IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Case Nos. 18–3145 & 18–3153

John W. Kimbrough, III D.O.C. No. 219656, Petitioner, Appellee / Cross-Appellant **v.** **Ron Neal**, Superintendent, Indiana State Prison, Respondent, Appellant / Cross-Appellee	)	Appeal from The United States District Court for the Southern District of Indiana, Indianapolis Division Case No. 1:16–cv–1729–WTL–DML The Honorable William T. Lawrence, Judge

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Response Brief, Principal Brief, and Required Short Appendix of John W. Kimbrough, III, Appellee / Cross-Appellant

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Disclosure Statement

Case Nos. 18–3145 & 18–3145

Short Caption: **John W. Kimbrough, III v. Ron Neal**

The undersigned, counsel of record for the Petitioner-Appellee / Cross-Appellant, John W. Kimbrough, III, furnishes the following in compliance with 7th Circuit Rule 26.1:

(1) The full name of every party or amicus the attorney represents in the case:

John W. Kimbrough, III

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

Not Applicable

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Jurisdictional Statement

Case Nos. 18–3145 & 18–3153

The jurisdictional statement of the Appellant Superintendent in Case No. 18–3145 is not complete and correct. Kimbrough's Motion to Alter or Amend the Judgment was timely filed on December 28, 20**17** not December 28, 20**18**. D.E. 22.[1] See Br. of Appellant at 1.

Case No. 18–3145 is the Appellant Superintendent's appeal from the district court's judgment granting John W. Kimbrough, III conditional habeas relief. D.E. 21.

Case No. 18–3153 is Kimbrough's cross-appeal from the district court's judgment granting Kimbrough conditional habeas relief, D.E. 21, and from that court's order denying Kimbrough's motion to alter the judgment under Federal Rule of Civil Procedure 59(e). D.E. 25.

On June 29, 2016, Kimbrough filed in the district court his Verified Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. D.E. 1. On November 30, 2017, the district court entered its judgment granting Kimbrough a writ of habeas corpus conditioned on the State of Indiana granting Kimbrough a new appeal within 45 days. App. 51a; D.E. 21.

On December 28, 2017, Kimbrough timely filed his Motion to Alter or Amend the Judgment under Federal Rule of Civil Procedure 59(e). D.E. 22. On September 6, 2018, the district court denied that motion. App. 52a.–54a; D.E. 25.

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[1] The Superintendent's appendix is also incomplete. It does not include the district court's judgment, D.E. 21, entered November 30, 2017, and which the Superintendent is appealing. See Cir. Rule 30(a). Kimbrough has included it in his appendix. App. 51a. The Superintendent's appendix is also missing the district court's Entry Granting Petition for a Writ of Habeas Corpus, D.E. 20. See Cir. Rule 30(a). Kimbrough has included it as well in his appendix. App. 38a–50a.

The district court had subject matter jurisdiction under 28 U.S.C. §§ 2241 & 2254.

On October 5, 2019, both the Superintendent and Kimbrough timely filed notices of appeal. D.E. 26 (the Superintendent in Case No. 18–3145); D.E. 30 (Kimbrough in Case No. 18–3153), App. 55a.

On January 3, 2019, this Court issued a certificate of appealability with respect to the question whether Kimbrough was denied his Sixth Amendment right to the effective-assistance of appellate counsel in his state-court direct appeal. App. 58a; Doc. 3.

This Court has jurisdiction of Kimbrough's cross-appeal under 28 U.S.C. §§ 1291 & 2253.

Statement of the Issues

I. The first question, presented by the Superintendent's appeal, is:

Did the district court correctly decide that Kimbrough was entitled to conditional habeas relief because:

1) there was a reasonable probability that Kimbrough would have received appellate sentencing relief had he asked for it, because he had actually received appellate sentencing relief without asking for it; and

2) the contrary conclusion by the Indiana Court of appeals was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984)?

II. Had Kimbrough prevailed, as he should have, in the state post-conviction litigation, either the result of his direct appeal would have been ordered reinstated—a reduction in his sentence from 80 years to 40 years—or he would have obtained a full resentencing by the Indiana state trial court. As a matter of well-established Indiana state law, a new appeal as relief for Kimbrough's appellate ineffective-assistance claim would have been impossible. The Indiana Post-Conviction Rules simply do not provide for a new appeal as possible relief, and, in fact, there is not a single reported Indiana case of a new direct appeal being ordered as state post-conviction relief for a meritorious appellate ineffective-assistance claim. In addition, there is no state constitutional provision, statute, or rule that provides an Indiana appellate court with the authority to order a new direct appeal after a grant of federal habeas relief for a meritorious appellate ineffective-assistance claim.

The second issue, presented by Kimbrough's cross-appeal, is:

At least in an AEDPA case, and as a matter of equity, should a federal court's undoubtedly broad discretion in fashioning conditional habeas relief be limited by:

1) the relief that would have been available for the same meritorious claim in the state courts; and

2) no provision of state law provides the Indiana state courts the power to implement a new direct appeal.

Statement of the Case

References to the Documents in the Case

The Appendices

The Superintendent refers to his appendix with "S.A.," and Kimbrough will do the same when the document referred to is in the Superintendent's appendix.

Kimbrough will refer to documents in his appendix with "App."

The State Court Decisions

There are three state-court decisions behind this case:

"*Kimbrough I*", Indiana Court of Appeals No. 45A04–1106–CR–328 (March 21, 2012) (*mem.*), *trans. granted and vacated in part and summarily aff'd in part by* 979 N.E.2d 625 (Ind. 2012) ("*Kimbrough II*"). This was the decision of the Indiana Court of Appeals in Kimbrough's direct appeal.

"*Kimbrough II*," *Kimbrough v. State*, 979 N.E.2d 627 (Ind. 2012). This was the decision of the Indiana Supreme Court after it had granted transfer in *Kimbrough I*.

Kimbrough III, Indiana Court of Appeals No. 45A05–1506–PC–687 (Jan. 11, 2016) (*mem.*), *trans. denied*. This was the decision by the Indiana Court of Appeals in Kimbrough's state post-conviction appeal.

The Procedural History of the Case

The important facts in this case are chiefly procedural.

Kimbrough's Trial & Direct Appeal

In 2011, Kimbrough was convicted of four counts of child molesting as Class A felonies. Kimbrough's total sentence was 80 years. He was sentenced to 40 years in prison for each count. Counts I and II were ordered served concurrently to one another, as were Counts III and IV; Counts III and IV,

were ordered served consecutively to Counts I and II. *Kimbrough III*, slip op. at 2–3; S.A. 42–43.

Kimbrough pursued a direct appeal that challenged both his convictions and sentences. *See Kimbrough I*, slip op. at 2; S.A. 5. Kimbrough's challenge to his sentence was merely that the trial court had abused his discretion. *Id.*; *see also id.* at 8–10; S.A. 11–13. The *Kimbrough I* court said it had not. *Id.* at 10; S.A. 13.

Nevertheless, in a split decision, the *Kimbrough I* court reduced Kimbrough's sentence from 80 years to 40 years under the authority of Indiana Appellate Rule 7(B). That rule provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Additionally, the *Kimbrough I* court cut Kimbrough's sentence in half without having been asked for a sentence reduction by Kimbrough's appellate lawyer.

Although agreeing with the majority that the trial court had not abused his discretion in sentencing Kimbrough, Judge Mathias dissented from the *Kimbrough I* majority's decision to grant Kimbrough sentencing relief under Rule 7(B):

> Because Kimbrough advances no argument under Appellate Rule 7(B) concerning the nature of the offense or his character, I would not reach the issue of the appropriateness of his sentence.
>
> But even assuming that it is proper to analyze Kimbrough's sentence under Appellate Rule 7(B) *sua sponte*, I would conclude that his sentence was not inappropriate.

Kimbrough I, slip op at 13–14, S.A. 16–17 (Mathias, J., concurring in part and dissenting in part) (citations omitted). Judge Mathias then proceeded to conduct a textbook Rule 7(B) analysis, weighing Kimbroughs lack of criminal history, S.A. 15, 17, the number and ages of the victims, S.A. 16–17, the fact that Kimbrough had abused a position of trust, S.A. 17, the fact that the

incidents were not isolated, S.A. 17, and additional evidence that Judge Mathias found pertinent to Kimbrough's character,. S.A.18.

Kimbrough's sentencing victory under was short-lived. The State of Indiana petitioned the Indiana Supreme Court for transfer, presenting a single issue: "Does an appellate court's authority to 'correct sentencing errors' extend to using Appellate Rule 7(B) to *sua sponte* revise an otherwise proper sentence that the defendant does not challenge as inappropriate." State's Petition to Transfer, App. 3a; D.E. 10–7 at 2. The Indiana Supreme Court granted the State's petition, resulting in its decision in *Kimbrough* II, *Kimbrough v. State*, 979 N.E.2d 625 (Ind. 2012); S.A. 22–29.

In *Kimbrough II*, the Indiana Supreme Court did three things. First, it summarily affirmed the part of *Kimbrough I* that affirmed Kimbrough's convictions. *Kimbrough II*, 979 N.E.2d 627–28; S.A. 25. Second, it agreed with *Kimbrough I* that the trial court had not abused its discretion in sentencing Kimbrough. *Id.* at 628–29; S.A. 25–28. Third, and most importantly for this case, the *Kimbrough II* court undid the Rule 7(B) sentence reduction Kimbrough had obtained, because Kimbrough had not asked for it:

> As we have declared[,] a defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review [imposed by Rule 7(B)]. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "When a defendant *requests* appellate review and revision of a criminal sentence pursuant to authority derived from Article 7, Sections 4 or 6 of the Indiana Constitution . . . the reviewing court is presented with an issue whether to affirm, reduce, or increase the sentence. *McCullough v. State*, 900 N.E.2d 745, 750 (Ind. 2009) (emphasis added). **Kimbrough made no such request and there therefore was no issue in this regard to be considered by a reviewing court.**

Kimbrough II, 979 N.E.2d at 630; S.A. 28 (emphasis added).

In a footnote, the Indiana Supreme Court also said: "Judge Mathias undertook a thorough analysis of the nature of Kimbrough's offenses and his

character and concluded that Kimbrough's sentence was not inappropriate." *Kimbrough II*, 979 N.E.2d at 630 n.1, S.A. 28 (citation omitted).

The State Post-Conviction Proceedings

Under the circumstances, Kimbrough sought state post-conviction relief for the claim that his appellate lawyer had been ineffective for failing to ask for a sentence reduction under Indiana Appellate Rule 7(B). The Indiana Court of Appeals dispatched the claim as follows:

> Kimbrough argues that his appellate counsel's failure to challenge his sentence on Rule 7(B) grounds resulted in prejudice. In making this argument, he relies on this Court's opinion that was ultimately overturned. Kimbrough reasons that because this Court revised his sentence downward on 7(B) grounds, and our Supreme Court overturned that decision only because the argument was not raised, that he was necessarily prejudiced by its omission. We cannot agree.
>
> **Initially, we note that this Court did not have the benefit of argument or analysis on the Rule 7(B) issue from the State. We now have the benefit of that argument and analysis, and as explored below, are persuaded that this Court would have reached a different result had the issue been fully briefed.** Furthermore, we echo the reasoning of the post-conviction court, which emphasized that the Kimbrough majority did not engage in any sort of Rule 7(B) analysis. Instead, only Judge Mathias did so, and—as emphasized by our Supreme Court—he "undertook a thorough analysis of the nature of Kimbrough's offenses and his character and concluded that Kimbrough's sentence was not inappropriate." *Kimbrough*, 979 N.E.2d at 630.
>
> **Following in Judge Mathias's footsteps, and with the benefit of full briefing on the issue, we now consider whether Kimbrough's sentence was inappropriate.** Indiana Appellate Rule 7(B) provides that this Court may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. We must "conduct [this] review with substantial deference and give 'due consideration' to the trial court's decision-since the 'principal role of [our] review is to attempt to leaven the outliers,' and not to achieve a perceived 'correct' sentence . . . ."

Knapp v. State, 9 N.E.3d 1274, 1292 (Ind. 2014) (quoting *Chambers v. State*, 989 N.E.2d 1257, 1259 (Ind. 2013)) (internal citations omitted).

Kimbrough was convicted of four class A felonies. For each conviction, he faced a term of twenty to fifty years, with an advisory term of thirty years. Ind. Code § 35-50-2-4.1. The trial court imposed a term of forty years imprisonment for each conviction—ten greater than the advisory term but ten less than the maximum. It ran two of the terms consecutively, as has been found appropriate when there are multiple victims. *See Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003) (holding that "when the perpetrator commits the same offense against two victims, enhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person.").

As for the nature of the offenses, Kimbrough repeatedly molested two very young victims—seven-year-old J.L. and five-year-old A.D. The molestations occurred on multiple occasions and over a time period spanning nearly two years. Kimbrough continued to molest A.D. after she asked him to stop and he instructed her not to tell anyone. Moreover, in molesting the girls, Kimbrough violated a position of significant trust. The couple and the children did many things together as a family, and he routinely drove the girls to school and helped them with their homework. Finally, at sentencing, Kimbrough expressed no remorse for his actions, instead casting himself as the victim and blaming the girls' parents for his involvement in the girls' lives.

As for Kimbrough's character, we certainly note his lack of a prior criminal history, as did the trial court. As noted by Judge Mathias, however, "Kimbrough's abuse of his position of trust with respect to J.L. and A.D. reflects very negatively on his character." *Kimbrough*, No. 45A04-1106-CR-328, *9. Furthermore, at the time of sentencing in this matter, there was an active warrant for Kimbrough's arrest for failure to appear on a driving while suspended charge, and he was also facing charges of class B felony criminal confinement, class C felony intimidation, class D felony criminal confinement, and class D felony residential entry. Kimbrough had also violated the terms of his pretrial release granted by another court in a separate case. We hasten to emphasize that Kimbrough was only in his mid-twenties. It is

> therefore apparent that, while he had no prior convictions, he had not been leading a law-abiding life since becoming an adult a few short years before the molestations.
>
> Given this evidence concerning Kimbrough's character, combined with the evidence regarding the nature of the offenses—including the presence of multiple victims, their young ages, the ongoing nature of his crimes, and his abuse of a position of trust—**we are persuaded that if the Kimbrough majority had engaged in a full Rule 7(B) analysis with the benefit of argument and analysis from the State, it would not have found Kimbrough's sentence inappropriate. In other words, Kimbrough has not established that there is a reasonable probability that, if appellate counsel had made a Rule 7(B) challenge, the result of the proceeding would have been different. Therefore, he has failed to establish prejudice as a result of the omission of this argument in his direct appeal.**

Kimbrough III, slip op. at 8 –12, S.A. 45–49 (footnote omitted) (emphases added).

Raising precisely the same appellate ineffective-assistance claim, Kimbrough unsuccessfully petitioned the Indiana Supreme Court for transfer of the *Kimbrough III* decision.

The Habeas Proceedings in the District Court

Having failed in the state courts, Kimbrough brought his appellate ineffective-assistance claim to federal court in a habeas petition under 28 U.S.C. § 2254. D.E.1. In his petition, Kimbrough specifically argued that the appropriate conditional habeas relief should be a new sentencing hearing, not a new appeal in state court. See D.E. 1 at 20.

The district court ordered the Superintendent to file a return to show cause why the petition should not be granted, D.E. 4; and the Superintendent did so. D.E. 10. Despite the Superintendent's arguments on the merits and Kimbrough's argument regarding the appropriate relief, the district court granted Kimbrough a writ of habeas corpus conditioned on a new appeal in state court. Judgment, D.E. 21; App. 51a.

In its discussion of it reasons for granting a writ, the district court addressed, in turn, *Strickland* performance, *Strickland* prejudice, and the conditional relief. Entry Granting Petition for a Writ of Habeas Corpus, D.E. 20 at 4–12; App. 41a–49a. With respect to *Strickland* performance, the district court said in part:

> Because the *Kimbrough III* court did not reach *Strickland*'s ineffectiveness prong, the Court reviews this issue *de novo*.
>
> "Appellate lawyers are not required to present every nonfrivolous claim on behalf of their clients—such a requirement would serve to bury strong arguments in weak ones—but they are expected to 'select[] the most promising issues for review.'" *Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013) (quoting *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983)). "For this reason, if [the petitioner's appellate counsel] abandoned a nonfrivolous claim that was both 'obvious' and 'clearly stronger' than the claim that he actually presented, his performance was deficient, unless his choice had a strategic justification." *Id.* Appellate counsel's performance is assessed "from the perspective of a reasonable attorney at the time of [the] appeal, taking care to avoid the distorting effects of hindsight." *Id.* (citation and quotation marks omitted).
>
> Kimbrough argues that his appellate lawyer performed deficiently by failing to argue for a sentence reduction under Rule 7(B). According to Kimbrough, this argument was obvious. As Kimbrough points out, his appellate lawyer did challenge his sentence, but only as an abuse of discretion and not as inappropriate under Rule 7(B). Moreover, the *Kimbrough I* court, by *sua sponte* reducing his sentence under Rule 7(B), recognized the significance and obviousness of such an argument. A challenge to the sentence under Rule 7(B) was, therefore, obvious.
>
> Kimbrough goes on to contend that this argument was stronger than any of the arguments his lawyer actually made. Counsel made three arguments on direct appeal. First, Kimbrough's lawyer argued that the evidence of penetration had been insufficient. But that argument was weak because there had been direct evidence of penetration. The *Kimbrough I* court therefore treated the argument as a request to reweigh the evidence, which is for the jury, not the Court of Appeals to do. *Kimbrough I*, Slip. Op. at 6. Next,

Kimbrough's lawyer argued that the trial court erred in instructing the jury on the definition of the female sex organ. The Court of Appeals dismissed this argument as waived for failure to present any cogent argument. *Id.* at 7. The court then went on to conclude that there was no error in giving the instruction. *Id.* at 8. Finally, Kimbrough's appellate lawyer challenged his sentence as an abuse of discretion. He argued that the trial court had not given sufficient weight to the mitigating circumstance that Kimbrough had no criminal history and had considered improper aggravating circumstances.

. . . .

Kimbrough's counsel challenged his sentence, but only on grounds that were highly unlikely to provide relief. This Court agrees with Kimbrough that the arguments raised by his appellate counsel, which were easily rejected by the Indiana Court of Appeals, were feeble.

. . . .

This Court concludes that the unraised Rule 7(B) argument was clearly stronger than the arguments that appellate counsel raised. As discussed above, the challenges that appellate counsel raised on appeal – a challenge to the sufficiency of the evidence, an undeveloped, and thus waived, challenge to a jury instruction, and a challenge to sentencing factors that were clearly reasonable – were weak at best. The fact that the *Kimbrough I* court *sua sponte* reduced his sentence as inappropriate demonstrates that an argument under Rule 7(B) would have been stronger than the other, unsuccessful, arguments that counsel did make.

. . . .

> In short, a challenge to Kimbrough's sentence under Rule 7(B) was obvious and stronger than the arguments Kimbrough's appellate counsel raised. Counsel's performance was therefore deficient when he did not raise it.

Entry, D.E. 20 at 4–8; App. 41a–45a) (some citations omitted) (footnote omitted).

With respect to *Strickland* prejudice, the district court said in part:

> To determine whether a defendant has been prejudiced under *Strickland*, a court asks only whether the defendant would have had a "reasonable probability" of success, not whether he definitively would or would not have succeeded. *Shaw*, 721 F.3d at 918. **Review under Rule 7(B) is discretionary. *Knapp v.* State, 9 N.E.3d 1274, 1291-92 (Ind. 2014). Thus, the *Kimbrough III* court's determination that it would not have reduced his sentence does not necessarily compel a conclusion that Kimbrough did not have a reasonable probability of success on the merits of a Rule 7(B) challenge.**
>
> The Seventh Circuit held in *Miller v. Zatecky*, 820 F.3d 275 (7th Cir. 2016), that when the state court has determined an issue of state law, a federal court cannot review it. But even if the conclusion of the *Kimbrough III* court that, as a matter of state law, it would not have reduced Kimbrough's sentence provided a basis to conclude that Kimbrough did not have a reasonable chance of success on appeal, this determination cannot be considered in a vacuum. This is because the *Kimbrough I* court, applying the same state law that the *Kimbrough III* court applied, reached the opposite conclusion. **Because two panels of the Indiana Court of Appeals utilized their discretion to reach opposite conclusions**, Kimbrough necessarily had a "better than negligible" chance of success on a Rule 7(B) argument. **The *Kimbrough III* court's conclusion that he did not is an unreasonable application of *Strickland* because it incorrectly asked how it would have resolved the issue, not, as required by *Strickland*, whether a Rule 7(B) challenge would have had a reasonable likelihood of success. *See Strickland*, 466 U.S. at 694.**
>
> . . . .

> Having found that the *Kimbrough III* court unreasonably applied *Strickland*, this Court must review the claim *de novo*, this requires the Court to determine whether it is at least reasonably likely the result would have been different if appellate counsel had not failed to ask for revision under Rule 7(B). As noted above, because the *Kimbrough I* court *sua sponte* concluded that a Rule 7(B) reduction was appropriate, it follows that Kimbrough would have had a reasonable chance of success on this argument. Kimbrough therefore has established prejudice from his counsel's deficient performance.

Entry, D.E. 20 at 8–12 ; App. 45a–49a (some citations omitted) (some internal quotation marks omitted.

With respect to the conditional relief of a new appeal in state court, the district court said:

> Kimbrough points out that the Indiana Court of Appeals has held that the proper relief when ineffective assistance of appellate counsel is found is to vacate the conviction and sentence. *See Montgomery v. State*, 21 N.E.3d 846, 857 (Ind. Ct. App. 2014). But the ruling in that case rested on the premise that if appellate counsel had not performed deficiently, the defendant would have been likely to have succeeded on appeal and been entitled to a new trial. *Id.* at 855. This Court has found that Kimbrough's appellate counsel was ineffective for failing to argue that his sentence was inappropriate. The only logical relief based on this ruling is the opportunity to make this argument to the Court of Appeals. *See Shaw*, 721 F.3d at 919. Accordingly, that is the relief that will be granted.

Entry, D.E. 20 at 12; App. 49a (citation omitted).

Kimbrough filed a motion under Federal Rule of Civil Procedure 59(e) in which he argued that the correct relief should be either reinstatement of the 40–year sentence reduction by the *Kimbrough I* court or a new sentencing hearing, but not a new appeal in state court. D.E. 22. The district court denied Kimbrough's 59(e) motion, saying in part:

> Mr. Kimbrough argues, like he argued in his petition, that the Indiana Court of Appeals has held that the proper relief when ineffective assistance of appellate counsel is found is to vacate the conviction and sentence. *See Montgomery v. State*, 21 N.E.3d 846, 857 (Ind. Ct. App. 2014). But, as this Court already explained, the ruling in *Montgomery* rested on the premise that if appellate counsel had not performed deficiently, the defendant would have been likely to have succeeded on appeal and been entitled to a new trial. *Id.* at 855. In contrast, this Court found that Kimbrough's appellate counsel was ineffective for failing to properly challenge his sentence. The only logical relief based on this ruling is the opportunity to make this argument to the Court of Appeals. *See Shaw v. Wilson*, 721 F.3d 908, 919 (7th Cir. 2013). Mr. Kimbrough also argues that equity requires that the Court not direct a new appeal, but direct that Mr. Kimbrough receive a new sentencing hearing or the sentence he would have received had the ruling by the Indiana Court of Appeals in his direct appeal not been vacated. But, as this Court has already explained, the proper remedy is a new appeal where the argument the Court found should have been made is presented. In short, Mr. Kimbrough has demonstrated no manifest error of law. Accordingly, the motion to alter or amend the judgment, Dkt. No. 22, is denied.

Entry Discussing Motion to Alter or Amend Judgment, D.E. 25 at 2; S.A. 52 (emphasis omitted) (citation omitted).

The Historical Facts

The historical facts of the crimes for which Kimbrough was convicted, as found by the Indiana Supreme Court in *Kimbrough II*, are:

> Mother and Kimbrough began dating in January 2009. Later that summer, Mother introduced Kimbrough to her children,

> including her daughters, J.L. born January 2003 and A.D. born July 2004. The couple and children began to function as a family, even staying at hotels together to allow the children to swim in the hotel pools. Kimbrough often drove the girls to school and helped with their homework. In the spring of 2010, the relationship ended. Nonetheless Mother continued to allow Kimbrough to take the children to school because they loved Kimbrough and Mother trusted him.
>
> The evidence showed that in October 2010, Mother observed that J.L. "seemed as if she was hiding something" or "as if she was scared." Tr. at 105. A.D. reluctantly told Mother that her vagina hurt and the girls eventually stated that Kimbrough had touched them both inappropriately. On October 30, 2010, law enforcement was contacted. That same day, both girls were taken to the emergency room of the local hospital where a physician—Dr. Kathryn Watts—examined each child. Later that same evening Kimbrough was arrested. On November 5, 2010, the State charged Kimbrough with four counts of child molesting as Class A felonies and two counts of child molesting as Class C felonies.

Kimbrough II, 979 N.E.2d at 626–27; S.A. 23. The facts as found by the Indiana Court of Appeals in *Kimbrough III*, Kimbrough's post-conviction appeal, are more cursory, but not otherwise different. *See Kimbrough III*, slip op. at 2; S.A. 39.

Additional Facts

First, it is also *an historical fact* that, in *Kimbrough I*, the Indiana Court of Appeals ordered Kimbrough's sentence reduced from 80 to 40 years without Kimbrough having made any request for the sentence reduction.

Second, although the Superintendent makes no issue of *Strickland* performance in his brief, this Court reviews the decision of the district court *de novo* and there are some facts related to Kimbrough's appellate lawyer, Jeffrey Schlesinger, that the district court only touched on in a footnote. See Entry, D.E. 20 at 5–6 n.1; App. 42a–43a n.1

More completely, at the time of Kimbrough's direct appeal in *Kimbrough I*, Schlesinger was simply unaware of Indiana Appellate Rule 7(B) and, for at least 3 years before Kimbrough's appeal, had been making appellate sentencing arguments based on an old standard that Rule 7(B) superseded in 2003. *See In re Schlesinger*, 53 N.E.3d 417 (Ind. 2016) (issuing a public reprimand for failing, in at least four appeals, to properly argue for sentencing relief under Indiana Appellate Rule 7(B), which became effective in 2003.); *see also generally Marcus v. State*, 27 N.E.3d 1134 (Ind. Ct. App. 2015) (striking Schlesinger's brief and remanding the appeal for the appointment of "competent counsel" after Schlesinger had, yet again, failed to realize that the "manifestly unreasonable" standard of former Indiana Appellate Rule 17 had been replaced by the appropriateness standard of Appellate Rule 7(B) in 2003). *Marcus* lists cases from 2008 to 2015 in which Schlesinger was apparently unaware of the 2003 change in the standard for appellate review of sentences. *See Marcus*, 27 N.E.3d at 1135–36. Schlesinger filed Kimbrough's brief in *Kimbrough I* in November 2011. *Kimbrough I* Appellate Docket, D.E. 10-2 at 2.

Summary of the Argument

I. The Merits of Kimbrough's Appellate Ineffective-Assistance Claim (Case No. 18–3145, the Superintendent's Appeal)

Strickland *Prejudice* & Kimbrough I *as a Fact*

Actuality is the best proof of possibility. Put differently, *Kimbrough III* says the thing that *did* happen in *Kimbrough I* could not reasonably *have* happened. That is not only unreasonable, it is incoherent.

Kimbrough does not rely on *Kimbrough I* for any proposition of state law. It is simply *a fact* that *Kimbrough I* reduced Kimbrough's sentence by 40 years under Appellate Rule 7(B) without Kimbrough having invoked the rule. It defies experience, if not logic, that there is no reasonable probability that

Kimbrough would have received Rule 7(B) sentencing relief had his appellate lawyer asked for it. That is, in light of *the fact* of *Kimbrough I*, *Kimbrough III* may have answered state-law Rule 7(B) question for itself, that answer does not dispose of the *Strickland* question. And, moreover, in all the times the issue has been briefed, no one has ever added anything to Judge Mathias's dissent possibly suggesting that "full briefing" in *Kimbrough I* would have changed anything.

Miller v. Zatecky

Because Kimbrough is not relying on *Kimbrough I* for any proposition of state law, the Court need not overrule *Miller v. Zatecky*, 820 F.3d 275 (7th Cir. 2016). But it should.

Miller misunderstood the nature of appellate resentencing under Indiana Appellate Rule 7(B). The Indiana Supreme Court has said that there is no "correct" answer and that courts may disagree about the result of review under Rule 7(B). An appellate decision reducing a sentence—or not—under Rule 7(B) is no more a statement of state law than a sentence imposed by a trial court.

Miller also misunderstood the structure of the Indiana appellate courts. Any panel of the Indiana Court of Appeals is free to disagree with any other panel. There is no equivalent of "circuit precedent"; there is no *en banc* process; and only the Indiana Supreme Court can resolve conflicts in the decisions of the Court of Appeals. Consequently, absent unambiguous parallel authority of the Indiana Supreme Court, it is very hard to characterize anything the Indiana Court of Appeals says as a statement of state law. That is especially true of memorandum decisions which, by rule, may not be regarded as precedent and may only be cited to establish *res judicata*, collateral estoppel, or law of the case. And *Kimbrough III* was a memorandum decision.

Finally, *Miller* cannot rationally coexist with this Court's decisions in *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013), and *Jones v. Zatecky*, 2019 U.S. App. LEXIS 6074 (7th Cir. Feb. 28, 2019). In both cases, the Indiana Court of Appeals had said, as a matter of state law, that late amendments to charging informations had been permissible despite a statute saying otherwise. In neither *Shaw* nor *Jones* did the Court say that was the end of the matter of *Strickland* prejudice—that because of the state-court decisions regarding the state-law question, the probability of a different result was zero. And both *Shaw* and *Jones* involved a question of state law to which there was more clearly a correct answer to the state-law question.

Shaw and *Jones* were correctly decided; *Miller* was not, and the Court should overrule *Miller*.

The Superintendent's Meritless Ancillary Arguments

The Superintendent's ancillary arguments are meritless. First, this case has nothing to do with independent and adequate state grounds. That doctrine, as applied in habeas cases, only applies to state *procedural* rulings that bar the consideration by federal courts of federal claims. Only federal claims are cognizable in § 2254 cases; a state-court decision on the merits of a federal claim cannot also be independent of the federal law necessary for the merits decision.

Second, as the district court correctly concluded, the record shows unambiguously that the decision in *Kimbrough I* to reduce Kimbrough's sentence by 40 years was under the authority of Indiana Appellate Rule 7(B). But even if the record were in any way ambiguous on this point, there is no state-law source other than Rule 7(B) that could have authorized the *Kimbrough I* court to cut Kimbrough's sentence in half.

II. The Conditional Relief (Case No. 18–3153, Kimbrough's Cross-Appeal)

Habeas relief is equitable in nature. Generally, the purpose of conditional habeas relief is to restore the *status quo* before the constitutional violation. Also generally, conditional habeas relief achieves that goal by doing two things: 1) it gives the State an opportunity to substitute a constitutionally valid judgment for an invalid one; and 2) it places the successful habeas petitioner in the position he or she would have been in had the constitutional violation not occurred.

This is an AEDPA case. That means the state courts unreasonably applied federal law in resolving Kimbrough's appellate ineffective assistance claim. Put differently, on any reasonable view, Kimbrough's appellate ineffective-assistance claim should have prevailed in the state courts. Had that claim prevailed in the state courts, the relief ordered would have been one of two things: 1) reinstatement of the *Kimbrough I* judgment, which reduced Kimbrough's sentence from 80 to 40 years; or 2) a new sentencing hearing. That is because, as a matter of state law, a new appeal is not possible relief for a state post-conviction claim of appellate ineffective assistance.

It is therefore inequitable to order a new appeal as conditional relief in this case. A new appeal puts Kimbrough in a materially worse position than he would have been in had he won his case in the state courts, as he should have. It also puts the State of Indiana in a materially better position, having to only win two out three falls, as it were, on the question of whether Kimbrough should be granted sentencing relief under Indiana Appellate Rule 7(B). Had Kimbrough prevailed in the state courts, the State would not have had that opportunity.

This Court is clearly sensitive to this issue. Very recently, in *Jones v. Zatecky*, 2019 U.S. App. LEXIS 6074 (7th Cir. Feb. 28, 2019), a case involving a trial ineffective-assistance claim for a failure to object to a late amendment

to a charging information, the Court did not order as conditional relief the customary new trial. Instead, it ordered Jones's sentence adjusted without the conviction resulting from the late amendment to the charging information.

The Court must have recognized that conditioning habeas relief on a new trial would put Jones in a materially worse position than if the Sixth Amendment violation had not happened. Since Jones's first trial, Indiana law regarding late amendments to charging informations has changed; were Jones to be subjected now to a new trial, the State would be able to amend the charging information with the charge it impermissibly added late at Jones's first trial. A new trial as conditional relief would not put Jones in the position he occupied before the Sixth Amendment violation; it would also provide the State with a windfall to which it is not entitled.

It is a practical certainty that Kimbrough would have received the 40-year sentence reduction ordered in *Kimbrough I* had his appellate lawyer asked for it. The result in *Jones* strongly suggests that the correct relief in this case is a writ conditioned on reinstatement of the judgment of *Kimbrough I*.

A new appeal ordered by the state appellate courts would also violate Kimbrough's Fourteenth Amendment right to equal protection. There can be no rational basis to treat Kimbrough differently just because his appellate ineffective-assistance claim prevailed in federal court instead of in state court.

Finally, there is no provision of state law under which the Indiana appellate courts have the authority to order and decide a new appeal of a judgment that is completely final and untouched by any decision of a federal court. The federal courts should not grant habeas relief conditioned on relief that the state courts cannot legitimately implement.

Argument

I. The district court correctly granted Kimbrough habeas relief for his appellate ineffective-assistance claim.

Standard of Review

The Court reviews *de novo* a district court's disposition of a habeas petition filed under 28 U.S.C. § 2254. *E.g.*, *Carter v. Thompson*, 690 F.3d 837, 843 (7th Cir. 2012).

A. To affirm district court, the Court need not overrule *Miller v. Zatecky*, because in this case, we know, as a matter of fact, that the probability is close to one that Kimbrough would have obtained sentencing relief had his lawyer made a Rule 7(B) argument.

Strickland says that prejudice results from a lawyer's constitutionally deficient performance when there is a reasonable probability of a different result. 668 U.S. at 694. *Strickland* also says that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. The "proceeding whose result is being challenged" in this case is *Kimbrough I*.

In most cases, the analysis of *Strickland* prejudice has to proceed by hypothetical. That is not so here. Because hindsight is permissible when analyzing *Strickland* prejudice," *Shaw*,721 F.3d at 918, we know the probability is practically one that the *Kimbrough I* majority would have granted Kimbrough a sentence reduction under Rule 7(B) had he asked for it. That is, actuality is the best proof of possibility. The *Kimbrough III* court said that that the thing that actually happened could not have reasonably happened. That is simply incoherent. As a matter of experience, if not logic, it is also absolutely unreasonable. *Cf. Martin v. Grosshans*, 424 F.3d 588, 591 (7th Cir. 2005) (finding a Wisconsin state court's illogical reasoning made its conclusion unreasonable).

The canard that "full briefing" would have made any difference is just that. The Indiana Supreme Court said in *Kimbrough II* that Judge Mathias, in his *Kimbrough I* dissent, "undertook a thorough analysis of the nature of Kimbrough's offenses and his character and concluded that Kimbrough's sentence was not inappropriate." *Kimbrough II*, 979 N.E.2d at 630 n.1; S.A. 28. And so he did.

In all of the iterations of this case, no one, including the Superintendent now in this Court, has ever added anything to Judge Mathias's dissent that "full briefing" would have supplemented." In its transfer petition in *Kimbrough I*, the State merely added a coda that Kimbrough's sentence was not inappropriate for the reasons given by Judge Mathias. App. 14a. In its brief in *Kimbrough III*, the State made no argument Judge Mathias had not already made. See App. 33a–36a. *Kimbrough III*, said it was doing its own Rule 7(B) analysis, "[f]ollowing in Judge Mathias's footsteps, and with the benefit of full briefing." *Kimbrough III*, slip op. at 9; S.A. 46. *Kimbrough III* followed quite precisely in Judge Mathias's footsteps, adding nothing. *See Kimbrough III*, slip op. at 9–11 ; S.A. 46–48. In the district court, the Superintendent again added nothing not already covered by Judge Mathias's dissent. See Return, D.E. 10 at 10– 12. And finally, in this Court, the Superintendent does not add anything to the *Kimbrough III* "full briefing" analysis, which, itself, added nothing to Judge Mathias's dissent. See Br. of Appellant at 15–16.

If "full briefing" would have added nothing to Judge Mathias's dissent, one would think the opinion and argument of a judicial colleague would be more persuasive than a brief from the State saying nothing more.

For these reasons, and for the reasons given by the district court, the *Kimbrough III* decision with respect to *Strickland* prejudice was at least an unreasonable application of *Strickland*, itself, if not absolutely contrary to it.

B. The Court should, nevertheless, overrule *Miller*, because this case completely exposes why *Miller* was wrongly decided.

1. *Miller* misunderstood the entirely discretionary nature of appellate sentencing relief under Rule 7(B).

Answers to questions of state law are, by definition, not discretionary. In other words, with questions of state law, there is generally a correct answer. Rule 7(B) sentencing determinations, on the other hand, depend on a state court's sense of "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). "The principal role of appellate review should be to attempt to leaven the outliers . . . but not to achieve a perceived correct' result in each case." *Id.* at 1225 (internal quotation marks omitted) (citation omitted); *see also Myers v. State*, 27 N.E.3d 1069, 1081–82 (Ind. 2015). "Appellate review of such sentences proceeds on a basis somewhat different from the methods that apply to other issues that typically are the subject of a criminal appeal." *Cooper v. State*, 540 N.E.2d 1216, 1218 (Ind. 1989). That method of review balances "the trial court's sentencing decision with the possibility of appellate revision on appeal [and] places central focus on the role of the trial judge, while reserving for the appellate court the chance to review the matter in a climate more distant from local clamor." *Parks v. State*, 22 N.E.3d 552, 556 (Ind. 2014) (Dickson, J., dissenting) (internal quotation marks omitted) (citation omitted).

In fact, by virtue of its origins, Rule 7(B) review is very much akin to an original sentencing by a trial court.

> The English statute establishing the Court of Criminal Appeals set forth that court's power to review and revise sentences as follows: On appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, and in any other case shall dismiss the appeal.

> Criminal Appeal Act, 1907, 7 Edward 7, ch. 23 § 4(3). For much of the period after the voters adopted this provision of the state constitution, this Court constrained review of sentences under a rule that provided that appellate courts could not revise sentences unless "the sentence was manifestly unreasonable in light of the offense and the offender." *See* Ind. Appellate Rule 7(B) (2002). This barrier was so high that it ran the risk of impinging on another constitutional right contained in Article 7, that the Supreme Court's rules shall "provide in all cases an absolute right to one appeal." Ind. Const. art. VII, § 6.
>
> Accordingly, we have taken modest steps to provide more realistic appeal of sentencing issues. The present rule says: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B).

Serino v. State, 798 N.E.2d 852, 856–57 (Ind. 2003). No one would say that a sentence imposed by a trial court is a "statement of state law." There is similarly no reason to say that a Rule 7(B) sentencing decision in an appeal, whatever it is, is "a statement of state law."

2. *Miller* misunderstood the structure of Indiana's appellate courts.

Any panel of the Indiana Court of Appeals is free to disagree with any other panel. There is no equivalent of "circuit precedent"; there is no *en banc* process; and only the Indiana Supreme Court can resolve conflicts in the decisions of the Court of Appeals. *See, e.g. Gaddie v. State*, 10 N.E.3d 1249, 1251–52 (Ind. 2014) ("We reach the same result but granted transfer to put to rest a conflict among various decisions in the Court of Appeals."); *see also* Ind. Appellate Rule 57(H)(1) (a principal for reason justifying transfer is that "[t[he Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals on the same important issue.") Consequently, absent unambiguous parallel authority of the Indiana Supreme Court, it is very hard to characterize anything the Indiana Court of Appeals says as a statement of state law. That is especially true of memorandum decisions

which, by rule, may not be regarded as precedent and may only be cited to establish *res judicata*, collateral estoppel, or law of the case. Ind. Appellate Rule 65(D). And *Kimbrough III* was a memorandum decision.

At best, *Kimbrough III*'s pronouncement regarding its view of 7(B) relief can only establish the law of Kimbrough's post-conviction case; it cannot be "a statement of state law."

3. *Miller* cannot coexist with *Shaw v. Wilson* and *Jones v. Zatecky*

In both *Shaw* and Jones, the Indiana Court of Appeals had said, as a matter of state law, that late amendments to charging informations had been permissible despite a statute saying otherwise. In neither *Shaw* nor *Jones* did the Court say that was the end of the matter of *Strickland* prejudice—that because of the state-court decisions regarding the state-law question, the probability of a different result was zero. And both *Shaw* and *Jones* involved a question of state law to which there was more clearly a correct answer to the state-law question.

Shaw and *Jones* were correctly decided; *Miller* was not, and the Court should overrule *Miller*.

For all of these reasons, although it need not do so to affirm the district court's decision on the merits of Kimbrough's appellate ineffective-assistance claim, the Court should overrule *Miller*.

C. The Superintendent's ancillary arguments are meritless.

The Superintendant makes two additional arguments. First, he says, the decision in *Kimbrough III*, rests on independent and adequate state grounds that bar habeas relief. Br. of Appellant at 11, 14. Second, he says, the *Kimbrough I* decision is irrelevant to Kimbrough's appellate ineffective-assistance claim, because *Kimbrough I* did not reduce Kimbrough's sentence under the authority of Indiana Appellate Rule 7(B). Br. of Appellant at 15. The first argument misunderstands the doctrine of "independent state

grounds" as applied to habeas cases; the second is completely contradicted by the record and, in any event, the *Kimbrough I* court had no authority other than Rule 7(B) to reduce Kimbrough's sentence.

1. This case has nothing to do with independent and adequate state grounds.

In habeas cases, the doctrine of independent and adequate state grounds only applies to state *procedural* rulings. 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure*, § 26.1 (2018). Because *only* federal claims are cognizable in habeas proceedings, a state ground, however independent and adequate, can *never* dispose of the *merits* of habeas petition. "[G]iven what a petition for habeas corpus is, the substantive merit of a legal claim contained therein is bound to be governed by federal law" *Richardson v. Lemke*, 745 F.3d. 258, 268 (7th Cir. 2014).[2]

In any event, the Superintendent should actually be glad that his argument about adequate and independent state grounds completely misses its mark. Were he correct, it would mean that the *Kimbrough III* decision did not decide the merits of Kimbrough's *federal* ineffective-assistance claim. Kimbrough's appellate ineffective-assistance claim was not procedurally defaulted in any way, and if *Kimbrough III* did not decide the federal *Strickland* question, this Court could dispense with AEDPA review and proceed to the merits *de novo* under 28 U.S.C. § 2243. *See*, *e.g.*, *Cone v. Bell*,

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[2] Further, applying the doctrine of independent and adequate state grounds to the merits would be completely unmoored from the doctrine's origins and purpose in habeas proceedings. When applied in a habeas case, the doctrine is not jurisdictional, because the federal court is not actually reviewing a judgment. *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). Instead, "[a]pplication of the 'independent and adequate state ground' doctrine to federal habeas review is based upon *equitable* considerations of federalism and comity." *Id.* at 523 (*emphasis added*). It only exists so that states can "correct[] their own mistakes" and so that would-be habeas petitioners cannot evade state procedural bars. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991).

556 U.S. 449, 471 (2009) (Where the state courts have not reached the merits of a federal claim, "habeas review is not subject to the deferential standard that applies under [the] AEDPA"). That is, the Superintendent would lose immediately, because he would not then even have the thin reed of *Miller* to support his argument.

2. In fact, *Kimbrough I* reduced Kimbrough's sentence under the authority of Indiana Appellate Rule 7(B), and the Superintendent should be judicially estopped from arguing otherwise.

The district court accurately and completely described the factual record establishing beyond doubt that *Kimbrough I* reduced Kimbrough's sentence under Rule 7(B). See Entry, D.E. 20 at 10–11 ; App. 47a–48a. But even if there were any ambiguity in the record about this, there was no other state-law provision under which the *Kimbrough I* court could have ordered Kimbrough's sentence reduced.

Finally, the Superintendent should be judicially estopped from arguing now, in this Court, that *Kimbrough I* did not reduce Kimbrough's sentence under the authority of Rule 7(B). The State's *sole* question presented in its *Kimbrough I* transfer petition was: "Does an appellate court's authority to correct sentencing errors extend to using Appellate Rule 7(B) to *sua sponte* revise an otherwise proper sentence that the defendant does not challenge as inappropriate?" App. 3a. That transfer petition was granted, and the State prevailed in *Kimbrough II* with its argument that sentencing relief under Rule 7(B) is unavailable, if not asked for.

The Supreme Court has explained when the equitable doctrine of judicial estoppel should apply:

> "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U. S. 680, 689 (1895). This rule, known as judicial estoppel,

> "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U. S. 211, 227, n. 8 (2000); see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

New Hampshire v. Maine, 532 U.S. 742, 749 (2001). The State of Indiana, the Superintendent's predecessor in interest, succeeded in the state courts with its argument that Rule 7(B) relief is unavailable, if unasked for. The Superintendent should be judicially estopped from now arguing that it wasn't Rule 7(B) relief at all that Kimbrough I granted.

D. *Strickland* Performance in Fact

First, the Superintendent has not made an argument in this Court that the performance of Kimbrough's appellate lawyer was, in fact, constitutionally adequate. The Court should therefore consider forfeited any argument in this regard. *See, e.g., Hill v. Werlinger*, 695 F.3d 644, 647 (7th Cir. 2012) (forfeiture of a waiver argument that was not made).

Second, in light of his argument that Kimbrough's appellate ineffective-assistance claim fails as a matter of state law under *Miller*, the Superintendent's apparent concession regarding *Strickland* performance should be surprising. A lawyer cannot perform deficiently in the *Strickland* sense if whatever the lawyer allegedly failed to do would have been futile as a matter of law. *See*, *e.g., Carter v. Douma*, 796 F.3d 726, 736 (7th Cir. 2015) (no deficient performance "by failing to make a futile objection").

Relying on *Miller v. Zatecky*, the Superintendent's argument is necessarily that the *Kimbrough III* decision means a Rule 7(B) argument in

Kimbrough I would have had a zero chance of success. If that is so, then Schlesinger cannot have performed deficiently by failing to make an argument that would have been entirely futile.

On the merits, because *Kimbrough III* did not address *Strickland* performance, the district court correctly reviewed the issue *de novo*. *See* Entry, D.E. 20 at 4; App. 41a (citing *Porter v. McCollum*, 558 U.S. 30, 38 (2009), and *Rompilla v. Beard*, 545 U.S. 374, 390 (2005). It also correctly reviewed the issue's merits, concluding that Schlesinger had performed deficiently in the *Strickland* sense. See D.E. 20 at 5–8; App. 42a–45a.

There is nothing to add to the district court's correct analysis of *Strickland* performance in fact, and the Court should affirm this part of the district court's judgment.

E. *Strickland* Prejudice in Fact

Kimbrough was prejudiced in fact by Schlesinger's performance for the same reason that the decision in *Kimbrough III* was an unreasonably decided the *Strickland* prejudice question. Again, actuality is the best proof of possibility. More formally, as the district court said: "[B]ecause the *Kimbrough I* court *sua sponte* concluded that a Rule 7(B) reduction was appropriate, it follows that Kimbrough would have had a reasonable chance of success on this argument [that his sentence should be reduced under the rule]." Entry, D.E. 20 at 12; App. 49a.

II. The relief should have either been conditioned the relief on reinstating the 40-year sentence reduction ordered in *Kimbrough I* or on a new sentencing hearing.

Standard of Review

"[A] court has broad discretion in conditioning a judgment granting habeas relief." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). This suggests that the Court might review conditional habeas relief ordered by a district

court for an abuse of discretion. At the same time, the Court generally reviews the disposition of a habeas case *de novo*. *Carter,* 690 F.3d at 843. The district court said that a new appeal was the only "logical" conditional relief. Entry, D.E. 20 at 12; App. 49a. There is, then, nothing fact-bound about the district court's decision in this regard and no reason, in Kimbrough's view, that the Court should not review the conditional relief ordered *de novo*.

A. Habeas relief is equitable in nature and, at least in an AEDPA case, it is inequitable to place a successful habeas petitioner in a position worse than he or she would have occupied had his or her claim succeeded in state court.

The district court should have conditioned habeas relief either on reinstatement of the *Kimbrough I* judgment or on new sentencing hearing in state court. The conditional relief of a new appeal ordered by the district court leaves Kimbrough in a worse position than he would have been in had his appellate ineffective-assistance claim prevailed in the state courts and therefore grants the State a windfall to which it is not entitled, namely the opportunity to win two out of three falls.

"[H]abeas corpus has traditionally been regarded as governed by equitable principles." *Fay v. Noia*, 372 U.S. 391, 438 (1963) (citation omitted), *overruled on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977); *see also Schlup v. Delo*, 513 U.S. 298, 299 (1995) ("[H]abeas corpus is, at its core, an equitable remedy . . . ."). Additionally, "Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation . . . .'" *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

Conditional habeas relief has as its goal the restoration of the *status quo* before the constitutional violation occurred. It does so in two ways: 1) by giving the State an opportunity to substitute a valid judgment for an invalid one, *see Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring); and 2) by placing the habeas petitioner in the position he would have

occupied had the constitutional violation not occurred, *see Nunes v. Mueller*, 350 F.3d 1045, 1057 (9th Cir. 2003). In the usual case, in another state, these two means of restoring the *status quo ante* are aligned, and the equitable remedy for an appellate ineffective-assistance claim is a new appeal in state court.

But in Indiana, as a matter of state post-conviction law, a new appeal is not an available remedy for a meritorious appellate ineffective assistance claim. As the Indiana Court of Appeals explained in *Montgomery v. State*, the Indiana Post-Conviction Rules do not permit a new appeal, 21 N.E.3d 846, 856 n.4 (Ind. Ct. App. 2014), *trans. denied*. Relief ordering a new appeal, said *Montgomery*, is not "an appropriate order with respect to the conviction or sentence" within the meaning of Indiana Post-Conviction Rule 1, § 6. *Id*. In fact, the *Montgomery* court said that it was "not aware of authority for such an order," *id*., and found the trial court's order of a new appeal "perplexing." *Id*. at 856. This really is state law with which this Court is not free to disagree. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *see also Miller*, 820 F.3d at 277.

Kimbrough is unaware of a single reported Indiana case in which a new appeal has been ordered as state post-conviction relief for a meritorious appellate ineffective-assistance claim. And, in fact, Indiana practice follows what *Montgomery* said. In *Gray v. State,* 841 N.E.2d 1210 (Ind. Ct. App. 2006), the court reversed the denial of the Gray's post-conviction relief and ordered a new trial after finding the Gray's appellate counsel's "deficient performance prejudiced Gray because had the issue been raised on direct appeal, he very likely would have received a new trial." *Id*. at 1220. More recently, in *Wilson v. State*, 94 N.E.3d 312, 325 (Ind. Ct. App. 2018), the court concluded that Wilson's appellate lawyer had been ineffective and remanded the case to the trial court for "further proceedings." *Id*. at 325. The trial court

subsequently granted a motion for a new trial date. *State v. Wilson*, Lake Superior Court No. 3, Case No. 45G03–1403–FA–10, entered June 12, 2018.[3]

This is an AEDPA case. That means that, on any reasonable view, Kimbrough should have prevailed in the state courts. Not only did the state courts get Kimbrough's appellate ineffective-assistance claim wrong, the *Kimbrough III* decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The consequence for Kimbrough's case is this. Had his appellate ineffective-assistance claim prevailed in the state post-conviction proceedings, one of two things would have been ordered as relief: 1) reinstatement of the *Kimbrough I* judgment, which cut Kimbrough's sentence from 80 years to 40 years; or 2) a new sentencing hearing. A new appeal as habeas relief clearly puts Kimbrough in a materially worse position than he would have been in had he prevailed earlier in the state courts with his appellate ineffective-assistance claim. It also puts the State in a materially better position, having only to win two out of three Rule 7(B) arguments in the state appellate courts.

There is an additional way that the conditional relief of a new direct appeal in state court disadvantages Kimbrough. It turns out that not all Indiana direct appeals are created equal. After a direct appeal, the Indiana Supreme Court has said that there is a state-law right to file a post-conviction petition under Indiana Post-Conviction Rule 1, § 1. *See Baird v. State*, 833 N.E.2d 28, 29 (Ind. 2003) (a person is entitled to a direct appeal and a first post-conviction petition "as a matter of right."). But after a new

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[3] The website for Indiana's online dockets is https://public.courts.in.gov/mycase/#/vw/Search. It is not possible to create permanent links to cases. The trial docket for Major Wilson's case appears if one searches there for the case number: 45G03–1403–FA–10.

direct appeal resulting from a federal conditional writ, the Indiana state courts treat state post-conviction petitions as successive, subject to authorization by the appropriate Indiana appellate court and subject to the restrictive standards of Indiana Post-Conviction Rule 1, § 12. *See Shaw v. State*, 2018 Ind. App. Unpub. LEXIS 1195 (Ind. Ct. App. Oct. 11, 2018) (*mem.*), *reh'g denied*, *trans. to be sought*. So a new appeal as conditional relief truly does not restore the *status quo ante*.

This Court is clearly mindful that habeas relief is equitable in nature. In *Jones v. Zatecky*, for a trial ineffective-assistance claim, the Court did not order the customary new trial as conditional relief. Instead, it ordered that Jones be resentenced without a conviction that had resulted from a late amendment to a charging information that his trial lawyer had failed to object to. *See Jones*, 2019 U.S. App. LEXIS 6074 at *10. Jones's prosecution occurred in 2005. *Id.* at *1. In 2005, as a matter at least of the statutory language involved, the late amendment to the charging information in Jones's case was impermissible. *Id.* at *7. But in 2007, the statute governing amendments to charging informations was amended. *See Shaw v. Wilson*, 721 F.3d at 912–13. Under the 2007 amendment to the statute, were Jones tried today, there would be no obstacle to the State amending the information to now include the confinement charge that was late in 2005. *See id.* at 919. In Jones's case, then, a new trial as conditional relief would not have placed Jones in the same position he would have occupied had the Sixth Amendment violation not occurred. And it is for that reason, it appears, that instead of a new trial, the Court ordered Jones's sentences adjusted without the confinement conviction that had resulted from the late amendment to the charging information. *See also Sanders v. Cotton*, 398 F.3d 572, 585 (7th Cir. 2005) (ordering a new trial for an appellate ineffective-assistance claim because the appellate argument not made "was an obvious and stronger argument" and "there is a reasonable probability the appellate court would have ordered a new trial" had the missed argument been made.)

The result in *Jones* strongly suggests that the appropriate conditional relief in this case is reinstatement of the *Kimbrough I* decision, which reduced Kimbrough's sentence by 40 years. But whether it is that or a new sentencing hearing, a new appeal as conditional relief is plainly inequitable.

The final reason that a new appeal should not be ordered as conditional relief is that it an invitation to the Indiana appellate courts to commit an independent constitutional violation. There is no rational basis for the Indiana courts to treat Kimbrough differently simply because his appellate ineffective-assistance claim prevailed in federal court. Had the claim prevailed in state court, the *Kimbrough I* judgment would have been reinstated, or Kimbrough would have had received a new sentencing hearing as relief. Under the circumstances, an order by a state appellate court for a new appeal would violate Kimbrough's Fourteenth Amendment right to equal protection. The federal courts should decline to issue such an invitation.

B. Federal courts should not order conditional habeas relief that state courts literally have no power to implement.

The Indiana state appellate courts have the power to hear a case—jurisdiction—only if there is a state constitutional provision or rule granting that power. *Packard v. Shoopman*, 852 N.E.2d 927, 931 (Ind. 2006) ("Pursuant to Article VII, Sections 4 and 6, appellate jurisdiction is established by rules, not by statute, and the judiciary, not the legislature, is the source of the rules governing appellate jurisdiction.). *See* Ind. Appellate Rule 5(A) (listing areas of the Indiana Court of Appeals' appellate jurisdiction as from "final judgments" of various lower courts.) Nothing *Packard* or the Indiana Appellate Rules includes as a source of appellate jurisdiction either "a decision of a federal court" or "when the State thinks a new appeal would be a good idea."

No Indiana constitutional provision or appellate rule grants the Indiana appellate courts jurisdiction to hear, at the State's request, new appeals

ordered as conditional federal habeas relief. As a matter of federalism and comity, the federal courts should not order conditional habeas relief that the state courts have no legitimate power to implement.

There is simply a missing jurisdictional part in Indiana appellate procedure. After a federal court has granted habeas relief for an appellate ineffective-assistance claim, and after the Indiana Attorney General has asked a state appellate court to institute a new appeal, there is no mechanism—no state constitutional provision or rule—to re-open a long final judgment so that there can be an actual judgment to review in the new appeal.

When a federal court grants federal post-conviction relief under 28 U.S.C. § 2255, it vacates the original judgment, giving the successful federal prisoner the opportunity to file a new appeal. *See*, *e.g. Page v. United States,* 884 F.2d 300, 302 (7th Cir. 1989) ("[Appellate] [i]neffective assistance may justify vacating and reentering the judgment of conviction, allowing a fresh appeal."). And among the states, Missouri appellate courts, for example, vacate their own earlier judgments and recall the mandate in a first direct appeal so that a second appeal may be taken. *State v. Gray*, 478 S.W.2d 654, 656–57 (Mo. 1972); *see also Jackson v. Dugger*, 580 So. 2d 161, 162 (Fla. Dist. Ct. App. 1991) (authorizing a new notice of appeal); *Ex parte Daigle*, 848 S.W.2d 691, 692 (Tex. Crim. App. 1993) ("proper remedy . . . is to return the Applicant to the point at which he can give notice of appeal. He may then, with the aid of counsel, follow the proper procedures in order that a meaningful appeal from his conviction may be taken."); *State v. Swiger*, 289 S.E.2d 497, 498 (W. Va. 1982) (resentencing occurred "to allow for a new appeal period").

That is not to say that Indiana appellate courts do not, in fact, order and decide come-back appeals from federal court. The Indiana Supreme Court ordered and decided a new appeal in *Mason v. State*, 689 N.E.2d 1233 (Ind. 1997), after this Court granted a new appeal as conditional habeas relief in

Mason v. Hanks, 97 F.3d 887 (7th Cir. 1996). But the jurisdictional problem Kimbrough is identifying was not raised in *Mason*.

The Indiana Supreme Court *did* recognize the problem long ago in *Cook v. State*, 231 Ind. 695, 97 N.E.2d 625 (1953). In *Cook*, Cook had been denied a direct appeal, because he had been prevented from getting in on time the papers necessary to begin the appeal. *Id*. at 698, 97 N.E.2d at 625. Having lost in the state courts on a federal equal protection claim, Cook succeeded in the federal courts, which held that he had been "the victim of a discriminatory denial of his statutory right of appeal in violation of the Equal Protection Clause of the Fourteenth Amendment . . . ." *Id*. at 698, 97 N.E.2d at 626.

The Indiana Attorney General filed with Indiana Supreme Court a request that a new appeal be ordered, *id*. at 700, 97 N.E.2d at 626, and that court took quite seriously the question of its authority to order a new appeal: "So far as we know, the situation presented here is unique. . . . We have never before authorized a delayed appeal at the instance of the State." *Id*. at 700, 97 N.E.2d at 626–27. But the *Cook* court concluded that it had the inherent authority to order *a belated appeal* under that specific circumstance: "Where an appeal has not been taken within the normal time allowed by the rules relating to appeals, this court has inherent authority to extend the time and accept jurisdiction of the appeal, for sufficient reason shown. The obstruction of Cook's efforts to perfect his appeal furnish good cause for granting him a delayed appeal." *Id*. at 700–01, 97 N.E.2d at 627 (citations omitted).

The inherent authority to extend a deadline in an appeal that never happened is quite a different thing from fabricating a new appeal that is entirely untethered to any appealable judgment. After the Indiana Supreme Court has denied transfer, any decision of the Court of Appeals is entirely final. *See* Ind. Appellate Rule 58(A) ("The opinion or not-for-publication memorandum decision of the Court of Appeals shall be final except where a Petition to Transfer has been granted by the Supreme Court.").

Two more recent cases of the Indiana Court Appeals expose the present-day incarnation of the very real jurisdictional problem that the Indiana state courts, at least so far, have chosen to evade, if not ignore. In *Shaw v. Wilson*, of course, this Court ordered habeas relief conditioned on a new appeal in state court. 721 F.3d at 919–20. When that case came back to state court, Shaw raised the jurisdictional problem, among other state-law procedural problems. *Shaw v. State*, 82 N.E.3d 886, 893 (Ind. Ct. App. 2017), *trans. denied*. The Indiana Court of Appeals could identify no constitutional provision or rule that gave it the power to hear the new appeal that the Indiana Attorney General had requested. Instead, it said Shaw was attempting an impermissible collateral attack on this Court's judgment:

> All of these arguments stem from the Seventh Circuit's opinion that granted Shaw relief on his federal habeas petition. Specifically, it was the Seventh Circuit that offered the State the choice of either granting Shaw a new direct appeal or releasing him. **If Shaw believed the Seventh Circuit's order was in error, Shaw should have sought relief in the federal courts. Shaw's attempts to undermine the Seventh Circuit's order in state court amount to an impermissible collateral attack.** *See Ind. Dep't of Envtl. Mgmt. v. Conard*, 614 N.E.2d 916, 922 (Ind. 1993) ("A collateral attack on a judgment is an attack made in a proceeding that has independent purpose other than to impeach or overturn the judgment, although impeaching or overturning the judgment may be necessary for the success of the motion."); *Dawson v. Estate of Ott*, 796 N.E.2d 1190, 1196 (Ind. Ct. App. 2003) (noting that an action in a state court that attempts to undermine a federal court decision is an impermissible collateral attack).

Id. (Emphasis added).

This Court is also familiar with Anthony Barnett's case. After it had decided *Shaw v. Wilson*, the Court summarily reversed the district court's denial of habeas relief for Barnett on a claim indistinguishable from that in *Shaw*; on remand, the district court granted a writ conditioned on a new appeal in state court. *See Barnett v. Neal*, 860 F.3d 570, 572 (7th Cir. 2017).

When Barnett's case came back to state court for the new appeal, Barnett raised the identical jurisdictional problem raised in Shaw's state-court reincarnation. *See Barnett v. State*, 83 N.E.3d 93, 99 (2017), *trans. denied*. In a decision issued eight days after *Shaw*, an entirely different panel of the Indiana Court of Appeals addressed the jurisdictional conundrum presented in terms almost identical to those is *Shaw*:

> By filing [his habeas] petition, Barnett surrendered himself to the federal court's determination as to the proper remedy for such a violation. . . . Here, the District Court opted to grant Barnett a conditional writ of habeas corpus, which allowed the State to either grant Barnett leave to pursue a new direct appeal within 120 days or release Barnett. **If Barnett believed that it was error for the District Court to grant a new direct appeal as part of the remedy, he should have sought relief in the federal courts. Barnett's attempts to undermine the District Court's order in state court amount to an impermissible collateral attack.** *See Minix v. Canarecci*, 956 N.E.2d 62, 71 (Ind. Ct. App. 2011) (party who believed federal consent judgment was in error should have sought relief in federal courts), *trans. denied*; *Dawson v. Estate of Ott*, 796 N.E.2d 1190, 1196 (Ind. Ct. App. 2003) (noting that action in state court that attempts to undermine federal court decision is impermissible collateral attack).

Id. (Emphasis added).

The decisions of the Indiana Court of Appeals in both *Shaw* and *Barnett* identify the conditional writs issued by federal courts as the source for *its* authority to order and decide new appeals of completely final judgments that have remained untouched—at the complete discretion of the State, no less. Neither decision identifies any source of Indiana law for appellate jurisdiction in a new appeal ordered as conditional habeas relief. That is because there is none.

Of course, conditional writs of habeas corpus issued by federal courts cannot, themselves, create appellate jurisdiction in state courts. "Habeas lies to enforce the right of personal liberty; when that right is denied and a

person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner." *Noia*, 372 U.S. at 430–31. If a federal habeas court cannot revise a state-court judgment, it is hard to imagine how it could, by itself, create state-court appellate jurisdiction.

Which is to say that the Indiana Court of Appeals was profoundly mistaken in both *Shaw* and *Barnett* that Shaw's or Barnett's jurisdictional objections were impermissible collateral attacks on the federal-court judgments involved. The conditional writs in both cases were true, but limited, alternatives: either grant Shaw and Barnett new appeals or release them. In no way were they—or could they have been—orders to the Indiana appellate courts to institute new appeals if the State so requests. As this Court said in *Barnett v. Neal*:

> The Indiana Constitution provides for a government in which the legislative, executive, and judicial powers are separated. See Ind. Const. art. III, § 1; *see also State v. Monfort*, 723 N.E.2d 407, 411 (Ind. 2000). Note that this problem does not arise in the more typical conditional writs, in which the state is given the choice of instituting a new prosecution or releasing the petitioner. The executive authorities control prosecutions, but **only the judicial branch can decide whether the criteria for a new appeal have been satisfied.**

860 F.3d at 573–74 (emphasis added). And *Monfort v. State*, relied upon by this Court in the quotation from *Barnett v. Neal* above, puts to rest any idea that the State's request for a new appeal can be a legitimate source of appellate jurisdiction: "The true interpretation of this separation of powers is, that any one department of the government may not be controlled or even embarrassed by another department, unless so ordained in the Constitution." 723 N.E.2d 407, 411 (Ind. 2000).

In *Price v. Georgia*, 398 U.S. 323 (1970), the Supreme Court reversed a conviction because of a double jeopardy violation. *Id*. at 329. But the Court

had a question whether, as a matter of Georgia state law, Price could be re-indicted and retried for voluntary manslaughter. *Id*. at 332. Because it was concerned about whether the relief it was inclined to order could be implemented as a matter of state law, it requested post-argument memoranda from the parties. *Id*.

Price was a direct appeal, not a habeas case. But the lesson of *Price* is applicable here: federal courts should not order relief that state law does not permit and that state courts therefore cannot implement.

Kimbrough is not asking this Court to decide any question of Indiana appellate procedure. It does not have to, because the Indiana Supreme Court said in *Packard*, above, 852 N.E.2d at 831, that the jurisdiction of the Indiana appellate courts is created by the Indiana Constitution, itself, or by rule. *See Jones*, 2019 U.S. App. LEXIS 6074 at *9–10 ("Jones's case does not require us to resolve any question of state law; it demands only the application of the state's statutes, as interpreted by Indiana's highest court.") Because no state constitutional provision or appellate rule grants the Indiana appellate courts the authority to order and decide a new appeal in Kimbrough's case—of a judgment long final and undisturbed by anything—a new appeal is not appropriate conditional habeas relief.

Conclusion

For the foregoing reasons, Kimbrough respectfully requests that the Court: 1) affirm the judgment of the district court granting Kimbrough a conditional writ of habeas corpus; but 2) reverse the district court with respect to the conditional relief it ordered, ordering any appropriate relief instead.

Respectfully submitted,

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Rule 32(g) Word-Count Certification

I hereby certify that, according to the word-count function of Microsoft Word 2003, excluding the items listed in Rule 32(f), the foregoing opening and response briefs of the Appellee / Cross-Appellant, contain 12,793 words, which is less than the 16,500 words permitted by Circuit Rule 28.1.

/s Michael K. Ausbrook
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Certificate of Service

I hereby certify that on March 30, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Circuit Rule 30(d) Statement

Under Circuit Rule 30(d), undersigned counsel of record for the Petitioner-Appellee / Cross-Appellant, John W. Kimbrough, III, hereby certifies that all material required by Circuit Rules 30(a) & (b), excluding that material exempted by 30(c), is contained in the Required Short Appendix attached to this brief.

/s Michael K. Ausbrook
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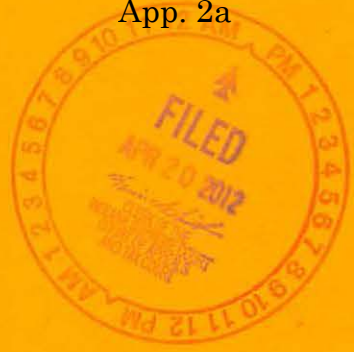

IN THE

INDIANA SUPREME COURT

CAUSE NO. ~~45A04-1106-CR-328~~

45S04-1212-CR-687

JOHN KIMBROUGH III,

Appellant (*Defendant below*),

v.

STATE OF INDIANA,

Appellee (*Plaintiff below*).

Appeal from the
Lake Superior Court,

Cause No. 45G04-1011-FA-48,

The Honorable
Kathleen Sullivan,
Judge.

PETITION TO TRANSFER

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QUESTION PRESENTED

Does an appellate court's authority to "correct sentencing errors" extend to using Appellate Rule 7(B) to *sua sponte* revise an otherwise proper sentence that the defendant does not challenge as inappropriate?

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PETITION TO TRANSFER

Appellate Rule 7(B) allows an appellate court "to revise an otherwise *proper* criminal sentence imposed by a trial court." *Akard v. State*, 937 N.E.2d 811, 813 (Ind. 2010) (emphasis added). Only when a defendant requests appellate review and revision, may a reviewing court "affirm, reduce, or increase the sentence." *McCullough v. State*, 900 N.E.2d 745, 750 (Ind. 2009). Here, although Kimbrough did not argue that his sentence was inappropriate, a majority panel of the Court of Appeals *sua sponte* revised Kimbrough's sentence by half. *Kimbrough v. State*, No. 45A04-1106-CR-328, slip op. at 10 (Ind. Ct. App. Mar. 21, 2012). The majority exceeded its authority granted by Appellate Rule 7(B) and discarded over thirty years of case law, which only permits *sua sponte* correction of illegal sentences. Much like this Court has done to settle the power to *sua sponte* upwardly revise sentences, *see Akard*, 937 N.E.2d at 813–14, and the power to revise a sentence based solely on the State's request for revision, *see McCullough*, 900 N.E.2d at 750–51, it should grant transfer to determine the scope of an

appellate court's authority to unilaterally reduce a defendant's sentence. Ind. Appellate Rule 57(H)(2), (4), (6).

BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

The facts as found by the Court of Appeals are as follows:

> A.D. (Mother) began dating Kimbrough in January 2009. After approximately six months of dating, Mother introduced Kimbrough to her three children: J.L., a daughter who was born in January 2003, A.D., a daughter who was born in July 2004, and A.D.L., a son who suffered from cerebral palsy. The couple and the children did many things as a family, including staying at hotels to swim at the pool and staying at a casino hotel. Kimbrough routinely drove the children to school and helped them with their homework. When Mother and Kimbrough ended their relationship in the spring of 2010, Mother continued to allow Kimbrough to take the children to school. Mother did so because she trusted Kimbrough and the children loved him. At the time, Kimbrough lived in the basement of his grandparents' house.
>
> On the evening of October 29, 2010, Mother thought that J.L. appeared to be hiding something and acted scared. A.D. also acted like she did not want to talk, but ultimately told Mother that her vagina was hurting. Mother asked the two if anyone had touched them "down there" and after Mother's questioning for a third time, J.L. and A.D. indicated that Kimbrough had touch[ed] them inappropriately. *Transcript* at 136. J.L. was the one who brought up Kimbrough's name. Kimbrough had picked the girls up from school early that day and had the children alone the previous weekend.
>
> J.L. called her vagina a "private" and A.D. called hers a "cootie cat." *Transcript* at 148. Kimbrough would put baby oil on his penis prior to touching J.L. and A.D. A.D. said that Kimbrough would put his private area against hers and her sister's and that he would stick his private part in her "cootie cat." Kimbrough also licked A.D.'s vagina. While in the basement at Kimbrough's grandparents' house, Kimbrough put his private area up in A.D.'s "cootie cat." A.D. also observed Kimbrough putting his private area up in J.L.'s "cootie cat." When A.D. told Kimbrough to stop, he refused. Instead, Kimbrough would say no and instruct A.D. not to tell anyone what had happened.
>
> Kimbrough also touched J.L. in her "private" and in the back with his private part. He would put his private part up in J.L.'s private part and would sometimes stick his penis in J.L.'s back side. J.L. observed Kimbrough touching A.D. Kimbrough touched J.L. more than once with his penis and used his fingers to touch J.L. inside her "private." J.L. saw Kimbrough masturbating and then ejaculating. Kimbrough asked J.L. to touch his penis and she complied. The touching occurred both at the hotel and in the basement of Kimbrough's grandparents' house.
>
> On October 30, 2010, law enforcement officers were contacted and Mother took the girls to the emergency room for examination. Each girl was

> examined by Dr. Kathryn Watts, and both girls told her that Kimbrough had rubbed his penis against their vaginas and touched their vaginas with his hands. Both A.D. and J.L. denied full penetration, or full insertion of the penis inside the vaginal vault. During the physical examination, Dr. Watts found a small break in J.L.'s hymen, but the break was not fresh because there was no bleeding. According to Dr. Watts, a break such as that can be found in cases of sexual abuse and can heal in one or two weeks. A.D. told Dr. Watts that her vagina was hurting. Upon examination, Dr. Watts discovered that A.D. had redness around her vaginal openings and about a one centimeter tear in her hymen. According to Dr. Watts while such an opening is not unusual, it can be found in cases of sexual abuse. Further, redness can also be caused by penetration. J.L. and A.D. were later interviewed by an officer at the family assistance bureau center.
>
> On the evening of October 30, 2010, Kimbrough went to the residence of Sabrina Clark, his cousin. Kimbrough, who was scared, told his cousin to close the doors. Clark asked Kimbrough what was going on and he eventually said that he might be in trouble and that it was all his fault. Kimbrough also told Clark that he wanted to end his life. Clark pleaded with Kimbrough not to end his life. Police officers responded minutes later to Clark's residence and apprehended Kimbrough.
>
> The State charged Kimbrough with four counts of class A felony child molesting and two counts of class C felony child molesting. At the conclusion of Kimbrough's four-day jury trial, he was found guilty as charged. The trial court did not enter a judgment of conviction on the two counts of class C felony child molesting. The trial court did enter judgments of conviction as to the remaining counts and sentenced Kimbrough to an aggregate sentence of eighty years imprisonment.

Kimbrough, slip op. at 2–4.

On appeal, Kimbrough argued there was insufficient evidence to support his convictions and the jury was improperly instructed. *Id.* at 2. Kimbrough also claimed the trial court abused its discretion when it sentenced him by finding an improper aggravating and failed to give enough mitigating weight to his lack of criminal history. *Id.* at 8. He did not argue that his sentence was inappropriate or that it should otherwise be revised under Appellate Rule 7(B). *See generally Br. of Appellant.*

A unanimous panel affirmed the sufficiency and jury instruction issues. *Id.* at 6–7, 11. The panel was also unanimous in finding that the trial court did not abuse its discretion when it found the aggravating circumstances "that Kimbrough had recently violated the conditions of his

pre-trial release granted in another court, the young ages of the victims, and that Kimbrough was in a position of trust with the victims and violated that trust over a two-year period" and the trial court's finding of Kimbrough's lack of criminal convictions as a mitigating circumstance. *Id.* at 9–10. The panel divided two to one over whether the Court of Appeals had the authority to *sua sponte* revise Kimbrough's sentence and whether his sentence was in fact inappropriate. The majority, which held that it had a duty to "correct sentencing errors, *sua sponte*, if necessary," *id.* at 10 (citing *Comer v. State*, 839 N.E.2d 721, 726 (Ind. Ct. App. 2005)), found that because Kimbrough had no criminal history the trial court "abused its discretion" in imposing an eighty-year aggregate sentence, and revised the sentence to a forty-year aggregate sentence. *Id.* at 10.

Judge Mathias, in dissent, expressed his view that appellate review of a sentence under Appellate Rule 7(B) is limited, as this Court explained in *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. *Kimbrough*, slip op. at 12 (Mathias, J., dissenting). Therefore, he would not have reached the issue of whether Kimbrough's sentence was inappropriate because Kimbrough advanced no such argument on appeal. *Id.* at 13 (Mathias, J., dissenting). Moreover, Judge Mathias found that Kimbrough's sentence was not inappropriate and was substantially dissimilar to all other child molesting cases where this Court had revised sentences. *Id.* at 13–17 (Mathias, J., dissenting).

ARGUMENT

I.
An appellate court may review the appropriateness of a sentence only when the defendant raises the issue on appeal.

Indiana Appellate Rule 7(B) grants Indiana appellate courts the authority to "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of

the offender." It does not permit the Court of Appeals to revise a sentence on appropriateness grounds when the defendant does not raise the issue. Rather, its review is limited only to instances when a defendant challenges the sentence. *McCullough*, 900 N.E.2d at 750 (holding only when a defendant requests appellate review and revision, may a reviewing court "affirm, reduce, or increase the sentence"). *See also Akard*, 937 N.E.2d at 813 (same). The Court of Appeals has removed that restriction on its own authority.

To be sure, *McCullough* and *Akard* involve upward revisions of sentences, but this Court did not make that fact a limiting principle when it instructed the Court of Appeals to restrict its appellate review to cases where the defendant requests its review of a sentence. *Akard*, 937 N.E.2d at 813; *McCullough*, 900 N.E.2d at 750. The panel majority viewed its action as merely a matter of "correcting sentencing errors," *Kimbrough*, slip op. at 10, but as Judge Mathias observed, appropriateness is not error correction. *Id.*, slip op. at 13 n.3 (Mathias, J., dissenting). Rather, it is review of legal sentences. *Anglemeyer*, 868 N.E.2d at 491. Moreover, Judge Mathias correctly took issue with the Court of Appeals' holding that the trial court "abused its discretion," *Kimbrough*, slip op. at 10, in not according Kimbrough's mitigating circumstance enough weight and instead imposing a sentence above the advisory. *Id.* at 12 (Mathias, J., dissenting). Indeed, this Court has prohibited such a practice. *Anglemeyer*, 868 N.E.2d at 491. But whether phrased as an abuse of discretion or an inappropriate sentence, the Court of Appeals exceeded the scope of its authority for raising the issue on its own.

Limiting when an appellate court may revise the length of a sentence serves at least two purposes. First, it protects the autonomy of the trial court by preventing appellate courts from needlessly adjusting sentences that are otherwise legal. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008) ("[S]entencing is principally a discretionary function in which the trial court's

judgment should receive considerable deference."). Appellate Rule 7(B) allows an appellate court "to revise an otherwise *proper* criminal sentence imposed by a trial court." *Akard*, 937 N.E.2d at 813 (emphasis added).

As this Court has explained about Rule 7(B),

> It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue.

Anglemyer, 868 N.E.2d at 491. That is to say, there is a limit in allowing an appellate court from revising a sentence that is in every way legal. This is likely why the defendant bears the burden to prove that his sentence is inappropriate because he must persuade the court to change a legal sentence. *See Anglemyer* 868 N.E.2d at 490.

Second, by requiring a defendant to first raise the issue, it protects both the defendant's and the State's right to be heard on the issue. In the case of the State, it has the opportunity to argue the sentence was appropriate or inappropriately short. *McCullough*, 900 N.E.2d at 750–51 (stating "that the perspectives of both the defendant and the State will be helpful" in determining whether to revise a sentence). By requiring a defendant to request a sentence revision, the State will not be forced to preemptively defend every sentence in the nearly 1700 brief it files yearly. Otherwise, a court's opportunity to benefit from briefing is lost when a court takes it upon itself to summarily decide an issue on its own.

Allowing an appellate court to *sua sponte* find a sentence inappropriate is contrary to nearly three decades of case law. Appellate courts have typically *sua sponte* reviewed or corrected sentences that were illegal. First are sentences that violated double jeopardy or otherwise required a merging of convictions. *Carter v. State*, 929 N.E.2d 1276, 1277 (Ind. 2010)

(noting the Court of Appeals remanded for sentencing after *sua sponte* finding the convictions violated double jeopardy); *Logan v. State*, 729 N.E.2d 125, 136 (Ind. 2000) (addressing *sua sponte* whether the defendant's convictions violated double jeopardy); *Puckett v. State*, 843 N.E.2d 959, 964 (Ind. Ct. App. 2006) (remanding for sentencing because the trial court failed to properly merge convictions); *Ratliff v. State*, 741 N.E.2d 424, 435 (Ind. Ct. App. 2000) (same as *Puckett*), *trans. denied*; *Abercrombie v. State*, 543 N.E.2d 407, 409 (Ind. Ct. App. 1989) (finding that "injuries occurring in the 'same episode' cannot elevate the class of felony of more than one conviction" and remanded to post-conviction court to vacate one of the defendant's convictions and sentences for one of the two enhanced crimes); *Collins v. State*, 491 N.E.2d 1020, 1022 (Ind. Ct. App. 1986) (noting the trial court failed to properly merge the convictions).

Second is when the sentence violated a statute. *Morrow v. State*, 690 N.E.2d 183, 185 (Ind. 1997) (fixing the sentence to ensure that the defendant's failure to pay ordered fines or court costs would not lead to imprisonment); *Woodson v. State*, 483 N.E.2d 62, 64 n.2 (Ind. 1985) (finding the court erred by ordering a separate thirty year sentence for a habitual offender enhancement when it should have enhanced the underlying felony); *Chandler v. State*, 451 N.E.2d 319, 321 (Ind. 1983) (noting that the present criminal offense was required by statute to be served consecutively to a prior sentence); *Cuppett v. State*, 448 N.E.2d 298, 299 (Ind. 1983) (same as *Woodson*); *Jones v. State*, 755 N.E.2d 322, 331 (Ind. Ct. App. 2002) (finding the sentence was required by statute to be consecutive); *Johnson v. State*, 659 N.E.2d 194, 201 (Ind. Ct. App. 1995) (finding the sentence violated Indiana Code Section 35-50-3-1); *Dickson v. State*, 624 N.E.2d 472, 474–75 (Ind. Ct. App. 1993) (deciding the class of felony of one of the defendant's previous felonies for habitual offender purposes).

Lastly are sentences imposed after the trial court considered an improper aggravating circumstance or failed to indicate why it ordered consecutive sentences. *Richardson v. State*, 481 N.E.2d 1310, 1314 (Ind. 1985) (remanding after the trial court imposed consecutive sentences, but gave no reasons why); *Comer*, 839 N.E.2d at 726–28 (finding the court considered an improper aggravator even though the error may have been invited), *trans. denied*; *Thakkar v. State*, 613 N.E.2d 453, 461 (Ind. Ct. App. 1993) (remanding because the trial court ordered an enhanced sentence, but offered no aggravating factors), *disapproved of on other grounds*, *Sloan v. State*, 947 N.E.2d 917, 921 n.7 (Ind. 2011).

Here, the majority exceeded its authority to review sentences by reducing Kimbrough's sentence by forty years when Kimbrough did not argue his sentence was inappropriate. *Kimbrough*, slip op. at 10. By doing so, the majority circumvented this Court's holding in *Anglemyer* by not requiring Kimbrough to carry his burden and show the sentence was inappropriate. The majority's actions were also contrary to more than thirty years of case law which show that appellate courts *sua sponte* fix illegal sentences—not sentences appellate courts simply disagree with. The State believes a defendant must challenge his sentence as inappropriate for an appellate court to then revise the sentence. This will allow the State the opportunity to submit its own argument and prevent appellate courts from side-stepping the discretion given to the trial court when it orders a sentence.

II.
Kimbrough's sentence was not inappropriate.

For the detailed reasons explained by Judge Mathias, *Kimbrough*, slip op. at 14-17 (Mathias, J., dissenting), the trial court's eighty-year aggregate sentence was not inappropriate in light of Kimbrough's character and the nature of his offenses. App. R. 7(B). The Court, however, should not reach this question for the reasons explained above.

CONCLUSION

For the foregoing reasons, the Court should grant transfer in this cause and affirm Kimbrough's sentence.

Respectfully submitted,
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Certificate of Service

I do solemnly affirm under the penalties for perjury that on April 20, 2012, I served upon the opposing counsel in the above-entitled cause two copies of the Petition to Transfer by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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IN THE
COURT OF APPEALS OF INDIANA

No. 45A05-1506-PC-687

JOHN W. KIMBROUGH, III,
Appellant-Defendant,

v.

STATE OF INDIANA,
Appellee-Plaintiff.

Appeal from the
Lake Superior Court, Crim. Div. 4,

No. 45G04-1312-PC-15,

The Honorable Samuel L. Cappas,
Judge.

STATE'S BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

Whether Petitioner received the effective assistance of appellate counsel.

STATEMENT OF THE CASE

Nature of the Case

John Kimbrough, III ("Petitioner") appeals from the denial of post-conviction relief regarding his 2011 convictions and sentence for four counts of Class A felony child molestation.

Course of Proceedings

On November 5, 2010, the State charged Petitioner with four counts of Class A felony child molestation and two counts of Class C felony child molestation (DA App. 9-10, 30-31). Following a jury trial, Petitioner was found guilty as charged of all six counts on May 5, 2011; the trial court entered judgement of conviction only on the four Class C felony verdicts (DA App. 88-93). On May 31, 2011, the trial court imposed 40 year sentences on each of the four convictions; the court ran the sentences on Counts I and II concurrently and the sentences on Counts III and IV concurrently, but ran those two sets of sentences consecutively, resulting in an aggregate 80 year sentence (DA App. 93-95).

On direct appeal, this Court affirmed Petitioner's convictions and held that the trial court did not abuse its discretion in sentencing him, but *sua sponte* reduced his sentence to 40 years (Pet's Ex. 3). *Kimbrough v. State*, Cause No. 45A04-1011-FA-48, slip op. (Ind. Ct. App. March 21, 2012). The Supreme Court granted transfer

and reinstated Petitioner's 80-year sentence (Pet's Ex. 6). *Kimbrough v. State*, 979 N.E.2d 625, 628-30 (Ind. 2012).

On December 17, 2013, Petitioner filed a petition for post-conviction relief (App. 4, 8-18). He filed an amended post-conviction petition on September 29, 2014 (App. 3, 37-38). The post-conviction court held an evidentiary hearing on February 23, 2015 (App. 2). On May 29, 2015, the court issued written findings of fact and conclusions of law denying post-conviction relief (App. 1, 74-81).

Petitioner filed a notice of appeal on June 25, 2015 (App. 82-86). The notice of completion of clerk's record was issued on July 13, 2015, and the notice of completion of transcript was issued on September 24, 2015 (App. 1; Docket). Petitioner filed his Brief of Appellant on October 22, 2015, with personal service on the State on the same day (Docket). Pursuant to an order of this Court on October 26, 2015, the State's Brief of Appellee is due 30 days after the date on which the direct appeal record was transferred to this appeal (Docket). The Supreme Court granted the motion to transfer the direct appeal record on October 29, 2015 (Docket).

STATEMENT OF THE FACTS

The facts as they were found by the Supreme Court on direct appeal are as follows:

> Mother and Kimbrough began dating in January 2009. Later that summer, Mother introduced Kimbrough to her children, including her daughters, J.L. born January 2003 and A.D. born July 2004. The couple and children began to function as a family, even staying at hotels together to allow the children to swim in the

hotel pools. Kimbrough often drove the girls to school and helped with their homework. In the spring of 2010, the relationship ended. Nonetheless Mother continued to allow Kimbrough to take the children to school because they loved Kimbrough and Mother trusted him.

The evidence showed that in October 2010, Mother observed that J.L. "seemed as if she was hiding something" or "as if she was scared." A.D. reluctantly told Mother that her vagina hurt and the girls eventually stated that Kimbrough had touched them both inappropriately. On October 30, 2010, law enforcement was contacted. That same day, both girls were taken to the emergency room of the local hospital where a physician – Dr. Kathryn Watts – examined each child. …

A jury trial began on May 5, 2011, during which both A.D. and J.L. testified regarding specific encounters with Kimbrough. A.D. testified that she had a front and a back private part and that she called her private part a "cootie cat" but she didn't have a name for Kimbrough's private part. A.D. testified that while they stayed at hotels Kimbrough stuck his private part in her front cootie cat and her backside and he would lick her cootie cat. She later detailed that Kimbrough put his private part in her cootie cat while they were present in the basement of Kimbrough's home. A.D. said that when Kimbrough touched her, she told Kimbrough to stop and he responded, "No." A.D. also testified that her sister was always with her when these acts occurred and that she saw Kimbrough stick his private part into her sister's cootie cat as well.

J.L. testified that Kimbrough touched her in her private part and in the back with his private part more than once. She also said that he put his finger in her private part and he put his private part in her private part. She identified the female pubic area from sketches as the female private part and identified a drawing that she made, which she characterized as a picture of Kimbrough's private part. J.L. testified that these touchings occurred at the hotel and in the basement of Kimbrough's home.

Dr. Watts also testified at trial noting that during her examination of the two girls she found a small break in J.L.'s hymen, which may have resulted from sexual assault. Dr. Watts further explained that she had discovered redness around A.D.'s vaginal openings and approximately a one-centimeter tear in A.D.'s hymen. Dr. Watts explained that such tears are not unusual but these types of openings

> may result from sexual abuse. Dr. Watts also stated that penetration may cause redness around the vaginal openings.

Kimbrough, 979 N.E.2d at 626-27 (internal record citations omitted). Petitioner told A.D. not to tell anyone when he molested her (Trial Tr. 187). Before Petitioner would touch J.L., he would put baby oil on his private part (Trial Tr. 221-22). J.L. also saw Petitioner touch A.D. (Trial Tr. 217). J.L. saw Petitioner move his hand up and down on his private part and "white stuff" would come out (Trial Tr. 219). After the girls disclosed, Petitioner went to a cousin's house; he was "scared," said that he might be in trouble, that it was all his fault, and that he wanted to end his life (Trial Tr. 259-61).

Petitioner was convicted of four counts of Class A felony child molestation, two involving victim A.D. (sexual intercourse and deviate sexual conduct, respectively) and two involving victim J.L. (sexual intercourse and deviate sexual conduct, respectively) (DA App. 30-31, 88-93). At sentencing, the trial court found that Petitioner had no prior criminal record but did have a pending failure to appear warrant in a misdemeanor case and pending felony charges of intimidation, two counts of confinement, and residential entry (DA App. 93; Sent. Tr. 36-37). The court felt that the risk that Petitioner would reoffend was "medium" because, although he had no prior record, he had been committing the crimes in this case for a period of almost two years (DA App. 93; Sent. Tr. 36) and had stopped only when the children disclosed the molestation. The court found Petitioner's lack of a prior criminal record a mitigating factor to which the court gave "significant weight" (DA App. 94; Sent. Tr. 37). As aggravating factors, the court found Petitioner's recent

violation of the conditions of his pre-trial release in the pending misdemeanor case, the extremely young ages of the victims (ages 5 and 7), Petitioner's violation of a position of trust with respect to both children, and the fact that the offenses were committed multiples times over a period of 22 months (DA App. 94; Sent. Tr. 37-39). The court imposed 40-year sentences on each conviction and ran Counts I and II concurrently and Counts III and IV concurrently to each other but consecutively to Counts I and II due to the fact that there were two separate victims, resulting in an aggregate 80-year sentence (DA App. 94; Sent. Tr. 39-40).

Petitioner was represented by attorney P. Jeffrey Schlesinger on direct appeal. He raised three issues: 1) sufficiency of the evidence to prove that penetration occurred; 2) incorrect jury instruction defining "female sex organ"; and 3) abuse of discretion in sentencing by relying on invalid aggravating factors (Pet's Ex. 2). This Court unanimously affirmed Petitioner's convictions and found that the trial court had not abused its discretion in sentencing Petitioner (Pet's Ex. 3). *Kimbrough*, Cause No. 45A04-1106-CR-328, slip op. at 2-11. However, by a 2-1 split, the Court nevertheless reduced Petitioner's aggregate sentence to 40 years on the grounds that "an aggregate sentence of eighty years for a defendant with no criminal history is clearly against the logic and effect of the facts and circumstances before the trial court." *Id.* at 10. Judge Mathias dissented from this portion of the opinion, finding it improper to consider the appropriateness of a sentence under Appellate Rule 7(B) *sua sponte* and also finding that the 80-year sentence was

appropriate given the nature of the offenses and Petitioner's character. *See id.* at 11-17 (Mathias, J., concurring in part and dissenting in part).

The Supreme Court granted the State's petition for transfer and reinstated the 80-year sentence imposed by the trial court (Pet's Exs. 4, 6). *Kimbrough*, 979 N.E.2d at 628-30. The Court held that it was improper to exercise the review and revise power under Appellate Rule 7(B) unless asked to do so by a party. *See id.* In a footnote, the Court also "note[d] in passing" that Judge Mathias' dissent "undertook a thorough analysis of the nature of [Petitioner's] offenses and his character and concluded that [Petitioner's] sentence was not inappropriate." *See id.* at 630 n.1.

SUMMARY OF THE ARGUMENT

Petitioner received the effective assistance of appellate counsel. Petitioner's 80-year sentence for four counts of Class A felony child molestation involving two separate victims, an extended period of ongoing molestation, and a violation of a position of trust is not an outlier, even for a defendant with little or no criminal history. It is less than half the 200-year sentence that Petitioner was authorized to receive by law. Appellate counsel did not perform deficiently by failing to raise a challenge to the appropriateness of this sentence, which would have subjected Petitioner to the realistic possibility that his sentence would have been increased rather than decreased, and Petitioner cannot show that he was prejudiced by that failure. When the Rule 7(B) appropriateness analysis is applied and the nature of the offenses and character of the offender are examined, the sentence imposed is

found to be appropriate. Despite his lack of a record, Petitioner had not led a law-abiding life for a significant period of time; he was only in his mid-twenties, he was molesting these victims in secret for almost two years, he had other pending felony charges, and the sentence imposed by the trial court already took into account and gave significant weight to his lack of a prior record. Therefore, this Court should affirm the post-conviction court's determination that Petitioner's appellate counsel was not ineffective for failing to challenge the appropriateness of his sentence.

ARGUMENT

Petitioner's appellate counsel was not ineffective for failing to raise an Appellate Rule 7(B) challenge to the sentence.

Petitioner received the effective assistance of appellate counsel. Counsel did not perform deficiently by failing to challenge the appropriateness of Petitioner's sentence and request appellate revision under Appellate Rule 7(B). Petitioner also cannot show that he was prejudiced by this failure because Petitioner cannot meet his burden to show that an 80-year sentence for four Class A felony child molestation convictions involving two separate victims is inappropriate.

A petitioner who has been denied post-conviction relief faces a "rigorous standard of review" on appeal. *Dewitt v. State*, 755 N.E.2d 167, 170 (Ind. 2001). The post-conviction court's denial of relief will be affirmed unless the petition shows that the evidence leads "unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). A post-conviction petitioner has the burden of establishing the grounds for

relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief is therefore in the position of appealing from a negative judgment. *Ben-Yisrayl*, 738 N.E.2d at 258. Accordingly, this Court will not disturb the denial of relief unless "the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion." *McCary*, 761 N.E.2d at 392. The post-conviction court's findings of fact are accepted unless "clearly erroneous." *Davidson v. State*, 763 N.E.2d 441, 443-44 (Ind. 2001). This Court considers only the probative evidence and all reasonable inferences therefrom that support the post-conviction court's determination and will not reweigh the evidence. *Bigler v. State*, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000).

The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel. *Allen v. State*, 749 N.E.2d 1158, 1166 (Ind. 2001). This Court starts with a strong presumption that counsel rendered adequate legal assistance. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002). To rebut this strong presumption, Petitioner must show both that: 1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and 2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). A reasonable probability is one "sufficient to undermine confidence in the

outcome." *Id.* Moreover, an inability to satisfy either prong of this test is fatal to an ineffective assistance claim. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999).

Indiana courts recognize three basic categories of alleged appellate counsel ineffectiveness: 1) denying access to an appeal; 2) failing to raise an issue on appeal; and 3) failing to present an issue completely and effectively. *Bieghler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997). Ineffectiveness is rarely found when the issue is failure to raise a claim on direct appeal. *Taylor v. State*, 717 N.E.2d 90, 94 (Ind. 1999). This is so because the decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. *Bieghler*, 690 N.E.2d at 193. This Court, therefore, gives considerable deference to appellate counsel's strategic decision and will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. *Taylor*, 717 N.E.2d at 94. Specifically, to establish deficient performance for failing to raise an issue, the petitioner must show that the unraised issue was "clearly stronger" than the issues that were raised. *Bieghler*, 690 N.E.2d at 194. Moreover, to demonstrate prejudice from the failure to raise a claim, a petitioner would have to show a reasonable possibility that the result of the appeal would have been different, i.e., that it would have resulted in the reversal of his conviction. *See id.*

A. Counsel did not perform deficiently by failing to raise an appropriateness challenge to the sentence.

Counsel did not perform deficiently by failing to challenge Petitioner's sentence on appropriateness grounds. An appropriateness challenge was not a meritorious issue that was clearly stronger than the issues that were raised. Had counsel raised an appropriateness challenge, the burden would have been on him to prove that Petitioner's sentence was inappropriate in light of both the nature of the offenses and Petitioner's character. *See Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006); *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). At the time this appeal was being perfected, the Supreme Court had recently emphasized the need to give the proper deference to the trial court's sentencing decision. *Akard v. State*, 937 N.E.2d 811, 813-14 (Ind. 2010).

Trial courts have "special expertise" in making sentencing decisions; therefore, although the constitutional grant of authority recognized in Appellate Rule 7(B) encourages appellate courts to critically investigate sentencing decisions, appellate courts should nonetheless exercise that authority with "great restraint" due to the trial courts' greater expertise. *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006); *see also Golden v. State*, 862 N.E.2d 1212, 1218 (Ind. Ct. App. 2007) (stating that appellate review of sentencing is "very deferential" to the trial court's decision and that appellate courts should "refrain from merely substituting our judgment for that of the trial court"). The principal role of appellate review is to "leaven the outliers;" it is not to achieve a perceived "correct" result. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Thus, the question under Appellate Rule

7(B) analysis is "not whether another sentence is *more* appropriate" but rather "whether the sentence imposed is inappropriate." *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008).

Petitioner's sentence was not an outlier requiring appellate revision. Petitioner was convicted of four counts of Class A felony child molestation for which he received an aggregate 80-year sentence. By statute, however, his convictions rendered him eligible to receive a 200-year sentence. *See* Ind. Code § 35-50-2-4 (2011) (maximum sentence for a Class A felony was 50 years). Thus, the sentence imposed upon Petitioner was already well-below half of the sentence that the legislature authorized for these crimes.[1] Moreover, had counsel raised an appropriateness challenge, it would have opened the door to allow the State to ask the appellate courts to increase Petitioner's sentence and for an appellate court to exercise its authority to revise the sentence upward. *See McCullough v. State*, 900 N.E.2d 745. 746-51 (Ind. 2009). Given that Petitioner's sentence was less than half of the sentence authorized by law, the risk of this happening was a realistic possibility that could not be ignored by a competent appellate attorney. *See also id.* at 753 (Boehm, J., concurring and concurring in result with separate opinion) (noting that the *McCullough* holding "puts the defendant's counsel in a very awkward position if upward revision by an appellate court is a realistic prospect," requiring counsel to forego a request for a downward revision in order to avoid the

[1] In addition, Petitioner's convictions were not only minimum non-suspendible, the non-suspendible minimum was 30 years because Petitioner was over 21 and the victims were under 12. *See* Ind. Code § 35-50-2-2(b)(4)(H) and (i) (2011).

risk that the sentence might end up increased instead); *Timberlake*, 753 N.E.2d at 605 (stating that appellate counsel's performance should not be evaluated with the benefit of hindsight but rather based on the circumstances as they faced appellate counsel at the time of counsel's decision-making).

An 80-year sentence is not an outlier for a person convicted of multiple counts of Class A felony child molestation, even if that person has no prior criminal record or only a very minimal prior record, particularly when the convictions either encompass more than one victim, involve a violation of a position of trust, or involve multiple instances of molestation over a period of time. *See, e.g.*, *Pierce v. State*, 949 N.E.2d 349, 352-53 (Ind. 2011) (finding 80-year sentence appropriate for defendant, who had only one prior conviction several years earlier, convicted of three counts of Class A felony child molestation all involving the same victim and the violation of a position of trust)[2]; *Remy v. State*, 17 N.E.3d 396, 398-99, 401-03 (Ind. Ct. App. 2014) (finding a 95-year sentence appropriate for a defendant with no criminal record who was convicted of three counts of Class A felony child molestation and two lesser sex offense charges that all involved the same victim, spanned a two-year period, and did not involve the use of force or result in physical injury); *Williams v. State*, 997 N.E.2d 1154, 1163-66 (Ind. Ct. App. 2013) (fining a 99-year sentence with nine years suspended appropriate for a defendant with no criminal record who was convicted of eight counts of Class A felony child molestation all involving the same

[2] *Pierce* was a 3-2 decision; two Justices would have affirmed as appropriate the 134-year sentence imposed by the trial court in that case. *See Pierce*, 949 N.E.2d at 353-54 (David, J., dissenting, joined by Dickson, J.).

victim over a two-year time span and the violation of a position of trust); *Couch v. State*, 977 N.E.2d 1013, 1017-18 (Ind. Ct. App. 2013) (finding 91-year sentence appropriate for defendant with no prior criminal record convicted of five counts of Class A felony child molestation and two lesser sex offenses all involving the same victim and the violation of a position of trust); *Mastin v. State*, 966 N.E.2d 197, 202-03 (Ind. Ct. App. 2012) (finding 90-year sentence appropriate for defendant with no prior record, except one misdemeanor, convicted of Class A felony child molest and two counts of Class B felony child molest all involving the same victim and the violation of a position of trust); *Light v. State*, 926 N.E.2d 1122, 1124-26 (Ind. Ct. App. 2010), *trans. denied* (finding 125-year sentence appropriate for defendant with no criminal record convicted of three counts of Class A felony child molestation involving different victims and the violation of a position of trust).

Because Petitioner's sentence is not an outlier, counsel was not deficient for failing to raise an appropriateness challenge to the sentence. In addition, as is argued fully in the following section, a review of Petitioner's offenses and his character do not support a conclusion that this sentence was inappropriate. Because reasonable jurists can conclude that this sentence is appropriate, counsel cannot be deemed deficient for failing to raise a claim that would not appear to be meritorious and that would expose his client to the risk that his sentence would be increased rather than decreased.

B. Petitioner was not prejudiced by counsel's failure to raise an appropriateness challenge to his sentence.

Petitioner also cannot show that he was prejudiced by counsel's failure to raise such a challenge because the sentence imposed was not inappropriate in light of the nature of the offenses and Petitioner's character. Although two members of this Court would have revised the sentence on direct appeal, they did so without the benefit of any briefing on this issue by the State. *See McCullough*, 900 N.E.2d at 750-51 (stating that when an appellate court is asked to exercise its review and revise authority, the perspective of the State through its brief "will be helpful" to the court in considering that issue). Furthermore, as the post-conviction court noted, even without the benefit of briefing by the State, Judge Mathias dissented from any revision of the sentence, and Judge Mathias was the only member of the panel who engaged in an evaluation of the nature of the offenses and the character of the defendant (App. 80; Pet's Ex. 3 at 10-17). The majority opinion did not engage in the Rule 7(B) analysis but based its revision solely on the fact that the trial court had abused its discretion by not giving more weight to the fact that Petitioner did not have a prior criminal record (Pet's Ex. 3 at 10). Had the Court engaged in the Rule 7(B) analysis, as Judge Mathias did, there is no reasonable possibility that the sentence would be found inappropriate.

An 80-year sentence is not inappropriate in light of the nature of Petitioner's offenses. Petitioner selected a vulnerable family to victimize—a single mother with three young children, including one disabled child who was afflicted with cerebral palsy. Petitioner became a father figure to the two young victims, taking them to

motels to swim in the pools, driving them to school, and helping them with their homework. He therefore violated a position of trust when he molested both J.L. and A.D., and he continued to molest A.D. even when she asked him to stop. "A harsher sentence is also more appropriate when the defendant has violated a position of trust that arises from a particularly close relationship between the defendant and the victim, such as a parent-child or stepparent-child relationship." *Hamilton v. State*, 955 N.E.2d 723, 727 (Ind. 2011). The girls were approximately ages seven and five when the molestations began. "[Y]ounger ages of victims tend to support harsher sentences." *Id.* Moreover, consecutive sentences are "necessary" and "appropriate" when there are separate victims, each of whom has been individually harmed. *See Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003); *Wright v. State*, 818 N.E.2d 540, 551 (Ind. Ct. App. 2004).

Petitioner molested them many times over a period of almost two years, stopping only because the children finally disclosed the molestation to their mother. This was not a one-time incident. *Cf. Hamilton*, 955 N.E.2d at 728 (finding it mitigating that a defendant only "engaged in a single act of sexual misconduct as opposed to a long-term pattern of abuse"). He also engaged in a variety of different sex acts with both girls, including sexual intercourse, more than one type of deviate sexual conduct, touching and fondling, masturbating in front of them, and molesting each one in the presence of the other. The fact that he molested two separate victims, their extremely young ages, the violation of trust that was involved, the variety and serious nature of the sex acts involved, and the extended

period of time over which the molesting occurred all render the nature of Petitioner's offenses very egregious.

The sentence is also appropriate in light of Petitioner's character. It speaks volumes about Petitioner's character that he would befriend a struggling single mother, groom her two little girls, and then repeatedly molest them, going so far as to engage in sexual intercourse with them even when A.D. asked him to stop, leaving A.D. with pain in her vagina. Although he effectively confessed guilt after the victims disclosed, going to a cousin's and saying that he was in trouble and it was "all his fault" (Trial Tr. 259-61), Petitioner expressed no remorse and accepted no responsibility for his actions during his sentencing allocution, instead casting himself as the victim and blaming the girls' parents for his involvement in the girls' lives (Sent. Tr. 30-35).

Petitioner's sole argument regarding his character, and the sole factor upon which this Court's direct appeal opinion was based, was his lack of a prior criminal record. The reason why the lack of a criminal record is normally viewed as mitigating in nature is because it shows that the defendant has lived a law-abiding life up until the mistake of a first crime. But that is not the case here. Petitioner, who was only in his mid-twenties to begin with, had not been leading a law-abiding life for a significant period of time; he was repeatedly molesting two little girls over the course of almost two years. He just had not been caught earlier. And he stopped not because he recognized that what he was doing was wrong and voluntarily chose to cease his misconduct but only because the victims finally

disclosed and his law-breaking was brought to light. Furthermore, this case was not Petitioner's only contact with the criminal justice system. At the time of his sentencing, he had a failure to appear warrant issued in a pending misdemeanor case and he also had four pending felony charges for the offenses of confinement, intimidation, and residential entry in another case.

Petitioner's sentence already took into account his lack of a prior criminal record and gave that fact more weight than it deserved given the extended period of time over which Petitioner was molesting little girls in secret—he was eligible for a 200-year sentence but he received only an 80-year sentence, and the *only* reason existing in the record why he did not deserve or receive that maximum sentence was his lack of a criminal record. And, again, the issue is not whether a reviewing court believes a lesser sentence would be more appropriate, but whether Petitioner has demonstrated that the sentence imposed is inappropriate. An 80-year sentence for a person convicted of four counts of Class A felony child molestation involving two very young victims, the violation of a position of trust, and an ongoing, repeated pattern of molestation for almost two years is not inappropriate. At the very least, Petitioner cannot meet his burden to show that this was such a clearly and undeniably inappropriate sentence that any constitutionally-competent appellate counsel would have raised this issue. Therefore, this Court should affirm the post-conviction court's denial of relief.

CONCLUSION

This Court should affirm the post-conviction court's judgment.

Respectfully submitted,

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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. I certify that the following persons were electronically served with the foregoing document:

Katherine Province
Office of State Public Defender
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/s/ Ellen H. Meilaender
Ellen H. Meilaender

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN W. KIMBROUGH,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:16-cv-01729-WTL-DML
	)	
RON NEAL,	)	
	)	
Respondent.	)	

Entry Granting Petition for a Writ of Habeas Corpus

Petitioner John Kimbrough was convicted of child molesting in an Indiana state court. He is currently serving an eighty-year sentence for this crime. Kimbrough seeks a writ of habeas corpus arguing that his appellate counsel was ineffective for failing to challenge his sentence as inappropriate.

For the reasons explained in this Entry, Kimbrough's petition for a writ of habeas corpus is **granted**.

I. Factual and Procedural Background

District court review of a habeas petition presumes all factual findings of the state court to be correct, absent clear and convincing evidence to the contrary. *See Daniels v. Knight*, 476 F.3d 426, 434 (7th Cir. 2007).

In Kimbrough's post-conviction appeal, the Indiana Court of Appeals restated the facts as follows:

> In January 2009, Kimbrough began dating A.D. (Mother), who introduced Kimbrough to her three children: J.L., a daughter born in 2003; A.D., a daughter born in 2004; and A.D.L., a son who had cerebral palsy. The couple and the children did many things together as a family, and Kimbrough continued to have a relationship with the children even after his romantic relationship with Mother ended in the spring of 2010. In October 2010, Mother

> noticed that J.L. and A.D. were acting as though they were scared and were hiding something. Eventually, the children told Mother that Kimbrough had touched them inappropriately on multiple occasions. The children revealed that Kimbrough had placed his penis on or in their genitalia and anal areas, had licked and touched their genitalia, and had coerced the children into masturbating him. The molestations occurred on multiple occasions over a time period spanning nearly two years.

Kimbrough v. State, 2016 WL 112394 (Ind. Ct. App. Jan. 11, 2016) (*Kimbrough III*). Kimbrough was convicted of four counts of child molesting as Class A felonies. He was sentenced to 40 years in prison for each count. Counts I and II were ordered served concurrently to one another, as were Counts III and IV; Counts III and IV were ordered to be served consecutively to Counts I and II, for a total sentence of 80 years.

In his direct appeal, a split panel of the Court of Appeals cut Kimbrough's sentence in half to 40 years. *Kimbrough v. State*, 2012 WL 983147 (Ind. Ct. App. Mar. 12, 2012) (*Kimbrough I*). It did so under apparently Indiana Appellate Rule 7(B), which permits an Indiana appellate court to revise a sentence if it is inappropriate; and it did so without Kimbrough's counsel referring to Rule 7(B), even though he challenged the sentence. This ruling was vacated by the Indiana Supreme Court on the State of Indiana's petition to transfer. *Kimbrough v. State*, 979 N.E.2d 625 (Ind. 2012) (*Kimbrough II*). Because Kimbrough had made no request for a sentence reduction under Appellate Rule 7(B), the Indiana Supreme Court said, the Court of Appeals should not have granted relief under the rule. *Id*. at 629-30.

Kimbrough then sought post-conviction relief in the trial court arguing that his appellate counsel was ineffective for failing to argue that his sentence was inappropriate under Rule 7(B). The motion for post-conviction relief was denied and the Indiana Court of Appeals affirmed. *Kimbrough III*, 2016 WL 112394. Kimbrough now seeks a writ of habeas corpus from this Court.

II. Applicable Law

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a federal court may grant habeas relief if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). Review under AEDPA is limited. "[T]he inmate must show, so far as bears on this case, that the state court which convicted him unreasonably applied a federal doctrine declared by the United States Supreme Court." *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001) (citing 28 U.S.C. § 2254(d)(1); *Guys v. Taylor*, 529 U.S. 362 (2000); *Morgan v. Krenke*, 232 F.3d 562 (7th Cir. 2000)). "A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner." *Brown v. Payton*, 544 U.S. 131, 141 (2005) (internal citations omitted). "The habeas applicant has the burden of proof to show that the application of federal law was unreasonable." *Harding v. Sternes*, 380 F.3d 1034, 1043 (7th Cir. 2004) (citing *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)).

As previously noted, Kimbrough contends that his appellate counsel was ineffective. A defendant has a right under the Sixth Amendment to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). When the deferential AEDPA standard is applied to a *Strickland* claim, the following calculus emerges:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is . . . difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," [*Strickland*] at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S. at 123. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at 123. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is

> whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Harrington v. Richter, 562 U.S. 86, 105 (2011).

III. Discussion

Kimbrough claims that his appellate counsel was ineffective for failing to argue on direct appeal that his eighty-year sentence was inappropriate under Rule 7(B) of the Indiana Rules of Appellate Procedure.

A defendant has a right under the Sixth Amendment to effective assistance of counsel. *See Strickland*, 466 U.S. at 687. For a petitioner to establish that "counsel's assistance was so defective as to require reversal," he must make two showings: (1) that counsel rendered deficient performance that (2) prejudiced the petitioner. *Id.* With respect to the performance requirement, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 534 (quoting *Strickland*, 466 U.S. at 694).

The Indiana Court of Appeals in *Kimbrough III* addressed only the prejudice prong of *Strickland*, concluding that it was not met. The parties dispute whether Kimbrough can establish both elements of his ineffective assistance of counsel claim, so the Court will address each in turn.

A. Performance

Because the *Kimbrough III* court did not reach *Strickland*'s ineffectiveness prong, the Court reviews this issue de novo. *Porter v. McCollum*, 558 U.S. 30, 38 (2009); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

"Appellate lawyers are not required to present every nonfrivolous claim on behalf of their clients—such a requirement would serve to bury strong arguments in weak ones—but they are expected to 'select[] the most promising issues for review.'" *Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013) (quoting *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983)). "For this reason, if [the petitioner's appellate counsel] abandoned a nonfrivolous claim that was both 'obvious' and 'clearly stronger' than the claim that he actually presented, his performance was deficient, unless his choice had a strategic justification." *Id.*; *see Sanders v. Cotton*, 398 F.3d 572, 585 (7th Cir. 2005). "This standard is difficult to meet because the comparative strength of two claims is usually debateable." *Shaw*, 721 F.3d at 915. Appellate counsel's performance is assessed "from the perspective of a reasonable attorney at the time of [the] appeal, taking care to avoid the distorting effects of hindsight." *Id.* (citation and quotation marks omitted); *see also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

Kimbrough argues that his appellate lawyer performed deficiently by failing to argue for a sentence reduction under Rule 7(B). According to Kimbrough, this argument was obvious. *See Shaw*, 721 F.3d at 915. As Kimbrough points out, his appellate lawyer did challenge his sentence, but only as an abuse of discretion and not as inappropriate under Rule 7(B). Moreover, the *Kimbrough I* court, by *sua sponte* reducing his sentence under Rule 7(B), recognized the significance and obviousness of such an argument.[1] A challenge to the sentence under Rule 7(B) was, therefore, obvious.

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[1] Kimbrough explains that his appellate lawyer has regularly failed to argue that a defendant's sentence is inappropriate under Rule 7(B) and he has been reprimanded for this failure. *In re Schlesinger*, 53 N.E.3d 417, 417 (Ind. 2016); *see also Marcus v. State*, 27 N.E.3d 1134 (Ind. Ct. App. 2015) (striking Schlesinger's brief and remanding the appeal for the appointment of competent counsel after Schlesinger had failed to realize that the "manifestly unreasonable" standard of former Indiana Appellate Rule 17 had been replaced by the appropriateness standard of Rule 7(B) in 2003). "An attorney's ignorance of a point of law that is fundamental to his case

Kimbrough goes on to contend that this argument was stronger than any of the arguments his lawyer actually made. Counsel made three arguments on direct appeal. First, Kimbrough's lawyer argued that the evidence of penetration had been insufficient. But that argument was weak because there had been direct evidence of penetration. The *Kimbrough I* court therefore treated the argument as a request to reweigh the evidence, which is for the jury, not the Court of Appeals to do. *Kimbrough I*, Slip. Op. at 6. Next, Kimbrough's lawyer argued that the trial court erred in instructing the jury on the definition of the female sex organ. The Court of Appeals dismissed this argument as waived for failure to present any cogent argument. *Id.* at 7. The court then went on to conclude that there was no error in giving the instruction. *Id.* at 8. Finally, Kimbrough's appellate lawyer challenged his sentence as an abuse of discretion. He argued that the trial court had not given sufficient weight to the mitigating circumstance that Kimbrough had no criminal history and had considered improper aggravating circumstances.

As the *Kimbrough I* court explained in rejecting this argument, once a trial court has identified aggravating and mitigating circumstances, the relative weight given to them is not subject to review for abuse of discretion. *Id.* at 8-9. In addition, counsel's challenge to the consideration of the age of the victims as an aggravating circumstance was weak because the victims were approximately five years old and seven years old and extreme youth can support an enhanced sentence. *Id.* at 10. Kimbrough's lawyer also challenged the aggravating circumstance that the abuse had occurred on multiple occasions over almost two years. But the record supported that finding. In other words, Kimbrough's counsel challenged his sentence, but only on grounds that were highly unlikely to provide relief. This Court agrees with Kimbrough that

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combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014). This principle applies "with equal force to appeals." *Vinyard v. United States*, 804 F.3d 1218, 1225 (7th Cir. 2015).

the arguments raised by his appellate counsel, which were easily rejected by the Indiana Court of Appeals, were feeble.

The respondent argues that the unraised claim – that Kimbrough's sentence is inappropriate under Rule 7(B) – was not clearly stronger than the arguments that were raised. According to the respondent, any challenge to Kimbrough's sentence under Rule 7(B) was unlikely to succeed because Kimbrough's convictions rendered him eligible to receive a 200-year sentence, Ind. Code 35-50-2-4 (2011) (50-year maximum sentence for a class A felony), the minimum sentence for Kimbrough's convictions was 20 years, Ind. Code 35-50-2-2(b)(4)(H) (current version at Ind. Code 35-50-2-2.2(d)), and an 80-year sentence is not an outlier for a person convicted of multiple counts of Class A felony child molestation. The respondent finally contends that a challenge under Rule 7(B) would open the door to allow the State to ask the appellate courts to increase the sentence by revising it upward. *See McCullough v. State*, 900 N.E.2d 745, 750 (Ind. 2009).

This Court concludes that the unraised Rule 7(B) argument was clearly stronger than the arguments that appellate counsel raised. As discussed above, the challenges that appellate counsel raised on appeal – a challenge to the sufficiency of the evidence, an undeveloped, and thus waived, challenge to a jury instruction, and a challenge to sentencing factors that were clearly reasonable – were weak at best. The fact that the *Kimbrough I* court *sua sponte* reduced his sentence as inappropriate demonstrates that an argument under Rule 7(B) would have been stronger than the other, unsuccessful, arguments that counsel did make.

To the extent that the respondent contends that a Rule 7(B) challenge would have been risky because the Court of Appeals could have decided to increase Kimbrough's sentence, such a ruling would have been unlikely at best. Kimbrough points out, and the respondent does not

dispute, that since *McCullough* was decided, the Indiana Court of Appeals has increased a sentence only once, and in that case, the Indiana Supreme Court reinstated the original sentence. *Akard v. State*, 937 N.E.2d 811, 814 (Ind. 2010); *accord McCullough*, 900 N.E.2d at 753 (Boehm, J. concurring) ("It seems highly unlikely that in practice Indiana's appellate courts will frequently exercise their power to increase a sentence.").

In short, a challenge to Kimbrough's sentence under Rule 7(B) was obvious and stronger than the arguments Kimbrough's appellate counsel raised. Counsel's performance was therefore deficient when he did not raise it.

B. Prejudice

The second prong of *Strickland* asks whether the defense was prejudiced as a result of counsel's errors. To establish prejudice under *Strickland*, "the 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." 466 U.S. at 694. In other words, there is *Strickland* prejudice when the chances of a different result are "better than negligible." *United States ex rel. Hampton v. Liebach*, 347 F.3d 219, 246 (7th Cir. 2003). "Because of AEDPA an extra layer of deference enters the picture: [the court] will defer to the Indiana appellate court's determination that [the petitioner] received effective assistance of counsel unless that determination is contrary to, or an unreasonable application of, clearly established Supreme Court precedent . . . ." *Shaw*, 721 F.3d at 914 (citing *Harrington*, 131 S.Ct. at 783-84). "An application of Supreme Court precedent is reasonable – even if wrong in [the court's] view – so long as fairminded jurists could disagree over its correctness." *Id.*

Kimbrough argues that the fact that the *Kimbrough I* court did in fact modify his sentence under Rule 7(B) shows that he had a better than negligible chance of succeeding had his attorney argued for a sentence reduction under Rule 7(B). The respondent replies that, on review of his petition for post-conviction relief, the *Kimbrough III* court reasonably concluded that it would not have modified Kimbrough's sentence and, thus, that Kimbrough did not establish prejudice. The respondent also argues that the *Kimbrough I* court did not really revise his sentence under Rule 7(B) and that the *Strickland* analysis is objective and should not be tied to the idiosyncrasies of the particular decision-maker.

To determine whether a defendant has been prejudiced under *Strickland*, a court asks only whether the defendant would have had a "reasonable probability" of success, not whether he definitively would or would not have succeeded. *Shaw*, 721 F.3d at 918. Review under Rule 7(B) is discretionary. *Knapp v.* State, 9 N.E.3d 1274, 1291-92 (Ind. 2014). Thus, the *Kimbrough III* court's determination that it would not have reduced his sentence does not necessarily compel a conclusion that Kimbrough did not have a reasonable probability of success on the merits of a Rule 7(B) challenge. *See United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003). (A "reasonable probability" is a "better than negligible" chance.).

The Seventh Circuit held in *Miller v. Zatecky*, 820 F.3d 275 (7th Cir. 2016), that when the state court has determined an issue of state law, a federal court cannot review it. But even if the conclusion of the *Kimbrough III* court that, as a matter of state law, it would not have reduced Kimbrough's sentence provided a basis to conclude that Kimbrough did not have a reasonable chance of success on appeal, this determination cannot be considered in a vacuum. This is because the *Kimbrough I* court, applying the same state law that the *Kimbrough III* court applied, reached the opposite conclusion. Because two panels of the Indiana Court of Appeals

utilized their discretion to reach opposite conclusions, Kimbrough necessarily had a "better than negligible" chance of success on a Rule 7(B) argument. The *Kimbrough III* court's conclusion that he did not is an unreasonable application of *Strickland* because it incorrectly asked how it would have resolved the issue, not, as required by *Strickland*, whether a Rule 7(B) challenge would have had a reasonable likelihood of success. *See Strickland*, 466 U.S. at 694.

The respondent suggests that the ruling of the *Kimbrough I* to reduce Kimbrough's sentence has no bearing on whether Kimbrough would have had a chance of success on his Rule 7(B) argument because that court did not undergo a Rule 7(B) analysis. But a review of the state court opinions belies this conclusion. Under Indiana Appellate Rule 7(B), "[t]he Court may revise a sentence authorized by statue if, after due consideration of the trial court's decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The majority opinion in *Kimbrough I* addressed the nature of the offenses and aspects of Kimbrough's character. Slip. Op. at 2-4. In reducing Kimbrough's sentence, it considered the aggravating circumstances found by the trial court, which included Kimbrough's relationship of trust with the victims and their young age. Slip. Op. at 9-10. The *Kimbrough I* majority also noted Kimbrough's lack of criminal history. *Id.* at 10. The court concluded: "Focusing on the *appropriateness* of the sentence and not the weight given to individual aggravating or mitigating factors, we find the trial court abused its discretion." Slip op. at 10 (emphasis added).

Further, the dissenting judge in *Kimbrough I* first pointed out that the appellate court's authority to reverse a sentencing decision is restricted as long as the trial court has identified reasons for the sentence that are not improper. Slip Op. at 14. "Because Kimbrough advances no argument under Appellate Rule 7(B) concerning the nature of the offense or his character, I

would not reach the issue of the appropriateness of his sentence." *Id.* at 14. He then when on to state: "[b]ut even assuming that it is proper to analyze Kimbrough's sentence under Appellate Rule 7(B) *sua sponte*, I would conclude that his sentence was not inappropriate." *Id.* He then provided a thorough analysis of the sentence under Rule 7(B). Slip. Op. at *Id.* at 14-18. There would, of course, be no reason to do this if the majority was not modifying the sentence under that Rule.

This conclusion is placed beyond doubt by the fact that, on the petition to transfer, the Indiana Supreme Court in *Kimbrough II* treated the ruling as a ruling under Rule 7(B). That Indiana Supreme Court stated:

> This brings us to the Court of Appeals' declaration that it was "focusing on the appropriateness of the sentence." Although not cited by the majority, this language implicates Indiana Appellate Rule (7)(B) which provides "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Kimbrough v. State, 979 N.E.2d 625, 629 (Ind. 2012). The court vacated the *Kimbrough I* court's ruling because "Kimbrough made no such request and therefore there was no issue in this regard to be considered by a reviewing court." *Id.* In other words, the Indiana Supreme Court said that appellate counsel did not raise a Rule 7(B) claim on direct appeal, so the court was wrong to raise it *sua sponte*. The respondent is therefore incorrect that the *Kimbrough I* court did not make a Rule 7(B) determination.

Having found that the *Kimbrough III* court unreasonably applied *Strickland*, this Court must review the claim de novo, this requires the Court to determine whether it is at least "reasonably likely the result would have been different" if appellate counsel had not failed to ask for revision under Rule 7(B). *See Harrington*, 562 U.S. at 111-112 ("*Strickland* asks whether it is 'reasonably likely' the result would have been different. This does not require a showing that

counsel's actions 'more likely than not altered the outcome.'"). As noted above, because the *Kimbrough I* court *sua sponte* concluded that a Rule 7(B) reduction was appropriate, it follows that Kimbrough would have had a reasonable chance of success on this argument. Kimbrough therefore has established prejudice from his counsel's deficient performance.

Because Kimbrough has established deficient performance on his counsel's part and prejudice from that performance, he has demonstrated his entitlement to relief because of ineffective assistance of appellate counsel.

C. Appropriate Relief

The parties also disagree regarding the appropriate relief. Kimbrough argues that he is entitled to a new sentencing hearing, while the respondent contends that he is entitled only to a new appeal. Kimbrough points out that the Indiana Court of Appeals has held that the proper relief when ineffective assistance of appellate counsel is found is to vacate the conviction and sentence. *See Montgomery v. State*, 21 N.E.3d 846, 857 (Ind. Ct. App. 2014). But the ruling in that case rested on the premise that if appellate counsel had not performed deficiently, the defendant would have been likely to have succeeded on appeal and been entitled to a new trial. *Id.* at 855. This Court has found that Kimbrough's appellate counsel was ineffective for failing to argue that his sentence was inappropriate. The only logical relief based on this ruling is the opportunity to make this argument to the Court of Appeals. *See Shaw*, 721 F.3d at 919; *United States v. Nagib*, 44 F.3d 619, 623 (7th Cir. 1995) ("If appellate counsel renders ineffective assistance, . . . the proper remedy is to allow a new appeal."). Accordingly, that is the relief that will be granted.

IV. Conclusion

For the foregoing reasons, Mr. Kimbrough's petition for a writ of habeas corpus is **granted**. The State of Indiana shall vacate any and all criminal penalties stemming from Mr. Kimbrough's convictions in Case No. 45G04-1011-FA-48 and release him from its custody pursuant to that conviction unless the State of Indiana grants Mr. Kimbrough a new appeal in the Indiana Court of Appeals as to that conviction within 45 days after issuance of final judgment in this case. The respondent shall notify the Court when this order has been complied with.

Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Date: 11/30/17

Distribution:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN W. KIMBROUGH,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:16-cv-01729-WTL-DML
	)	
RON NEAL,	)	
	)	
Respondent.	)	

FINAL JUDGMENT

Consistent with the Order issued this day, John Kimbrough's petition for a writ of habeas corpus is **granted**. The State of Indiana shall vacate any and all criminal penalties stemming from Mr. Kimbrough's convictions in Case No. 45G04-1011-FA-48 and release him from its custody pursuant to that conviction unless the State of Indiana grants Mr. Kimbrough a new appeal in the Indiana Court of Appeals as to that conviction within 45 days after issuance of final judgment in this case.

Date: 11/30/17

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Laura Briggs, Clerk

BY: _____
Deputy Clerk, U.S. District Court

Distribution:

Electronically registered counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN W. KIMBROUGH,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:16-cv-01729-WTL-DML
	)	
RON NEAL,	)	
	)	
Respondent.	)	

Entry Discussing Motion to Alter or Amend Judgment

Petitioner John Kimbrough has moved to alter or amend the judgment in this case pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In his petition for a writ of habeas corpus, Mr. Kimbrough argued that his counsel was constitutionally ineffective for failing to challenge his sentence under Indiana Appellate Rule 7(B), which permits an Indiana appellate court to revise a sentence if it is inappropriate, and that the Indiana courts unreasonably applied federal law in not finding ineffectiveness. The Court agreed, granted Mr. Kimbrough's petition, and ordered that he be permitted to file a new direct appeal. In his motion to alter or amend, Mr. Kimbrough argues that a new direct appeal is not the appropriate relief.

"Rule 59(e) allows a court to amend a judgment only if the petitioner can demonstrate a manifest error of law or present newly discovered evidence." *Heyde v. Pittenger*, 633 F.3d 512, 521 (7th Cir. 2011) (internal quotation omitted); *United States v. Resnick*, 594 F.3d 562, 568 (7th Cir. 2010). "A manifest error is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (internal quotations omitted).

"Relief under Rules 59(e) and 60(b) are extraordinary remedies reserved for the exceptional case…." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008).

Mr. Kimbrough argues, like he argued in his petition, that the Indiana Court of Appeals has held that the proper relief when ineffective assistance of appellate counsel is found is to vacate the conviction and sentence. *See Montgomery v. State*, 21 N.E.3d 846, 857 (Ind. Ct. App. 2014). But, as this Court already explained, the ruling in *Montgomery* rested on the premise that if appellate counsel had not performed deficiently, the defendant would have been likely to have succeeded on appeal and been entitled to a new trial. *Id.* at 855. In contrast, this Court found that Kimbrough's appellate counsel was ineffective for failing to properly challenge his sentence. The only logical relief based on this ruling is the opportunity to make this argument to the Court of Appeals. *See Shaw v. Wilson*, 721 F.3d 908, 919 (7th Cir. 2013); *United States v. Nagib*, 44 F.3d 619, 623 (7th Cir. 1995) ("If appellate counsel renders ineffective assistance, . . . the proper remedy is to allow a new appeal."). Mr. Kimbrough also argues that equity requires that the Court not direct a new appeal, but direct that Mr. Kimbrough receive a new sentencing hearing or the sentence he would have received had the ruling by the Indiana Court of Appeals in his direct appeal not been vacated. But, as this Court has already explained, the proper remedy is a new appeal where the argument the Court found should have been made is presented. In short, Mr. Kimbrough has demonstrated no manifest error of law. Accordingly, the motion to alter or amend the judgment, Dkt. No. 22, is **denied**.

Mr. Kimbrough further requests that if his motion to alter or amend the judgment is denied, this Court grant him a certificate of appealability. Pursuant to § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Such a showing includes demonstrating "that reasonable jurists could

debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and quotation marks omitted). Here, Mr. Kimbrough has not made such a showing and a certificate of appealability is **denied**.

IT IS SO ORDERED.

Date: 9/6/18

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Distribution:

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Chandra Hein
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In the United States District Court
for the Southern District of Indiana

Indianapolis Division

John W. Kimbrough, III, Petitioner, **v.** **Ron Neal**, Superintendent, Indiana State Prison, Respondent.	)	**Case No. 1:16-cv-1729** The Honorable William T. Lawrence, Judge

Petitioner's Notice of Appeal

The Petitioner, John W. Kimbrough, III, by counsel, hereby gives notice that he appeals to the United States Circuit Court of Appeals for the Seventh Circuit the relief ordered the district court's Entry Granting Petition for a Writ of Habeas Corpus and in the court's judgment, D.E. 20 & 21, both entered November 30, 2017, granting the Petitioner a conditional writ of habeas corpus under 28 U.S.C. § 2254. The Petitioner is also appealing the denial of his motion under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment, D.E. 25, entered September 5, 2018.

Respectfully submitted,

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Counsel for John W. Kimbrough, III,
Petitioner

Certificate of Service

I affirm under penalty for perjury that on October 5, 2018, a copy of the foregoing was served on opposing counsel via the Court's electronic filing system.

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Counsel for John W. Kimbrough, III,
Petitioner

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 3, 2019

Before

MICHAEL B. BRENNAN, *Circuit Judge*

No. 18-3153

JOHN W. KIMBROUGH,
Petitioner-Appellant,

v.

RON NEAL,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:16-cv-01729-WTL-DML

William T. Lawrence,
Judge.

O R D E R

In this habeas corpus action under 28 U.S.C. § 2254, the district court granted John Kimbrough partial relief from his 80-year Indiana sentence for child molesting. Kimbrough's underlying constitutional claim is that his direct-appeal counsel was ineffective for not raising certain state-law challenges to the sentence. The federal relief granted to Kimbrough was a conditional writ directing Indiana to either release him or reinstate his direct-appeal rights.

Neither side is satisfied with that judgment; both have filed notices of appeal. *See* No. 18-3145 (7th Cir.) (government appeal); *see also Jennings v. Stephens*, 135 S. Ct. 793, 800 (2015) (petitioner who wishes appellate court to alter the scope of conditional relief must appeal even if government is pursuing its own appeal). The government seeks to argue that the district court should have denied habeas relief altogether. Kimbrough, meanwhile, contends that because the state appellate court has already evaluated aspects of his sentence multiple times, equity required the district court to dispense with further state appeals and order the trial court to resentence him without further

ado. The procedural posture of these appeals raises the question whether § 2253(c) requires Kimbrough to obtain a certificate of appealability for his cross-appeal, or whether instead the government appeal relieves him of any such requirement.

As in previous cases, we assume without deciding that a certificate of appealability is needed. *See, e.g., Barnett v. Neal*, 860 F.3d 570, 572-73 (7th Cir. 2017). On that assumption, we grant a certificate here. Section 2253(c)(2) calls for a "substantial showing of the denial of a constitutional right." Our review (not to mention the district court's grant of habeas relief) convinces us that Kimbrough's theory of ineffective assistance is debatable enough to meet that standard. To be sure, we would deny a certificate if Kimbrough's demand for resentencing (instead of a new direct appeal) were frivolous in its own right. But at this stage we find his equitable argument debatable enough to warrant further briefing under § 2253.

Accordingly, a certificate of appealability is GRANTED. Kimbrough's lawyer's request to be appointed under the Criminal Justice Act (in both this case and any case consolidated with it) is GRANTED. A separate order addressing the briefing schedule will follow.