IN THE

Indiana Supreme Court

Supreme Court Case No. 45S00-1508-PD-508

Kevin Charles Isom,
Appellant,

–v–

State of Indiana,
Appellee.

Argued: September 12, 2019 | Decided: June 30, 2021

Appeal from the Superior Court of Lake County, Criminal Division
No. 45G04-1701-PC-1
The Honorable Samuel L. Cappas, Judge
The Honorable Natalie Bokota, Magistrate

On Direct Appeal

Opinion by Justice Slaughter

Chief Justice Rush and Justices David, Massa, and Goff concur.

Slaughter, Justice.

Kevin Charles Isom faces the death penalty for the murders of his wife and her two children. We affirmed his convictions and death sentence on direct appeal. Isom then sought post-conviction relief, raising many challenges to the effectiveness of his trial and appellate counsel. Although he refused to verify his petition as our post-conviction rules require, we eventually allowed him to proceed. Then, after lengthy proceedings, the post-conviction court denied his petition. We affirm.

I. Factual and Procedural Background

This case arises from a brutal crime. In August 2007, Isom's neighbors reported gunshots ringing out from his apartment. When police arrived, they quickly took shelter because of ongoing gunfire. Several hours later, a SWAT team entered Isom's apartment. They subdued and arrested him after a scuffle. During the arrest, a .357 Magnum handgun fell from Isom's waistband. Police also found a .40-caliber Smith & Wesson handgun and 12-gauge shotgun in the room.

Nearby, officers discovered a grisly scene: the bodies of Isom's wife, Cassandra, and his two stepchildren, thirteen-year-old Ci'Andria and sixteen-year-old Michael. Cassandra was killed by a shotgun blast to her head. Ci'Andria had been shot with the .357, the .40 caliber, and the shotgun. And Michael was killed by two shotgun wounds to his chest and flank areas.

The next day, Isom gave a statement to police. When asked who had killed his wife and stepchildren, he replied, "I can't believe I killed my family, this can't be real." Isom recounted what he did that day and where he was when he shot his victims. But he said he did not remember shooting at police. After reviewing his statement, Isom said, "I smell like gunpowder, like I've been at the range … Why y'all just didn't kill me?"

A. Trial Court Proceedings and Direct Appeal

Isom was charged with the murders of Cassandra, Ci'Andrea, and Michael, and the State sought the death penalty. The State also pursued three counts of attempted murder based on Isom firing at police. Attorney

Nick Thiros led Isom's first trial team. But in October 2010, Thiros died. Isom, distrustful of his remaining attorneys, fired them and sought a public defender. The Lake County Public Defender's Office was appointed, and it assigned attorneys Herbert Shaps and Casey McCloskey to represent Isom. Because Isom claimed to lack any memory of the murders, he was evaluated for competency, and all four evaluators found him competent to stand trial.

The case first went to trial in February 2012 but ended in a mistrial when the pool of approximately 600 potential jurors was exhausted without seating a full jury. The next year, more than 1,100 potential jurors were called for Isom's second jury trial. This trial, which lasted more than five weeks, began in January 2013. The jury returned a guilty verdict on all three murder counts and on three counts of criminal recklessness. The jury, after weighing aggravators and mitigators, recommended the death penalty for each murder conviction. The trial court accepted the jury's recommendation and ordered the three death penalties to be served consecutively. On direct appeal, we affirmed Isom's convictions and death sentence but remanded for a new sentencing order after concluding the trial court erred in ordering the sentences served consecutively. *Isom v. State*, 31 N.E.3d 469, 476, 495 (Ind. 2015), *cert. denied*, 577 U.S. 1137 (2016). We stayed his execution after he filed a notice of intent to seek post-conviction relief.

B. First Post-Conviction Proceeding

In January 2016, the Public Defender of Indiana tendered a petition for post-conviction relief on Isom's behalf. But the petition lacked Isom's oath and affirmation. The post-conviction court, observing this omission, issued an order giving Isom additional time to file the missing verification page. Yet Isom refused to verify the petition, apparently concluding that his attorneys "were not up to the task of representing him." The consequence, though, of his not signing the petition was that he would forfeit his post-conviction challenge. The trial court entered an order concluding that Isom had waived post-conviction review, and that his time to file the petition had expired.

In January 2017, after hearing oral argument, we ordered the trial court to deem Isom's petition filed as of the date of our January 13, 2017 order. On remand, the post-conviction court held a five-day hearing in March 2018. The court denied Isom's petition in June 2018 and denied his motion to correct errors shortly after. Under Indiana Appellate Rule 4(A)(1)(a), this capital post-conviction appeal comes directly to us.

II. Analysis

In post-conviction proceedings, the petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). Where, as here, the petitioner is appealing from a negative judgment denying post-conviction relief, he "must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Id*. (cleaned up).

We review ineffectiveness claims under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on these claims, Isom needed to prove that counsel's performance was deficient, and that their deficient performance prejudiced his defense. In analyzing whether counsel was deficient, we ask whether, "'considering all the circumstances,' counsel's actions were 'reasonable[] under prevailing professional norms.'" *Wilkes*, 984 N.E.2d at 1240 (quoting *Strickland*, 466 U.S. at 688). We afford counsel considerable discretion in choosing strategy and tactics, and our review of counsel's performance is highly deferential. *Id.* at 1240–41. We evaluate that performance based on counsel's knowledge and perspective at the time and do not subject their decisions to the "distorting effects" of 20/20 hindsight. *Strickland*, 466 U.S. at 689. To prove prejudice, "[t]he 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." *Wilkes*, 984 N.E.2d at 1241 (quoting *Strickland*, 466 U.S. at 694).

The post-conviction court denied Isom relief on all grounds. On appeal, we first consider Isom's claims that his trial counsel were ineffective. Then we consider whether his appellate counsel were

ineffective. Finally, we address five allegedly erroneous rulings of the post-conviction court. Because Isom waives his claims, or fails to meet his burden, or both, we affirm.

A. Effective Assistance of Trial Counsel

Most of Isom's post-conviction claims are that his trial counsel were constitutionally ineffective "at all phases of Isom's trial", including during jury selection and at the guilt and penalty phases. Because we find that Isom fails to meet his burden on review, he is not entitled to relief on these grounds.

1. Jury Selection

Isom's challenges to the jury-selection process are that counsel were deficient in screening and selecting jurors, thus forcing him to "accept jurors who should have been stricken [sic] for cause" and denying him the right to be tried by an impartial jury. Because Isom either waives his arguments, or fails to meet his burden, or both, we agree with the post-conviction court that he is not entitled to relief.

a. Prospective Jurors Discuss the Case

Before voir dire, potential jurors received a questionnaire that included some of the facts of the murders. During their orientation, prospective jurors were instructed not to discuss Isom's case, and the parties then began voir dire. The parties questioned prospective jurors individually, and panels of jurors waited in the jury room for their turn. The first panel included prospective jurors 8, 9, 19, and 25. Prospective juror 8 was questioned first and then struck. The next prospective juror (prospective juror 9) said other prospective jurors were discussing the case, contrary to the court's instruction. When asked if prospective juror 9 could presume Isom innocent, she said she had heard Isom killed his children and was trying to kill himself. Asked where she heard this, she answered, "I actually didn't even know of his last name until I was in that room with everybody. And then everybody told me about the case." The trial court granted a for-cause challenge for prospective juror 9.

Isom argues that trial counsel were deficient in failing to request the return of the peremptory challenge used to strike prospective juror 8, and in failing to move to strike the entire jury panel. The post-conviction court rejected Isom's arguments, and we agree.

i. Prospective Juror 8

Isom argues that trial counsel were ineffective for failing to request the return of the peremptory strike used to strike prospective juror 8. Even before prospective juror 9 disclosed possible discussions in the jury room about Isom's case, prospective juror 8 had already been questioned at length during voir dire**.** When asked by counsel, she denied having prior knowledge of the case:

> I don't know that much about the case. I have not really – all I had read was what was on the questionnaire. And, you know, I know nothing about the trial or the case to be honest with you. If I had read it years ago, it's not in my mind now.

Prospective juror 8 told the trial court she "may lean closer to imposing the death penalty", although she promised to "listen to all the evidence and the instructions".

Isom's lawyers exercised a peremptory challenge to remove her before the parties knew that some potential jurors had discussed the case. The peremptory strike was about prospective juror 8's views of the death penalty and was not related to her knowledge of the case—a finding by the post-conviction court that Isom does not challenge. When the parties learned of the discussions, Isom's counsel mentioned the peremptory strike used on prospective juror 8. The trial court found that prospective juror 8 knew nothing about the case and would decide the case on the evidence. Counsel did not seek to have the peremptory strike returned.

The post-conviction court ruled that trial counsel's performance was not deficient and that there was no prejudice. We agree and hold that counsel were not ineffective for not seeking the return of the peremptory strike used on prospective juror 8.

Isom has failed to show either that his counsel performed deficiently or that he suffered any prejudice because counsel did not move for the return of the peremptory strike used on prospective juror 8. The record shows that the trial judge would have denied any request to return a peremptory strike because he concluded that this prospective juror had not been tainted by any jury-room discussions that may have occurred. "With juror number 8 just for purposes of the record … [she] made it really, really clear that she knew nothing about the case." The court also indicated its suspicion that prospective juror 9 may have fabricated some or all of her testimony about unauthorized juror discussions to avoid jury service.

> And it's important to note the moment I told juror 9 that she was not going to be selected on the case she became very excited and kind of yelled out, yeah. So I don't know yet if that [alleged discussion] actually occurred [or] [i]f that was another attempt for her to get out of jury duty. Because from her questionnaire it was clear she didn't want to serve. She made it really clear she didn't [want] to serve here.

The conclusion that prospective juror 8 had not been tainted and the question about prospective juror 9's credibility mean the trial court would not have excused prospective juror 8 for cause; they also mean trial counsel had to use a peremptory challenge to strike her. Thus, Isom cannot prevail on his post-conviction argument that counsel should have sought the return of this peremptory challenge and was deficient for not doing so. Isom does not argue that the prevailing professional norm is for counsel to make gratuitous requests that the trial court will deny. Without this critical link, he cannot show deficient performance under *Strickland* because the "proper measure of attorney performance remains . . . reasonableness under prevailing professional norms." 466 U.S. at 688.

As for prejudice, Isom does not argue that he was prejudiced by the individual error alleged here: counsel's failure to request the return of the peremptory strike used against prospective juror 8. He thus waives this argument, Ind. Appellate Rule 46(A)(8)(a), and cannot meet his burden

under *Strickland*. But even had Isom raised this argument, he would still have to show that a seated juror was biased. Cf. *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."); *Oswalt v. State*, 19 N.E.3d 241, 246 (Ind. 2014) ("[A]n appellate court will find reversible error only where the defendant eventually exhausts all peremptories and is forced to accept either an incompetent or an objectionable juror.") (cleaned up). But here, the post-conviction court found that the seated jurors were not tainted—a finding Isom does not dispute.

Because Isom shows neither deficient performance nor prejudice, he is not entitled to relief on this ground.

ii. Entire Panel

Isom also claims his trial counsel were ineffective during jury selection because they did not ask the trial court to strike the entire panel after discovering that prospective jurors had discussed the case. The post-conviction court found that Isom did not show deficient performance. We agree and add that he did not show prejudice either.

After prospective juror 9 was struck, trial counsel noted that precautions needed to be taken to prevent jurors from discussing the case. The court agreed, and the bailiff placed multiple signs in the jury room directing prospective jurors not to discuss the case. Once voir dire resumed, follow-up colloquy with prospective jurors yielded little information about who, specifically, told other jurors about Isom's case or what was said.

Prospective juror 19 said that she was out in the hallway, away from the other jurors, and had no part in the discussion. She added that she thought she heard "some girls" or a "woman's voice" talking about what "could be a murder trial", but assured the court and the parties that she had not "heard anything" specific about the case. Prospective juror 31 said a "female", maybe a fifty-something woman was discussing the case. Prospective juror 12 said that "[s]ome people mentioned or stated if they knew or did not know anything about it without saying anything. But that

was all." When pressed, she said she heard "one gentleman in the room say that there had been a mistrial or something in the past on this case." She identified the man as prospective juror 11. Prospective juror 25 added that "[s]omebody mentioned that … their spouse or somebody had seen an article or something in the paper. But they kept it away from them. And they made sure they stayed away from it." He added that he "hadn't heard or read anything about [the case]".

Prospective jurors 19 and 25, who ultimately sat on the jury, were asked during voir dire if they were biased by the conversations. Prospective juror 19 responded that she could be "truly impartial", and prospective juror 25 assured the court that he could be "fair to both sides".

We hold that counsel were not deficient for failing to move to strike the entire panel. Consistent with the aim of voir dire, counsel questioned the jurors thoroughly to explore what they knew or had heard and to discover any possible bias—to ensure they were able to render a fair and impartial verdict. Isom concedes that he received the remedy required by *Remmer v. United States*, 347 U.S. 227 (1954)—the opportunity to question the jurors. But he argues that *Leonard v. United States*, 378 U.S. 544 (1964), requires automatic disqualification because bias should be presumed. According to Isom, where the juror discussions are acknowledged and the content is largely known, but the culprits are not identified, the entire panel should be dismissed.

But *Leonard* stands for no such principle. In *Leonard*, the defendant was convicted by two separate juries in two back-to-back trials. *Id.* at 544. Five of the jurors selected in the second case were in the courtroom awaiting jury selection when the verdict in the first case was announced. *Ibid.* In a one-sentence analysis in its per curiam opinion, the Court simply said: "We agree that under the circumstances of this case the trial court erred in denying petitioner's objection." *Id.* at 545. Isom fails to explain how this narrow holding can be stretched to the broad principle his argument rests on, thus waiving his argument on this ground. App. R. 46(A)(8)(a).

Even had Isom properly developed his argument, however, it would have failed because it rests on a faulty premise. According to Isom, improper juror communication triggers a presumption of bias, requiring

automatic dismissal. But Isom mistakes presuming bias for proving it. In *Remmer*, the Court recognized that after notice of improper communication and a hearing to investigate, the government could still show that any improper communication was harmless. 347 U.S. at 229. Here, the trial court conducted the hearing, and a handful of seemingly isolated comments about the case came to light. The court then struck one prospective juror for cause based on these conversations, and received assurances, which it credited, from the two prospective jurors (19 and 25) who were eventually seated that they could be impartial. In other words, the court assured itself that the isolated comments were harmless. Thus, Isom cannot establish deficient performance because even had counsel requested that the court strike the entire panel, this request would have been denied. And as we point out above, Isom does not argue that the prevailing professional norm is for counsel to make gratuitous requests that a trial court will deny.

Nor has Isom shown prejudice due to counsel's failure to strike the entire panel. As with prospective juror 8, Isom does not argue that he was prejudiced by the individual error alleged here: counsel's failure to ask that the court strike the entire jury. He thus waives this argument, App. R. 46(A)(8)(a), and cannot meet his burden under *Strickland*. And even had Isom raised this argument, he would have had to show that all of the evidence points to the conclusion that a seated juror was biased, which he cannot do on this record because he does not challenge the post-conviction court's findings that the seated jurors were not tainted. The testimony from prospective jurors 19 and 25 supports that they not only heard nothing improper about the case to begin with, but that they would be impartial regardless. Thus, Isom's claim fails.

The post-conviction court said of Isom's claim that the entire panel should have been struck that "[s]uch an extreme remedy is not constitutionally required." We agree. He is not entitled to relief on this ground.

b. Jury Questionnaire

Isom also argues that his trial counsel were ineffective for using a jury questionnaire that did not identify which prospective jurors would be able

to consider the mitigation evidence that counsel expected to present. Below, Isom made two claims relevant to the juror questionnaire. First, he argued that trial counsel were ineffective for failing to hire a jury consultant, resulting in counsel's undue reliance on the questionnaire. Second, he argued that trial counsel were ineffective for failing to adequately question prospective jurors based on their responses to the questionnaire. Isom did not, however, argue that trial counsel were ineffective for using a faulty questionnaire. Having failed to raise this claim below, he cannot raise it here. Ind. Post-Conviction Rule 1(8).

Even had Isom raised this argument below, he fails to show he is entitled to relief on the merits. He notes that counsel planned to present three mitigators: (1) Isom was under the influence of an extreme emotional disturbance at the time of the murders, (2) Isom had no significant criminal history, and (3) Isom lacked capacity to appreciate the criminality of his conduct or conform his conduct to the law due to mental disease or defect or intoxication. Isom implicitly acknowledges that trial counsel used a questionnaire that was consistent with their mitigation strategy by asking about "trauma and background", including whether past trauma can affect an individual for life, whether criminal history was an important factor, and how important a person's mental status was when deciding whether to impose a capital sentence.

But according to Isom, even though the questions in the questionnaire were consistent with trial counsel's early mitigation strategy, they were nonetheless "insufficient to identify appropriate jurors." But Isom cites no authority for this assertion. And he does not argue or establish that the questions asked violated prevailing professional norms. Without this critical link, Isom cannot show deficient performance under *Strickland*. 466 U.S. at 688. And since trial counsel asked questions consistent with their mitigation strategy, we presume under *Strickland* that their performance was reasonable. *Id.* at 689. Isom is not entitled to relief.

c. Prospective Jurors 45 and 137

Isom's final arguments based on jury selection are that his trial counsel were deficient for not striking prospective jurors 45 and 137, both of

whom ultimately sat on the jury. Isom is not entitled to relief on either ground.

i. Prospective Juror 45

Isom argues that trial counsel were deficient for failing to move to strike prospective juror 45 for cause, and if denied, removing him with a peremptory challenge. According to Isom, prospective juror 45 "was impaired in his ability to determine Isom's sentence" because he never said he would consider all sentencing alternatives or consider Isom's upbringing as mitigating evidence. But both here and below, Isom fails to identify the governing legal standard or explain how the factual record in this case entitles him to relief. Thus, he waives this argument, App. R. 46(A)(8)(a), and is not entitled to relief.

Moreover, even had Isom properly presented this argument, it would fail. To support his claim that trial counsel should have moved to strike prospective juror 45 for cause, Isom needed to show the post-conviction court that prospective juror 45 was incompetent—here, that prospective juror 45 could not be impartial. *Oswalt*, 19 N.E.3d at 246. Isom relies on prospective juror 45's equivocal responses during voir dire to support his argument that prospective juror 45 should have been struck for cause. But these factual assertions do not establish that prospective juror 45 was not impartial. Indeed, the post-conviction court found that prospective juror 45 said he would follow the court's instructions, had no inclinations toward either party, would take the oath to consider all three potential penalties, and would have "meaningful discussion" with the other jurors about Isom's penalty—all facts that suggest that prospective juror 45 was impartial. Because these unchallenged findings support the post-conviction court's conclusion that prospective juror 45 was competent, Isom is not entitled to relief.

ii. Prospective Juror 137

Isom also argues that trial counsel were deficient for failing to remove prospective juror 137. Isom seems to argue that it was important to trial counsel that jurors be honest on their questionnaires and thus, had counsel discovered that prospective juror 137 had an inaccurate response

on her questionnaire, they would have removed her. Again, however, Isom fails to identify the governing legal standard or explain how these facts, even if true, entitle him to relief. Thus, under our own rules, he waives this argument, App. R. 46(A)(8)(a), and is not entitled to relief.

Moreover, the post-conviction court found that Isom waived this argument below for failing to address this claim in his proposed findings of fact and conclusions of law. Thus, even had Isom presented a developed argument to this Court, he would not be entitled to relief. P-C.R. 1(8).

2. Guilt Phase

Isom raises two guilt-phase challenges. He argues first his trial counsel were ineffective during the guilt phase because counsel "implicitly but certainly" conceded that Isom was guilty via Dr. Parker's testimony. Second, where below Isom argued in his post-conviction petition that counsel were ineffective in handling the State's plea offer to Isom, he argues here that the Court should revisit its holding in *Harshman v. State*, 232 Ind. 618, 115 N.E.2d 501 (1953), in light of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). The post-conviction court denied Isom relief on both grounds, and so do we.

i. Dr. Parker's Testimony

Isom's first claim—that trial counsel called a witness who implicitly conceded Isom's guilt—is both waived and meritless. It is waived because Isom claims for the first time in this Court that trial counsel were ineffective because they conceded Isom's guilt. Below, although Isom referenced that Dr. Parker "essentially conceded Isom's guilt", he did not do so as a discrete claim. Instead, he mentioned Dr. Parker's testimony only to dispute trial counsel's testimony during the post-conviction hearing that their strategies for the guilt and mitigation phases were reasonable. Isom did not even identify what Dr. Parker said. And Isom's operative petition for post-conviction relief lists fifty-five grounds for relief—but none that mentions Dr. Parker's "concession". Having failed to raise this issue in any recognizable way below, he cannot now repackage it as a preserved claim. P-C.R. 1(8).

On appeal, Isom tries to explain, belatedly, what Dr. Parker said and how his testimony amounted to an implicit concession of guilt. Despite overwhelming evidence of his guilt, Isom insisted he was innocent and that someone else—the real perpetrator—had entered their apartment, killed Isom's family, and left him alone there. Thus, the defense solicited Dr. Parker's testimony to explain why Isom, whom police found at the scene of the murders, had no memory of what happened. Dr. Parker attributed Isom's lack of memory to post-traumatic stress disorder and dissociative amnesia. Isom told Dr. Parker that these symptoms arose after his prior counsel showed him graphic photographs of the crime scene. In response to counsel's question, Dr. Parker gave extended testimony recounting why he believed Isom was not malingering, i.e., faking symptoms of memory loss.

> [Isom] has no recollection of that period of time and that, of course, raises the concern that maybe he's deliberately saying he's not remembering that. What is unusual for malingering in this situation is that Mr. Isom has made no effort to try to convince anybody that he has any other memory problems except that particular circumscribed period of amnesia. He has made no effort to fake memory deficits since then. He has done well on all of the memory tests that I did and that other court ordered evaluators have done. He's been consistent in his statements about the memory loss, the timing and the nature and duration. It is usually pretty hard to maintain a consistent story over time when you're faking it because you have to remember so many things not to say and he has been pretty consistent based upon my review of the other court ordered reports and my interviews with him. And he has created a fairly elaborate explanation, alternative explanation for what must have happened because he cannot remember what happened and therefore, he was not responsible for it since he can't remember it. So it all sort of fits together with the explanation of dissociative amnesia and does not fit with my explanation of malingering for that kind of memory deficit.

On appeal, Isom identifies one sentence from this testimony that he now says implicitly conceded his guilt: "[Isom] has created a fairly elaborate explanation, alternative explanation for what must have happened because he cannot remember what happened and therefore, he was not responsible for it since he can't remember it." Isom does not argue that Parker's oblique comment here was an overt concession of guilt. Isom merely concludes without explanation that this phrase is an implicit concession of guilt. Thus, even had Isom properly raised this issue below, he would waive it here for failing to develop this argument. App. R. 46(A)(8)(a).

Even absent waiver, Isom's claim would fail as a factual matter. Isom never explains how Dr. Parker's phrasing is a concession of guilt. Isom's implication seems to be that he—Isom—came up with an "alternative explanation" in which he was not the guilty party. Thus, if Isom's explanation that he was not the guilty party was "alternative", then he must be the guilty party. But there is another equally plausible inference from Parker's testimony: Isom's "alternative explanation" had to be alternative to whatever happened because Isom had no memory of the actual events. In other words, all of Isom's explanations had to be "alternative" to reality because he allegedly had no idea what happened. Because Dr. Parker's statement is susceptible to more than one interpretation, a fact Isom ignores, he fails to establish the factual basis for his claim.

Finally, Isom fails to show that the alleged concession here would violate *McCoy*. *McCoy* stands for the principle that defendants get to decide the objective of their defense. 138 S. Ct. at 1505. There, counsel made multiple, intentional, and explicit concessions that his client was guilty. *Id.* at 1505–07 (telling the jury that his client "committed [the] three murders" and that "he's guilty"). And, critically, these unambiguous concessions were made over the client's adamant and repeated objections. *Id.* at 1505. Here, in contrast, the statements did not come from counsel, and they were not explicit, part of a deliberate trial strategy, or made over Isom's objections. Isom does not wrestle with these key differences, and thus his bald assertion that "*McCoy* favors [his] position[]" is unavailing.

Isom waived his argument that trial counsel were ineffective for conceding Isom's guilt by not raising it below; he waives it here by failing to explain how a passing reference open to multiple interpretations is an implicit concession subject to *McCoy*. Isom thus fails to show he is entitled to relief.

ii. Plea Agreement

Below Isom argued that "[c]ounsel refused to properly present to Isom the State's plea offer." The post-conviction court found the claim waived because Isom failed to address it in his proposed findings of fact and conclusions of law. The post-conviction court went on to say that even if it reached the merits, Isom would not be entitled to relief under *McCoy*. We agree that Isom waived his claim below; he is thus prohibited from raising it here. P-C.R. 1(8). We also agree he is not entitled to relief on the merits.

For Isom to succeed on the merits, he would have to show that all the evidence points unerringly to the conclusion that his counsel were deficient. *Wilkes*, 984 N.E.2d at 1240. But here, the post-conviction court found the following facts:

- that Isom maintained his innocence and insisted that someone else committed the crimes throughout his case,
- that Isom refused to accept any plea or defense that involved an admission of guilt,
- that counsel "addressed the State's plea offer in Isom's presence on the record before the trial court and the court was satisfied that Isom did not wish to plead guilty."

Isom does not challenge these factual findings. Thus, there is record evidence that counsel did everything they could to honor Isom's objective and no basis to reverse the post-conviction court's finding that counsel satisfied *McCoy*.

Isom now repackages this claim as a free-standing argument that Indiana should change its law to accept "best-interest" pleas. But Isom failed to raise this issue below and is now prohibited from raising it here. P-C.R. 1(8). Because Isom waived his arguments and failed to show that

he would otherwise be entitled to relief on the merits, we decline his invitation to revisit our holding in *Harshman*.

3. Penalty Phase

Isom argues that his trial counsel failed to fully investigate and present a mitigation case at the penalty phase of Isom's trial. According to Isom, trial counsel's investigation and use of Dr. Durak's data and expertise and Lake County's jail records amounted to ineffective assistance of counsel. Under *Strickland*, counsel has the duty to act reasonably under prevailing professional norms, including conducting reasonable investigations. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). In determining whether an investigation was reasonable, courts ask whether the known evidence would lead a reasonable attorney to investigate further. *Id.* at 527. And like all performance under *Strickland*, decisions about what and how much to investigate are given a "heavy measure of deference". *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (cleaned up). Because evidence in the record shows that counsel's investigation and use of both sets of records were part of a reasonable trial strategy, Isom does not carry his burden on review, and he is not entitled to relief under *Strickland*.

a. Dr. Durak's Data and Expertise

As for Dr. Durak, Isom argues that trial counsel were ineffective because they did not interview Dr. Durak, obtain his data, call him as a witness, or give his data to other expert witnesses. The post-conviction court held that Isom failed to prove deficient performance. We agree.

Isom's first trial team hired Dr. Durak in 2008 to evaluate Isom's mental state for a possible insanity defense. Although Dr. Durak met and evaluated Isom, he did not finish his evaluation or diagnose Isom. Shortly before attorney Thiros died in 2010, Dr. Durak moved out of state and suspended his practice in Indiana. Dr. Durak did not respond to an attempt by Thiros's team to reach him and did not provide his test results to them. A few months later, Isom informed Thiros's colleagues that he wanted new counsel. Once attorneys Shaps and McCloskey took over Isom's defense, they tried to contact Dr. Durak but did not reach him.

They then moved forward with three other psychiatric experts, Drs. Eisenberg, Gelbort, and Parker.

According to Isom, the second trial team's failure to obtain and use Dr. Durak's records and testimony was deficient because they reached out to him only once and did not seek recourse from the court in securing his records and testimony. But Isom fails to explain why the Shaps team's decision to use their resources in developing evaluations and expert testimony from three other, more responsive experts was not reasonable. He thus waives this argument, App. R. 46(A)(8)(a), and cannot show deficient performance under *Strickland*. But even had he developed this argument, the post-conviction court identified evidence in the record supporting the conclusion that the Shaps team's decision to focus on other experts was reasonable. Namely, the Shaps team knew that Thiros had hired Dr. Durak but that he had provided no diagnosis and no written report. Thus, they had no reason to think that Dr. Durak had information that would be different or more helpful than that developed by their own investigation and experts. And Isom had made it clear that he did not want Shaps's team to use any of the Thiros team's experts. Because evidence in the record shows that the information known to the Shaps team would not have led a reasonable attorney to investigate further, and that the decision to use new experts was part of a reasonable trial strategy, Isom cannot prove deficient performance.

Moreover, even if Isom could show deficient performance, he fails to show prejudice. Isom's argument consists only of the bald statement that if counsel had investigated Dr. Durak's role more and used his testimony and records, "there is a reasonable chance the jury would have recommended against death." But Isom fails to explain why this would have changed the jury's recommendation, thus waiving this argument. App. R. 46(A)(8)(a). Moreover, there is ample evidence in the record showing that it would not have changed the jury's recommendation. For instance, one of the experts who testified at trial, Dr. Gelbort, conducted tests similar to Dr. Durak's and got similar results. Also, because Dr. Durak never completed his evaluation of Isom or made a diagnosis, at best his data and testimony would have been speculative. And the speculation of mental illness was in front of the jury many times because,

although no expert ever diagnosed Isom with a serious mental illness, all three experts acknowledged that Isom could have a serious mental illness and that schizophrenia was a possibility.

Under our standard of review, Isom must show that all evidence points to the conclusion opposite that reached by the post-conviction court. But evidence in the record supports the post-conviction court's holding that Isom failed to show that trial counsel's investigation and use of Dr. Durak's data and testimony were ineffective. Thus, Isom cannot carry his burden on review and is not entitled to relief on these grounds.

b. Lake County's Jail Records

As for the jail records, Isom argues that trial counsel were ineffective because they did not obtain certain jail records and provide them to their expert witnesses. The post-conviction court held that Isom failed to prove deficient performance. We agree.

Isom's arguments center on a jail-intake form titled "Mental Health Suicide Risk Assessment". The unnamed jail employee who filled out Isom's intake form indicated that Isom was "visibly exhibiting symptoms indicative of thought disorder. (Cannot focus attention/hearing or seeing things not there)." This form also stated that Isom had "Loose Associations". Isom's arguments also concern other jail records noting possible psychosis and schizophrenia.

According to Isom, the second trial team failed to obtain and use these records, and their failure to do so was deficient performance. But Isom's arguments fail on the record. First, there is evidence that the second trial team had all the jail records. McCloskey testified that he obtained the records from the jail, had no problems getting them, and got updates regularly. Shaps testified that they asked the jail for as many records as they could get and that they had all the jail records the first trial team had.

Plus, Dr. Eisenberg's testimony suggested he knew of the records Isom claims were missing. Isom concedes that the first trial team had the records indicating possible diagnoses of schizophrenia and psychosis, and the post-conviction court found that the first trial team gave a binder containing these records to all of the experts—a finding Isom does not

challenge. Thus, Isom cannot show that all the evidence points to the conclusion that the records were missing. Second, even if Isom could show that they were, he would still have to show that the Shaps team's investigation was unreasonable given the information they knew at the time. Isom cannot do so because the evidence shows that the Shaps team thought they had all the jail records.

Finally, Isom cannot show prejudice. His only argument as to prejudice is the same one he made about Dr. Durak's records: that had counsel found and used the jail records, "there is a reasonable chance the jury would have recommended against death." Isom again fails to explain why finding and using the jail records would have changed the jury's recommendation, thus waiving this argument. App. R. 46(A)(8)(a). Moreover, there is evidence that additional records and their use by other experts would not have changed the jury's recommendation. Isom presented evidence from several mental-health experts, none of whom testified that Isom had a mental illness. Unlike the nameless jail employee, these doctors used their significant expertise to formally evaluate Isom and then shared their observations directly with the jury. Isom makes no attempt to explain how a few sheets of paper of unknown authorship indicating possible mental illness would have changed the jury's recommendation when so much other speculation about Isom's mental illness from expert witnesses failed to do so. We do not find such an unlikely and speculative proposition reasonably probable.

There is evidence that supports the post-conviction court's holding that Isom failed to show that trial counsel's investigation and use of jail records were ineffective. Thus, Isom cannot carry his burden on review and is not entitled to relief on these grounds.

4. Penalty-Phase Instructions

Next, Isom claims that his trial counsel provided constitutionally ineffective assistance for not objecting to penalty-phase jury instructions 17, 18, and 23. Because Isom is appealing a negative judgment on post-conviction relief, he must show that the evidence as a whole points "unmistakably and unerringly" to the conclusion that he was denied the effective assistance of counsel under *Strickland*. *Wilkes*, 984 N.E.2d at 1240.

Under this exacting standard, for each instruction Isom must show that the evidence points only to the conclusion that by not objecting, trial counsel provided substandard performance that prejudiced Isom. And when counsel's alleged error is a failure to object, the defendant must also show that the trial court would have sustained counsel's objection. *Timberlake v. State,* 690 N.E.2d 243, 259 (Ind. 1997). Thus, to meet *Strickland*'s prongs, Isom had to show deficient performance; that objections to instructions 17, 18, and 23 would have been sustained; and a reasonable probability that absent the instructions, the jury would not have recommended a death sentence. *Strickland*, 466 U.S. at 694. Because Isom does not make these showings, he is not entitled to relief on these grounds.

a. Instructions 17 and 18

Isom first argues that trial counsel were ineffective for not objecting to instruction 17 (defining "mental disease or defect") and instruction 18 (defining "intoxication"). Because Isom combined his arguments for instructions 17 and 18, we will address them together. Specifically, Isom argues that instruction 17 removed his purported mental illness from the jury's consideration by wrongly informing the jury it could consider only a mental illness that rendered a defendant "unable to appreciate the wrongfulness" of his conduct at the time of his offense. And he argues that instruction 18 caused the jury to consider as a mitigator only the degree of intoxication that would have caused Isom to lose normal control of his faculties, thus excluding evidence of being under the influence of alcohol to a lesser degree. According to Isom, both instructions were error because they impermissibly limited the jury's consideration of mitigating factors.

Instruction 17 quoted the definition of "mental disease or defect" in Indiana Code section 35-41-3-6:

> a) a person is not responsible for having engaged in conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.
>
> b) as used in this section, "mental disease or defect" means a severely abnormal mental condition that grossly and

> demonstrably impairs a person's perception, but the term does not include an abnoormality [sic] manifested only by repeated unlawful or antisocial conduct.

Instruction 18 said:

> "Intoxication" means under the influence of alcohol so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties.

This instruction not only recites a statutory definition of "intoxication", see Ind. Code §§ 9-13-2-86, 35-46-9-2, but also describes its common meaning. See Merriam-Webster, https://www.merriam-webster.com/dictionary/intoxication (last visited June 29, 2021) (defining "intoxication" as "the condition of having physical or mental control markedly diminished by the effects of alcohol or drugs").

The post-conviction court held that Isom did not show either deficient performance or prejudice as to trial counsel's failure to object to these instructions. We agree.

i. Performance

We begin with deficient performance. Under our well-settled standard of review, Isom had to show that the only conclusion based on the evidence was that trial counsel's representation fell below prevailing professional norms. But his effort to do so fails as a matter of law, logic, and fact.

First, as the post-conviction court pointed out, instructions 17 and 18 are accurate statements of law. Both instructions use a statutory definition, and instruction 18 recites the ordinary meaning, too. Isom has no counter to these points. Also, the instructions were relevant because they were used to define terms in instruction 16, an unchallenged instruction that Isom requested. Instruction 16 recited mitigating circumstances from Indiana Code section 35-50-2-9(c)(6): the "defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of **mental disease or defect** or of **intoxication**." Isom does not argue that the prevailing norm for lawyers is to object to accurate statements of law

made relevant by their own instruction. He thus waives this argument. App. R. 46(A)(8)(a).

Second, as to logic, we agree with the post-conviction court that merely defining "mental disease or defect" and "intoxication" did not preclude the jury from considering other evidence that might not rise to the level of mental disease, mental defect, or intoxication. Nothing in either instruction, individually or taken together with other instructions, told the jury to ignore all evidence of mental-health issues or alcohol consumption falling outside the definitions in instructions 17 and 18. Isom points to no evidence suggesting that merely defining one part of the law excludes consideration of all other facts. Rather, instructions 17 and 18 did what instructions are meant to do, which are to educate the jury on a relevant part of the law. *Batchelor v. State*, 119 N.E.3d 550, 562 (Ind. 2019). These points do not lead us "unmistakably and unerringly" to the conclusion that trial counsel's failure to object fell below prevailing professional norms.

Third, as a factual matter, the post-conviction court also rejected Isom's argument that instructions 17 and 18 wrongly caused the jury to consider only behavior defined as a mental disease, mental defect, or intoxication. We agree. Taking the instructions as a whole, we find that the jury was advised to consider all facts it thought were mitigating. Instruction 11 informed the jury that "there are no limits on what facts any of you may find as mitigating", and that a "mitigating circumstance can be anything about the defendant . . . which any one of you believes should be taken into account", including "circumstances relating to the defendant's . . . mental state".

In addition, relevant to Isom's instruction 17 challenge, instruction 16 listed eight other mitigators pertaining to mental health:

1) "Potential brain damage as a result of fall during childhood",

2) "Frontal lobe limitations and impairment",

3) "Suppression of ability to process and encode concrete bits of material",

4) "Impairment of transfer from short to long term memory",

5) "Attention and concentration problems",

6) "Limitation of capacity to adapt in situations requiring active and efficient cognitive endeavors and information processing",

7) "Dissociative amnesia", and

8) "Post-traumatic stress disorder (PTSD)".

None of these mental-health issues were limited as possible mitigators to those that rendered Isom incapable of appreciating the wrongfulness of his actions.

Isom's only answer is that instruction 11 contradicts but does not explain the error in instructions 17 and 18, and, thus, under *Francis v. Franklin*, 471 U.S. 307, 322 (1985), instruction 11 cannot cure instructions 17 and 18. But Isom's argument mischaracterizes both the facts and the law. First, his argument ignores that the post-conviction court considered instruction 17 in relation to both instructions 11 and 16. Second, the post-conviction court did not hold that instruction 11 cured any error in instructions 17 and 18. The post-conviction court instead found no error in either. Thus, Isom's argument applying *Francis* is inapposite. The post-conviction court did not consider instructions 11 and 16 to have cured the other instructions' alleged deficiency. Instead, it noted that instructions should be considered as a whole to determine whether they misled the jury on the law. This is the proper approach under controlling precedent. See, e.g., *Inman v. State*, 4 N.E.3d 190, 200 (Ind. 2014). Isom never explains why *Francis* should govern the analysis instead of our settled approach that considers instructions as a whole, and we reject his attempt to mischaracterize the proceedings below. Isom thus did not show that trial counsel's performance was constitutionally deficient for not objecting to instructions 17 and 18.

If anything, counsel's decision to use instructions 17 and 18 to supplement the jury's understanding of instruction 16 is the type of strategic decision subject to the deferential *Strickland* inquiry. Elsewhere, we have held that a defendant cannot overcome the presumption of

competent representation under *Strickland* unless the defendant shows that trial counsel's presumptively reasonable strategic decision was in fact due to counsel's ignorance. *Brewington v. State*, 7 N.E.3d 946, 977–78 (Ind. 2014). Isom does not address whether trial counsel's failure to object was the product of a strategic decision. Without overcoming this presumption, Isom cannot meet his *Strickland* burden, and his claims necessarily fail.

ii. Prejudice

We turn next to prejudice. Although Isom's *Strickland* claim fails because he did not show deficient performance, it fails independently for lack of prejudice. To prove prejudice, Isom had to show that the only conclusion based on the evidence is that there was a reasonable probability the unraised objections would have been sustained and that absent the instructions, the jury would not have recommended the death penalty. Critically, Isom did not argue either. Thus, he waives these arguments, App. R. 46(A)(8)(a), and cannot meet his *Strickland* burden.

Even had Isom raised these waived arguments, they would have failed. First, as discussed above, Isom shows no error in the instructions, so he shows no grounds for the trial court to sustain counsel's objection. Moreover, even had the objections been sustained, Isom cannot show a reasonable probability that the jury would have returned a sentence other than death. The jury's charge under section 35-50-2-9(l)(2) was to decide whether one or more aggravating circumstances outweighed the mitigating circumstances. Here, this means that Isom needed to show that the jury would have accorded the fact that he had been drinking (but was not legally intoxicated) and had mental-health issues (but not a mental illness or defect) such mitigating weight that their addition to the approximately thirty other proposed mitigators would have overcome the aggravators—that Isom had committed two other murders. We reject any argument that this speculative counterfactual outcome was reasonably probable. Thus, Isom cannot establish prejudice under *Strickland*.

Instead, Isom argues that his trial counsel's alleged error rendered the proceedings fundamentally unfair: "the jury was precluded from considering the most compelling portions of the mitigating evidence because the final instructions placed the burden too high." But Isom's

claim that this was so does not make it so. He provides no evidence to support his claim. And he cites no case law to support his view that any instructional error relevant to a mitigating circumstance renders a proceeding so unreliable that it violates a defendant's due-process rights. To the contrary, Supreme Court precedent recognizes that not all instructional error in capital cases is fundamental error, *Sochor v. Florida*, 504 U.S. 527, 534 n.* (1992), as does our own precedent, *Inman*, 4 N.E.3d at 200. Because Isom did not develop this fundamental-error argument, he waived it. App. R. 46(A)(8)(a). But even had he developed it, we discern no fundamental unfairness in the proceedings.

Isom also argues that his alleged instructional errors are structural errors and that *Strickland* prejudice should thus be presumed. In doing so, he quotes a number of federal cases, but none stands for the broad principle that instructional error relevant to mitigating circumstances is structural error and thus exempt from harmless-error review. Specifically, Isom argues that so-called *Lockett* errors are not subject to harmless-error review under Supreme Court precedent. But the issue in *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978), and other like cases, see *Tennard v. Dretke*, 542 U.S. 274, 285–86 (2004), *Penry v. Johnson*, 532 U.S. 782, 799–800 (2001), *Penry v. Lynaugh*, 492 U.S. 302, 318–20 (1989), and *Eddings v. Oklahoma*, 455 U.S. 104, 112–13 (1982), was whether a state's sentencing scheme could preclude a sentencer from considering mitigating evidence as a matter of law. And the circuit cases Isom cites similarly focus on state law or procedure that precluded the sentencer from considering mitigating evidence as a matter of law. See *Nelson v. Quarterman*, 472 F.3d 287, 291, 303 (5th Cir. 2006); *Davis v. Coyle*, 475 F.3d 761, 772 (6th Cir. 2007); *Hargrave v. Dugger*, 832 F.2d 1528, 1534 (11th Cir. 1987).

Here, though, Isom neither challenges the validity of Indiana's sentencing scheme nor argues that the jury was precluded from considering mitigating evidence as a matter of law. Indeed, Isom concedes that his jury was specifically instructed to consider all facts it believed were mitigating. Because Isom does not develop his argument under *Lockett* and later federal cases by showing why they should apply here, he waives it. App. R. 46(A)(8)(a). Moreover, structural error under state law is an extremely narrow doctrine, see *Durden v. State*, 99 N.E.3d 645, 652, 653 (Ind. 2018), which we decline to extend here.

We are thus persuaded that Isom's alleged error is subject to traditional harmless-error review. But even were it not, Isom's claims of fundamental and structural error ignore that he invited the alleged errors concerning instructions 17 and 18. Under Indiana's invited-error doctrine, a party cannot benefit from an error the party commits, invites, or sets into motion by his own neglect or misconduct. *Id.* at 651. Thus, invited error can defeat a claim of even structural or fundamental error. *Id.* at 655. An unobjected-to instruction coupled with an active request for related instructions raises the question of invited error. *Brewington*, 7 N.E.3d at 974. Here, Isom pursued a deliberate strategy of putting as many mitigators, statutory and nonstatutory, in front of the jury as possible. As part of that strategy, he sought instruction 16 and did not object to instructions 17 and 18, which defined terms used in instruction 16. Thus, Isom invited any errors in instructions 17 and 18, thereby defeating his claims, even if he could somehow show structural or fundamental error.

Because Isom does not argue or show prejudice and he invited the alleged errors, he does not meet *Strickland*'s second prong. He thus fails to show that the evidence points "unmistakably and unerringly" to the conclusion that trial counsel's failure to object to instructions 17 and 18 was both deficient performance and prejudicial under *Strickland*. He is not entitled to relief on either ground.

b. Instruction 23

Isom next argues that trial counsel were ineffective for failing to object to instruction 23. According to Isom, the instruction wrongly informed the jury that its sentencing decision must be unanimous and was thus unconstitutional at the penalty phase.

Instruction 23 said:

> To return verdicts, each of you must agree to them.
>
> Each of you must decide the case for yourself, but only after considering the evidence with the other jurors. It is your duty to consult with each other. You should try to agree on a verdict, if you can do so without compromising your individual judgment. Do not hesitate to re-examine your own views and change your mind if you believe you are

> wrong. Do not give up your honest belief just because the other jurors may disagree, or just to end the deliberations. After the verdict is read in Court, you may be asked individually whether you agree with it.

The post-conviction court held that Isom did not show constitutionally deficient performance or prejudice for trial counsel's failure to object to instruction 23. We agree.

i. Performance

We begin with deficient performance and find that Isom fails to meet his burden. Critically, he does not explain why, even were instruction 23 erroneous, it was constitutionally deficient performance not to object. And apart from waiver, even had Isom supplied this critical missing link, his argument fails as a matter of both fact and law.

As a factual matter, instruction 23 nowhere tells the jury it must return a unanimous sentencing recommendation. It merely says that to return a verdict in a capital case, its verdict must be unanimous. In fact, the instruction states that each juror "must decide the case for yourself" and admonishes jurors to try to agree only if they can do so without "compromising" each juror's "individual judgment." And it advises jurors they should not give up an "honest belief" just because other jurors disagree. Also, a reviewing court considers whether the instructions, taken as a whole, misinformed the jury about the law. Thus, the post-conviction court properly considered instruction 23 alongside other instructions, namely, instruction 11. Instruction 11 told the jury that each juror "must consider and weigh any mitigating factors he or she finds to exist without regard to whether other jurors agree with that determination." Taken together, instructions 11 and 23 correctly informed the jury of its obligations in a capital case: to seek unanimity before recommending the death sentence—but only if unanimity can be reached without sacrificing individual judgment and after each juror individually weighs any mitigating factors. See I.C. § 35-50-2-9(f). For these reasons, Isom's argument fails factually.

His argument also fails legally. The post-conviction court found that instruction 23 is a correct statement of law because all jurors must agree that death is the proper sentence before the trial court will accept its

recommendation. Isom does not explain why instruction 23 was unconstitutional at the penalty phase, does not provide any legal citations to support his claim, and does not specify which constitutional right the instruction allegedly violated. Isom says only that it was "especially true" that instruction 23 was unconstitutional considering instruction 15. Yet Isom did not mention instruction 15 in his post-conviction petition or in his proposed findings to the post-conviction court. He cannot raise this issue for the first time on appeal. See, e.g., *Cavens v. Zaberdac*, 849 N.E.2d 526, 533 (Ind. 2006).

Isom also waives this argument by not developing it. App. R. 46(A)(8)(a). He does not explain how instruction 23 was unconstitutional at sentencing or how instruction 15 supports his claim. And the Court discerns nothing in instruction 15 that makes instruction 23 unconstitutional. Instruction 15 says "[a]ny findings you enter in a verdict form must be unanimous. Do not enter any findings or sign any verdict form to which there has not been a unanimous agreement." Taken together, these instructions make it harder for a defendant to receive the death penalty, thus providing a reasonable basis for counsel's strategic decision not to object to instruction 23. To overcome the presumption that his counsel made a reasonable strategic decision, Isom needed to show that counsel acted instead due to ignorance of the law. *Brewington*, 7 N.E.3d at 978. But Isom does not make this argument, see App. R. 46(A)(8)(a), and thus cannot overcome *Strickland*'s presumption of reasonable performance.

Instead, Isom points to trial counsel's statement at the post-conviction hearing that counsel should have objected to instruction 23. Nothing in the record, however, suggests that counsel's statement was anything more than the inevitable second-guessing with 20/20 hindsight that does not meet *Strickland*'s high bar. *Strickland*, 466 U.S. at 689. In fact, trial counsel's response—"[i]n retrospect, yes"—when asked at the hearing if he should have objected, suggests it was precisely that. Notably, Isom does not argue that ignorance of the law (instead of trial strategy) explains counsel's decision not to object to instruction 23. He thus waives this argument, App. R. 46(A)(8)(a), and cannot show that the evidence as a whole points only to deficient performance.

Isom also argues that instruction 23 was erroneous because it contradicted instructions 11 and 14. But he does not identify the contradiction or show why, even were they contradictory, trial counsel's performance was deficient because they did not object. Because Isom does not develop this argument, he waives it. App. R. 46(A)(8)(a).

Even had he developed it, however, his argument would fail both factually and legally. Factually, Isom cannot show that instruction 23 necessarily contradicts instructions 11 and 14. Instruction 11 admonishes each juror to consider individually all facts the juror finds mitigating. In contrast, instruction 23 speaks to the jury's verdict. Individual juror decisions about whether a fact is mitigating are not the jury's collective verdict. There is no conflict because the two instructions address different parts of the law. Instruction 14 requires jurors to individually balance aggravating and mitigating circumstances to determine if the aggravators outweigh the mitigators. Instruction 14 does not contradict instruction 23 but clarifies both its "individual judgment" reference and how a juror should decide the case for herself.

Legally, to the extent Isom would rest on his earlier contradiction argument vis-à-vis instructions 17 and 18, his argument as to instruction 23 similarly fails. In his briefing on instructions 17 and 18, Isom argues that where another instruction "merely contradicts" without explaining the error of the challenged instruction, it cannot cure the challenged instruction's deficiency under Supreme Court precedent. As explained above, Isom does not establish that instruction 23 was erroneous or that the post-conviction court considered other instructions to cure that error. And our settled precedent holding that jury instructions should be considered as a whole to determine whether they misled the jury about the law does not conflict with the Supreme Court's holding in *Francis*, 471 U.S. 307.

Because Isom does not show that the evidence points only to the conclusion that trial counsel's performance was constitutionally deficient for not objecting to instruction 23, he is not entitled to relief on this ground.

ii. Prejudice

As to prejudice, Isom does not show that the evidence leads unerringly to the conclusion that trial counsel's failure to object to instruction 23 prejudiced him. Isom does not argue that the trial court would have sustained an objection to instruction 23 or that the jury would have recommended a different sentence absent the instruction. He thus waives these arguments. App. R. 46(A)(8)(a).

Even had Isom made these arguments, though, they would have failed. Instruction 23 accurately states the law. And there is no indication that the instructions, as a whole, misled the jury. Thus, there is no obvious ground on which the trial judge would have sustained an objection. And, absent instruction 23, the jurors would have missed the explicit admonishment to "decide the case for yourself" and not to "compromis[e]" a juror's "individual judgment" or give up her own "honest belief" just because other jurors disagree. It is unreasonable to suppose that omitting an instruction to make an individual judgment would result in a juror being more likely to make an individual judgment. Isom thus cannot show a reasonable probability that without instruction 23 at least one juror would have voted against the death penalty.

Because Isom does not show that the evidence points unerringly to the conclusion that his trial counsel's failure to object to instructions 17, 18, and 23 was both constitutionally deficient and prejudicial, he is not entitled to relief on these grounds.

5. Cumulative-Prejudice Argument

Isom tries to bolster his individual-prejudice arguments by arguing that the cumulative effect of counsel's errors at the penalty phase prejudiced Isom by undermining confidence in the proceedings. Isom alleges that trial counsel were deficient for failing to object to penalty-phase instructions 17, 18, and 23 and failing to investigate, obtain, and use records from Dr. Durak and the jail. According to Isom, these alleged errors, taken together, denied him a jury that could make an individualized-sentencing determination, thus depriving him of his constitutional right to a fair trial and reliable sentencing. The post-

conviction court found that Isom failed to meet his burden in establishing even error, let alone cumulative prejudice. We agree.

Even had Isom carried his burden and proved deficient performance, however, "[g]enerally, trial errors that do not justify reversal when taken separately also do not justify reversal when taken together." *Weisheit v. State*, 109 N.E.3d 978, 992 (Ind. 2018). Isom does not explain why the trial errors he alleged are exceptions to this general rule. The thrust of his argument seems to be that the alleged errors prevented the jury from hearing certain mitigating evidence and that this missing mitigating evidence calls into question the reliability of the sentencing verdict. Given that the aggravating factors for each sentence was the brutal murder of two victims—with two of the three victims children—and given that the jury was presented with thirty different mitigators spanning from Isom's childhood to his mental health as an adult, we see no unreliability in the result. Accord *id.* (finding cumulative-prejudice claim failed where defendant did not show that he would be given a different sentence absent the alleged errors "in light of the nature of this particular crime—the murder of two small children—and the overwhelming evidence of his guilt."). Isom's claim fails.

B. Effective Assistance of Appellate Counsel

Isom also claims that appellate counsel were ineffective for failing to raise fundamental-error challenges on direct appeal concerning instructions 17, 18, and 23. We review claims that appellate counsel were ineffective as we do such claims against trial counsel, asking whether counsel's performance was substandard and caused prejudice under *Strickland*.

Claims that appellate counsel were ineffective fall into three general categories of constitutionally deficient performance: "(1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Hollowell v. State*, 19 N.E.3d 263, 270 (Ind. 2014). Isom's claims fall in the second category. For such waiver-of-issues claims, "[i]neffectiveness is very rarely found" because deciding which issues to raise "is one of the most important strategic decisions to be made by appellate counsel." *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997) (cleaned up). To prove deficient performance, Isom needed to show that the unraised claims were

"significant and obvious upon the face of the record" and were clearly stronger than those presented. *Id.* at 194 (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Only then does the defendant establish that appellate counsel's performance was deficient.

On review, Isom must show that as to each instruction, the evidence points only to the following conclusions:

- that trial counsel's decision not to object to instructions 17, 18, and 23 was a significant and obvious error on the face of the record;
- that these unraised issues were clearly stronger than the issues appellate counsel raised; and
- that but for appellate counsel's decision not to raise these issues, there is a reasonable probability that Isom's appeal would have led to resentencing.

Because Isom did not make these showings, he is not entitled to relief on his claim that appellate counsel were ineffective concerning the challenged instructions. The post-conviction court found that Isom failed to show constitutionally deficient performance. We agree and likewise find that Isom did not show prejudice.

Isom argues that instructions 17 and 18 wrongly prevented the jury from considering his mitigating evidence during sentencing and that instruction 23 unconstitutionally informed the jury that its sentencing decision must be unanimous. But, as we held above, *supra*, at 24–25, 30, Isom did not make either showing. Thus, he cannot establish significant, obvious, or evident errors on the face of the record. This shortcoming alone provides an adequate basis for affirming the post-conviction court's denial of relief on these grounds.

Moreover, Isom does not argue that the unraised instructional issues were clearly stronger than the raised issues. He thus waives this argument. App. R. 46(A)(8)(a). Nor does Isom overcome the presumption of competent representation under *Strickland*, a presumption especially strong in waiver-of-issue cases. *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013). Isom does not address this presumption and therefore waives this argument. App. R. 46(A)(8)(a). And even had he not waived it, reviewing

courts should defer to appellate counsel's strategic decision not to raise an issue unless it was "unquestionably unreasonable". *Bieghler*, 690 N.E.2d at 194. On this record, we decline to find that appellate counsel's decision not to challenge trial counsel's failure to object to instructions 17, 18, and 23 was "unquestionably unreasonable."

This is especially true where, as here, a defendant bears the burden of showing fundamental error. Fundamental error is an extremely narrow doctrine that requires an error so flagrant a judge should have raised it on his own. *C.S. v. State*, 131 N.E.3d 592, 596 (Ind. 2019). Isom must show that such a plain error made a fair trial impossible, *id.* at 595, a burden he does not meet. As to Isom's claim that appellate counsel were ineffective, he does not argue that trial counsel's failure to object to instructions 17, 18, and 23 was such an obvious error that the judge should have raised it sua sponte. Nor does Isom argue that the lack of objection made a fair trial impossible. Isom thus waives these arguments, App. R. 46(A)(8)(a), and cannot meet his burden. To the extent Isom relies on the fundamental-error argument he raised in his corresponding claim that trial counsel were ineffective, he fails to establish fundamental error for the same reasons. *Supra*, at 25–27. And we have held elsewhere that finding a defendant was not denied effective counsel is tantamount to finding that an alleged error was not fundamental. *Brewington*, 7 N.E.3d at 974. Here, Isom does not show ineffective assistance of trial counsel and thus cannot show fundamental error.

Finally, Isom does not show prejudice under *Strickland*. As an initial matter, he does not assert that the outcome of his appeal would have been different had appellate counsel raised the instructional issues. Because Isom does not make this argument, he waives it, App. R. 46(A)(8)(a), and cannot meet his burden. Instead, he focuses on the reasonable probability that the jury would have reached a different sentencing decision had it not heard instructions 17, 18, and 23. But his argument misses the mark, as the relevant proceeding is his direct appeal. Because Isom does not argue the outcome of his direct appeal would have been different, he cannot show prejudice under *Strickland*.

Because Isom does not show that all evidence points unerringly to the conclusion that he met *Strickland*'s especially rigorous standard for failure-

to-raise claims, his challenge to appellate counsel's failure to raise error as to instructions 17, 18, and 23 fails.

C. Post-Conviction Court Orders

Isom also raises five freestanding challenges to the post-conviction court's rulings: (1) denying Isom's renewed motion for a competency hearing; (2) denying Isom's discovery request for the State's lethal-injection protocol and finding his execution-validity challenge waived; (3) denying Isom's discovery request for juror-contact information and finding issue waived; (4) limiting the testimony of two expert witnesses; and (5) finding Isom's challenge to his petition's filing date waived. Because Isom does not establish that the post-conviction court erred, he is not entitled to relief.

1. Isom's Competence

After Isom refused to sign his petition for post-conviction relief, a requirement under our post-conviction rules, see P-C.R. 1(3)(b), his counsel raised the issue of Isom's competency. The post-conviction court found Isom competent and dismissed his petition. After this Court reinstated Isom's petition for post-conviction relief, counsel renewed its earlier challenge to Isom's competency and again sought hearing from the post-conviction court. The post-conviction court denied Isom's motion, and subsequent renewed motion, finding that he "d[id] not assert any change in circumstances", and that Indiana Code section 35-36-3-1 does not apply in post-conviction cases. Isom argues that the post-conviction court was wrong on both points and erred by denying his renewed request for a competency hearing. While we decline to address whether section 35-36-3-1 applies to post-conviction proceedings, we hold that Isom is not entitled to relief because he does not argue and cannot show that the evidence before the post-conviction court was without conflict and led only to the conclusion that he was incompetent.

Section 35-36-3-1 provides that:

> If at any time before the final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense, the court shall immediately fix a

> time for a hearing to determine whether the defendant has that ability.

I.C. § 35-36-3-1(a). We have not decided whether this section applies to post-conviction proceedings. *Timberlake v. State*, 753 N.E.2d 591, 600 (Ind. 2001). Because Isom is not entitled to relief either way, we need not decide this question here, and we decline Isom's invitation to hold that section 35-36-3-1 applies to such proceedings.

Even assuming that section 35-36-3-1 applies to post-conviction proceedings, Isom is not entitled to relief. He argues that his refusal to cooperate with his attorneys represented a change in circumstances relevant to competency that should have received new consideration from the court. According to Isom, his "attitude" changed after counsel's clerical error omitting Isom's signature from his original petition for post-conviction relief. Isom argues this omission explains his refusal to engage further with counsel or experts recommended by counsel. Because Isom's argument fails as a matter of fact and law, he is not entitled to relief.

As a factual matter, Isom's refusal to cooperate with his counsel does not represent a change in circumstances. The record is replete with instances where Isom refused to engage with counsel—even before the omitted signature on the petition. In fact, the very behavior that Isom argues was a changed circumstance was referenced in Isom's first verified motion requesting a competency hearing. There he stated:

> Kevin Isom has a long and documented history of adverse reactions to stressful situations. As the Court knows, Isom absented himself from the penalty phase of this death penalty trial. As the Court knows, that reaction came first when trial counsel called Isom's mother as a mitigation witness. But Isom's withdrawal extended beyond what he initially told the trial court. Isom learned, during a colloquy with the trial judge, that Isom could withdraw from the remainder of the penalty phase. Isom never returned.

Isom goes on to say that his "negative reaction continued, and continues still today." It thus cannot represent a change in circumstances between the first verified motion and the renewed motion for a competency hearing.

As a legal matter, a post-conviction court's finding of competency receives a high level of deference from a reviewing court. *Timberlake*, 753 N.E.2d at 602. Thus, we will disturb the post-conviction court's order only if Isom shows that the evidence is without conflict and leads solely to the conclusion that Isom was incompetent. *Id.* at 597, 602. Isom does not make this argument, however, and thus waives it. App. R. 46(A)(8)(a).

Even had he made the argument, it would fail because the record supports the court's order. To receive a competency hearing, there must be "evidence before the trial court that creates a reasonable or bona fide doubt as to the defendant's competency." *Goodman v. State*, 453 N.E.2d 984, 986 (Ind. 1983) (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966)). Here, there was no such evidence. The only new evidence the post-conviction court had in front of it was Dr. Dinwiddie's affidavit—evidence that did not raise a "reasonable or bona fide doubt" about Isom's competency. As the court noted, Dr. Dinwiddie's affidavit was unpersuasive because he did not evaluate Isom. Contradicting this already unpersuasive evidence were the multiple mental-health assessments from the trial record—all of which found Isom competent—and were conducted by mental-health professionals who did evaluate Isom. And, unlike Dr. Dinwiddie, the post-conviction judge observed Isom at length and conversed with him during two separate hearings about his decision to forfeit post-conviction relief. Under our law, a court's "observations of a defendant in court can be an adequate basis for finding that a competency hearing is not necessary." *Cotton v. State*, 753 N.E.2d 589, 591 (Ind. 2001). On this record, Isom cannot show that the uncontroverted evidence pointed only to the conclusion there was a "reasonable or bona fide doubt" about his competency. His claim fails.

2. Lethal-Injection Protocol

During Isom's post-conviction proceeding, he sought the State's lethal-injection protocol through a discovery request. The post-conviction court denied Isom's request based on the State's objection that it had no execution date set for Isom and did not know which substances or method would be used to execute him. Isom then included in his operative post-conviction petition the following challenge to the validity of the State's lethal-injection protocol: "9(D) As of the mandatory deadline for submitting this pleading, Indiana has no valid method of execution. The

State has declined to provide Isom any information about how it plans to complete his execution." Isom included no other reasoning or citations in support of his challenge. In its findings, the post-conviction court denied Isom's challenge to the validity of Indiana's method of execution and found it waived due to Isom's failure to present a cogent legal argument or include his reasoning and evidence in his proposed findings of facts and conclusions of law.

Although Isom nominally asserts that the post-conviction court erred by denying his discovery request, he does not develop this argument and thus waives it. App. R. 46(A)(8)(a). Even had Isom developed this argument, we "affirm [discovery] determinations absent a showing of clear error and resulting prejudice", *Wilkes*, 984 N.E.2d at 1251, and discern neither clear error nor prejudice here. Isom concedes that he requested information the State did not have, meaning there was nothing the State could produce in response to Isom's request. Thus, the post-conviction court did not err by denying Isom's request.

The bulk of Isom's argument concerns his request that the Court generally "hold that a challenge to the method of execution may be raised when an execution date is sought." He argues that the post-conviction court's conclusion that Isom waived his challenge to the validity of the execution is wrong as a matter of law. This is so, according to Isom, because the post-conviction court based its decision on the fact that Isom did not address his challenge in his proposed findings of fact and conclusions of law, and Isom had no notice that the post-conviction court would do so. Because Isom does not establish that the post-conviction court erred, his claim fails.

As an initial matter, Isom mischaracterizes the post-conviction court's reasons for finding his execution challenge waived. The court gave two reasons for denying Isom's challenge: first, because Isom failed to address the claim in his proposed findings of fact and conclusions of law; and, second, for the reasons stated under claim 9(A). Claim 9(A) in turn specifies that a party seeking review bears the burden of making cogent arguments, citing relevant authorities, and citing relevant parts of the record. In other words, the post-conviction court merely reiterated what any reviewing court would recite, which is that the burden is on the petitioner to show why he is entitled to relief.

Although a post-conviction court is not an appellate court, it does act as a reviewing court. But even when acting as initial factfinders, our courts operate according to the foundational expectation that those seeking relief must articulate and support their claims. Even for run-of-the-mill objections during factfinding proceedings, parties must "present[] a cogent legal theory to the trial court." *Jackson v. State*, 712 N.E.2d 986, 988 n.2 (Ind. 1999) (cleaned up). Whether we term Isom's omissions (failure to provide developed arguments, relevant authorities, and record citations) a "failure to present" or "waiver", the post-conviction court was correct to hold Isom to his burden of presenting cogent legal theories and establishing the grounds for relief—a burden he did not meet.

Isom seems to argue that because the post-conviction court did not grant his discovery order, it is unfair to hold that he then failed to present the issue. We disagree. Upon the post-conviction court's discovery order, Isom could have removed the issue from his subsequently amended petition. Our post-conviction rules require that a petitioner verify that the petition includes every ground for relief "known to the petitioner." P-C.R. 1(3)(b). Here, Isom proceeded with his validity challenge even though the grounds for relief were not yet "known" to him. With Isom having thus raised the issue, the post-conviction court did not err in requiring him to sustain his burden, which he did not do. We decline to grant him relief.

Also unavailing is Isom's claim that he was denied due process because he had inadequate notice to include all of the issues for which he was seeking relief in his proposed findings of fact and conclusions of law. First, under our post-conviction rules, the burden is the petitioner's. P-C.R. 1(5). Second, our post-conviction rules specify that a failure to assert claims leads to waiver. P-C.R. 1(8). Third, the post-conviction court ordered the parties to submit their proposed findings of fact and conclusions of law by a certain date as part of its case-management schedule. Proposed findings of fact and conclusions of law act as proposed orders to the post-conviction court. Isom knew this, which is why he referred to his proposed findings of fact and conclusions of law as his "Proposed Order" and styled it as the post-conviction court's order.

Because Isom raised but failed to support his execution-protocol challenge, he is not entitled to relief on this ground.

3. Juror-Contact Information

Early in the post-conviction proceedings, the parties agreed to send a letter to the jurors, through the court, informing them that the attorneys might wish to talk to them and listing the attorneys' contact information. The post-conviction court notified the parties that if they did not hear from any jurors and wished to communicate with them further, they could draft another letter and petition the court to send it. Neither the State nor Isom opted to do so. Instead, Isom asked the post-conviction court to provide him with the jurors' phone numbers and addresses so that he could contact them directly. The post-conviction court declined to do so, a decision Isom now challenges. Because the post-conviction court was well within its discretion to deny Isom's motion, his challenge fails.

Absent a showing of clear error and prejudice, we will not disturb a post-conviction court's discovery order. *Wilkes*, 984 N.E.2d at 1251. Here, Isom does not establish clear error because he does not cite any precedent requiring a post-conviction court to give the juror's contact information to a party, and we are aware of none. The post-conviction court was clear that the parties could petition it to send a subsequent letter, an option Isom chose not to pursue. Nowhere does Isom argue that the means offered by the post-conviction court was insufficient. In fact, the relief Isom seeks is the opportunity to ask the former jurors if they are willing to discuss Isom's case, an objective easily met by a letter drafted to this effect and sent by the court as a conduit. We have already held elsewhere that direct disclosure is not required where other reasonable means of investigation are available. *Matheney v. State*, 688 N.E.2d 883, 894 (Ind. 1997). Isom argues only that our law does not preclude a court from sharing juror-contact information. But not prohibiting direct juror contact is different than requiring direct juror contact. Isom cites no case law requiring a post-conviction court to share juror-contact information to facilitate direct contact, and we decline to so hold today.

Our case law instead makes clear that post-trial investigations of jurors should be used only in extraordinary cases and that deference to a juror's privacy should govern a court's inquiry. *State v. Dye*, 784 N.E.2d 469, 477 (Ind. 2003). To disturb a juror's privacy, a party must show "manifest indications of material discrepancies appearing in the record". *Ibid.* For instance, in *Dye*, material discrepancies appeared on the face of the record

because the juror's questionnaire responses differed from her voir doir responses. *Ibid.* But here Isom merely alleged that three jurors provided incomplete questionnaire answers as to their criminal history with no evidentiary support from the record. Only later, months after the post-conviction court denied Isom's motion, did Isom submit exhibits containing jury questionnaires, chronological case summaries, and Bureau of Motor Vehicle records for one seated juror and two alternate jurors. Isom thus did not establish "manifest indications of material discrepancies appearing in the record" and is not entitled to relief.

Isom next raises an unspecified challenge to what he styles as the post-conviction court's waiver ruling. We find this argument waived because he does not develop it. App. R. 46(A)(8)(a). Isom's clearest statement of the challenge is that: "The post-conviction court erred in denying Isom's attorneys the opportunity to contact Isom's former jurors. **The court compounded that error by finding the issue waived.**" But it is unclear which issue is "the issue waived" because the first sentence discusses Isom's opportunity to contact former jurors, but the post-conviction court does not rule that Isom's opportunity to contact former jurors is waived. Because Isom has not presented a reviewable claim, we have no grounds on which to revisit the post-conviction court's ruling.

4. Expert Witness Limitation

During the hearing on Isom's post-conviction petition, he proposed two capital-litigation experts as witnesses. The post-conviction court permitted the experts to testify but limited their testimony to topics that were addressed in death-penalty training seminars. The post-conviction court did not allow the witnesses to give their opinions on trial counsel's performance. Isom argues that the post-conviction court erred by not permitting two expert witnesses to give their opinions on whether Isom's trial counsel were ineffective. Because the post-conviction court did not abuse its discretion in limiting the witnesses' testimony to factual issues that were helpful to the court, Isom's argument fails.

We review a post-conviction court's exclusion of expert testimony for an abuse of discretion. *Williams v. State*, 706 N.E.2d 149, 163 (Ind. 1999). Isom waives this argument by not claiming that the post-conviction court abused its discretion by limiting the testimony of his two expert witnesses. App. R. 46(A)(8)(a).

But even had Isom argued that the post-conviction court abused its discretion, his claim would still fail. Indiana Rule of Evidence 702 permits expert testimony when the "expert's . . . specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." According to Isom, he need "only . . . show that the subject matter is 'beyond the knowledge' of the fact-finder." But his argument fails as a matter of fact and law. First, Isom did not show the post-conviction court that the matter of effective counsel was beyond its knowledge because Isom never made this argument to the post-conviction court. Instead, when the post-conviction court asked Isom how the expert testimony would help the court, he replied only that the witnesses received specialized death-penalty training and could testify about what was in the training.

Second, by arguing that he need only show that the subject matter is "beyond the knowledge" of the factfinder, Isom takes the quoted language out of context and mischaracterizes our law. The case he cites actually said:

> Where an expert's testimony is based upon the expert's skill or experience rather than on the application of scientific principles, the proponent of the testimony must only demonstrate that the subject matter is related to some field **beyond the knowledge of lay persons and that the witness** possesses sufficient skill, knowledge or experience in the field to **assist the trier of fact to understand the evidence or** to determine **a fact in issue**."

Norfolk S. Ry. Co. v. Estate of Wagers, 833 N.E.2d 93, 102 (Ind. Ct. App. 2005) (emphasis added). But even were it an accurate statement of law that Rule 702 requires only that expert testimony be "beyond the knowledge" of the trial court, Isom concedes that he cites no cases holding that a trial court must accept expert testimony about ineffective assistance of counsel. Moreover, Isom does not establish how the question of ineffective counsel is beyond the knowledge of the post-conviction court. In fact, he makes no argument on this point and thus waives it. App. R. 46(A)(8)(a).

Instead, Isom seems to argue by implication that because Indiana's Criminal Rule 24 requires that death-penalty defenses be conducted by trained counsel, the post-conviction court was required to accept the

assistance of trained counsel in dissecting trial counsel's performance. Although Rule 24 requires trained counsel in death-penalty cases, Isom's conclusion that the effectiveness of such attorneys is beyond the ken of post-conviction courts does not follow from his premise. To the contrary, under Indiana's Rules of Evidence, ultimate legal conclusions, such as whether trial counsel meets *Strickland*'s standard, are left to the factfinder. Evid. R. 704(b); *Ritchie v. State*, 875 N.E.2d 706, 728–29 (Ind. 2007).

Elsewhere, we have rejected the notion that a lawyer's performance is beyond a trial judge's competence to assess. See, e.g., *id.* at 728–29 (holding no abuse of discretion in death-penalty case where post-conviction court rejected defendant's argument that expert testimony was necessary to show counsel's conduct "fell below prevailing professional norms and was unreasonable under the standards of the conduct of counsel in capital defense cases in Indiana and nationally."); *Williams*, 706 N.E.2d at 163–64 (holding no abuse of discretion in death-penalty case where post-conviction court rejected attorney testimony because "the magistrate and the judge are necessarily very familiar with ineffective assistance of counsel claims."). We decline to hold otherwise here. Isom's claim fails.

5. Post-Conviction Petition Filing Date

After the post-conviction court found Isom's initial petition for post-conviction relief waived due to his refusal to sign the petition, he appealed to our Court. He asked us to provide relief in one of two ways: either accept the post-conviction petition that Isom tendered in January 2016, or order the post-conviction court to accept the petition as of any date outside the case management schedule. In response, we granted Isom relief and ordered the post-conviction court to deem Isom's petition filed as of the date of our order, January 13, 2017. Although Isom sought this alternative relief and did not seek rehearing from our Court, he argued in his post-conviction petition that we erroneously ordered the post-conviction court to file Isom's petition as of the date of our order. According to Isom, he raised the issue in his petition to preserve the claim, even though he conceded that the post-conviction court could not decide the claim.

Our post-conviction rules permit limited grounds for relief of a sentence or conviction. See P-C.R. 1(1)(a). Notably, nothing in the post-

conviction rules permits Isom to collaterally attack an issue of post-conviction procedure that our Court already settled on appeal. Moreover, even if the post-conviction rules provided a procedural vehicle for this type of collateral challenge, we would deny Isom relief. First, by specifically requesting the relief he now challenges, Isom waived any such challenge. See, e.g., *Durden*, 99 N.E.3d at 651 (discussing waiver and estoppel in the context of invited error and noting that waiver is "designed to promote fairness by preventing a party from sitting idly by, ostensibly agreeing to a ruling only to cry foul when the court ultimately renders an adverse decision.") (cleaned up). Isom makes no answer.

Second, had Isom wanted a different outcome he could have (in addition to not asking for an undesired form of relief in the first place) petitioned for rehearing. But he did not, and our law-of-the-case doctrine counsels against revisiting our ruling. As we recently explained, under the law-of-the-case doctrine "a court will not revisit issues already determined in a previous appeal in the same case." *State v. Timbs*, No. 20S-MI-289, 2021 WL 2373817, at *4 (Ind. June 10, 2021). This means that an earlier decision "governs the case throughout all of its subsequent stages, as to all questions which were presented and decided". *Ibid.* (cleaned up). In Indiana, absent "extraordinary circumstances", we apply this doctrine "in its strictest sense". *Ibid.* (cleaned up). Isom does not address the law-of-the-case doctrine, but even had he, we would decline to find extraordinary circumstances here.

Third, even if waiver and law of the case did not bar Isom's claim, he points to no error in the Court's order and cites no rule the order violates. He argues instead that although Indiana Trial Rule 15(C) does not apply to post-conviction cases, if it did, the rule would require that Isom's petition be deemed filed as of January 12, 2016. But elsewhere we have already held that even if Rule 15(C) applied to post-conviction petitions, it requires that an original petition be timely filed for an amended petition to relate back. *Corcoran v. State*, 845 N.E.2d 1019, 1021 (Ind. 2006). The question here, however, is when the original petition was filed, not whether Isom's subsequent amendments relate back to it. Thus, Rule 15(C) and our reasoning in *Corcoran* are inapposite, and Isom's arguments fail.

Finally, Isom argues that the post-conviction court erred by finding his claim waived. Isom rests on the same reasons described above, see *supra*, at 38. For the same reasons Isom's waiver arguments failed in the execution-protocol analysis, they fail here too. See *supra*, at 38–39. In short, whether we label Isom's failure to develop this argument, relevant authorities, and record citations a "waiver" or "failure to present", the post-conviction court was correct to hold Isom to his burden of presenting developed legal theories and establishing the grounds for relief.

Isom has not established that the post-conviction court erred in: (1) denying his renewed motion for a competency hearing; (2) denying his discovery request for the State's lethal-injection protocol and finding execution-validity challenge waived; (3) denying his discovery request for juror contact information and finding issue waived; (4) limiting the testimony of two expert witnesses; (5) finding his challenge to his petition's filing date waived. Thus, Isom's claims fail, and he is not entitled to relief.

* * *

For all of these reasons, we affirm the judgment of the post-conviction court.

Rush, C.J., and David, Massa, and Goff, JJ., concur.

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