

In the Indiana Supreme Court

Kevin Charles Isom,
Petitioner,

v.

State of Indiana,
Respondent.

Supreme Court Case No.
23S-SD-52

Trial Court Case No.
45G04-1701-PC-1



Published Order on Successive Petition for Post-Conviction Relief in a Capital Case

Petitioner, Kevin Charles Isom, was convicted and sentenced to death for the murders of his wife and her two children. The United States District Court for the Northern District of Indiana stayed Isom’s federal habeas corpus proceedings under *Rhines v. Weber*, 544 U.S. 269 (2005). *Rhines* permits federal habeas petitioners to return to state court and seek to exhaust claims never previously raised there. *Id.* at 273, 275, 277. Isom now seeks this Court’s permission to litigate fourteen claims in a successive petition for post-conviction relief. We deny his request for the reasons outlined below.

Case History

In August 2007, residents at the Lakeshore Dunes Apartments in Gary reported hearing gunfire ringing out repeatedly from an apartment complex where Isom and his family lived. The police arrived but were not immediately able to enter the building. Instead, they sought cover outside as Isom continued to shoot at them through his apartment windows. After several hours, a SWAT team entered Isom’s apartment where they found him sitting on the floor, leaning against the wall. Police eventually placed him into handcuffs after a struggle. They found multiple guns inside the apartment—a .357 Magnum handgun that fell from Isom’s waistband, a .40-caliber Smith & Wesson pistol, and a 12-gauge shotgun—and several rounds of ammunition. Police also discovered Isom’s wife, Cassandra, and his two step-children—Ci’Andria, thirteen years old; and Michael, sixteen years old—all shot dead in the apartment.

The next day, Isom made incriminating statements to police and explained where in the apartment the victims had been when they were shot. When asked who had killed his wife and

stepchildren, he replied, “I can’t believe I killed my family, this can’t be real.” After reviewing his written statement to the police, Isom said, “I smell like gunpowder, like I’ve been at the range . . . Why y’all just didn’t kill me?”

The State charged Isom with three counts of murder for the deaths of Cassandra, Ci’Andria, and Michael. *See* Ind. Code § 35-42-1-1(1). It sought the death penalty for each murder, citing multiple murders as the qualifying aggravator. *See* Ind. Code § 35-50-2-9(b)(8). After a lengthy jury trial, the jury convicted Isom of all three murders and several other felony charges. Jurors weighed aggravating and mitigating factors and recommended a death sentence for each murder conviction. The trial court followed the jury’s recommendation and sentenced Isom to three consecutive death sentences.

This Court unanimously affirmed Isom’s convictions on direct appeal, but we remanded for a new sentencing order because the trial court erred in ordering Isom’s death sentences to be served consecutively. *Isom v. State*, 31 N.E.3d 469, 494–95 (Ind. 2015), *cert. denied*, 577 U.S. 1137 (2016) (“*Isom I*”). We stayed Isom’s execution after he provided notice that he intended to seek post-conviction relief.

In January 2016, the Public Defender of Indiana petitioned for post-conviction relief on Isom’s behalf. But those proceedings were fraught with conflict between Isom and his appointed post-conviction counsel. Isom’s post-conviction petition mistakenly did not include the required verification page that certified the petition’s correctness under oath. When he learned of the mistake, Isom repeatedly refused to submit the signed verification page and told the post-conviction court he had lost faith in his attorneys’ ability to represent him. The post-conviction court eventually decided Isom waived his right to post-conviction review. A year later, we reinstated Isom’s post-conviction proceedings. Isom ultimately received new appointed post-conviction counsel and litigated his claims where he challenged his trial and appellate counsel’s effectiveness. The post-conviction court denied Isom’s petition and his subsequent motion to correct errors. This Court unanimously affirmed. *Isom v. State*, 170 N.E.3d 623, 658 (Ind. 2021), *reh’g denied*, (“*Isom II*”).

In July 2022, Isom’s appointed federal habeas counsel filed an Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on Isom’s behalf. Since Isom raised new claims he had yet to exhaust in state court, he requested a stay of his federal habeas proceedings under *Rhines*, 544 U.S. at 273, which the district court granted. Through his counsel, Isom now seeks this Court’s permission to file a successive petition for post-conviction relief under Indiana Post-Conviction Rule 1(12) to litigate his unraised claims and thus exhaust his state remedies as federal law requires. 28 U.S.C. § 2254(b)(1)(A). We have jurisdiction because Isom has been sentenced to death. *See* Ind. Appellate Rule 4(A)(1)(a).

Successive Post-Conviction Procedures

Isom previously availed himself of Post-Conviction Rule 1, which allows a convicted person in Indiana to seek one collateral review of his conviction and sentence in state post-conviction proceedings. Isom now seeks our permission to litigate successive post-conviction

claims. *See* P-C.R. 1(12).

When a criminal defendant seeks to file a successive post-conviction relief petition, appellate courts must first grant permission to litigate the merits of those claims. P-C.R. 1(12). Even in capital cases, our Court performs a screening function to determine whether permission is warranted. *Wrinkles v. State*, 915 N.E.2d 963, 964–65 (Ind. 2009). Before we grant permission, the petitioner must show a “reasonable possibility” that he is entitled to relief on his successive post-conviction claims. P-C.R. 1(12)(b). We “may consider applicable law, the petition, and materials from the petitioner’s prior appellate and post-conviction proceedings including the record, briefs and court decisions, and any other material the court deems relevant” to decide whether Isom has met this burden. *Id.* If we authorize Isom’s successive post-conviction petition, he will have a right to appointed counsel and the case will return to the trial court for proceedings consistent with Post-Conviction Rule 1(12)(c). *See Baird v. State*, 833 N.E.2d 28, 30 (Ind. 2005), *cert. denied*, 546 U.S. 924 (2005).

No Relief for Isom

Isom argues he can show a reasonable possibility that he is entitled to relief on the fourteen claims he seeks to litigate in his successive post-conviction petition. We find that all of Isom’s claims are barred by either res judicata or procedural default. Thus, we decline to grant Isom permission to file his successive petition.

Indiana’s Post-Conviction Rule 1(8) addresses res judicata and procedural default. It says: “All grounds for relief available to a petitioner under this rule must be raised in his original petition.” P-C.R. 1(8). The petitioner may raise new claims in a successive petition only if the unraised claims “could not have been raised in earlier proceedings.” *Matheney v. State*, 834 N.E.2d 658, 662 (Ind. 2005). Unraised claims that are “knowingly, voluntarily and intelligently waived . . . may not be the basis for a subsequent petition” absent a “sufficient reason [they were] not asserted.” P-C.R. 1(8). Unraised claims that should have been raised previously are waived or “procedurally defaulted.” *Matheney*, 834 N.E.2d at 662. Our res judicata doctrine bars relitigating post-conviction “[c]laims that have already been decided.” *Id.*; P-C.R. 1(8).

Isom seeks leave to litigate the following fourteen claims in his successive petition:

- (1) his trial counsel were ineffective for:
 - (a) failing to object to the trial judge’s emotional display at juror orientation;
 - (b) failing to present Isom the State’s best-interest plea offer;
 - (c) failing to properly challenge Isom’s statements to the police on grounds that he was incapable for knowingly and intelligently waiving his right to remain silent;
 - (d) improperly focusing on prospective jurors’ race during voir dire;
 - (e) failing to remove an unqualified juror;
 - (f) failing to move for a change of venue;
 - (g) failing to investigate or present an insanity defense despite there being evidence to support it;

- (h) inadequately investigating and litigating his competence to stand trial and to knowingly, voluntarily, and intelligently waive his presence at the penalty-phase proceedings;
 - (i) failing to argue any persuasive explanation for Isom's memory loss of the events surrounding his family's murder;
 - (j) failing to investigate, develop, and present certain pieces of mitigating evidence;
 - (k) failing to ensure the penalty-phase jury received instructions that protected his constitutional rights; and
 - (l) failing to object to prosecutorial misconduct during the penalty phase of the trial;
- (2) his trial and appellate counsel were ineffective for failing to argue that Indiana's death penalty sentencing statute and related jury instructions allow for the death penalty to be arbitrarily imposed; and
 - (3) the cumulative errors he complains of render his conviction and sentence unconstitutional.

Isom argues he has not raised these fourteen claims before. To the extent he did not raise them before, they are barred by procedural default—meaning they are waived—because they were known or knowable to him during the prior proceedings and thus could have been raised before. Isom argues that he did not in fact waive his new claims, even though they were known or knowable to him, for two reasons. First, he argues that “he was incapable of knowingly, voluntarily, and intelligently waiving his unraised claims.” Reply Br. at 5. In *Isom II*, however, we declined to disturb the post-conviction court's conclusion that there was no reasonable doubt about Isom's competency during those proceedings. 170 N.E.3d at 653. We will not reconsider the issue of his capacity to waive unraised claims. Second, Isom argues that the post-conviction court constructively denied him counsel by failing to appoint new counsel when his relationship with his attorneys broke down. In post-conviction proceedings, we require only that counsel appear and represent the petitioner “in a procedurally fair setting which resulted in a judgment of the court.” *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989). Isom had counsel to present his claims throughout his post-conviction proceedings, including appeal to this Court. We cannot agree that his attorneys, representing him in difficult circumstances, “constructively abandoned him.” See Reply Br. at 21.

In fact, the record shows Isom has raised some of these claims before. Six of Isom's claims were raised previously and resolved against him. Res judicata thus prevents Isom from relitigating these claims. *Wallace v. State*, 820 N.E.2d 1261, 1263 (Ind. 2005). These six prior claims argue that:

- (1) his trial counsel were ineffective for:
 - (a) failing to object to certain improper prosecutorial remarks made at the penalty phase;
 - (b) arbitrarily failing to remove an unqualified juror;
 - (c) failing to present the State's offer of a best-interest plea;

- (d) failing to ensure the jury received instructions during the penalty phase that protected his constitutional rights; and
 - (e) failing to present evidence of his alleged memory loss during the murders, and failing to investigate, develop, and present his mental illness and intellectual disability as mitigating evidence; and
- (2) his trial and appellate counsel were ineffective for failing to argue that Indiana's death penalty sentencing statute and related jury instructions allow for the death penalty to be arbitrarily imposed.

Because each of these issues has already been decided adversely to Isom, he cannot raise them again here.

In sum, to receive permission from this Court to successively litigate any of these fourteen claims, Isom must show a "reasonable possibility" he is entitled to relief on them. P-C.R. 1(12)(b). Because each of Isom's claims is either barred by res judicata or procedurally defaulted, we find that he has not met this burden, as we explain next.

Eight of Isom's Claims Are Barred by Procedural Default.

We find that eight of Isom's claims are barred by procedural default. Procedurally defaulted claims are those "that could have been, but were not, raised in earlier proceedings and [were otherwise] not properly preserved." *Matheny*, 834 N.E.2d at 662. Isom seeks leave to litigate eight unraised claims in his tendered successive petition. Isom admits that he raised none of these claims either on direct appeal or in his prior PCR proceedings. We conclude those claims were known or knowable to Isom when the prior proceedings occurred. And we conclude Isom's arguments excusing his waiver of these claims lack merit.

Knowing, Voluntary, and Intelligent Waiver of Claims

Isom cites two specific reasons he could not knowingly, voluntarily, and intelligently waive his new claims: his post-conviction counsel were ineffective, and Isom was too mentally ill to assist counsel in his post-conviction case. These arguments fail, but for different reasons.

First, Isom says his prior counsel failed to adequately investigate and then present the unraised post-conviction claims to him, meaning he could not knowingly waive them. In support, Isom cites *Emerson v. Gramley*, 91 F.3d 898, 906 (7th Cir. 1996), and *Sanders v. Davis*, 23 F.4th 966, 975, 988 (9th Cir. 2022). Neither case addressed procedural default or waiver during post-conviction proceedings. *Emerson*, 91 F.3d at 904; *Sanders*, 23 F.4th at 987. Instead, both panels excused the defendants' waiver of sentencing arguments on direct appeal because their counsel were ineffective. *Id.*

The facts of those cases are also distinct from Isom's. In both cases, counsel's ineffectiveness was obvious. The defendants showed their counsel failed to investigate

mitigating evidence or to warn the defendants that the court must sentence them to death absent mitigating evidence. *Emerson*, 91 F.3d at 906; *Sanders*, 23 F.4th at 983, 988. Here, Isom does not explain how counsel failed to investigate his post-conviction claims or failed to effectively warn him of the risks of waiving certain claims. We cannot assume his counsel’s alleged failures were constitutionally deficient simply because Isom says so. See *Darden v. Wainwright*, 477 U.S. 168, 186 (1986). Were we to accept Isom’s argument, waiver would be excusable any time new counsel asserts an argument that prior counsel never made.

Second, Isom argues that his mental illness prevented him from cooperating with his counsel in his first post-conviction proceedings, meaning any waiver was involuntary. But this argument is barred by res judicata. The post-conviction court found that Isom understood the proceedings against him and “assist[ed] in the preparation of his defense.” *Isom II*, 170 N.E.3d at 652. We affirmed that ruling in *Isom II*, *id.*, and will not revisit it here.

Isom’s First Post-Conviction Proceedings

Isom next asks us to excuse his waiver because he had a “sufficient reason” to not raise those claims—his first post-conviction proceeding was procedurally unfair. He makes two specific arguments on this point, both of which fail.

First, he says the post-conviction court denied him assistance of counsel by not addressing Isom’s communication difficulties with his lawyers and refusing Isom’s requests for a competency evaluation. Res judicata bars this unfairness argument because we rejected it in *Id.* at 651–58. There, we affirmed the post-conviction court’s decision to deny Isom’s requests for a competency evaluation. *Id.* at 652–53. We also affirmed the post-conviction court’s finding that Isom could “assist in the preparation of his defense.” *Id.* Isom cannot now argue he was constructively denied counsel because he could not communicate with them. *Id.*

This argument ignores that Isom has had issues with every counsel who represented him from the outset of his case. “The record is replete with instances where Isom refused to engage with counsel.” *Id.* at 652. Siding with Isom here would allow him to continuously raise claims over and over, so long as he refuses to work with his counsel in every proceeding, thus “denying” him assistance of counsel.

Second, Isom argues his post-conviction counsel were ineffective and effectively abandoned him because counsel should have “withdraw[n] from representation and arrange[d] for replacement counsel after it became apparent that the attorney-client relationship was irretrievably broken.” Reply Br. at 21. This argument fails under our longstanding precedent. So long as counsel “in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court,” we do not judge post-conviction counsel against the federal ineffective assistance yardstick. *Baum*, 533 N.E.2d at 1201 (noting the different standard in Indiana law from *Strickland v. Washington*, 466 U.S. 668 (1984)). Isom’s post-conviction counsel ably litigated his claims over a five-day hearing before the post-conviction court. Counsel filed extensive briefs and dozens of motions. They presented sixteen volumes of exhibits and fifty-six volumes of transcripts from his original trial. And proceedings ended with a

trial court order that was over fifty pages long. Isom's counsel may not have succeeded on post-conviction review, but they did not abandon him.

Isom urges we reconsider our precedent given two United States Supreme Court cases, *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). While the rule from *Martinez* and *Trevino* preserves certain otherwise waived claims for federal habeas review when state post-conviction counsel were ineffective, it does not preserve claims in state proceedings. *Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017). Isom needs to persuade the federal habeas court that there is cause for his procedural default of these claims in state court.

Because Isom's waiver of claims in his first post-conviction relief proceedings cannot be excused, we hold his waived claims are procedurally defaulted. Thus, we deny his request to file a successive post-conviction petition as to these claims. P-C.R. 1(8); *Matheney*, 834 N.E.2d at 662.

Six of Isom's Claims Are Barred by Res Judicata.

We also find that several of Isom's claims are barred by res judicata, which prevents him from relitigating claims that have already been decided against him. *Wallace*, 820 N.E.2d at 1263. We have previously decided six of his fourteen proposed claims, in full or in part. Isom cannot resurrect these old claims by simply recharacterizing them. P-C.R. 1(8); *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006). We address below each claim that is barred by res judicata.

Prosecutor's Improper Remarks

Isom claims that his trial counsel failed to object to certain improper prosecutorial remarks made at the penalty phase. He objects to the parts of the prosecutor's closing statement about Isom's character, the tragic nature of the crime, and the victims' character and relationship with Isom. "None of these remarks," Isom argues, "directed the jury's attention to the appropriate aggravating factors as enumerated in Indiana's death penalty statute." Motion to File Successive Pet. at 10.

But our holding in *Isom I* precludes Isom's ineffective assistance claim here. *Isom I*, 31 N.E.3d at 490. There, Isom argued these same statements constituted prosecutorial misconduct because "they focused not on the charged aggravator and how that aggravator outweighed any mitigating factors, but rather 'direct[ed] the jury to focus on the horrible nature of the killings'" and Isom's bad character. *Id.* Isom now couches this argument as an ineffective assistance of trial counsel claim, which requires him to show prejudice. *Strickland*, 466 U.S. at 687. But Isom cannot argue the prosecutor's misconduct, and the lack of objection at trial, was prejudicial because in *Isom I*, we found the prosecutor's misconduct "*de minimis* and not substantial." *Id.* (emphasis in original). The prosecutor's statements were isolated and at the end of weeks of

trial. *Id.* Because any misconduct was insubstantial, *res judicata* precludes finding the prosecutor's statements prejudicial here. This claim is thus barred by *res judicata*.

Indiana's Allegedly Arbitrary Death Penalty Statute

Isom claims both trial and appellate counsel were ineffective for failing to argue that Indiana's death penalty statute and related jury instructions allowed the jury to impose the death penalty arbitrarily. He says our death penalty statute "does not give juries any guidance in determining whether the penalty should be life or death," leaving it to their "uncontrolled discretion." Mot. to File Successive Pet. at 10; see Ind. Code § 35-50-2-9(d), (e), (l).

This claim repeats a similar argument Isom made on his direct appeal. *Isom I*, 31 N.E.3d at 487. There, we rejected Isom's argument that the jury should have been instructed to impose the death penalty only if it found the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. *Id.* at 487–88. Isom's latest claim repeats the prior claim that the death penalty statute does not sufficiently restrict the jury's death recommendation. This claim is barred by *res judicata*.

Failure to Remove Juror 194

Isom also claims trial counsel erred in failing to remove juror 194, who Isom says was unqualified because the juror "revealed himself to be biased against the defendant and reluctant to consider mitigating evidence." Motion to File Successive Pet. at 4. While Isom has not previously challenged juror 194's placement on the jury, he has made several similar juror challenges on direct appeal and during his post-conviction appeal. On direct appeal, we rejected his argument that five jurors should have been removed for cause since they would not consider mitigation evidence. *Isom I*, 31 N.E.3d at 478. Then, on post-conviction, we rejected Isom's argument that trial counsel were ineffective for failing to remove one juror because that juror said he would not consider Isom's upbringing as mitigating evidence. *Isom II*, 170 N.E.3d at 637.

Isom's argument about juror 194 mirrors his previous claims about other jurors. Like the other jurors, juror 194 at first said he would not have considered all the mitigators, but his position changed after further inquiry and explanation. See *Isom I*, 31 N.E.3d at 478; *Isom II*, 170 N.E.3d at 637. Isom presents no new facts on juror 194 that would counsel a different result. Because his claim on juror 194 is identical to his prior claims against the other jurors, *res judicata* bars this "new" claim.

State's Best-Interest Plea Offer

Isom also claims trial counsel were ineffective for failing to present to him the State's best-interest plea offer. In *Isom II*, we rejected an identical claim. 170 N.E.3d at 639–40. There,

Isom argued that counsel refused to properly present to him the State’s plea offer. *Id.* at 639. We held that counsel did everything they could to address the plea offer in Isom’s presence and honor his desire not to admit guilt. *Id.* at 640. Thus, his ineffective assistance of counsel claim failed on the merits. *Id.* at 639–40. Our holding there bars Isom’s identical claim here.

Jury Instructions

Isom raises three jury instruction arguments based on certain ineffectiveness of his trial counsel. Res judicata bars two of these arguments; the third is procedurally defaulted.

First, Isom argues the jury instructions on diminished capacity and intoxication limited the jury’s ability to consider his mental state as mitigating evidence in the penalty phase. We rejected this same argument in *Isom II*. *Id.* at 643–44. We held that Isom failed to show that his trial counsel were ineffective in failing to object. *Id.* at 647, 650.

Second, he argues the trial court improperly instructed the jury to reach a unanimous sentencing decision. The disputed instruction suggested jurors should not reach their own individual opinion on whether a death sentence was appropriate. We also rejected this argument in *Isom II*, holding the challenged instruction stated the law correctly. *Id.* at 647–48. With no instructional error, trial counsel were not ineffective in failing to object. *Id.* at 649, 650.

Isom’s third argument—that the jury instructions improperly told the jury to “put aside all sympathy”—was not raised before and is thus procedurally defaulted.

Memory Loss, Mental Illness, and Intellectual Disability Evidence

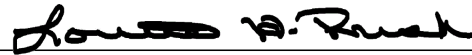
Finally, Isom claims his trial counsel were ineffective for failing to present evidence of his alleged memory loss during the murders, and for failing to investigate, develop, and present his mental illness and intellectual disability as mitigating evidence. We have addressed and decided his mental-illness argument before, so it is barred by res judicata. *Id.* at 640. We did not directly address his claims about memory loss or intellectual disability, but those claims are procedurally defaulted because Isom did not raise them until now.

Our holding in *Isom II* forecloses Isom’s claim on mental illness here. Isom argued that “his trial counsel failed to fully investigate and present a mitigation case” on his mental illness at the penalty phase. *Id.* But we held that Isom did not show prejudice warranting reversal because duplicative evidence suggesting he was mentally ill would not have changed the jury’s death-penalty recommendation. *Id.* at 641, 642. Isom put forward three experts who “acknowledged that Isom could have a serious mental illness”; more evidence would not have changed the result. *Id.* We also found that trial counsel’s investigation into Isom’s mental illness was “part of a reasonable trial strategy” because counsel “use[d] their resources [to] develop[] evaluations and expert testimony from three other” experts. *Id.* at 640, 641. Thus, Isom’s rephrased ineffective assistance claim before us today is barred by our past rulings.

Conclusion

Isom's fourteen proposed claims are barred by either procedural default or res judicata. Thus, he cannot show a "reasonable possibility" he is entitled to relief on these claims. We decline to authorize the filing of his successive petition.

Done at Indianapolis, Indiana, on June 25, 2024.



Loretta H. Rush
Chief Justice of Indiana

All Justices concur.