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APPELLANT PRO SE:

**OTIS R. JONES**  
Carlisle, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**RICHARD C. WEBSTER**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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OTIS R. JONES, )  
 )  
Appellant-Petitioner, )  
 )  
vs. ) No. 46A03-0610-PC-454  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

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APPEAL FROM THE LAPORTE SUPERIOR COUR  
The Honorable William E. Alexa, Special Judge  
Cause No. 46D04-8906-CF-897

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**July 27, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Otis R. Jones (“Jones”) appeals the LaPorte Superior Court’s denial of his petition for post-conviction relief. He raises two issues, which we consolidate and restate as whether Jones received ineffective assistance of counsel before pleading guilty, causing his plea to be unknowing, unintelligent, and involuntary. We affirm.

### **Facts and Procedural History**

On June 23, 1989, the State charged Jones with Class D felony battery as the result of Jones striking a Department of Correction employee. Pursuant to the terms of the plea agreement, Jones agreed to plead guilty to battery as a Class A misdemeanor, and the trial court sentenced him to one year to be served consecutive to the forty-year sentence for murder he was already serving.

On December 1, 2004, Jones filed a pro se petition for post-conviction relief alleging that he did not knowingly, intelligently, or voluntarily plead guilty and that he received ineffective assistance of counsel. The trial court held a hearing on the petition on August 17, 2006. The court took the matter under advisement and issued an order denying Jones’s petition on September 5, 2006. Jones now appeals. Additional facts will be provided as necessary.

### **Standard of Review**

Post-conviction procedures do not afford petitioners an opportunity for a “super appeal.” Matheney v. State, 688 N.E.2d 883, 890 (Ind. 1997). Rather, they create a narrow remedy for subsequent collateral challenges to convictions. Id. Those collateral challenges must be based upon grounds enumerated in the post-conviction rules. Id.; see also Ind. Post-Conviction Rule 1(1). The petitioner in a post-conviction proceeding bears

the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

### **Discussion and Decision**

Jones argues that his guilty plea was not knowingly, intelligently, and voluntarily made because his attorney misinformed him about the charge he faced. Jones claims that while the charging information was “labeled” a Class D felony battery pursuant to Indiana Code section 35-42-2-1(a)(2)(F), because the information did not allege that he inflicted bodily injury on the correctional officer, he was actually being charged with battery as a Class A misdemeanor. He further contends that had his attorney informed him that he was actually charged with a Class A misdemeanor, he would not have agreed to plead guilty.

Pleas entered “after coercion, judicial or otherwise, will be set aside. Defendants who can prove that they were actually misled by the judge, the prosecutor, or defense counsel about the choices before them will present colorable claims for relief.” White v. State, 497 N.E.2d 893, 905-06 (Ind. 1986). As a claim of ineffective assistance of counsel, a claim of an involuntary plea based on bad advice by counsel must demonstrate that trial counsel in fact misadvised the defendant and such bad advice was material to his

or her decision to plead guilty. See Willoughby v. State, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003), trans. denied (citing Segura v. State, 749 N.E.2d 496, 504 (Ind. 2001)).

Jones's attorney testified that, while he had no independent recollection of the case, based upon the charging information, probable cause affidavit, and police reports, he would have known that the State charged Jones with Class D felony battery and that the State could have remedied any defect in the charging information by moving to file an amended information or by dismissing the information and filing a new information including the omitted "bodily injury" language. Tr. pp. 5-8, 13-16. Therefore, Jones has not established that he was actually misled about the choices before him at the time of his guilty plea. As such, he has not demonstrated that counsel's performance was deficient or that he suffered prejudice as a result. See Strickland v. Washington, 446 U.S. 668 (1984); Segura, 749 N.E.2d at 504. The trial court properly denied Jones's petition for post-conviction relief.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.