IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3145

JOHN W. KIMBROUGH,

Petitioner/Appellee/Cross-Appellant,

v.

RON NEAL,

Superintendent, Indiana State Prison,
Respondent/Appellant/Cross-Appellee.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:16-cv-1729-WTL-DKL,
The Honorable William T. Lawrence, Judge

# BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT SUPERINTENDENT RON NEAL


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## JURISDICTIONAL STATEMENT

On June 29, 2016 John W. Kimbrough filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Indiana. D.E. 1. The district court had jurisdiction over his claim under 28 U.S.C. §§ 2241, 2254. On November 30, 2017, the district court issued an order granting Kimbrough's petition, S.A. 2–14, and it entered final judgment the same day, S.A. 1. On December 28, 2018, Kimbrough timely filed a motion to alter or amend the judgment, D.E. 22, which the district court denied on September 6, 2018, App. 51–53. On October 5, 2018, Ron Neal, by counsel, filed a timely notice of appeal. D.E. 29. This Court has jurisdiction to review the district court's final decision because this is an appeal from a final judgment in a habeas corpus proceeding as to all parties and all claims. 28 U.S.C. §§ 1291, 2253.

## STATEMENT OF THE ISSUE IN THE MAIN APPEAL

Whether the district court erred in holding that Kimbrough is entitled to habeas relief under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the Indiana post-conviction-review court's decision rejecting Kimbrough's *Strickland* claim on the basis of Indiana law.

## INTRODUCTION

Indiana Appellate Rule 7(B) provides that an Indiana appellate 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. App. R. 7(B). John W. Kimbrough received an 80-year sentence for molesting two young girls, and although Kimbrough's counsel on direct appeal argued the sentence constituted an abuse of discretion, his counsel did not seek revision of the sentence under Rule 7(B). On post-conviction review, Kimbrough contended that the failure to raise Rule 7(B) on direct appeal constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Indiana Court of Appeals rejected this claim, reasoning that Kimbrough was not entitled to a sentence revision under Rule 7(B) and that he therefore could not establish the prejudice required by *Strickland*.

Because 28 U.S.C. § 2254(d) prohibits federal habeas courts from reviewing state-court decisions of state law, Kimbrough's Rule 7(B) *Strickland* claim cannot support federal habeas relief. Indeed, this Court reached precisely this conclusion in *Miller v. Zatecky*, 820 F.3d 275 (7th Cir. 2016), which also involved a decision by the Indiana Court of Appeals rejecting a post-conviction Rule 7(B) *Strickland* claim because the claimant was not eligible for a sentence revision under Rule 7(B).

In spite of the virtual identity between this case and *Miller*, the district court below accepted Kimbrough's claim and granted habeas relief. Its decision misapplies *Miller* and 2254(d). It should be reversed.

## STATEMENT OF THE CASE

### I. Kimbrough's Crime, Arrest, and Trial

In January 2009, Kimbrough began dating a mother of two young daughters—a six-year-old and five-year-old—and a son with cerebral palsy. App. 39. The mother introduced Kimbrough to her children, and Kimbrough continued to have contact with the children even after he and the mother ended their relationship. *Id.* In October 2010, the mother noticed that her daughters were behaving strangely, and she came to realize that Kimbrough had touched them inappropriately on multiple occasions. *Id.* The daughters revealed that Kimbrough had placed his penis on or in their genitalia and anal areas, had licked and touched their genitalia, and had coerced them into masturbating him. *Id.* Kimbrough's molestations occurred on multiple occasions over the course of nearly two years. *Id.*

On November 5, 2010, the State charged Kimbrough with four counts of Class A felony child molestation for performing sexual intercourse with a child under fourteen, *see* Ind. Code § 35-42-4-3(a) (2010), and two counts of Class C felony child molestation for fondling a child under fourteen, *see* Ind. Code § 35-42-4-3(b) (2010). App. 39. After hearing testimony from a medical expert and the two young victims, the jury found Kimbrough guilty on all counts. App. 23–24. On May 31, 2011, the trial court sentenced Kimbrough to 40 years on each count, with counts I and II to be served concurrently and counts III and IV to be served concurrently with each other but consecutive to counts I and II. App. 1–3.

## II. Kimbrough's Direct Appeal

Kimbrough appealed his conviction and sentence to the Indiana Court of Appeals, and he argued that the evidence was insufficient, that the trial court's jury instructions were erroneous, and that the trial court abused its discretion in imposing what was in effect an 80-year sentence. App. 5. On March 21, 2012 the Indiana Court of Appeals affirmed Kimbrough's conviction, but reversed his sentence. App. 9–14. The three-judge panel of the Court of Appeals unanimously rejected Kimbrough's sufficiency-of-the-evidence and jury-instruction arguments, but it divided 2-1 over Kimbrough's challenge to his sentence. App. 9–21.

Kimbrough's abuse-of-discretion claim argued that "the trial court considered improper aggravating circumstances and failed to give enough weight to the sole mitigating circumstance, i.e., his lack of a significant criminal history." App. 11. In addressing this argument, the panel majority noted that under Indiana law a defendant may establish that a sentencing court abused its discretion by showing that the court "(1) fail[ed] to enter a sentencing statement, (2) . . . [gave] reasons not supported by the record. . . (3) . . . omit[ted] reasons clearly supported by the record, or (4) . . . [gave] reasons that are improper as a matter of law." *Id.* (citing *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on other grounds on reh'g* 875 N.E.2d 218). The panel majority found "no abuse of discretion in the [trial court']s finding of . . . valid aggravating circumstances," and concluded that the trial court "did not err by failing to recognize a valid mitigating circumstance supported by the record." App 13. But it nevertheless reduced Kimbrough's sentence to an aggregate 40 years—that is, the 20-year statutory minimum for each count—concluding that, "[f]ocusing on the

appropriateness of the sentence and not the weight given to individual aggravating or mitigating factors, . . . the trial court abused its discretion," because "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." App. 13.

The dissenting member of the panel would have affirmed Kimbrough's 80-year sentence. The dissent argued that Kimbrough's abuse-of-discretion claim failed because "the trial court entered a reasonably detailed sentencing statement setting forth valid aggravating and mitigating factors that are supported by the record," and under Indiana law "a trial court cannot be said to have abused its discretion in failing to properly weigh the mitigating and aggravating factors." App 16. The dissent contended that Indiana Appellate Rule 7(B) was the only other possible justification for revising Kimbrough's sentence and that any 7(B) argument should be rejected "[b]ecause Kimbrough advances no argument under Appellate Rule 7(B) concerning the nature of the offense or his character." App. 17. And even looking past Kimbrough's failure to raise a 7(B) claim, in light of the other charges pending against Kimbrough at the time of sentencing, "combined with . . . the presence of multiple victims, their young ages, the ongoing nature of Kimbrough's crimes, and his abuse of a position of trust," the dissent concluded that Kimbrough was in any event not entitled to a revision of his sentence under Rule 7(B). App. 21.

The State sought and obtained transfer to the Indiana Supreme Court, which affirmed Kimbrough's original 80-year sentence. App 22–29. The Court held that Kimbrough's abuse-of-discretion claim could not support the Court of Appeals'

reduction of his sentence because "the trial court's sentencing statement did not omit consideration of Kimbrough's lack of a criminal history . . . [but instead] specifically noted as a mitigating factor that Kimbrough 'has no history of delinquency or criminal activity.'" App. 27. Any disagreement the panel majority may have had with the sentencing court's weighing of aggravating and mitigating factors could not give rise to an abuse-of-discretion claim because under Indiana law "a trial court 'no longer has any obligation to 'weigh' aggravating and mitigating factors against each other' and thus 'a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors.'" App. 27 (quoting *Anglemyer*, 868 N.E.2d at 491).

The Court next observed that "the Court of Appeals' declaration that it was 'focusing on the appropriateness of the sentence' . . . implicates Indiana Appellate Rule 7(B), and it held that Rule 7(B) also could not justify the reduction of Kimbrough's sentence. App. 27–28. Noting that the dissenting member of the panel "undertook a thorough analysis of the nature of Kimbrough's offenses and his character and concluded that Kimbrough's sentence was not inappropriate," it held that Rule 7(B) could not support the Court of Appeals' decision because "Kimbrough did not seek sentencing revision, did not cite to or rely upon Appellate Rule 7(B) and thus . . . made no attempt to [show that his sentence was inappropriate]." App. 28 & n.1.

## III. Kimbrough's State Post-Conviction-Review Proceedings

Kimbrough filed a petition for post-conviction relief in Indiana trial court. Kimbrough's petition raised an ineffective-assistance-of-counsel claim under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), arguing that his appellate

counsel was unconstitutionally ineffective for failing to challenge the 80-year sentence under Indiana Appellate Rule 7(B). App. 43. The post-conviction court denied Kimbrough's petition, and Kimbrough appealed to the Indiana Court of Appeals. The Indiana Court of Appeals affirmed the denial of Kimbrough's ineffective-assistance claim. After considering in detail Kimbrough's character and the nature of his offense "with the benefit of full briefing on the issue," the Court of Appeals concluded 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." App. 48. It thus held that because Kimbrough is not entitled to relief under Rule 7(B), he "failed to establish prejudice as a result of the omission of this argument in his direct appeal" as required by *Strickland*. App 48. Kimbrough petitioned for transfer to the Indiana Supreme Court, which the Court denied. App. 50.

**IV. Kimbrough's Federal Habeas Proceedings**

Kimbrough next filed a petition for a writ of habeas corpus in the United States District Court of the Southern District of Indiana, which the district court granted. D.E. 1; S.A. 1. The district court concluded that the Rule 7(B) claims were stronger than the other claims that appellate counsel raised and that as a result counsel's performance was deficient under *Strickland*. S.A. 2–14. The district court next determined that Kimbrough satisfied *Strickland*'s prejudice prong because Kimbrough would have had a reasonable probability of success on a Rule 7(B) argument. S.A. 9–13. The district court concluded that the panel majority's—apparent—decision to reduce Kimbrough's sentence under Rule 7(B) on direct appeal

"necessarily," S.A. 11, meant that there was "a reasonable probability" that "the result of the proceeding would have been different" if Kimbrough's counsel had raised a Rule 7(B) argument, *Strickland*, 466 U.S. at 694. The district court held that the post-conviction-relief decision of the Indiana Court of Appeals concluding otherwise was "an unreasonable application of *Strickland*" and held that Kimbrough was entitled to a new appeal where the Indiana Court of Appeals can consider his Rule 7(B) argument once again. S.A. 11–14.

After Kimbrough unsuccessfully asked the district court to directly reduce his sentence to 40 years or order a new sentencing hearing instead the new appeal it had originally ordered, D.E. 22, 25, the State filed its notice of appeal. D.E. 29. Kimbrough also filed a separate notice of appeal. D.E. 30. On January 4, 2019 the Court set a briefing schedule requiring the State to file the opening brief in the main appeal on or before February 13, 2019. The State now does so.

## SUMMARY OF ARGUMENT

The district court's decision granting habeas review required disregarding the post-conviction-review decision of the Indiana Court of Appeals on a matter of state law. In doing so, the district court exceeded the limits of its authority in habeas review. Its decision should be reversed.

The Indiana Court of Appeals concluded, as a matter of state law, that Kimbrough is not entitled to relief under Rule 7(B); it then properly determined that Kimbrough therefore could not establish prejudice from his appellate counsel's decision not to raise a Rule 7(B) claim. The denial of Kimbrough's petition for post-conviction relief thus rested on a state court's decision on an issue of state law—a

decision that federal courts have no power to review. *See* 28 U.S.C. § 2254(d). This Court addressed precisely this scenario in *Miller v. Zatecky*, 820 F.3d 275 (7th Cir. 2016). There the Indiana Court of Appeals had rejected a *Strickland* claim premised on the failure to raise a Rule 7(B) claim because the petitioner had "not established that his 120–year aggregate sentence is inappropriate" and therefore could not "establish that there is a reasonable probability that his sentence would have been revised pursuant to Appellate Rule 7(B) if appellate counsel had raised the issue on direct appeal." *Miller v. State*, 985 N.E.2d 371 (Ind. Ct. App. 2013) at *6. This Court held that such a state-court decision is unreviewable in a federal habeas proceeding because a "federal court cannot disagree with a state court's resolution of an issue of state law." *Miller*, 820 F.3d at 277.

Kimbrough's attempts to distinguish *Miller* fail. Kimbrough argues that the decision of the majority of the Indiana Court of Appeals panel in his direct appeal necessarily means he satisfies *Strickland*'s "prejudice" requirement. But the direct-appeal panel majority's decision to reduce Kimbrough's sentence is of little probative value because it reached this determination without the benefit of briefing and without any analysis. And in any case, federal law bars federal courts from reviewing state-law decisions made "with respect to any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). Here, the *post-conviction-review court* adjudicated Kimbrough's *Strickland* claim, and it is *that* Court's decision—not the vacated decision of the intermediate appellate court on direct appeal—that binds federal courts.

## ARGUMENT

### I. Under *Miller v. Zatecky*, the State Post-Conviction-Review Court's Decision Denying Kimbrough's *Strickland* Claim on the Basis of State Law Forecloses this Claim in Federal Habeas Review

1. This Court reviews the district court's decision to grant habeas relief *de novo*. *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003). Kimbrough's sole habeas claim is that, under *Strickland v. Washington*, 466 U.S. 668 (1984), his Sixth Amendment right to assistance of counsel was violated because his appellate counsel chose not to challenge Kimbrough's sentence as "inappropriate in light of the nature of the offense and the character of the offender" under Indiana Appellate Rule 7(B). *Strickland* claims require the claimant to show two things: that his "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688–689, and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Because Kimbrough's *Strickland* claim has already been "adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), this Court reviews the claim through the deferential framework of 2254(d). In addressing a *Strickland* claim under 2254(d), the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id*. at 101. Thus, a federal habeas court does not apply the principles of *Strickland* directly, but rather analyzes whether the state courts reasonably applied federal law in concluding that counsel were not ineffective. *Id*; *see also Conner v. McBride*, 375 F.3d

643, 657 (7th Cir. 2004). In sum, Kimbrough must establish that in denying his *Strickland* claim the judges of the Indiana Court of Appeals did not act as "fairminded jurists." *Richter*, 562 U.S. at 102. If his "position depends on anything other than a straightforward application of established rules," he cannot obtain habeas relief. *Liegakos v. Cook*, 106 F.3d 1381, 1388 (7th Cir. 1997).

Most importantly, 2254(d) provides that a habeas petition cannot be granted unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established *Federal* law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). For this reason, "[w]hen a state court resolves a federal claim by relying on a state law ground that is both independent of the federal question and adequate to support the judgment, federal habeas review of the claim is foreclosed." *Richardson v. Lemke*, 745 F.3d 258, 286 (7th Cir. 2014); *see also Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Thus, when a state-court decision rejecting a claim later raised in a federal habeas petition rests on *state* law, 2254(d) categorically requires the federal habeas claim to be dismissed.

2. That is what the district court should have done here. The Indiana Court of Appeals rejected Kimbrough's *Strickland* claim because it determined that Kimbrough is not eligible for a sentence revision as a matter of state law. *See* App. 48–49. ("[I]f 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. . . . Therefore, [Kimbrough] has failed to establish prejudice as a result of the omission of this argument in his direct appeal."). Under Section 2254(d), that ends the matter.

Indeed, in *Miller v. Zatecky* this Court arrived at precisely this conclusion after reviewing a virtually identical sequence of events. 820 F.3d 275 (7th Cir. 2016). In *Miller*, as here, an Indiana jury convicted the habeas petitioner of child molestation, and the Indiana trial court imposed a 40-year sentence for each count. *Id.* at 276. The Indiana Court of Appeals affirmed the convictions on direct appeal, and the petitioner later raised a *Strickland* claim in the Indiana post-conviction review court, arguing that his appellate counsel's failure to raise a claim under Indiana Appellate Rule 7(B) constituted ineffective assistance of counsel. *Id.* The Indiana Court of Appeals reviewed the facts surrounding the offense and the offender's character, as well as other Rule 7(B) cases, and held that the petitioner "has not established that his . . . sentence is inappropriate in light of the nature of the offense and the character of the offender. Consequently, [he] cannot establish that there is a reasonable probability that his sentence would have been revised pursuant to Appellate Rule 7(B) if appellate counsel had raised the issue on direct appeal." *Miller v. State*, 985 N.E.2d 371 (Ind. Ct. App. 2013) at *6.

As this Court explained in its decision affirming the denial of the subsequent federal habeas petition, the decision of the Indiana post-conviction-review court "means that, if [the] appellate lawyer had contested the sentence, the argument would have failed on the merits. Because, in the state court's view, the chance of

success was zero, it necessarily followed that [the petitioner] had not shown a 'reasonable probability' that a better appellate lawyer could have obtained a lower sentence for him. *Miller v. Zatecky*, 820 F.3d at 276. This Court held that the Indiana court's decision "rest[ed] on a conclusion that, as a matter of state law, it would have been futile to contest the sentence's length on appeal," and "[a] federal court cannot disagree with a state court's resolution of an issue of state law." *Id.* at 277. "[T]he state's court of appeals . . . concluded that appellate review of [the petitioner's] sentence . . . would have done him no good—as a matter of state law. That's the sort of decision § 2254 leaves to the state judiciary." *Id.*

Kimbrough finds himself in precisely the same position as the petitioner in *Miller*. As in *Miller*, the post-conviction-review court held, as a matter of Indiana law, that any Rule 7(B) argument Kimbrough might have made "would have failed on the merits." *Id.* at 276. This state-law decision binds federal courts, and, because this decision necessarily means Kimbrough's "chance of success was zero," Kimbrough cannot establish prejudice under *Strickland*. *Id.*

## II. Attempts to Distinguish *Miller v. Zatecky* Fail

The district court attempted to distinguish *Miller*, but its arguments for doing so are foreclosed by this Court's precedents. *Miller* squarely controls and requires rejecting Kimbrough's *Strickland* claim.

1. The district court argued that *Miller* does not bar Kimbrough's claim because the Indiana Court of Appeals on direct appeal appeared to conclude that Kimbrough was entitled to relief under Rule 7(B), "reach[ing] the opposite conclusion" of the

decision the Indiana Court of Appeals reached in post-conviction review. S.A. 10. Without delving into the Rule 7(B) analysis itself, the district court concluded that the direct-appeal court's decision meant "Kimbrough *necessarily* had a 'better than negligible' chance of success on a Rule 7(B) argument." S.A. 11 (emphasis added).

The decision of an intermediate state court on direct appeal—much less such a decision that is later vacated—is irrelevant to this federal habeas proceeding: "In assessing whether a state court ruling is based on an 'independent and adequate' determination of state law, the federal court must refer to the decision of the *last state court* to have ruled on the merits." *Page v. Frank*, 343 F.3d 901, 905 (7th Cir. 2003) (emphasis added); *see also Weaver v. Nicholson*, 892 F.3d 878, 883 (7th Cir.), *cert. denied*, 139 S. Ct. 649 (2018) (explaining that federal habeas courts "review the *last state court decision* to address the merits of a prisoner's claim" (emphasis added)). Here, the last state court decision to address Kimbrough's *Strickland* claim is the decision of the post-conviction-review court, not the direct-appeal court. And because the post-conviction-review court rejected Kimbrough's *Strickland* claim on the basis of state law, its decision dooms the claim here.

Federal courts look to what the last state court said about state law because that is what 2254(d) requires. The *Strickland* claim Kimbrough asserts in this federal habeas proceeding "was adjudicated on the merits in [a] State court proceeding[]." 28 U.S.C. § 2254(d). And 2254(d) says that Kimbrough's claim cannot warrant federal habeas relief unless that prior state court proceeding—namely, the post-conviction-review proceeding—involved an "unreasonable application of" "clearly established

*Federal* law." *Id.* (emphasis added). Because *that* decision rested on state law, 2254(d) bars habeas relief. In other words, because it was the *post-conviction-review court* that rejected the claim Kimbrough makes here, it is *that court's* decision of state law that binds federal courts; the direct-appeal court's conclusion is irrelevant for the purpose of habeas review.

Moreover, even if the decision of a direct-appeal court could give a federal court the authority to question a post-conviction-review court's decision on a matter of state law, the direct appeal decision by the Court of Appeals cannot be relied upon here. The Indiana Supreme Court's grant of transfer, App. 23, automatically vacated the Court of Appeals' direct-appeal decision, *see* Ind. App. R. 58(A) ("If transfer is granted, the opinion or memorandum decision of the Court of Appeals shall be automatically vacated"), leaving the decision void and without effect.

The decision was also made without the benefit of briefing and without any actual Rule 7(B) analysis. "Kimbrough advance[d] no argument under Appellate Rule 7(B)" in the direct appeal, and of course the State did not brief the issue either. App. 17. The panel majority did not analyze Kimbrough's sentence in terms of "the nature of the offense and the character of the offender." Ind. App. R. 7(B). Indeed, it did not even *cite* Rule 7(B). Rather, the panel majority found "that the trial court *abused its discretion*." App. 13. This conclusion has nothing to do with Rule 7(B), for, as the Indiana Supreme Court explained in vacating the decision, "a request for sentence revision under Appellate Rule 7(B) is not truly a claim of sentencing error" and "the 'appropriateness' of a sentence has no bearing on whether a sentence is erroneous."

App. 28 (internal citation and quotation marks omitted). The only Indiana judges actually to undertake a Rule 7(B) analysis of Kimbrough's sentence—the dissenting panelist on the direct appeal, the post-conviction-review trial court, and the three panelists on the Indiana Court of Appeals on post-conviction-review—*all* concluded that Kimbrough is not entitled to relief under Rule 7(B). App 38–49. And, unlike the direct-appeal court, the latter four of these judges had the benefit of adversarial briefing.

The only opinion even arguably to suggest merit in Kimbrough's Rule 7(B) claim was unclear as to the basis of its holding, was made without briefing, and vacated by a decision of the Indiana Supreme Court. Particularly in light of the "doubly" deferential standard 2254(d) applies to state-court decisions rejecting *Strickland* claims, this opinion is plainly insufficient to justify disregarding the considered decision of the post-conviction review court. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

2. The district court also argued that "[r]eview under Rule 7(B) is discretionary" and that therefore the post-conviction-review court's "determination that it would not have reduced [Kimbrough's] 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"—presumably because a *different* panel of the Indiana Court of Appeals might have reached a different conclusion. S.A. 10. But *Miller* rules out this argument, for it is precisely this contention that the dissenting panelist raised—and the majority rejected—in *Miller*. The *Miller* dissent argued that the

majority should not have "equat[ed] one panel's discretionary rejection of [the petitioner's] sentencing claim . . . with a finding that there is no reasonable probability that the state supreme court or another panel of the court of appeals would have modified the sentence on direct appeal." *Miller v. Zatecky*, 820 F.3d 275, 287 (7th Cir. 2016) (Adelman, J., dissenting). The dissent reasoned that "there is no 'right' or 'wrong' answer under Appellate Rule 7(B)," and that it was therefore "incorrect to say, as the majority does, that the Indiana court of appeals definitively resolved the issue as a matter of state law in finding the sentence appropriate." *Id.*

The *Miller* majority rejected this argument, concluding that the post-conviction-review court's determination that the petitioner "ha[d] not established that his . . . sentence is inappropriate," *Miller v. State*, 985 N.E.2d 371 (Ind. Ct. App. 2013) at *6, meant that the petitioner's "chance of success was *zero*," *Miller v. Zatecky*, 820 F.3d at 276 (emphasis added), and that as a result "as a matter of *state* law, it would have been futile to contest the sentence's length on appeal," *id.* at 277. And rightly so: Contrary to the *Miller* dissent's contentions, Indiana law does *not* give appellate courts unconstrained discretion to revise sentences issued by trial courts.

The Indiana Supreme Court has explicitly stated that Rule 7(B) does not give Indiana appellate courts license to "second guess[] the trial court sentence." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). "Appellate Rule 7(B) analysis is not to determine 'whether another sentence is more appropriate' but rather 'whether the sentence imposed is inappropriate.'" *Id.* (quoting *King v. State,* 894 N.E.2d 265, 268 (Ind. Ct. App. 2008)). Rule 7(B) authorizes Indiana appellate courts "to 'leaven the

outliers' rather than necessarily achieve what is perceived as the 'correct' result." *Id.* *(*quoting *Cardwell v. State,* 895 N.E.2d 1219, 1225 (Ind. 2008)). It is because Indiana law limits appellate courts' use of Rule 7(B) that the Indiana Supreme Court regularly corrects the Indiana Court of Appeals when the latter exceeds the bounds of its authority under Rule 7(B). *See, e.g., McCain v. State*, 88 N.E.3d 1066, 1067 (Ind. 2018); *Bess v. State*, 58 N.E.3d 174, 175 (Ind. 2016), *opinion corrected on reh'g*, 65 N.E.3d 593 (Ind. 2016); *Merida v. State*, 987 N.E.2d 1091 (Ind. 2013); *Lynch v. State*, 987 N.E.2d 1092, 1093 (Ind. 2013); *Bushhorn v. State*, 971 N.E.2d 80, 81–82 (Ind. 2012).

Not only is the district court's argument foreclosed by *Miller*, but it also leads to absurd results. According to the district court, *every* failure to raise a Rule 7(B) claim on direct appeal could support a *Strickland* claim in a federal habeas proceeding—even if a state post-conviction-review court later holds that such a claim would fail as a matter of state law. This would encourage direct-appeal counsel to *avoid* raising Rule 7(B) claims because their client would be guaranteed an opportunity to raise such claims later, *both* in state post-conviction review *and* in a federal habeas petition. The district court's theory would make it practically impossible for Indiana post-conviction-review courts definitively to address *Strickland* claims premised on a failure to seek a sentence revision under Rule 7(B); that is not what 2254(d) requires, for the very purpose of 2254(d) is to "promot[e] comity, finality, and federalism by giving state courts the first opportunity to review the claim, and to correct any constitutional violation in the first instance." *Jimenez v.*

*Quarterman*, 555 U.S. 113, 121 (2009) (internal brackets, quotation marks, and citation omitted).

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Where, as here and in *Miller*, the last state court to address the issue rejects a claim that a petitioner argues appellate counsel should have raised, the probability that the claim would have succeeded in the direct appeal is zero; in this circumstance, a federal habeas court need not wonder how a state appellate court would have decided the claim if it had been made. Here, the Indiana Court of Appeals on post-conviction review determined that under Indiana law Kimbrough was not entitled to a sentencing revision. Subsection 2254(d) forbids federal courts from second-guessing such determinations. That is what the district court did below, and its decision should be reversed.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the district court's decision granting habeas relief.

Respectfully submitted,

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By: *s/ Kian J. Hudson*
Kian J. Hudson
Deputy Solicitor General

## CERTIFICATE OF SERVICE

I hereby certify that on February 13, 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.

*s/ Kian J. Hudson*
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## REQUIRED SHORT APPENDIX

Pursuant to Circuit Rule 30, Appellant submits the following as its Required Short Appendix. Appellant's Required Short Appendix contains all of the materials required under Circuit Rule 30(a). Appellant separately files an Appendix that contains all of the materials required under Circuit Rule 30(b).

By: *s/ Kian J. Hudson*
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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
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| 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.

[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.**

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

Date: 11/30/17

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