IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-3145 & 18-3153

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-DML,
The Honorable William T. Lawrence, Judge

APPELLANT REPLY / CROSS-APPELLEE RESPONSE BRIEF OF SUPERINTENDENT RON NEAL

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STATEMENT OF THE ISSUES

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.

Issue in the Cross-Appeal: Whether, if the district court were correct that Kimbrough is entitled to federal habeas relief, it correctly granted that relief by issuing a conditional order requiring the State either to release Kimbrough or grant him a new appeal.

SUMMARY OF ARGUMENT

Because "[t]he habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States,'" *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (quoting 28 U.S.C. § 2254(a)), "only noncompliance with *federal* law . . . renders a State's criminal judgment susceptible to collateral attack in the federal courts," *id.* The Supreme Court has thus repeatedly held that it "is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* This principle resolves the two issues raised in this appeal: Decisions of Indiana courts both foreclose John W. Kimbrough's claim under *Strickland v. Washington*, 466 U.S. 668 (1984), and—if this Court were to nevertheless accept his claim—preclude his challenge to the district court's remedy. This Court should reject Kimbrough's request to re-examine these state-court determinations and should instead reverse the district court's grant of habeas relief.

1. As this Court recognized in *Miller v. Zatecky*, when an Indiana post-conviction-review court concludes that a petitioner is ineligible for relief under Indiana Appellate Rule 7(B) and therefore rejects a *Strickland* claim premised on a failure to raise an argument under that Rule, its decision bars federal habeas courts from later accepting the claim: The state-court decision "rests 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." 820 F.3d 275, 277 (7th Cir. 2016).

That is precisely what happened here. On post-conviction-review, the Indiana Court of Appeals rejected Kimbrough's *Strickland* claim because it concluded that he is not entitled to Rule 7(B) relief as a matter of state law and therefore cannot show the prejudice required to establish his claim. App. 48–49. Kimbrough half-heartedly attempts to distinguish *Miller* on the theory that the Court of Appeals' decision in his *direct appeal* appeared to grant him Rule 7(B) relief. But that decision leaves the basis of its holding unclear, was made without adversarial briefing, is now vacated, and is irrelevant to this habeas proceeding—in which federal courts are bound by the state-law determinations reached in "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).

Perhaps because he recognizes that *Miller* cannot be distinguished away, Kimbrough instead focuses on urging the Court to overrule the decision, but he comes nowhere near providing the "compelling reason" required to do so. *Int'l Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674, 677 (7th Cir. 2017). *Miller* straightforwardly applies this Court's precedents, which explain that "although claims of ineffective assistance of counsel can be premised on an attorney's failure to raise state-law issues, federal courts reviewing such claims must defer to state-court precedent concerning the questions of state law underlying the defendant's ineffectiveness claim." *Shaw v. Wilson*, 721 F.3d 908, 914 (7th Cir. 2013). Because *Strickland* requires a defendant to show a "reasonable probability" that he would have obtained relief if his counsel had raised a Rule 7(B) argument, the Rule 7(B) question necessarily "underl[ies]" his *Strickland* claim. *Id.* *Miller* thus correctly

recognized—over objections, which Kimbrough repeats here, that Rule 7(B) decisions are purely "discretionary"—that federal habeas courts are bound by a post-conviction-review court's determination that a sentence is not "inappropriate" under Rule 7(B).

2. Precedent also precludes Kimbrough's challenge to the district court's order of conditional habeas relief, which followed the settled practice in ineffective-assistance-of-appellate-counsel cases, ordering the State to release Kimbrough or grant him a new appeal. *See* S.A. 13–14 (citing *Shaw v. Wilson*, 721 F.3d at 919; *United States v. Nagib*, 44 F.3d 619, 623 (7th Cir. 1995)). Courts regularly issue such relief, and Indiana courts regularly hear such appeals—even after considering the state-law jurisdictional arguments Kimbrough raises here. *See, e.g.*, *Barnett v. State*, 83 N.E.3d 93, 99 (Ind. Ct. App. 2017), *transfer denied*, 95 N.E.3d 1294 (Ind. 2018).

Kimbrough says it is unfair to grant him a new appeal because Indiana courts would have been forced to give him broader relief if his petition for post-conviction relief had been successful—but this is both incorrect and irrelevant. Indiana courts sometimes *do* order new appeals in ineffective-assistance-of-appellate-counsel cases. *See, e.g., Gooch v. State*, 10 N.E.3d 99 (Ind. Ct. App. 2014) (not for publication). And in any case, the relief *state post-conviction-review courts* can grant has no bearing on the extent of the remedial powers of *federal habeas courts*. Indeed, States need not provide any post-conviction procedure at all. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). If the Court were to accept Kimbrough's *Strickland* claim and distinguish or overrule *Miller*, it should affirm the district court's "precisely tailored" remedy to which "the state was entitled." *Barnett v. Neal*, 860 F.3d 570, 574 (7th Cir. 2017).

ARGUMENT

I. *Miller v. Zatecky* Squarely Forecloses Kimbrough's Claim

A. *Miller* is indistinguishable from Kimbrough's case

As the State explained in its opening brief, Kimbrough's case is in all relevant respects identical to *Miller v. Zatecky*, 820 F.3d 275 (7th Cir. 2016). In both cases, the federal habeas petitioner raised a *Strickland* claim based upon his appellate counsel's failure to raise an argument under Indiana Appellate Rule 7(B). *Id.* at 276. And in both cases, the habeas petitioner had previously raised his *Strickland* claim in Indiana post-conviction-review proceedings; in each case the Indiana Court of Appeals rejected the claim because the petitioner failed to "establish[] that his . . . sentence is inappropriate" under Rule 7(B) and consequently failed to "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; *see* App. 48 (holding that if the panel majority in Kimbrough's direct appeal "had engaged in 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, he has failed to establish prejudice as a result of the omission of this argument in his direct appeal").

Because in such cases the post-conviction-review court's decision rests on a state-law determination with which a "federal court cannot disagree," the petitioner's *Strickland* claim is barred in a federal habeas proceeding brought under 28 U.S.C. § 2254. *Miller v. Zatecky*, 820 F.3d at 277. Federal habeas petitioners cannot "use

§ 2254 to override a state court's conclusion that state law does not provide the petitioner with the benefit he sought." *Id.*

Kimbrough, like the district court, briefly offers one reason why his case is different from *Miller*: In the his case's *direct appeal*, the majority of a divided panel of the Indiana Court of Appeals concluded, so Kimbrough argues, that he was entitled to relief under Rule 7(B). *See* Appellee Br. 22–23; S.A. 10–11. It is not clear that even this is true: The panel majority held "that the trial court *abused its discretion*," App. 13 (emphasis added)—a rationale for reversing a sentence entirely distinct from Rule 7(B)—and neither analyzed Kimbrough's sentence in terms of "the nature of the offense and the character of the offender," Ind. App. R. 7(B), nor even cited Rule 7(B).[1]

But even if the Court were to accept Kimbrough's characterization of the direct-appeal decision, it is no help to him here, for this Court is bound by the state-law determinations in "the *last state court decision* to address the merits of" Kimbrough's claim—namely, the decision of the Indiana Court of Appeals on post-conviction review. *Weaver v. Nicholson*, 892 F.3d 878, 883 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 649 (2018) (emphasis added). To obtain relief under section 2254, Kimbrough must show that the decision that previously "adjudicated [his claim] on the merits"—

[1] Kimbrough contends that judicial estoppel prevents the State from questioning the basis of the direct-appeal court's decision, Appellee Br. 28–29, but he cites no decision applying judicial estoppel against the government in a habeas case. *Cf. ShisInday v. Quarterman*, 511 F.3d 514, 524 (5th Cir. 2007) (observing that "[t]he Fifth Circuit has rejected judicial estoppel as a ground for habeas relief"). And in any event, Kimbrough failed to raise a judicial estoppel argument before the Indiana Court of Appeals in his post-conviction proceedings, *see* ECF No. 10-11at 11–14; ECF No. 10-13 at 7–8, which means he has forfeited the argument here. *See Farrell v. Lane*, 939 F.2d 409, 411 (7th Cir. 1991) (explaining that a habeas petitioner "forfeits the right to raise an issue he failed to raise in direct or post-conviction review").

i.e., the decision of the post-conviction-review court—"resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d). Because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," Kimbrough cannot use *other* state-court decisions to attack this decision's state-law determinations. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus."). For the purposes of this federal habeas proceeding, the post-conviction-review court's determination that Kimbrough is ineligible for Rule 7(B) relief is thus the final word on that question of state law. *See id.*; *Curtis v. Montgomery*, 552 F.3d 578, 582 (7th Cir. 2009) (observing that federal courts "may not review state-court interpretations of state law" and that "petitioners cannot avoid this limitation by recasting their arguments as challenges to a state court's application of" federal constitutional standards).

Rather than confronting these arguments, Kimbrough asks the Court to disregard the post-conviction-review court's decision in favor of the direct-appeal court. He maintains that because the direct-appeal court appeared to conclude that he was eligible for Rule 7(B) relief, it was "simply incoherent" for the post-conviction-review court to conclude otherwise. Appellee Br. 22. Not only is that a conclusion federal courts lack jurisdiction to make, it is also wrong. The direct-appeal court did not receive any briefing on the Rule 7(B) issue and did not analyze Kimbrough's sentence in terms of Rule 7(B)'s "inappropriate" standard or in terms of the Indiana

case law applying Rule 7(B). App. 8–11. The post-conviction-review court thus reasonably concluded that if the direct-appeal court "had engaged in 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. There is nothing incoherent about one state court, with the benefit of full briefing, concluding that a prior state-court decision was wrong—particularly where, as here, the Indiana Supreme Court had vacated the earlier decision and suggested that it was erroneous. *See* App. 28 n.1 (noting pointedly that the judge who dissented from the direct-appeal decision "undertook a thorough analysis of the nature of Kimbrough's offenses and his character and concluded that Kimbrough's sentence was not inappropriate").

Furthermore, because the post-conviction-review court concluded the direct-appeal court's "application" of Rule 7(B) was *wrong* as a matter of Indiana law—again, a determination section 2254 bars federal habeas courts from reviewing—the direct-appeal court's decision is not proof of "prejudice" under *Strickland*. "[T]he Supreme Court has consistently held that 'the likelihood of a different outcome *attributable to an incorrect interpretation of the law*' does not constitute 'the legitimate prejudice' required under *Strickland*." *Gray v. Hardy*, 598 F.3d 324, 331 (7th Cir. 2010) (emphasis added) (quoting *Williams v. Taylor*, 529 U.S. 362, 392 (2000)); *see also Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993) ("'[I]n judging prejudice and the likelihood of a different outcome, a defendant has no entitlement to the luck of a lawless decisionmaker.'" (internal citations, quotation marks, and brackets omitted)). The direct-appeal decision may show that his "counsel's error would have

"deprived [Kimbrough] of the chance to have the state court make an error in his favor," *id.* at 371, but "[s]heer outcome determination . . . [i]s not sufficient to make out a claim under the Sixth Amendment," *id.* at 370.

The direct-appeal court's decision was made without briefing, failed to clearly identify the basis of its holding, has been vacated and called into doubt by the Indiana Supreme Court, and was declared incorrect by the post-conviction-review decision—binding in this federal habeas proceeding—of the Indiana Court of Appeals. The direct-appeal decision does not distinguish Kimbrough's case from *Miller*.

B. *Miller* is correct and should not be overruled

Unable to distinguish *Miller*, Kimbrough asks the Court to overrule it. This Court does "not take lightly suggestions to overrule circuit precedent and therefore require[s] a compelling reason to do so." *Int'l Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674, 677 (7th Cir. 2017) (internal citations and quotation marks omitted). "What is more, 'principles of stare decisis require that [this Court] give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling.'" *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006), *aff'd*, 553 U.S. 507 (2008) (quoting *Haas v. Abrahamson*, 910 F.2d 384, 393 (7th Cir.1990)). And stare decisis considerations are particularly weighty here, where the decision Kimbrough seeks to overturn is a mere three years old and was considered by the full circuit court and the Supreme Court, on petitions for

rehearing en banc and certiorari, respectively. *See Miller*, 820 F.3d at 275, *cert. denied*, 137 S. Ct. 1579 (2017).

Kimbrough has not come close to demonstrating a "compelling reason" for overruling *Miller*. He "points to no intervening developments in statutory, Supreme Court, or even intermediate-appellate-court law," *Int'l Union of Operating Engineers Local 139*, 863 F.3d at 677, and largely reiterates the arguments this Court considered and rejected in originally deciding *Miller*. These arguments were wrong then, are wrong now, and clearly do "not amount to a compelling reason to revisit" a decision of this Court. *United States v. Kendrick*, 647 F.3d 732, 734 (7th Cir. 2011)

Kimbrough first suggests that Rule 7(B) relief is "entirely discretionary" and that Indiana courts' Rule 7(B) decisions therefore cannot produce a "statement of state law" to which federal habeas courts must defer. Appellee Br. 24–25. Not so. As the State's opening brief—to which Kimbrough does not even attempt to respond—points out, Rule 7(B) relief clearly is not *entirely* discretionary, for the Indiana Supreme Court has explicitly limited appellate courts' power to grant such relief. *See Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (explaining that Rule 7(B) does not give Indiana appellate courts license to "second guess[] the trial court sentence"). This is why the Indiana Supreme Court routinely invalidates Indiana Court of Appeals decisions that erroneously apply 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). Thus, whether or not Rule 7(B) contemplates some discretionary judgment calls, there are undoubtedly some cases where, as a matter of Indiana law, a sentence is not "inappropriate," Ind. App. R. 7(B), and Rule 7(B) relief is therefore necessarily unavailable. Here, the post-conviction-review court determined that Kimbrough's is such a case, and federal habeas courts are bound to respect that determination of state law.

Beyond being wrong on the merits, Kimbrough's characterization of Rule 7(B) also "[s]imply rehash[es]," *Guerrero v. Holder*, 407 Fed. App'x 964, 966 (7th Cir. 2011), the argument of the *Miller* dissent, which took precisely the same "entirely discretionary" view of Rule 7(B). *See Miller*, 820 F.3d at 287 (Adelman, J., dissenting) (arguing that the Indiana Court of Appeals could not have "definitively resolved the issue as a matter of state law in finding the sentence appropriate," because "there is no 'right' or 'wrong' answer under Appellate Rule 7(B)"). This Court "previously considered" and correctly rejected this argument, and simply raising it again "does not provide a compelling reason to revisit [circuit precedent]." *Guerrero*, 407 Fed. App'x at 966; *see also Kendrick*, 647 F.3d at 734.

Kimbrough next contends that *Miller* incorrectly deferred to the post-conviction review decision of the Indiana Court of Appeals on the ground that *no* decision of the Indiana Court of Appeals can bind federal habeas courts, reasoning that because the decision of one Court of Appeals panel does not bind future panels, "it is very hard to characterize anything the Indiana Court of Appeals says as a statement of state law" that would bind federal habeas courts. Appellee Br. 25–26.

This reasoning does not even get state law right: While Indiana does not recognize "horizontal stare decisis," it does recognize *vertical* stare decisis, which means Indiana Court of Appeals decisions *are* binding on state trial courts. *In re C.F.*, 911 N.E.2d 657, 658 (Ind. Ct. App. 2009); *see, e.g.*, *Budden v. Bd. of Sch. Comm'rs of City of Indianapolis*, 698 N.E.2d 1157, 1158 (Ind. 1998) (noting that "[t]he trial court concluded that it was bound by a recent Court of Appeals decision"). More importantly, it confuses the *precedential effect* of state-court decisions with whether those decisions bind federal courts on habeas review: Federal habeas courts reviewing state-court decisions under section 2254 do not have jurisdiction "to reexamine state-court determinations on state-law questions," *regardless* of the state-court decision's precedential effect under state law. *Estelle*, 502 U.S. at 67–68; *see also Bradshaw v. Richey*, 546 U.S. at 76. It is for this reason that federal habeas courts regularly defer even to *state trial courts'* state-law determinations. *See, e.g., Landers v. Warden, Atty. Gen. of Ala.*, 776 F.3d 1288, 1296 (11th Cir. 2015); *Richardson v. Branker*, 668 F.3d 128, 141 (4th Cir. 2012); *Young v. Dretke*, 356 F.3d 616, 628 (5th Cir. 2004).

Indeed, although Kimbrough's argument presumably would relieve federal habeas courts from adhering to Indiana Court of Appeals decisions on *any* issue of state law, he supports his cross-appeal with the decision of the Indiana Court of Appeals in *Montgomery v. State*, 21 N.E.3d 846 (Ind. Ct. App. 2014), which he claims "really is state law with which this Court is not free to disagree." Appellee Br. 32 (citing *Bradshaw v. Richey*, 546 U.S. at 76). Apparently not even Kimbrough

considers federal habeas courts free to disregard the decisions of the Indiana Court of Appeals. This Court should not either.

Finally, Kimbrough summarily—and incorrectly—claims that *Miller* is inconsistent with *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013), and *Jones v. Zatecky*, 917 F.3d 578 (7th Cir. 2019). Appellee Br. 26. In both cases this Court corrected what it saw as the post-conviction-review court's incorrect application of *Strickland*'s *deficient performance* prong and explicitly noted that it was *not* reviewing any state-law determination of the post-conviction-court. *See Shaw v. Wilson*, 721 F.3d at 914 ("Shaw is not asking (and has no reason to ask) that we second-guess an Indiana court on the meaning of [Indiana law]."); *Jones v. Zatecky*, 917 F.3d at 583 ("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.").

In particular, both *Shaw* and *Jones* involved habeas petitions arising from the Indiana Supreme Court's decision in *Fajardo v. Indiana*, 859 N.E.2d 1201, 1207–08 (Ind. 2007), which interpreted a now-amended Indiana statute to permit substantive amendments to felony informations only up to thirty days before the case's "omnibus date." Following *Fajardo*, the habeas petitioners in *Shaw* and *Jones* brought *Strickland* claims in state post-conviction-review proceedings on the basis of their defense counsel's failure to argue that the informations issued against them had been unlawfully amended; the post-conviction-review courts *accepted* the petitioners' interpretation of the state statute—as *Fajardo* obligated them to do. *See Shaw v. State*, 898 N.E.2d 465, 470 (Ind. Ct. App. 2008); *Jones v. State*, 46 N.E.3d 501 (Ind.

Ct. App. 2016). The post-conviction-review courts nevertheless denied relief, but only because they concluded, in light of pre-*Fajardo* confusion regarding the meaning of the Indiana statute, that the defense counsel's *performance* was not "deficient" under *Strickland*. *See Shaw v. State*, 898 N.E.2d at 470 ("While some decisions included *dicta* indicating an amendment of substance would be invalidated if it was untimely, those decisions ultimately upheld the amendments because they were not prejudicial to the defendant. . . . counsel's failure to raise the issue does not demonstrate ineffective assistance"); *Jones v. State*, 46 N.E.3d 501 ("[C]ounsel's representation cannot be deemed to have fallen below an objective standard of reasonableness for failing to anticipate a change in the law." (internal quotation marks and citation omitted)).[2] This Court ultimately granted habeas relief in these cases because it concluded that the post-conviction-review courts improperly applied *Strickland*'s deficient-performance analysis. *See Shaw v. Wilson*, 721 F.3d at 914; *Jones v. Zatecky*, 917 F.3d at 583.

In sum, *Shaw* stands for the unremarkable proposition "that a defendant may use ineffective-assistance doctrine to gain the benefit of state law when a lawyer's error prevented the state judiciary from recognizing the force of a potential state-law defense." *Miller*, 820 F.3d at 277. As this Court recognized in *Shaw*, "although claims of ineffective assistance of counsel can be premised on an attorney's failure to raise

[2] Kimbrough wrongly claims that "[i]n 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." Appellee Br. 19. While *earlier* Court of Appeals decisions had interpreted the state statute differently, the *post-conviction-review* courts in *Shaw* and *Jones* accepted the petitioners' and *Fajardo*'s interpretation of the Indiana statute.

state-law issues, federal courts reviewing such claims *must defer* to state-court precedent concerning the questions of state law underlying the defendant's ineffectiveness claim." 721 F.3d at 914 (collecting cases) (emphasis added; citations omitted). As in *Miller*, the district court failed to defer to do so here.

***

Kimbrough has provided no reason, much less a compelling one, to overrule *Miller*. Indeed, if the Court were to overrule *Miller, every* failure to raise a Rule 7(B) claim on direct appeal would give rise to a *Strickland* claim in a subsequent federal habeas proceeding—even if the Indiana post-conviction-review court holds that the petitioner's Rule 7(B) claim would fail as a matter of state law. Paradoxically, this would mean that raising a Rule 7(B) claim in direct appeal would give a defendant just one chance (because if the direct-appeal court rejects the claim, it cannot be raised later), while waiting to raise the claim until the post-conviction proceeding would give the defendant *two* chances (because if the post-conviction-relief court rejects the claim, the petitioner is guaranteed a chance to raise it in a subsequent federal habeas proceeding). Federal habeas law "does not make defendants with poor lawyers better off than defendants with good ones." *Miller*, 820 F.3d at 278.

At best, Kimbrough "has articulated a solid defense of the arguments that [the Court] rejected in" *Miller*; this "does not amount to a compelling reason to revisit" a case the Court decided just three years ago. *Kendrick*, 647 F.3d at 734. The Court should apply *Miller* and reverse the decision of the district court.

II. If the Court Concludes Kimbrough Received Ineffective Assistance of Appellate Counsel, It Should Affirm the District Court's Order Requiring the State Either to Release Kimbrough or Grant Him a New Appeal

Kimbrough's defense of the district court's acceptance of his *Strickland* claim urges the court to disregard this Court's decision in *Miller* as well as the decision of the Indiana post-conviction-review court. His cross-appeal of the conditional habeas relief the district court ordered goes even further: He asks the Court to depart from *several* of its prior decisions and hold that federal habeas courts can never issue conditional habeas relief that permits Indiana to provide a new direct appeal to remedy ineffective-assistance-of-appellate-counsel claims. It should not do so. Indeed, the Court should not address Kimbrough's cross-appeal at all: As explained above, it should reverse the decision below, which would render Kimbrough's arguments regarding the district court's conditional habeas relief order irrelevant. But if this Court were to accept Kimbrough's *Strickland* claim, it should affirm the district court's order. A new appeal remedies the purported constitutional violation and permitting the State to provide such an appeal accords with this Court's longstanding precedent. Kimbrough's request for a special exception for habeas petitioners in Indiana misunderstands the Court's precedents and the role of federal habeas courts.

A. This Court regularly orders conditional habeas relief providing for new appeals in ineffective-assistance-of-appellate-counsel cases, and Indiana courts regularly hear new appeals in response

Section 2254 permits federal courts "to entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in *violation of the Constitution or laws*

or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). It authorizes federal courts to issue the writ—which simply requires the prisoner to be released from custody—only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" the Supreme Court's precedents interpreting and applying the particular federal right at issue. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Section 2254 "goes no further." *Id.*

Because section 2254 is "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions," *id.* at 103, the Supreme Court "has repeatedly stated" that, after determining that the strict requirements of section 2254 have been met, a federal court "may delay the release of a successful habeas petitioner in order to provide the State an *opportunity to correct the constitutional violation* found by the court," *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (emphasis added) (collecting cases); *see also see also Phifer v. Warden, United States Penitentiary, Terre Haute, Ind.*, 53 F.3d 859, 864–65 (7th Cir.1995) (explaining that federal courts have the power to issue conditional writs giving states the opportunity to cure any constitutional errors).

Here, Kimbrough's *Strickland* claim neither challenges the length of his sentence itself, nor the procedure the Indiana trial court used to reach that sentence. It asserts, rather, that the manner of his direct appeal was constitutionally defective: At bottom, Kimbrough's *Strickland* claim is that his appellate counsel's failure to present an argument under Rule 7(B) violated his constitutional rights under the principle that "[a] first appeal as of right . . . is not adjudicated in accord with due

process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The district court concluded that Kimbrough's appellate counsel did render ineffective assistance, S.A. 13, thereby depriving Kimbrough of "a meaningful appeal," *id.* at 405. Having found a constitutional defect in the prosecution of Kimbrough's direct appeal, the district court, following this Court's prior decisions, concluded that "[t]he only logical relief" was to give him a new direct appeal where he could make the Rule 7(B) argument his original appellate counsel failed to make. S.A. 13 (citing *Shaw v. Wilson*, 721 F.3d 908, 919 (7th Cir. 2013); *United States v. Nagib*, 44 F.3d 619, 623 (7th Cir. 1995)).

The district court's rejection of Kimbrough's request for a different remedy straightforwardly applied decades of consistent decisions. Even before the Supreme Court held that ineffective-assistance-of-appellate-counsel claims are cognizable, lower federal courts recognized that a new direct appeal fully cures the constitutional violation caused by ineffective appellate counsel and is thus the appropriate remedy for such claims. *See, e.g., United States v. Winterhalder*, 724 F.2d 109, 112 (10th Cir. 1983) (per curiam) (holding that "[t]he proper remedy for a denial of effective assistance of counsel in the prosecution of an appeal" is "[t]he reinstatement of defendant's direct criminal appeal"), *cited in Evitts*, 469 U.S. at 309 n.10. This Court has also long agreed that conditional habeas relief allowing the State to provide a new appeal is the appropriate remedy for a successful ineffective-assistance-of-appellate-counsel claim, including in habeas cases involving Indiana convictions. *See, e.g., Mason v. Hanks*, 97 F.3d 887, 902 (7th Cir. 1996) (concluding that the petitioner's

appellate counsel was ineffective for failing to pursue an Indiana hearsay issue and therefore instructing the district court "to issue an order granting the petition for a writ of habeas corpus unless . . . [the petitioner] is afforded a new appeal in which he may raise the hearsay argument omitted from his original direct appeal" (collecting ineffective-assistance-of-appellate-counsel cases ordering new appeals)).

This Court continues to hold that when a habeas petitioner challenging an Indiana conviction successfully establishes an ineffective-assistance-of-appellate-counsel claim, "the relief to which [the petitioner] is entitled is a new direct appeal." *Shaw v. Wilson*, 721 F.3d 908, 919 (7th Cir. 2013). Indeed, the Court has held that when "Indiana is . . . prepared to give" the petitioner a new appeal, "the state [i]s *entitled* to the more precisely tailored option"—even though the petitioner "obviously would have liked" unconditional habeas relief. *Barnett v. Neal*, 860 F.3d 570, 574 (7th Cir. 2017) (emphasis added).

In response, Indiana's appellate courts, including the Indiana Supreme Court, have consistently agreed to hear new appeals following federal courts' issuance of conditional habeas relief. *See, e.g.*, *Mason v. State*, 689 N.E.2d 1233, 1236 (Ind. 1997) ("[T]he State asked us to authorize a second direct appeal for [the successful federal habeas petitioner], which we did."); *Shaw v. State*, 82 N.E.3d 886, 887 (Ind. Ct. App. 2017) ("The Seventh Circuit . . . concluded that [the petitioner] was entitled to a new direct appeal . . . . In this *new appeal*, the sole issue for our review is whether the trial court properly allowed the State to amend the charging information." (emphasis added)), *transfer denied*, 96 N.E.3d 577 (Ind. 2018); *Barnett v. State*, 83 N.E.3d 93, 98

(Ind. Ct. App. 2017) ("[T]he District Court on remand granted conditional federal habeas relief for [the petitioner's] claim of ineffective assistance of appellate counsel. . . . this appeal ensued."), *transfer denied*, 95 N.E.3d 1294 (Ind. 2018).

Kimbrough acknowledges these Indiana decisions but argues that the Court should disregard them on the ground that Indiana courts do not, as a matter of state law, have jurisdiction to hear new direct appeals. Appellee Br. 35–41. Kimbrough's contention is not, however, an argument cognizable in a federal habeas proceeding: "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Even if it were, Kimbrough fails to cite any Indiana decision that so much as suggests that Indiana courts cannot hear a second direct appeal in response to a federal court's habeas order: Other than *Mason*, *Shaw*, and *Barnett*, he cites only *Cook v. State*, 97 N.E.2d 625 (Ind. 1951), a 68-year-old decision which held that Indiana appellate courts *can* hear belated appeals in response to federal habeas orders, and *Packard v. Shoopman*, 852 N.E.2d 927, 931 (Ind. 2006), which simply held that the Indiana judiciary sets the rules governing the jurisdiction of Indiana appellate courts. Neither of these cases provides any reason to question the longstanding practice of Indiana's appellate courts. Indeed, in *Barnett* and *Shaw*, the Indiana Court of Appeals considered precisely the jurisdictional argument Kimbrough raises here and rejected it. *Shaw v. State*, 82 N.E.3d at 893; *Barnett v. State*, 83 N.E.3d at 99. That ends this Court's inquiry.

The district court's conditional habeas order accords the State its opportunity to cure the constitutional violation of which Kimbrough complains, and it follows the unbroken example of this Court's precedents. If habeas relief were necessary, the district court's order would constitute appropriate relief.

B. The relief Indiana courts issue in state post-conviction proceedings is irrelevant to the propriety of the district court's order

In spite of the unanimous precedent holding that a new appeal is the appropriate remedy for a successful ineffective-assistance-of-appellate-counsel habeas claim, Kimbrough argues that the district court should instead have either ordered a new sentencing hearing or unilaterally reduced his sentence to the 40 years ordered in the now-vacated direct-appeal decision. Appellee Br. 20. He claims that Indiana courts cannot grant new appeals and suggests that it is unfair for federal habeas courts to leave him with relief the state post-conviction-review courts could not have ordered.[3] The premise of Kimbrough's argument is wrong: Notwithstanding the arguments to the contrary canvassed in *Montgomery v. State*, 21 N.E.3d 846, 856 (Ind. Ct. App. 2014), Indiana courts sometimes *do* order new appeals in ineffective-assistance-of-appellate-counsel cases. *See, e.g., Gooch v. State*, 10 N.E.3d 99 (Ind. Ct.

[3] Kimbrough also suggests that the district court's remedy order would require Indiana courts to violate the Equal Protection Clause, Appellee Br. 35, but he does not develop this argument, and it is therefore waived. *See Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 706 n.4 (7th Cir. 2002) (holding that appellants waive any argument not developed in briefs on appeal). This argument also fails on the merits. There are many contexts where the availability of particular relief turns on whether the case is heard in federal or state court. *See e.g.*, *F. D. Rich Co. v. U.S. Indus. Lumber Co.*, 417 U.S. 116, 127 (1974) (holding that in cases involving a federal cause of action, the availability of remedies, including attorney's fees, is a matter of federal and not state law). This differential treatment plainly does not amount to an Equal Protection Clause violation: The different powers and functions of state and federal courts easily justify treating the two types of cases differently.

App. 2014) (not for publication). The Court should not backtrack on decades' of precedent on the basis of Kimbrough's speculation as to how Indiana courts will resolve their current disagreement regarding *Indiana courts'* power to order new appeals in post-conviction-review proceedings.

More fundamentally, the kind of relief state law authorizes *state courts* to grant in state post-conviction-review proceedings has no bearing on *federal courts'* power to grant conditional habeas relief. After all, States need not provide *any* post-conviction procedure in the first place. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) ("States have no obligation to provide [postconviction] relief"); *Montgomery v. Louisiana*, 136 S. Ct. 718, 746 (2016) (Thomas, J., dissenting) (same). It is obvious that if Indiana were to entirely abolish its post-conviction-review procedure—and thereby leave Indiana courts with *no* power to grant post-conviction relief—federal courts' habeas powers would continue unabated.

Kimbrough fails to explain why the scope of Indiana post-conviction-review courts' remedial powers is at all relevant to what conditional habeas relief a federal court ought to order. He relies heavily on this Court's decision in *Jones v. Zatecky*, 917 F.3d 578 (7th Cir. 2019), but that case involved a claim alleging ineffective assistance of *trial* counsel, not ineffective assistance of *appellate* counsel. *Id.* at 580. *Jones* therefore provides no support for Kimbrough's claim that federal habeas courts cannot order conditional habeas relief that gives Indiana the opportunity to provide a new appeal in order to cure ineffective assistance of appellate counsel.

Federal habeas courts are not all-purpose guarantors of the correctness and fairness of state proceedings—proceedings which Section 2254 ensures remain "the central process, not just a preliminary step for a later federal habeas proceeding." *Harrington*, 562 U.S. at 103. The purpose of section 2254 is not to put the federal habeas petitioner in the same position "he would have been in had he prevailed earlier" in the state *post-conviction-review* proceeding. Appellee Br. 33. It is simply to correct "extreme malfunctions in the state criminal justice systems," *Harrington*, 562 U.S. at 102 (internal quotation marks and citation omitted), that produce an obvious "violation" of a right secured by federal law, 28 U.S.C. § 2254(a). The authority of a federal court under section 2254 goes no further than ending custody that violates federal law. And here the federal constitutional violation Kimbrough alleges is that his appellate counsel's ineffectiveness deprived him of "a meaningful appeal." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985). A new appeal wholly cures such a violation. Kimbrough does not have a federal constitutional right to any particular sentencing outcome, and the new sentencing hearing—or worse, the direct reduction in his sentence—that he requests therefore not only exceeds federal courts' habeas powers but also exceeds what is necessary to correct the purported constitutional violation. If the Court were to conclude that Kimbrough is entitled to habeas relief, it should affirm the district court's order of conditional habeas relief.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 6,314 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 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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