

IN THE
INDIANA SUPREME COURT

No. 45S00-1508-PD-508

KEVIN CHARLES ISOM,
Appellant-Defendant,

v.

STATE OF INDIANA,
Appellee-Plaintiff

Appeal from the Lake Superior Court

Cause No. 45G04-0708-MR-00008

The Honorable Samuel L. Cappas,
Judge.

The Honorable Natalie Bokota,
Magistrate

CAPITAL CASE

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion in denying Isom's motion for a competency determination.

II. Whether the trial court properly found that Isom refused to file a petition for post-conviction relief with the required oath and affirmation and that the time to do so had expired.

STATEMENT OF THE CASE

Nature of the Appeal

Isom challenges the trial court's finding that he failed to file a petition for post-conviction review and that a competency hearing was not required.

Course of the Proceedings

On August 8, 2007, the State charged Isom by Information with three counts of murder, which was amended to include four counts of attempted murder and three requests for the death penalty based on the multiple murders aggravator (TA¹ 30, 53-57). On June 16, 2009, the trial court found that Isom was competent to proceed to trial (TA 119-120). On January 7, 2013, a jury trial commenced and Isom was found guilty of three murders and three counts of criminal recklessness (one count of attempted murder was previously dismissed) (TA 6, 831-37). Isom proceeded to the penalty phase of his trial, and the jury recommended the death penalty for each murder conviction (TA 891-95). The trial court sentenced Isom in

¹ The State uses the same citing references delineated in the Brief of Appellant, footnote 1.

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accordance with the jury's recommendation and ordered the three death sentences to be served consecutively (TA 896-98).

On April 8, 2013, Isom appealed (TA 901-03). This Court affirmed Isom's convictions, but remanded the case to the trial court to enter the three sentences of death to be served concurrently, instead of consecutively. *Isom v. State*, 31 N.E.3d 469, 495 (Ind. 2015). On June 29, 2015, the trial court entered an amended sentencing order (PA II 40).

On August 26, 2015, Isom's post-conviction attorneys filed a Motion for Stay of Execution (PA II 47-49). On August 28, 2015, counsel filed their Appearance and a Notice of Intent to File Petition for Post-Conviction Relief in the post-conviction court (PA II 42-46). On September 14, 2015, the trial court held a hearing to determine the case management schedule and the State Public Defender's Office requested that the petition for post-conviction relief be due on January 13, 2016 (PA 54; PT 4-16). Because the case management schedule provided for the entry of final judgment on a date that was substantially longer than other capital cases, this Court remanded the matter back to the trial court for a schedule that provided for a final judgment no later than February 28, 2017 (PA 67). On January 8, 2016, the trial court held a second hearing to draft a proposed case management schedule and the State Public Defender's Office again requested the January 13, 2016, date for the petition to be filed (PT 18-25). The Court accepted a revised case management schedule for post-conviction review on January 20, 2016 (PA II 54, 67, 76, 102).

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On January 12, 2016, Isom's counsel tendered a petition for post-conviction relief (PA II 91-100). On January 19, 2016, the trial court entered an order recognizing that the petition as tendered lacked the required affirmation and oath and giving Isom until February 9, 2016, to submit the missing oath and affirmation (PA II 101). On February 9, 2016, Isom's counsel moved for an extension of time to file the missing oath and affirmation (PA II 104-108). The trial court granted the motion and scheduled a status hearing for March 14, 2016 (PA II 110). The Court held a hearing on March 14, 2016, where Isom was present but failed to submit the missing oath and affirmation (PT 47-59). The trial court ordered Isom to file the missing oath and affirmation by March 28, 2016, and scheduled a status hearing on May 2, 2016 (PT 55; PA II 118).

On March 24, 2016, Isom's counsel moved the trial court to accept the petition Isom tendered on January 12, 2016 (PA II 119-124). On April 4, 2016, the trial court denied Isom's motion (PA II 132). The trial court provided Isom a final opportunity to file the missing oath and affirmation on or before May 2, 2016 (PA II 132). On May 2, 2016, the trial court held a hearing that Isom attended, but Isom failed to file the missing oath and affirmation and refused to sign it during the hearing (PA II 133). The trial court issued an order finding that Isom had not filed a petition and the time for filing a petition had expired (PA II 133).

On May 4, 2016, the trial court filed a Petition to Vacate the Post-Conviction Relief Hearing notifying this Court that Isom had failed to tender a petition for post-conviction relief with the required oath and affirmation and, after additional

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time and advisements, Isom's time to file a petition had expired (PA II 136). On May 4, 2016, Isom's counsel filed in the trial court the following: a motion in the trial court to determine Isom's competency to waive post-conviction proceedings (PA II 136-149); a motion for the trial court to reconsider its denial of Isom's motion to accept the tendered petition (PA II 153-162); and a motion to reconsider whether Isom's forfeiture and waiver of post-conviction proceedings was done knowingly, intelligently, and voluntarily (PA II 180-185). On May 25, 2016, Isom's counsel filed a motion to correct error (PA II 195-198). On June 15, 2016, the trial court denied Isom's motions (PA II 236-237). Isom's counsel filed a Notice of Appeal on July 13, 2016 (Dkt.).

STATEMENT OF THE FACTS

Facts underlying the crime

Isom and his wife Cassandra lived together in an apartment in Gary, Indiana, with Cassandra's two children, Ci'Andria Cole and Michael Moore, ages thirteen and sixteen, respectively (T 7280, 7322, 7279, 12616, 12618; Ex. 244, 359, 360, 366, 367). At approximately 10:30 p.m. on August 6, 2007, Isom used multiple firearms to shoot and kill Ci'Andria, Michael, and Cassandra while in the apartment (T 12617-21, 12616, 10524-25, 12435-548; Ex. 54, 55, 57, 65, 66, 73, 78, 81, 82).

Police officers responded to multiple calls reporting gunfire (T 7336-7338, 7412, 7439, 7496, 7567, 7569, 7609-14, 7682-83, 7686-90, 7744-49, 7790, 7800, 7865; Ex. 363, 365). Over the following three hours, Isom remained in the apartment

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firing multiple weapons out both front and back windows toward the police officers (T 7499-504, 7508-11, 7691, 7699, 7750, 7753, 7927, 7928-31, 7964-65, 7967, 8165, 8176-79, 8810, 8181, 8313-20, 8469; Ex. 100). The SWAT team relieved the responding officers of their positions and subsequently gained entry to the apartment (T 7839, 7935).

The officers found Isom sitting on the ground and leaning against the wall in a back bedroom (T 7839, 7935, 8557-59, 8633-34). Ignoring the commands of the officers to show his hands, Isom reached underneath a sheet and moved his hand around (T 8557-58, 8561-62, 8634, 8638). As Isom resisted, the officers physically struggled to secure Isom and place him in handcuffs (T 8562-69, 8590, 8642-43). When Isom stood up, a .357 Magnum fell onto the floor from his waistband (T 8569). In the area where Isom was sitting, he also had a .40 caliber Smith & Wesson pistol, a 12-gauge shotgun, and multiple rounds of ammunition (T 8646, 9401-26; Ex. 204-05, 207-13, 213a, 216, 219, 221-23, 227-28, 231, 233-35).

An autopsy revealed that Cassandra was killed by a close range shotgun blast to the top of her head (T 10357, 10407-08; Ex. 82). She also had five separate entrance wounds to her chest, abdomen, and her back where both shotgun pellets and .40 caliber bullets were recovered (T 10407, 10428-45; Ex. 93). Michael was killed by shotgun blasts to his chest and flank area (T 10476-520; Ex. 94). All three weapons were used on Ci'Andria; she had eight separate entrance wounds (T 10448-72, 11673, 11675-81; Ex. 95, 123). Isom's jeans and shoes had blood splatter and contact transfer from all three victims (T 12260-12361, 12410).

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Later, Isom provided a statement to the police where he admitted killing his family: “I can’t believe I killed my family, this can’t be real.” (T 12595, 12601-12, 12615-22). Isom proceeded to give an account of his activities during the course of the day and explained where the victims were when they were shot (T 12617-22). After reviewing the written statement, Isom remarked: “I smell like gunpowder, like I’ve been at the range...Why y’all just didn’t kill me?” (T 12628).

Facts pertaining to pre-trial determination that Isom was competent

After Isom was charged, trial counsel filed a Motion for Psychiatric Examination to Determine Competence to Stand Trial on January 8, 2008, which was granted (TA I 46, 48). On July 17, 2008, the trial court held a competency hearing wherein Dr. Prasad, a psychiatrist, Dr. Carauana, a clinical psychologist, and Dr. Rodos, a clinical psychiatrist all testified (T 17-144; TA 70). All three doctors found that Isom was competent to proceed with trial despite Isom’s claims that he did not have any memory of the shooting (T 23, 67, 106). The defense challenged the doctor’s opinions on competency based on Isom’s claimed memory loss just before, during, and after the shooting of Cassandra, Ci’Andria, and Michael (T 23-144). On this particular question, the trial court ordered further evaluation of Isom (TA I 70-114; T 168-170, 173-180, 196-97, 200).

On April 24, 2009, the trial court held a second hearing wherein Dr. Parker testified that Isom was competent to stand trial (T 220). Dr. Parker found that Isom “did quite well” in his ability to communicate and speak effectively with his

attorney and the trial court (T 202). Dr. Parker testified as to the relevance of Isom's claimed memory loss:

[T]here really has not been any evidence that aside from this one gap, that Mr. Isom has any short term or long term memory deficits or impairment. So his memory should be adequate for the information that you provide him now. He may not accept that he has been accused of what is said to have happened, but he has the memory capacity to take in that information and process it and work with his team as to how to defend the case against him.

(T 208-09). Dr. Parker administered cognitive tests and Isom did "fine," and he was "generally organized in thought process throughout the two hour interview" (T 233-34). The trial court found that Isom was competent to proceed to trial (TA 114, 119-120). The trial court based this finding in part on his interactions with Isom in that when the judge spoke with Isom in open court, the judge found Isom's "demeanor and ability to respond to questions to be coherent and logical" (TA 119-120). The trial court found that even if Isom had no memory of the crime, "he still has an ability to understand the proceedings and does, in fact, understand the proceedings and is able to assist his counsel in the defense" (TA I 119-120). On January 7, 2013, Isom proceeded to a jury trial (TA 6, 831-37).

Facts regarding post-conviction proceedings

On September 14, 2015, the trial court held a scheduling conference and Isom's counsel requested January 13, 2016, as an initial filing date for Isom's petition for post-conviction relief (PT 7). Following this Court's order to revise the case scheduling order, on January 8, 2016, Isom's counsel informed the trial court that they wanted to maintain the January 13, 2016, filing date (PT 18-19).

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On January 12, 2016, Isom's counsel tendered a petition for post-conviction relief (PA II 91-100). On January 19, 2016, the trial court entered an order that the tendered petition lacked the required affirmation and oath and gave Isom until February 9, 2016, to submit the missing information (PA II 101). On February 9, 2016, Isom's counsel moved for an extension of time to file the missing oath and affirmation (PA II 104-108). The trial court granted the motion and scheduled a status hearing for March 14, 2016 (PA II 110).

On March 14, 2016, the trial court held a hearing where Isom was present (PT 47). The trial court recounted in open court that on the day Isom's petition was due, the trial court received a petition that did not include the required notarized oath and the trial court set a new due date of February 9, 2016 (PT 47). Instead, on that date, the trial court received a motion for extension of time (PT 47). The trial court informed the parties that it expected a signed and notarized petition to be filed that day (PT 48). Isom's counsel informed the trial court that she did not have the authorization and, that when counsel took Isom the oath to sign, he told them that "[their] mistake is between he (sic) and the Court now" (PT 48-49). The trial court addressed Isom:

[T]his is an issue of legally how procedurally it gets filed. When you obtained his signature, there should have been a notary there. And so if you're asking me to hear from your client, of course I will. But let me be very clear. My thought is that we should set this out about two weeks at the most, so that you can make arrangements to come in with the petition and obtain a notary and get that signed, and then we'll give the State seven days thereafter.

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(PT 50-51). Isom informed the trial court that he wanted new counsel (PT 50-51).

The trial court advised Isom that she had no ability to provide him with different counsel and that Stephen Owens, the State Public Defender, would make that decision (PT 52). Isom responded:

Well, as it was explained to me by the attorneys that they made a mistake. They simply forgot to submit the affirmation for my PCR petition. A very basic and fundamental aspect of the petition.

Now, if they make that sort of mistake, what sort of mistakes will they make when it becomes more complex? That's my concern...[T]hey've already proven that they can[t] effectively represent me.

(PT 52-53). The trial court reiterated that she had no authority or jurisdiction to appoint different counsel and "for the record I view all attorneys as being competent, but I'm sensitive to your concerns" (PT 54).

The trial court informed Isom that she would give his counsel two weeks to obtain a signed and notarized petition (PT 54). The trial court engaged in the following colloquy with Isom:

THE COURT: If you would like to obtain other counsel, I caution not to let that desire stop you from effecting the petition getting filed. Because we have time limits here, and you may be in danger of yielding, waiving, giving up, your right to proceed with post-conviction relief. We're already almost two months past the date that the petition was supposed to be filed, sir. Do you understand what I mean?

MR. ISOM: I understand what you said, but waiving is not even a consideration.

THE COURT: I don't understand what you mean.

MR. ISOM: I have no desire to waive my post- conviction.

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THE COURT: But you may end up doing that if you're tardy.

MR. ISOM: But I understand what you said.

THE COURT: There you go. Then you are telling me that I am right to warn you about this.

MR. ISOM: Yes.

THE COURT: Because we don't want to be in a situation where you are having a disagreement with your attorneys about how to proceed, and therefore delay the filing of the Petition for Post-Conviction Relief. Then the attorney general might legally have a reason to say that it's too late and you've given up those post-conviction rights. I'm not saying that's what would happen. I want you though to be fully apprised of the fact that we are under a time constraint and that petition needs to be filed.

(PT 54-55). The trial court ordered: "On March 28th we need to have a properly signed, verified, and notarized petition (PT 55). The trial court then engaged in the following colloquy with Isom:

THE COURT: Mr. Isom, do you have any questions about what we have ordered here today?

MR. ISOM: No, ma'am.

THE COURT: Mr. Isom, you understand what I'm saying? That you need to address any concerns to Mr. Owens. This Court doesn't have an ability to appoint other counsel.

MR. ISOM: Yes.

The trial court stated that she intended to schedule a status hearing to discuss issues and asked Isom if he would like to be present (PT 58). Isom responded, "It won't be necessary" (PT 58).

On March 24, 2016, Isom's counsel moved the trial court to accept the petition Isom tendered on January 12, 2016 (PA II 119-124). On April 4, 2016, the trial

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court denied Isom's motion (PA II 132). The trial court ordered that Isom shall have until May 2, 2016, in order to give Isom a "final opportunity" to file the missing oath and affirmation (PA II 132).

On May 2, 2016, the trial court held a status hearing to determine whether a petition has been filed "that is properly affirmed and notarized," and Isom was present (PA II 133; PT 61). Isom's counsel informed the trial court, "We do not have a signed oath, your honor" (PT 61). The trial court had the following discussion with Isom:

THE COURT: Mr. Isom, you understand, sir, that as we explained at our last setting, if the petition is not filed in substantial compliance with the requirements of the post-conviction rules, that is notarized, affirmed, then there is no Petition for Post-Conviction Relief. We would find that you had forfeited your right to pursue post-conviction relief. And then the State would be -- excuse me -- the Supreme Court would be notified and an execution date would be set. Do you understand that, sir?

MR. ISOM: So it doesn't matter my issue wanting new representation? It doesn't matter at all?

THE COURT: I'm not sure what you mean when you say it doesn't matter. I, this Court --

MR. ISOM: Because I have no desire to waive my PCR, none whatsoever.

THE COURT: But that's what you're doing if you don't sign the verified and notarized sheet, the affirmation sheet, that is part of the Petition for Post-Conviction Relief. That is what you're doing. And that's why we're having the hearing today, because I wanted to make sure you understood that. This Court has no authority to choose your counsel. The state public defender is the counsel that you have at your disposal, sir. And so that's

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really not an issue for this Court. Do you want some time to consult with your attorneys based on what I've told you today? I will leave the bench for a few moments and give you that opportunity. But today -- let me be very clear before I even take my recess. We have given an excessive amount of time for this petition to be filed; the clock is ticking. We have a case management schedule that's been approved by the Supreme Court, and that hearing date was set. If we don't have that affirmed, notarized petition, a petition that complies with the post-conviction rules today, then we will find you have forfeited your right to pursue post-conviction relief. Do you wish a moment to speak with your attorneys?

MR. ISOM: That won't be necessary.

THE COURT: All right. So you're going to sign that and have that notarized today?

MR. ISOM: Well, I have to respectfully decline.

THE COURT: Decline to sign and have notarized a Petition for Post-Conviction Relief; is that correct?

MR. ISOM: Yes, ma'am.

(PT 61-62). Isom's counsel asked Isom a series of questions regarding whether Isom's attorneys read a petition to him, whether he read the petition himself, whether there were claims that were not included in the petition, and whether counsel informed him that they would continue to investigate claims, to which Isom responded that he did not recall (PT 65). During further questioning, Isom recalled meeting with Stephen Owens who indicated that he would consider Isom's request for different counsel, but that Owens never got back to him with an answer (PT 67-69).

At that time, the following colloquy between the trial court and Isom

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occurred:

THE COURT: Well, I'm glad you told us that. Now here we are. The fact of the matter is, from the Court's perspective, these are the attorneys who are assigned to your case. Today is the day when you must sign that petition in the form that's required, where it would be notarized, it is affirmed under oath. If you do not do that today, sir, then you are forfeiting your post-conviction relief rights.

MR. ISOM: I cannot continue with these attorneys. I cannot.

THE COURT: And you feel so strongly about that that you're willing to forfeit post-conviction relief knowing that an execution date would be set? Essentially, you're making the decision that you would go forward to that ultimate penalty of execution, rather than sign the petition and work with these attorneys toward the goal of post-conviction resolution?

MR. ISOM: I cannot work with these attorneys.

THE COURT: Why not?

MR. ISOM: These attorneys resubmitting the petition as is, has just added to the growing list of reasons why they cannot properly represent me.

THE COURT: ...What alternative did these attorneys have if you would not sign, if you refused to sign, the petition with the affirmation and the notarization? What alternative did they have than to resubmit and ask the Court to please accept it as is?

MR. ISOM: They could have resigned.

THE COURT: Toward what end? You would then be self-representing.

MR. ISOM: New attorneys would have been appointed.

The trial court informed Isom that it is not known whether different counsel would be assigned to him and reiterated that the trial court is operating under a definite

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time line in regards to the filing of the petition (PT 73). The trial court further repeated:

THE COURT: ...The Court has given now multiple extensions of time. We cannot continue to proceed, or to continue rather, to give you more time for that petition to be filed. We just can't do it. I'm going to ask you one last time if you will sign that petition and have it notarized so that we may proceed with post-conviction, or not?

MR. ISOM: If the petition was acceptable as it was without the oath, then we wouldn't even be here, right, for this hearing? Why would they --

THE COURT: Substantively acceptable or procedurally acceptable?

MR. ISOM: I'm not a lawyer.

THE COURT: Okay. What I mean by that is, the deficiency is nothing to do with the actual claims that are being raised. The error that was made is what we call procedural. It's missing the page that affirms by you, under oath, that these are all my claims and then it's notarized. It's just missing that formality. But it's a critical formality because it is telling the Court that you've read it, you agree that these are all the claims you know about, and you're affirming that under oath, and then it's notarized. It's important, but it is -- it's more procedural in a way, than substantive.

MR. ISOM: When I signed what I signed, I was under the impression that everything was, you know. Then later I find out. So I signed in good faith that everything was proper.

THE COURT: Okay. Well, then now you know that we need that affirmation page.

MR. ISOM: Well, no, no. Now I know that it wasn't proper and that they made a mistake on a basic and fundamental element of the petition. And then, you know, if it was acceptable without the oath to begin with, we wouldn't be here. And for them to

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resubmit it, that makes no sense.

THE COURT: I hear everything you're saying.

MR. ISOM: And for me to be placed in a corner to have to sign or face an execution because of their – and I hesitate to use the word incompetence because you told me that all lawyers are competent. But that's what I'm facing here.

THE COURT: It would not be appropriate for me, in a sense, to comment on your assessment of the attorneys; it really wouldn't be proper.

MR. ISOM: Well, you already did.

THE COURT: In what sense?

MR. ISOM: The last time I was here, you said, "Well, in my opinion all lawyers are competent."

THE COURT: I don't think that was me.

MR. ISOM: Oh, yes. If it's recorded, you can play it back.

THE COURT: Well, I will do that, because I have a memory like an elephant.

MR. ISOM: So do I.

THE COURT: Well, regardless of that, here we are today, and the decision is still yours. I appreciate everything you're saying about the concerns that you have concerning counsel. I bet I said that attorneys are presumed competent. That's a legal standard.

MR. ISOM: I would have appreciated if you had said "presumed", but that's not what you said.

THE COURT: At any rate, today's the day you need to decide whether you want to sign that petition.

MR. ISOM: Well, I have to respectfully decline.

THE COURT: All right, sir. So we'll show there is no petition before the Court.

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(PT 70-74).

Isom's counsel attempted to contact Stephen Owens, but was unsuccessful (PT 74-76). Isom wanted assurance that if he provided the required affirmation and oath that he would get new counsel, but both Isom's counsel and the trial court informed him that they could not give that assurance (PT 76). The trial court again told Isom that "today is the day," that he may get new counsel or he may not, that Isom has said twice that morning that he declines to sign, and that the trial court has said that there would then be a finding that Isom's forfeited post-conviction relief (PT 76-77). The trial court vacated the post-conviction hearing "because there is no petition before this court" (PT 77).

At that time, Isom's counsel said that they would be filing motions for reconsideration and motion for competency determination "because your ruling means Mr. Isom has foregone PCR and he's saying he doesn't want to" (PT 77). The trial court responded that under the law, the trial court had no legal authority to find that a petition is before it—" [t]here is no petition before this Court. And so the filing of further motions, I'm not sure can be well-taken" (PT 77). If Isom's counsel had a question as to his competency, the trial court questioned why Isom's counsel had not raised it before (PT 78). Isom's counsel stated, "Well, your Honor, honestly we hoped he would sign the oath and we would just go forward with post-conviction relief" (PT 78). The trial court stated that it would issue an order finding there's no petition before the court (PT 80). On May 2, 2016, the trial court issued an order finding that Isom's time to file the petition had expired and notified this Court of the same on May 4, 2016 (PA II 133).

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On May 4, 2016, Isom's counsel filed in the trial court the following: a motion in the trial court to determine Isom's competency to waive post-conviction proceedings (PA II 136-149); a motion for the trial court to reconsider its denial of Isom's motion for the trial court to accept the tendered petition (PA II 153-162); and a motion to reconsider whether Isom's forfeiture and waiver of post-conviction proceedings was done knowingly, intelligently, and voluntarily (PA II 180-185). On May 19, 2016, the trial court received a letter from Isom informing the trial court that he met with Attorney Steve Schutte and that he consented to allowing Attorney Schutte to represent him in the post-conviction proceedings (PA II 191).

On May 25, 2016, Isom's counsel filed a motion to correct error claiming 1) that Isom did not knowingly, intelligently and voluntarily waive post-conviction review and 2) because Isom expressed his desire to continue with post-conviction review, but did not sign the oath after "the Court explained to Isom the consequences of his action," Isom is not competent to waive post-conviction (PA II 195-198). On May 27, 2016, Attorney Schutte filed a notice to the trial court to inform the trial court of "the Public Defender's response to Isom's views regarding Schutte's possible representation" and that Isom wrote a letter to Attorney Schutte and the trial court indicating his willingness to accept Attorney Schutte as his counsel (PA II 192-193). On June 15, 2016, the trial court denied Isom's motions (PA II 236-237). Isom's counsel filed a Notice of Appeal on July 13, 2016 (Dkt.).

SUMMARY OF THE ARGUMENTS

I. The trial court did not abuse its discretion in denying Isom's motion for a competency determination. Isom's counsel did not present any evidence to cast reasonable doubt on Isom's ability and capacity to make a rational decision or show any change in circumstances from Isom's competency determination prior to trial. Moreover, the reason why trial counsel originally challenged his competency before trial, his claim to not remember the shooting, is not relevant to his competency to waive post-conviction review. Isom's decision not to file the required oath and affirmation, in and of itself, cannot be a basis for questioning his competency, let alone establish incompetence. The focus of the inquiry is not whether a defendant has made an arguably irrational choice, but rather whether they have the present ability and capability to make one. Isom's counsel has failed to show reason to doubt that he lacks the capability.

II. The remainder of Isom's claims are not reviewable on appeal because they do not challenge a final appealable order. To the extent this Court finds that his claims are properly before this Court, Isom knowingly, intelligently, and voluntarily chose not to proceed with post-conviction review. Isom made this choice with a full understanding of his legal position, what was required of him to bring the tendered petition into compliance, and the consequences if he failed to do so. The trial court did not abuse its discretion by not accepting for filing Isom's tendered petition for post-conviction relief. Isom repeatedly informed the trial court that the petition as tendered was not acceptable and that he would not file the

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required oath or affirmation. This Court should not allow Isom's counsel to proceed with post-conviction review of Isom's conviction and sentence without Isom's consent.

ARGUMENT

I.

The trial court did not abuse its discretion in denying Isom's motion for a competency determination.

The trial court properly found no reasonable basis to order a competency determination on Isom's decision not to pursue post-conviction relief. *Dusky v. United States* holds that federal law requires that for a defendant to be competent to stand trial he must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*). Indiana Code §35-36-3-1, Indiana's statutory trial competency standard, is consistent with *Dusky*. *Brewer v. State*, 646 N.E.2d 1382, 1384-85 (Ind. 1984). The U.S. Supreme Court has held that the competency standard for a capital defendant who wants to waive certiorari review in a federal habeas corpus appeal is "whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation." *Rees v. Peyton*, 384 U.S. 312, 314 (1966) (*per curiam*). Most federal courts apply *Rees* to any waiver of federal collateral review by a capital defendant. *See, e.g., Wilson v. Lane*, 870 F.2d 1250, 1253-54 (7th Cir. 1989), *reh'g & reh'g en banc denied*,

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cert. denied (affirming a district court’s determination that an Illinois capital defendant was competent to waive federal habeas review under *Rees*).

As the Supreme Court has explained, there is no meaningful difference between *Dusky*’s “rational understanding” language and *Rees*’ “rational choice” language; they both require the same inquiry. *Godinez v. Moran*, 509 U.S. 389, 398 n. 9 (1993). Together, these cases make clear that these competency standards, whether it be to stand trial, plead guilty, represent oneself, or waive appeals, all require defendants to be capable of making rational decisions. *Mata v. Johnson*, 210 F.3d 324, 329 n. 2 (5th Cir. 2000) (“both standards inquire about the discrete capacity to understand and make rational decisions concerning the proceedings at issue, and the presence or absence of mental illness or brain disorder is not dispositive”). In accord with federal courts, this Court has determined, for a capital offender to be found competent to waive collateral review, the trial court must determine, “whether an individual has the capacity to comprehend the legal proceedings with which he or she is confronted and assist his or her counsel in choosing among the various legal alternatives.” *Corcoran v. State*, 820 N.E.2d 655, 659 (Ind. 2005), *aff’d on reh’g*, 827 N.E.2d 542 (Ind. 2005).

A competency hearing is only required “when there is 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); *Cook v. State*, (1972) 258 Ind. 667, 670, 284 N.E.2d 81, 83). The decision to hold a hearing on competency is within the

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discretion of the trial court and should be reviewed for clear error. *Malo v. State*, 266 Ind. 157, 161, 361 N.E.2d 1201, 1204 (1977).

Isom's counsel has failed to raise any reasonable doubt as to Isom's ability and capacity to make a rational choice, or identify a change in circumstances since his first competency determination. Isom was found to be competent for trial after being evaluated by four mental health professionals. Isom has historically been competent, and is presumed therefore to still be competent. It is Isom's burden to disprove the strong presumption that Isom is competent by presenting evidence to reasonably doubt it and demonstrate that circumstances have changed that call into question Isom's presumed competency. *See Malo*, 266 Ind. at 161, 361 N.E.2d at 1204. Isom's counsel has done neither.

On July 17, 2008, the trial court held a competency hearing where Dr. Prasad, a psychiatrist, Dr. Carauana, a clinical psychologist, and Dr. Rodos, a clinical psychiatrist all testified after evaluating Isom for competency (T 17-144; TA 70). All three doctors found that Isom was competent to proceed with trial (T 23, 67, 106). The defense challenged the doctor's opinions based on one circumstance: Isom's claimed memory loss just before, during, and after the shooting of Cassandra, Ci'Andria, and Michael (T 23-144). On this particular question, the trial court ordered further evaluation of Isom (TA I 70-114; T 168-170, 173-180, 196-97, 200).

The trial court held a second hearing wherein Dr. Parker testified that Isom was competent to stand trial (T 220). Dr. Parker found that Isom "did quite well" in

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his ability to communicate and speak effectively with his attorney and the trial court (T 202). Dr. Parker testified that there was no evidence that Isom had any short or long term memory deficits or impairments (T 208-09). Dr. Parker administered cognitive tests and Isom did “fine,” and he was “generally organized in thought process throughout the two hour interview” (T 233-34).

The trial court found that Isom was competent to proceed to trial (TA 114, 119-120). The trial court based this finding in part on his interactions with Isom in that when the judge spoke with Isom in open court, the judge found Isom’s “demeanor and ability to respond to questions to be coherent and logical” (TA 119-120). The trial court found that even if Isom had no memory of the crime, “he still has an ability to understand the proceedings and does, in fact, understand the proceedings and is able to assist his counsel in the defense” (TA I 119-120).

Isom has failed to show any changes in circumstances since the trial court found him to be competent. Moreover, the reason why trial counsel originally challenged his competency before trial, his claim to not remember the shooting, is not relevant to his competency to waive post-conviction review. Instead, Isom points only to the choice Isom made not to sign the required oath and affirmation and characterizes the choice as being irrational (Br. of Appellant 30). Isom’s decision, in and of itself, cannot be a basis for questioning his competency, let alone establishing incompetence. The focus of the inquiry is not whether a defendant has made an arguably irrational choice, but rather whether they have the present ability and capability to make one. Moreover, capital defendants, like Isom, cannot

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only make this decision, but he is the only one that can. *See Smith v. State*, 686 N.E.2d 1264, 1273 & n.7 (Ind. 1997) (collecting cases and other authorities); *Vandiver v. State*, 480 N.E.2d 910 (Ind. 1985), *Judy v. State*, 275 Ind. 145, 416 N.E.2d 95 (1981).

Isom provides no evidence that any mental health professional would consider him incompetent—in fact, the consensus of the mental health professionals that have evaluated Isom is that he is competent despite his memory loss regarding the crime which is irrelevant here. Isom has failed to present any change or new information that would call Isom’s competency into question and/or rebut the presumption that Isom is competent. Instead, Isom’s counsel relies on past anecdotal evidence and testimony from his trial regarding times in the past where he has withdrawn during stressful situations. But this evidence does not demonstrate that Isom lacks the capacity to make a rational decision. Indeed other evidence shows otherwise; Isom performed averagely on cognitive subtests, graduated from high school, and maintained gainful employment for fifteen years as a security guard (T 13677-79, 13686, 13689). During the four months in which the trial court extended the time for Isom to comply, Isom did not demonstrate any confusion or vacillation as to the decision he was being asked to make and the gravity and the consequences of that decision. And, here Isom did not withdraw but rather he did the opposite. Isom attended both status hearings regarding the filing of the petition, effectively communicated with the trial court, and expressed his concerns, his thoughts about his decision, and why he chose to decline to file the

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missing oath or affirmation. This evidence does not place doubt on his capacity to make a rational decision, but instead, supports it. Additionally, this information was either considered at the time Isom was found competent before trial or available for Isom's counsel to support another challenge to his competency during trial, but they did not do so.

Indeed, Isom's counsel claims that they did not even question his competency before the trial court found that he waived his post-conviction review. Even in these proceedings, Isom's counsel could have challenged his competency at any time, but did not do so because, as they stated to the trial court, "Well, your Honor, honestly we hoped he would sign the oath and we would just go forward with post-conviction relief" (PT 78). Isom's counsel did not see the need to do so until the post-conviction court found that Isom's time to file his petition had expired (PT 78). Isom's counsel did not question or provide any basis that he is not competent to proceed with post-conviction review. Instead, Isom's counsel urged the trial court on at least two occasions to proceed with post-conviction review, despite having the unsigned affirmation. Isom's counsel were certainly put on notice at the very least by the time they filed a motion to extend the time for filing a petition with the required affirmation and oath, February 9, 2016, that Isom was in danger of forfeiting post-conviction for failing to sign the affirmation. And yet for the following 3 months, where Isom's signing of the petition was the only impediment to moving forward with the post-conviction proceeding, Isom's counsel never questioned his competency. This is unlike Corcoran's counsel who submitted an unsigned petition

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to the court along with a request to determine his competency. *Cf. See Corcoran*, 820 N.E.2d at 657 (where the State Public Defender filed an unsigned petition for post-conviction relief and a request to determine Corcoran's competency). At bottom, Isom's counsel does not question Isom's competency to proceed with post-conviction relief but only argues that Isom is incompetent to waive post-conviction relief. Counsel is attempting to have it both ways, on one hand saying that there is no reason to question, let alone rebut, the presumption that Isom is competent. But, on the other hand arguing that a finding that Isom waived post-conviction review shows that he is incompetent. The trial court did not error in rejecting this inconsistent argument.

Isom's counsel's assertion that Isom asked them what happened after the May 2, 2016, status hearing concluded does not establish that Isom's competency is indeed in question and mandates a full competency hearing. Trial counsel suggests that Isom's question indicates that he did not understand the proceedings and presumably, did not knowingly or intentionally make a decision not to file the oath and affirmation. However, Isom's counsel never provided the trial court any context for the statement that would indicate that that is the case. There is no context for understanding what specifically Isom was referring to or what if anything trial counsel discussed with Isom afterward to determine whether Isom was requesting trial counsel's assessment of the hearing or if he truly did not understand.

Isom's involvement and discussions with the trial court belie this assertion, which the trial court appropriately relied on. The trial court's own observations and

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interactions with Isom demonstrate that he was aware, lucid, and made his decision to forfeit post-conviction review by not signing the required oath and affirmation after full consideration of the consequences and months to make the decision. For example, in the May 2nd hearing, Isom challenged the trial court on whether the court had said in the March 24th hearing that she thought all counsel were competent rather than merely presumed competent (PT 53-73). Isom was correct in that the trial court had not used the phrase presumed competent. Further, based on her interactions and observations of Isom, the trial court properly found:

The court specifically notes that throughout the hearings of March 14 and May 2, 2016, Mr. Isom was alert attentive, and intently focused on the proceedings. He expressed his opinions concerning the proceedings clearly, cogently and concisely. He explained, without the slightest confusion or equivocation, that he declined to sign the petition as required by the Post-Conviction Rules because he wanted different counsel. After repeated advisements by the court that failing to sign the petition would result in a waiver, a forfeiture, a giving-up-of his post-conviction appeal with the result that an execution date would be set, Mr. Isom revealed his understanding of the proceedings and his legal position by saying, “And for me to be placed in a corner to have to sign or face an execution because of their—and I hesitate to use the word incompetence because you told me that all lawyers are competent. But that’s what I’m facing here.”

(PA II 236-237). These findings show that the trial court did not abuse its discretion. Isom engaged the court during the two hearings, and there is nothing to support counsel’s observation that he withdrew within himself; Isom made a rational decision not to talk with counsel that he believed were not competent, and he expressed his reasons to the trial court why he did not file an affirmation or oath in order to pursue post-conviction relief.

The fact that Isom made the decision not to proceed with post-conviction review does not suggest that he is incompetent. Isom was determined to be competent to stand trial. Isom's counsel have failed to show that there has been a change in Isom's mental health or capacity to make a rational decision that would require further inquiry. Because there has been no change in circumstances to question Isom's competency, and Isom demonstrated his ability to understand and make a rational decision, this Court should deny Isom's motion for further inquiry into his competency. *See Malo*, 361 N.E.2d at 1203-04 (finding no hearing required where defendant was previously found to be competent and no event or occurrence subsequent to the determination amounted to reasonable grounds).

II.

The trial court properly found that no petition was pending and that the time to do so had expired.

The trial court properly found that Isom refused to file a petition for post-conviction relief that contained the required oath and affirmation and that the time to do so had expired. In this appeal, the only questions properly before this Court is whether the trial court properly denied Isom's motion for a competency hearing. The remaining questions presented by Isom are not available for appellate review because there is no final judgment. However, to the extent this Court finds that Isom's remaining questions are reviewable, the State has addressed them below.

A. This Court is without jurisdiction to review Isom's remaining claims.

This Court is without jurisdiction to review Isom's remaining claims. Isom has not filed a petition for post-conviction relief that is in substantial compliance

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with the post-conviction rules³. Rather, the trial court sentenced Isom to the death penalty and Isom's attorney sought a stay of execution based on the intent to file a petition for post-conviction relief (PA II 42-49). However, to date, no petition has been filed. On January 12, 2016, Isom tendered a petition for post-conviction relief to the trial court that did not include a notarized affirmation signed by Isom which is required by Ind. Post-Conviction Rule 1(3)(b) (PA II 91-100,101, 119-124, 132). The trial court recognized the omission and gave Isom time to file a petition that complied with the rules (PA II 110, 118). But, Isom refused to do so (PA II 133). Because Isom has not filed a post-conviction petition, it is axiomatic that there is no final judgment. The trial court only made the decision to not hold open the window for Isom to file a petition. This is not a final judgment. Isom's real claim is that he may be precluded from filing a petition for post-conviction relief in the future. However, that claim is speculative because Isom has refused to file a petition so there is no reason to believe he will attempt to file a petition in the future. But if he did and it was dismissed, at that point he would have a final judgment to appeal. As it stands now, there is no final judgment; there is no appealable order. This Court must dismiss Isom's appeal because it does not have jurisdiction.

³ The State addresses Isom's argument that the petition is in substantial compliance and should be accepted for filing under Argument II. B.

B. Isom knowingly, intelligently, and voluntarily refused to sign the oath even when he was informed that the effect would be to forfeit post-conviction review.

The trial court did not abuse its discretion in finding that Isom acted knowingly, intelligently, and voluntarily when he forewent post-conviction review. Whether Isom's refusal to properly submit his petition for post-conviction after repeated chances and advisements of the consequences is considered a waiver or forfeiture, the trial court properly determined that Isom was unwilling to pursue post-conviction relief according to the rules. A death row inmate is free to knowingly and voluntarily waive remaining appeals, and allow for the imposition of the death penalty. *Smith v. State*, 686 N.E.2d 1264, 1272 (Ind. 1997). Such waiver of appeals must be knowing and voluntary. *Id.*; *see also Corcoran v. State*, 820 N.E.2d 655, 662 (Ind. 2005) (finding that the evidence showing that Corcoran was able to appreciate the gravity of his legal position and the consequences of his choice to waive further post-conviction review is "sufficient evidence to support the post-conviction court's determination that Corcoran made his choice knowingly, voluntarily, and intelligently").

Moreover, "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). Waiver differs from forfeiture in that forfeiture is the failure to make the timely assertion of

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a right, whereas waiver is the “intentional relinquishment or abandonment of a known right.” *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). A death row inmate may also forfeit post-conviction review if he fails to file a petition for post-conviction review by the time limits established by the courts. *Corcoran*, 820 N.E.2d at 663.

The record amply supports the trial court’s decision that Isom knowingly, intelligently, and voluntarily chose to not pursue post-conviction review and that Isom appreciated the gravity of his legal position and the consequences of his choice. Isom was given multiple opportunities to pursue post-conviction relief, and each time he refused to have the petition filed. Whether considered under waiver or forfeiture, the trial court properly found that there was no petition pending before it due to Isom’s refusals to properly file a petition, that the time to file had expired, and vacated the final hearing.

The trial court allowed Isom sufficient time, approximately four months past the original due date for the petition, in order to file the missing affirmation or oath. On January 12, 2016, Isom tendered a petition for post-conviction relief the day before Isom’s counsel requested the date be scheduled based on concerns of the federal habeas statute of limitations (PA II 91-100; PT 7, 18-19). The trial court recognized the lack of the required oath and affirmation and ordered Isom to submit the missing affirmation on or before February 9, 2016 (PA II 101). On February 9, 2016, Isom’s counsel filed for an extension of time, which the trial court granted and scheduled a status conference on March 14, 2016 (PA II 110). On March 14, 2016,

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the trial court held a hearing and Isom was present but he failed to submit the missing oath and affirmation (PT 47-59). During the hearing, the trial court established a new due date of March 28, 2016, and when Isom failed to meet that deadline, the trial court ordered a final deadline for Isom to file the petition on May 2, 2016, and scheduled a status hearing on that date (PT 55; PA II 118, 132). Isom failed to meet that deadline as well and the trial court found that the time to file had expired (PA II 133). Over the course of four months, Isom failed to submit a petition for post-conviction relief on 5 scheduled due dates.

Over this period of time, the trial court and his counsel thoroughly advised Isom of the right that he was waiving and the consequences of the waiver. On several occasions, the trial court explained that the petition as tendered did not comply with the rules and that he needed to submit the missing oath and affirmation to be in compliance (PT 47-58, 61-74). Isom was informed that the consequences of failing to file the missing oath and affirmation by the due date established by the court would result in waiver or forfeiture of post-conviction review and that an execution date would be set (PT 47-58, 61-74). The trial court addressed Isom's concerns regarding his desire for different counsel, that if his attorneys resigned he could be left to represent himself, and that his desire to have different counsel was separate from and should not preclude Isom from filing the required oath (PT 47-58, 61-74). And, over the four-month period of time, Isom consistently maintained that he understood the advisements, failed to submit the

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missing oath and affirmation letting multiple due dates expire, and affirmatively declined to provide the missing information to the trial court (PT 47-48, 61-74).

On appeal, Isom does not dispute that the advisements were not thorough and sufficient, but claims that Isom may have filed the missing oath or affirmation if he had been advised that he could represent himself. Isom's claim is not supported by the law or the facts. Isom has failed to provide any law that requires a trial court to inform a defendant that he may proceed pro se in post-conviction before a defendant can waive or forfeit review. Further, Isom has failed to show that under these circumstances, the trial court was required to inform Isom that he could represent himself or that Isom was operating under a false belief that he had to proceed with counsel. Instead, Isom's concern was that he wanted different counsel and competent counsel, not that he wanted to go it alone.

In fact, this was a concern that the trial court thoroughly explored with Isom, and at one juncture, informed Isom that if his current counsel resigned and he was not appointed new counsel, he would be facing the possibility of self-representation (PT 72-73). Although Isom acknowledges this advisement, Isom fails to explain how this exchange, assuming it was required, was inadequate to advise Isom that he could represent himself. Additionally, as shown by the interaction with Attorney Schutte, Isom continued to refuse to submit a proper petition even after the prospect of different counsel (PA II 191-193). While Isom's counsel now argues that choices between counsel or self-representation may have allowed Isom to file a proper petition, that argument is undercut by Isom's actions in this case.

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Further, Isom's statement that he did not wish to waive post-conviction review does not show that he was equivocal nor does it render his waiver invalid. This argument is based on the assumption that Isom can choose to pursue post-conviction in his own way apart from the rules. But Isom cites no legal principle to support a claim that a person can avoid waiver or forfeiture by claiming that they want a result without following the legal requirements for pursuing that result. In this case, while Isom indicated his desire to pursue some sort of review, he consistently refused to take the action necessary to effectuate that review. On more than one occasion Isom affirmatively declined to sign the petition when directly asked by the trial court. And, he declined to do so after being duly advised by the Court numerous times that if he did not sign the petition on that date, the Court would find that he forfeited review. Isom made these decisions after sufficient warnings of what was required of him and advisement of the consequences; by failing to do so he would be declining post-conviction review and an execution would be scheduled. The trial court always followed Isom's expression of not wanting to waive post-conviction by an advisement that if he did not want to waive then he needed to file the missing affirmation. Isom was not equivocal about declining to file the missing affidavit as the trial court requested; Isom missed five filing deadlines over a four month period and personally declined to file the missing affirmation on at least three occasions when directly asked by the trial court. And, although he expressed that he did not want to waive review, he still maintained that he could not meet the trial court's requirements despite knowing that his

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failure to do so would mean just that. Isom was unequivocal in his decision that he would not sign an oath or affirmation even if the consequence of not doing so would mean that he waived post-conviction review and that an execution would be set. A waiver may be in the form of a relinquishment or declining to do something that the person is required to do after being fully informed of the consequences. That is what occurred here.

Isom attempts to distinguish his case from *Corcoran* and *Judy*, where both defendants expressed an intention not to proceed coupled with a reason why they did not wish to proceed with post-conviction review. However, while the reasons for waiving post-conviction review are different for those defendants, the analysis is the same, and it is met here. A defendant must appreciate the gravity of his legal position and the consequences of his choice to waive further post-conviction review; Isom understood the gravity of his legal position and the consequences of his choice. This was sufficient to support the trial court's finding.

Even if this Court finds the record is insufficient to show that Isom waived post-conviction review, Isom has forfeited review by failing to timely file a petition for post-conviction review. Isom's forfeiture clearly supports the trial court's order finding that no petition was pending before the court and the time to file the

petition had expired. Isom has failed to show that the trial court abused its discretion⁴.

C. Whether the trial court abused its discretion by not accepting for filing Isom's tendered petition for post-conviction relief.

The trial court properly declined to file Isom's tendered petition for post-conviction relief. Initially, this claim is unavailable for review. Isom did not challenge the trial court's April 4, 2016, ruling. As the trial court gave Isom multiple opportunities to remedy this defect, Isom refused to do so. Further Isom's subsequent refusal to sign the tendered petition demonstrates that he did not want to file the tendered petition. While trial counsel asked the trial court to accept the petition as tendered to bypass Isom's involvement, Isom clearly did not want to go forward with the tendered petition as exhibited by his refusal to sign the oath. The question of whether the trial court should accept an unverified petition was not the issue before the trial court, and therefore the claim is not properly before this Court.

Even if this claim were available for review, the trial court did not err by declining to accept the petition without a signed oath or affirmation. Isom's tendered petition did not substantially comply with Indiana Post-Conviction Rule (1)(3) as it did not contain the required oath and affirmation. The Post-Conviction Rules only require one signature on a petition for post-conviction relief: to an oath

⁴ Although Isom's counsel recognizes that competency and the validity of the waiver are two separate inquiries, Isom presents evidence in support of his challenge to the validity of the waiver that is relevant only to his competency and the State will address that evidence in that context.

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that verifies the correctness, authenticity, and completeness of the petition and its attachments. Ind. P-C. R. 1(3)(b). The failure to include the oath and affirmation is not merely a hyper-technical mistake as Isom posits. This Court has made clear:

In cases where the petition is not properly completed, the trial court should return the petition for verification. By such a procedure, trial courts will be assured that they are considering all of a petitioner's allegations, and the petitioner will be denied the issue of lack of verification if he appeals a trial court's adverse decision. We do not consider the requirement of verification a mere technicality, and we believe that insistence on such a requirement implements the finality that P.C.R. 1, Sec. 8 was intended to embody.

Owen v. State, 167 Ind. App. 258, 263-64, 338 N.E.2d 715, 718 (1975). When a trial court "adjudicates the merits of a petition which lacks the necessary verification, the petitioner is not barred from raising a different ground for relief in a subsequent petition." *Barnes v. State*, 496 N.E.2d 816, 817 (Ind. Ct. App. 1986). The fact that a petition can be amended does not remedy the problem of no properly filed petition in the first instance.

While it may be true that failure to verify the petition does not deny the trial court subject matter jurisdiction, *Brown* holds that a failure to verify the petition would deny the trial court jurisdiction over this particular case. *Brown v. State*, 458 N.E.2d 245, 248-49 (Ind. Ct. App. 1983). Or, in the current language employed by this Court, it would be legal error for a trial court to deem the petition filed. See *R.L. Turner Corp. v. Town of Brownsburg*, 963 N.E.2d 453, 457 (Ind. 2012) (acknowledging the abolition of the phrase "jurisdiction of the particular case" in favor of "legal errors"). The proper procedure is to remedy the jurisdictional defect

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before proceeding in a particular case. *Brown*, 458 N.E.2d at 248. Most importantly, this Court has specifically required petitioners in death penalty cases to comply with Post-Conviction Rule 1(3), *Corcoran v. State*, 820 N.E.2d 655, 657 (Ind. 2005), and to do so under the timeframes set by its scheduling order or otherwise forfeit state post-conviction review, *Corcoran v. State*, 827 N.E.2d 542, 545 (Ind. 2005 (opinion on rehearing)).

The trial court properly rejected Isom's tendered petition so that Isom could supply the required affirmation or oath. Isom concedes that the petition tendered to the court on January 12, 2016, does not contain the required oath or affirmation. This fact alone supports the court's decision not to accept the petition. And, the fact that Isom signed a petition presented to him by his counsel, does not satisfy the requirement or show that the trial court abused its discretion in not accepting the petition for filing. No other signature is contemplated or required under the Rules other than the oath and affirmation. Because Isom's petition lacked this requirement, the trial court properly insisted that the jurisdictional error be remedied before proceeding. Isom has failed to show that the trial court abused its discretion in not accepting Isom's petition as tendered.

Further, the trial court's comments to Isom regarding the practices of some trial courts is irrelevant. Isom has taken the comments out of their context. The trial court informed Isom that she was surprised to learn from another magistrate that some counties do not require the petition to be signed, but the trial court reiterated that a signed oath and affirmation were what the law required (PT 53).

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The trial court also wanted Isom to consider that sometimes when attorneys are dealing with “heavy legal issues, something fundamental like obtaining a notarization might be the thing to slip by” (PT 53). The trial court’s discussion was intended to provide advice and assist Isom as he considered the magnitude of his counsel’s mistake and whether he could proceed with post-conviction review with these specific attorneys. This was not an acknowledgment by the trial court that the oath and affirmation are merely superfluous, but rather provides yet another example of the efforts that the trial court made to fully inform Isom so that he could make a decision about how to proceed. Whatever the practice is of other trial courts and the justifications provided by Isom’s counsel to forego the requirement, they are trumped by this Court’s explicit and strictly enforced command that post-conviction petitioners such as Isom must personally execute an oath that verifies his petition.

Isom’s counsel also ignores Isom’s repeated refusals to sign the oath and affirmation. Although Isom may have been willing to sign a petition in the past and has expressed a desire not to forfeit post-conviction review, this does not provide sufficient reason to overlook this jurisdictional requirement. The purpose of the verification has not been met. Isom has made it crystal clear through his repeated affirmative denials to amend his petition and his failures to submit the oath or affirmation that he is not willing to sign the oath and affirmation and proceed with post-conviction review. Refusal to sign the petition is not substantial compliance with the rules; it is the opposite. Everything that Isom has done since the time his counsel tendered the unverified petition belies counsel’s assertion that the spirit of

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the affirmation has been met. Isom has consistently and repeatedly refused to verify his petition for post-conviction relief, knowing that his failure to do so will prevent the petition from being filed, and that the trial court will find that he forfeited post-conviction review. Isom's refusal to sign the required oath and affirmation demonstrates that Isom has not acknowledged that the petition contains all his claims or vouched for the claims enumerated in the petition. Isom confirmed his disapproval of the petition in the May 2, 2016, hearing when he informed the trial court that if the petition was acceptable without the oath, "we wouldn't even be here" (PT 70-74). Like other cases, Isom's continued refusal to sign the affirmation demonstrates that the requirement has not been met. *See Corcoran v. State*, 827 N.E.2d 542, 545 (Ind. 2005); *Owen*, 167 Ind. App. At 263-264, 338 N.E.2d at 718; *Barnes v State*, 496 N.E.2d 816, 817 (Ind. Ct. App. 1986); *Brown v. State*, 458 N.E.2d 245, 248-49 (Ind. Ct. App. 1983).

Isom alone has always had the ability and, because of the trial court's grace, an extraordinary amount of time (approximately 4 months) to sign the required oath and affirmation to remedy any error made by counsel. Despite the ability, the time, the counsel, and the trial court's advisements, Isom has chosen not to sign the required oath and affirmation. Isom's forfeiture of his post-conviction review is solely a product of his own doing and voluntary, knowing, and intelligent choice to do so. Isom's refusal to timely file a petition with the required affirmation or oath is the only fact that is dispositive because it is the only signature that is contemplated or required under the Rules and case law; an oath that verifies the correctness,

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authenticity, and completeness of the petition and its attachments. Ind. P-C. R. 1(3)(b). Neither his attorney nor the trial court can prevent him from making that choice. *See generally Corcoran*, 820 N.E.2d at 655, and opinion on reh'g, 827 N.E.2d 542. Isom's decisions left the trial court with no other choice than to not accept the tendered petition. Without a timely submission of a petition with this oath and affirmation, this Court has made clear that a trial court is required to deem his petition forfeited. *See generally Corcoran*, 820 N.E.2d 655, and opinion on reh'g, 827 N.E.2d 542. Isom has been given all the process that is due to him under the federal and Indiana constitutions and the fact that this is a capital case does not exempt Isom from this requirement. *See Corcoran v. State*, 827 N.E.2d at 545.

D. This Court should not allow Isom's counsel to proceed with post-conviction review without Isom's consent.

This Court should follow its long-standing precedent requiring a defendant's participation and consent to pursue post-conviction remedies. In *Corcoran*, this Court held that capital defendants who waive post-conviction review by failing to file petitions for post-conviction within the time limitations are not entitled to automatic post-conviction review. *Corcoran*, 820 N.E.2d at 663-664. Isom's counsel's proposed automatic review rule would not apply to this case in any event. Even though direct review is automatic, it may be waived. *See Judy*, 275 Ind. at 100; *Vandiver*, 480 N.E.2d at 910-916. So here, even a rule for automatic post-conviction review would not apply to save the petition as Isom has waived review. Isom has expressly declined to file with the trial court a signed oath or affirmation

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with a petition for post-conviction relief. And, he has made it clear that he will not proceed with his current counsel. Isom's counsel does not provide a sufficient basis to challenge this Court's decision, and the review procedures of the majority of courts in states that have the death penalty, not to allow automatic collateral review of convictions and sentences in a death penalty case. Isom's counsel do not provide any policy reason why post-conviction proceedings should occur apart from a defendant's participation or desire to proceed. Isom's counsel has not provided any basis to elevate the prolongation of the review of capital cases over the community's interest in achieving finality, especially for an individual who has outright refused to pursue this avenue of review. This Court should decline Isom's counsel's invitation to allow automatic collateral review in capital cases.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court's judgment.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words. This brief contains 11,404 words. The word count was conducted by selecting all portions of the brief not excluded by Indiana Appellate Rule 44(C) and selecting Review/Word Count in Microsoft Word, the word-processing program used to prepare this brief.

/s/Kelly Loy
Kelly Loy

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CERTIFICATE OF SERVICE

I certify that on November 10, 2016, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS).

I also certify that on November 10, 2016, the foregoing document was served upon the following persons via IEFS:

Joanna Green
Laura Volk
Anne Kaiser
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