an aggregate executed sentence of 44 years.

In the present Post-Conviction Relief context, Stoke's argument is simple and clear. He assumes that his trial counsel did not raise the sufficiency of the evidence on the A felony attempted robbery count, and he further contends that since one appellate court panel found insufficient evidence for on that count, his appellate counsel was necessarily ineffective, because she did not also raise the issue or did not achieve the same result. While again, it is not clear that appellate counsel did not raise the issue, from her testimony at the evidentiary hearing, appellate counsel's decisions on which issues to raise or not raise were not a product of negligence, but rather were considered, strategic decisions. Moreover, it is important to stay focused on the exact issue presented by the present petition. The issue is not merely, whether there is insufficient evidence, nor is the issue merely whether a plausible argument could have been made which might have supported an argument for insufficiency. Rather the issue is whether appellate counsel was ineffective for failing to raise the issue.

Clearly, sufficiency of the evidence on the A felony was an issue that could have been raised on appeal. When counsel made her decision, she was not faced with a record where no evidence at all existed on each element of the crimes charged. Rather, at the time appellate counsel made her decision, the record was that the State and the defense had presented reasoned arguments on the issue of the sufficiency of

the evidence to the trial court and the Court had then ruled in the defense's favor on some counts, and ruled that sufficient evidence existed on other counts. She was also faced with a record where that trial counsel had essentially presented the same argument to the jury, which also rejected the theory.

The standard has long been that effectiveness of counsel cannot be measured from the perspective of hindsight. Instead, an attorney's performance can only reasonably and fairly be assessed based on the facts and circumstances before the attorney when the questioned decisions were made. *Bieghler v. State* 481 N.E.2d 78, 96 (Ind.,1985); *Williams v. State* 489 N.E.2d 594, 597 (Ind.App. 2 Dist.,1986) (the court... may not speculate, with the advantage of hindsight, as to.. the most advantageous strategy); *Collier v. State* 715 N.E.2d 940, 942 (Ind.App.,1999) ("Counsel's tactical decisions and strategy will not be viewed through the distortions of hindsight") (Citing, *Spranger v. State*, 650 N.E.2d 1117, 1121 (Ind.1995); *Baker v. State* 922 N.E.2d 723, 733 (Ind.App.,2010) (trans. granted and summarily affirmed by *Baker v. State* 948 N.E.2d 1169, 1173 (Ind.,2011)) ("Strategies are assessed based on facts known at the time and will not be second-guessed") The question therefore, is not whether Petitioner is entitled to relief on the merits of his claim. "Instead, the appropriate question on petition for post-conviction relief is whether appellate counsel's performance, viewed in its entirety, denied [Petitioner] his Sixth Amendment right to counsel." *Martin v. State*, 760 N.E.2d 597, 600 (Ind. 2002)

Applying these basic principles to the Petitioner's case, and based on the facts available to appellate counsel at the time she reviewed the record and selected the issues to pursue, this court cannot realistically hold that appellate counsel's strategic

In the
Indiana Supreme Court

FILED

Jan 09 2020, 1:36 pm

CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

Curtis Stokes,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
18A-PC-02982

Trial Court Case No.
49G02-0812-PC-288158

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 1/9/2020.

Loretta H. Rush

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

EXHIBIT C