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

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

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Corrected Reply Brief of Appellee / Cross-Appellant

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Argument

At least in Indiana AEDPA cases—and perhaps in all Indiana cases—federal habeas courts should not order new appeals as conditional relief for appellate ineffective-assistance claims, because to do so is inequitable and because a new appeal in Indiana does not cure the constitutional violation.

With respect to the new appeal the district court ordered as conditional relief in this case, Kimbrough's argument in the district court and now here could not be simpler, and Kimbrough will rehearse the main point again here briefly. He will then go on to explain in detail why the Superintendent's counter-arguments are meritless.

Like elections, the AEDPA has consequences. Those consequences are usually dire for federal habeas petitioners. At least in AEDPA cases, federal habeas petitioners can only obtain relief if the state courts got a federal constitutional claim unreasonably wrong—so wrong that fairminded jurists could not have reached the result that the state courts reached.

Had Kimbrough prevailed in state court post-conviction proceedings, as the Court will see below, the uniform relief in state court for meritorious state post-conviction claims of appellate ineffective assistance has been a new trial or a new sentencing hearing, not a new direct appeal. By "uniform," Kimbrough means in any case worth paying attention to.

But Kimbrough did not prevail in the state post-conviction proceedings; his (pretty obvious) appellate ineffective-assistance claim succeeded only later in federal court, after the district court found that the decision in *Kimbrough III* was unreasonably wrong. That is, on any reasonable view, the district court's grant of habeas relief is a statement that Kimbrough should have prevailed in the state post-conviction litigation. That is what the AEDPA means.

Nobody seems to disagree that habeas relief is equitable in nature. The Superintendent has *no* argument, actually, that would explain why, just because the Indiana Attorney General managed to snooker the Indiana state

courts with respect to Kimbrough's appellate ineffective-assistance claim, Kimbrough should be left so clearly worse off—with a new appeal as conditional relief instead of a new sentencing hearing or reinstatement of the *Kimbrough I* judgment—just because he prevailed in federal court instead of in state court. And because the AEDPA is what it is, and because Indiana law is what it is, new appeals as conditional relief actually create an incentive for the Indiana Attorney General to snooker the Indiana appellate courts.

The Superintendent attempts to deny the obvious equities of the situation by interposing at least one straw man that he then knocks over with an aplomb that would be admirable if Kimbrough's argument in any way resembled the Superintendent's characterization of it. *Of course* federal habeas courts have the power to order new appeals as conditional relief. See Response Br. of Appellant 4 ("[T]he relief state post-conviction-review courts can grant has no bearing on the extent of the remedial powers of federal habeas courts." (Emphasis omitted); *see also id.* at 22 ("[T]he 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." (Emphasis omitted). It would be absurd for Kimbrough to argue that federal courts do not have *the power* to order new appeals as conditional habeas relief—as absurd as the Superintendent's arguments are, with respect to the merits of Kimbrough's appellate ineffective-assistance claim, that which happened could not reasonably have happened or that the post-conviction decision by the Indiana Court of Appeals rests on independent and adequate state grounds. (The first is a factual absurdity, the second a legal one.)

Kimbrough has *never* argued—either in the district court or in this Court—that the district court *could not* order a new appeal as the conditional relief for Kimbrough's meritorious appellate ineffective-assistance claim. He has only argued that, as a matter of equity, because Indiana law—especially Indiana appellate procedure—is what it patently is, federal courts *should not*

order new appeals as conditional relief for appellate ineffective-assistance claims. To do so is inequitable for all of the reasons set out in Kimbrough's combined opening and response brief, and to do so does not "tailor" the relief to the constitutional injury suffered. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

A. *Gooch*, a single memorandum decision of the Indiana Court of Appeals, is no answer to *Ben-Yisrayl*, a 20-year old case of the Indiana Supreme Court.

For the proposition that a new appeal is *possible* state post-conviction relief for an appellate ineffective-assistance claim, the Superintendent relies on *Gooch v. State*, 2014 Ind. App. Unpub. LEXIS 430 (Ind. Ct. App. 2014) (*mem.*), *trans. denied*. See Response Br. of Appellant at 21–22 ("Indiana courts sometimes do order new appeals in ineffective-assistance-of-appellate-counsel cases." (Citing *Gooch*). Besides other problems with *Gooch* "sometimes" is an exaggeration. *Gooch* appears to be *the singular* instance of an Indiana post-conviction court granting a new direct appeal.[1]

Gooch also actually illustrates well Kimbrough's point in his opening brief that very little the Indiana Court of Appeals says can be taken as state law. See Br. of Appellee at 25–26. Almost 20 years ago, now, in *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000), the Indiana Supreme Court affirmed as state post-conviction relief a new sentencing hearing for a meritorious appellate ineffective-assistance claim. *Id.* at 267–68. As a matter of Indiana

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[1] *Gooch*, itself, describes new appeals as state post-conviction relief as "rare," 2014 Ind. App. Unpub. LEXIS 430 at *1. In the time before memorandum decisions of the Indiana Court of Appeals began appearing in the electronic legal research databases, there may well be other cases that involved new appeals as state post-conviction relief. Kimbrough has only said he is unaware of any *reported* case ordering a new appeal as post-conviction relief for an appellate ineffective-assistance claim. See Br. of Appellee at 32. The Superintendent has not come up with a counter-example, and Kimbrough continues to believe there is none.

state post-conviction law, not a single reported case of which Kimbrough is aware has done anything else.

Gooch is also a memorandum decision of the Indiana Court of Appeals. It is absolutely legitimate for the Superintendent to pull the unicorn out of his hat to show, as a matter of fact, that *a* unicorn exists. But under Indiana's Appellate Rules, it is illegitimate for the Superintendent to rely on *Gooch* as saying anything about Indiana law. Indiana Appellate Rule 65(D) provides in relevant part: "[A] memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case." And this Court has eschewed any legal reliance on memorandum decisions of the Indiana Court of Appeals. see *Horn v. A.O. Smith Corp.*, 50 F.3d 1365, 1370 n. 10 (7th Cir. 1995) (disregarding a memorandum decision citing then-Indiana Appellate Rule 15(A)(3), which is identical to today's Rule 65(D)); *see also United States v. Anderson*, 2019 WL 1306309 at *4 (7th Cir. Mar. 21, 2019) (same, in a case not involving diversity jurisdiction).

Finally, *Gooch* was decided before *Montgomery v. State*, 31 N.E.3d 846 (Ind. Ct. App. 2014)*, trans. denied,* which explains why, over the decades, now, the correct state post-conviction relief for an appellate ineffective-assistance claim is a new trial or a new sentencing hearing, not a new appeal.

The Superintendent says 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." Response Br. of Appellant at 22 (emphasis in the original). Kimbrough has never "speculated" about any disagreement in the Indiana courts in this regard. There is no reason that he should have, because there is simply no disagreement.

B. *Mason*: Whether Indiana appellate courts have the legitimate power to order a new appeal was never raised.

Kimbrough has never disputed that new appeals have, in fact, been initiated in state court after federal courts have granted habeas relief conditioned on a new appeal. The Superintendent's Exhibit 1 in this regard is *Mason v. State*, 689 N.E.2d 1233 (Ind. 1997), in which the Indiana Supreme Court decided a new appeal after this Court granted habeas relief for an appellate ineffective-assistance claim in *Mason v. Hanks*, 97 F.3d 887 (7th Cir. 1996). But the jurisdictional problem for the state courts—and it is a very real problem—was not raised in the state-court iteration of *Mason*. So the Superintendent's Exhibit 1 is not much of an exhibit.

Also, the Superintendent says the precedent is "unanimous" "that a new appeal is *the* appropriate remedy" for a meritorious claim of appellate ineffective-assistance. Response Br. of Appellant at 21 (emphasis added). That's not really so. In *Mason v. Hanks*, as for an appellate ineffective-assistance claim, this Court ordered a new appeal *or* a new trial. *Mason*, 97 F.3d at 902.

C. *Barnett* and *Shaw*: The Superintendent's argument is entirely circular.

The Superintendent says that there's no problem ordering a new appeal as conditional relief, because the Indiana courts order new appeals following writs conditioned on new appeals all the time. The Superintendent's Exhibits 2 and 3, after *Mason*, are *Shaw v. State*, 82 N.E.3d 886 (Ind. Ct. App. 2017), *trans. denied* and *Barnett v. State*, 83 N.E.3d 93 (Ind. Ct. App. 2017), *trans. denied*. See Response Br. Appellant at 19–20. For good measure, the Superintendent tacks on that Kimbrough's attack in this Court on the jurisdiction of the Indiana appellate courts to hear come-back new appeals on conditional writs is a state-law claim that is not cognizable in federal habeas proceedings. See Response Br. of Appellant at 20.

But Kimbrough is not making any "claim" that the Indiana appellate courts have no jurisdiction, as a matter of state law, to institute come-back appeals. They don't, but that's not Kimbrough's "claim" here. His "claim" is that the appropriate conditional relief for his appellate ineffective-assistance claim is not a new appeal. The state courts' response to both Barnett's and Shaw's jurisdictional argument, made in the state courts, was that it was the federal courts that had authorized the new appeals in those cases. *See Barnett*, 83 N.E.3d at 99 ("If Barnett believed that it was error for the District Court to grant a new direct appeal as part of the remedy, he should have sought relief in the federal courts.); *Shaw*, 82 N.E.3d at 893 (same).

In Barnett's habeas appeal, after the State of Indiana blew the deadline for initiating a new appeal this Court left squarely up to the Indiana state courts to decide whether "the criteria for a new appeal have been satisfied. *Barnett v. Neal*, 860 F.3d 570, 574 (7th Cir. 2017).

So the Superintendent says it's up to the state courts; this Court says its up to the state courts. When people in Kimbrough's position go back to the state courts, *they* say it's up to the federal courts, and any complaints should be lodged there.

Kimbrough is not making any point about Indiana procedure that this Court need decide. But the Superintendent's argument that state courts *do* decide come-back appeals resulting from conditional habeas relief, at least insofar as it relies on *Barnett* and *Shaw*, is rounder than any circle and based on the fundamentally flawed position of the Indiana Court of Appeals: the state courts do decide come-back appeals, because the federal courts say they can; the federal courts say they can, but it's ultimately up to the state courts to decide, say the federal courts. Rinse and repeat.

It cannot be equitable to order a new appeal as conditional relief when people in Kimbrough's position are subjected, by the state courts, to this particular, legally unsupportable whipsaw.

D. It is not an "argument" subject to forfeiture or waiver that a an order of a new appeal as conditional relief would be an invitation to the Indiana Courts to violate Kimbrough's right to equal protection: It is simply a fact.

In the district court, Kimbrough said, "Relief conditioned on a new appeal invites the state courts to violate Kimbrough's federal right to equal protection." D.E. 22 at 5–6. In this Court, Kimbrough has said the same thing at some length:

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

Br. of Appellee at 33. The Superintendent says in a footnote that Kimbrough's argument in this regard has been waived by his failure to develop it in this Court. Response Br. of Appellant at 21 n.3.

It is hard to imagine what more development the Superintendent—or, more importantly, this Court—would require. But it really doesn't matter, because it is a simply a fact of which this Court, as the district was before it, should be aware as it considers whether a new appeal is appropriate conditional relief in this case and in cases like it. And lest the Court think that the equal protection claim that would arise from an Indiana court ordering a new appeal is merely theoretical or simply too academic to be important, precisely this claim is currently pending in a habeas petition in the Southern District of Indiana. See Shaw v. Neal, Verified Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, filed May 9, 2019, Southern

District of Indiana Case No. 1:19–cv-1887–JPH–DLP, D.E. 1 at 8 (Claim 5: "Troy was denied his right to equal protection when the Court of Appeals ordered a new appeal instead of a new trial.").

E. A "new direct appeal" resulting in Indiana state court after a federal habeas court has ordered a new direct appeal as conditional relief does not cure the constitutional error, because it does not result in a new judgment.

After this Court reversed the denial of habeas relief in Troy Shaw's case, *Shaw v. Wilson*, 721 F. 3d 908 (7th Cir. 2013), Shaw was subjected to the new appeal that was ordered as conditional relief. *See Shaw v. State*, 82 N.E.3d 886 (Ind. Ct. App. 2017), *trans. denied*. Having lost in that endeavor in the Indiana Court of Appeals, albeit on the combined strength of eight decisions overruled by the Indiana Supreme Court at the time of his "new direct appeal," Shaw filed a fresh state post-conviction petition as of right under Ind. Post-Conviction Rule 1, § 1. But that petition was dismissed as successive and unauthorized under Indiana Post-Conviction Rule 1, § 12. Shaw appealed that dismissal to the Indiana Court of Appeals, and that court affirmed the dismissal, agreeing that Shaw's petition was successive and under Rule 1, § 12. *See Shaw v. State*, 2018 Ind. App. Unpub. LEXIS 1195 (Ind. Ct. App. Oct. 11, 2018) (*mem.*), *reh'g denied*, *trans. pending*.

The decision of the Indiana Court of Appeals seems to rest on the idea that no new judgment resulted from Shaw's new direct appeal. *See id.* at *11 ("Shaw's sentence was not vacated and he was merely permitted to pursue a new direct appeal."). Shaw has filed a petition to transfer the Indiana Court of Appeals' decision to the Indiana Supreme Court; the briefing on Shaw's transfer petition is complete.

In that briefing, following the decision of the Indiana Court of Appeals, the Indiana Attorney General has taken the position that no new judgment resulted from Shaw's new direct appeal. See State's Response to Transfer, filed May 2, 2019, at 4 ("The limited habeas relief granted to raise a single

claim in a second direct appeal did not result in a new judgment . . . .").[2] If the Indiana Court of Appeals and the Indiana Attorney General are correct, that is a serious doctrinal problem for the Superintendent and for the State of Indiana.

"Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release." *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring); *accord Saterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006); *see also Pfifer v. Warden*, 53 F.3d 859, 864–65 (7th Cir. 1995) ("Conditional writs are essentially accommodations accorded to the state. They represent a [habeas] court's holding that a[n] . . . infirmity justifies petitioner's release. The conditional nature of the order provides the state with a window of time within which it might cure the constitutional error.").

It really should not require much more argument that federal habeas courts should not order conditional relief that will not result in a new judgment free of constitutional error. *See*, *e.g.*, *Lafler*, 566 U.S. at 170. (federal habeas remedies should be "tailored" to the constitutional injury suffered). And, actually, even the Superintendent should not want a new appeal as the conditional relief in Kimbrough's case, because that relief would deprive the State of Indiana of the opportunity to substitute a valid judgment for an invalid one, compelling Kimbrough's release. *See Pfifer*, 53 F.3d at 865 ("Failure to cure [the constitutional] error . . . justifies release of

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[2] If the links to specific cases on the Indiana appellate courts' website are durable, which Kimbrough doubts, then the appellate docket for Troy Shaw's post-conviction appeal in Shaw v. State, Indiana Court of Appeals No. 18A-PC-1181 can be reached directly here: https://tinyurl.com/yyofnnkv. (The web address is very long, so Kimbrough has resorted to a TinyURL alias.) If, as Kimbrough suspects, the links to specific cases are not durable, then the appellate docket for the case can be reached by going to https://public.courts.in.gov/mycase/#/vw/Search and searching using either Troy Shaw's name or the case number. The publicly available documents, including the State's Response to Transfer, are linked to the docket entries by date.

the petitioner); *see also Jensen v. Pollard*, 2019 U.S. App. LEXIS 14403 at *9–10 (7th Cir. May 15, 2019) (a federal habeas court only loses jurisdiction when "custody flows from a new judgment").

Conclusion

For the foregoing reasons, and for the reasons set out in his combined opening and response brief, Kimbrough respectfully requests that the Court: 1) affirm the judgment of the district court granting Kimbrough a conditional writ of habeas corpus; but 2) reverse the district court with respect to the conditional relief it ordered, ordering any appropriate relief instead.

Respectfully submitted,

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Rule 32(g) Word-Count Certification

I hereby certify that, according to the word-count function of Microsoft Word 2003, excluding the items listed in Rule 32(f), the foregoing Reply Brief of Appellee / Cross-Appellant contain 3,111 words, including footnotes, which is less than the 6,500 words permitted by Circuit Rules 28.1(e)(2)(A) and (e)(2)(C).

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Certificate of Service

I hereby certify that on May 22, 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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