

No. \_\_\_\_

---

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

JOHN W. KIMBROUGH, III  
*Petitioner,*

v.

RON NEAL, Superintendent,  
*Respondent.*

---

**APPLICATION FOR EXTENSION OF TIME TO FILE  
A PETITION FOR A WRIT OF CERTIORARI  
TO UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

---

Michael K. Ausbrook  
Indiana Attorney No. 17223–53  
Indiana University Maurer School of Law  
*Federal Habeas Project*  
211 South Indiana Avenue  
Bloomington, IN 47402  
(812) 322–3218  
mausbroom@gmail.com  
*Counsel of Record*  
Counsel for Petitioner

No. \_\_\_\_

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

JOHN W. KIMBROUGH, III

*Petitioner,*

v.

RON NEAL, Superintendent

*Respondent.*

---

APPLICATION FOR EXTENSION OF TIME TO FILE  
A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

**To the Honorable Justice Brett Kavanaugh, as Circuit Justice for the United States Court of Appeals for the Seventh Circuit:**

The Petitioner, John W. Kimbrough, III, respectfully requests a 61-day extension of time, to and including Monday, March 23, 2020, to file a petition for a writ of certiorari. In support of this application, the Petitioner says:

1. The United States Court of Appeals for the Seventh Circuit issued its decision reversing the grant of federal habeas relief on October 24, 2020, in *Kimbrough v. Neal*, 941 F.3d 879 (7th Cir. October 24, 2019). A copy of that opinion is attached to this application. Absent an extension of time, the petition for a writ of certiorari would therefore be due on Wednesday, January 22, 2020. The Petitioner

is depositing this request with a third-party carrier 11 days before the petition's due date.

2. The court to which certiorari would be directed is the United States Court of Appeals for the Seventh Circuit. This Court has jurisdiction to review the judgment that court under 28 U.S.C. § 1254(1).

3. The Petitioner was convicted in 2011 for four counts of child molesting and sentenced to 80 years in prison. In Petitioner's direct appeal, without any request by Petitioner, on the authority of Indiana Appellate Rule 7(B), a panel of the Indiana Court of Appeals cut Petitioner's sentence in half to 40 years.

The State sought discretionary review by the Indiana Supreme Court, presenting the sole question of whether a discretionary appellate sentence reduction is available under Rule 7(B) when there has been no request for such a reduction. The Indiana Supreme Court agreed with the State that a sentence reduction under the rule is not available unless it has been requested and reinstated Petitioner's 80-year sentence. *See Kimbrough v. State*, 979 N.E.2d 625 (Ind. 2012).

Accordingly, in state post-conviction proceedings, Petitioner alleged that his appellate lawyer had been ineffective for failing to request a sentence reduction under Rule 7(B). (The lawyer had a demonstrable multi-year history of not even knowing that the rule existed.) Without reaching the question of whether Petitioner's lawyer had performed deficiently within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), a different panel of the Indiana Court of Appeals concluded that because *it* would not have granted a sentence reduction under Rule

7(B), had the reduction been requested, neither would the first panel—even though the first panel granted the sentence reduction without a request. See *Kimbrough v. State*,

Petitioner then sought federal habeas relief under 28 U.S.C. § 2254 for his appellate ineffective-assistance claim. The district court granted a writ. That court first concluded that Petitioner’s lawyer had performed deficiently within the meaning of *Strickland* by not requesting a sentence reduction under Rule 7(B). The Respondent Superintendent did not contest this conclusion in the Seventh Circuit.

The district court also concluded that Petitioner was prejudiced within the meaning *Strickland* for the obvious reason: there was a reasonable probability that what actually happened without a request for a sentence reduction would have happened with a request.

The Respondent appealed. The Seventh Circuit reversed the grant of habeas relief, saying that the panel of the Indiana Court of Appeals in Petitioner’s post-conviction appeal had decided a question of state law that federal habeas courts may not second guess. *Kimbrough*, 941 F.3d at 881–882. Specifically, the court said that the Indiana Court of Appeals decided in Petitioner’s post-conviction appeal that, as a matter of state law only, it would have been “futile” for Petitioner’s appellate lawyer to have requested a sentence reduction under Rule 7(B). *Id.*

4. In this Court, the Petitioner will be challenging the Seventh Circuit’s conclusion that the state post-conviction appellate court decided a question of state law that federal habeas courts may not second-guess. See, e.g., *Estelle v. McGuire*,

502 U.S. 62, 67–68 (1991). Appellate re-sentencing under Indiana Appellate Rule 7(B) Indiana is as discretionary trial-level sentencing. Indiana state law, with which the federal court may not disagree, is this: Rule 7(B) “leav[es] much to the unconstrained judgment of the appellate court.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). In any given case, there is no “correct result,” *id.* at 1225, or “right answer,” *id.* at 1224, about whether a sentence reduction is warranted. “As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error . . . .” *Id.* at 1224.

The entirely unobjectionable proposition from *McGuire* applies to state-law questions that involve legal error, *e.g.*, as in *McGuire*, whether evidence is admissible at trial as a matter of state law. Petitioner will be raising the important question of whether *McGuire* extends to “questions” that have no “correct” answer, *i.e.*, “questions” that do not involve legal error. Petitioner will also be raising the important question of whether, under *Strickland*, it can *ever* be “futile” to raise a claim when, as the district court concluded, and the Respondent has not contested, a lawyer has performed deficiently by failing to raise the claim.


5. The Petitioner is requesting an extension of time to file a petition for a writ of certiorari, first because undersigned counsel has been attempting to recruit counsel for the Petitioner. Second, when not away during the holiday break, undersigned counsel has been occupied almost exclusively with preparing for the new semester teaching the federal habeas litigation clinic he directs the Indiana University Maurer School of Law.

6. The Petitioner is requesting an extension of time to file a petition for a writ of certiorari so that the questions described above may be properly presented to the Court.

### CONCLUSION

Wherefore, the Petitioner, John W. Kimbrough, III, respectfully requests a 61-day extension of time, to and including Monday, March 23, 2020, to file a petition for a writ of certiorari.

Respectfully submitted,



Michael K. Ausbrook  
Indiana Attorney No. 17223-53  
Indiana University Maurer School of Law  
*Federal Habeas Project*  
211 South Indiana Avenue  
Bloomington, IN 47402  
(812) 322-3218  
mausbroom@gmail.com

Counsel of Record  
*Counsel for Petitioner*

January 11, 2020