No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW McWHORTER,

Petitioner,

v.

THE STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Indiana Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Maryrachel Durso
Jose Moncada
Willow Thomas
Benjamin Adams

Indiana University Maurer School of Law
Federal Habeas Project
211 South Indiana Avenue
Bloomington, IN 47405
(812) 855-8885

Michael K. Ausbrook
Counsel of Record

P.O. Box 1554
Bloomington, IN 47402
(812) 322-3218
mausbrook@gmail.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment barred the State of Indiana from "retrying" Petitioner for the

1) knowing

2) killing

3) of Amanda Deweese

4) while acting under sudden heat

3) by means of a deadly weapon

after a jury at Petitioner's first trial had expressly acquitted Petitioner of the

1) knowing

2) killing

3) of Amanda Deweese

and after the State of Indiana had amended the charging information to add the two additional elements to the charge on which Petitioner was "retried"?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption to the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Cases (Continued)

Constitutional Provisions, Statues, and Rules

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW McWHORTER,

Petitioner,

v.

THE STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Indiana Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Petitioner Andrew McWhorter respectfully petitions for a writ of certiorari to review the decision of the Indiana Court of Appeals below.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals, App., *infra*, 3a–8a, is reported as *McWhorter v. State* (*McWhorter IV*), 117 N.E.3d 614 (Ind. Ct. App. 2018), *reh'g denied*, *trans. denied*. The Indiana Supreme Court's order denying transfer, App., *infra*, 2a, is reported as *McWhorter v. State*, 129 N.E.3d 783 (Ind. June 18, 2019). The opinion of the Indiana Supreme Court in Petitioner's first post-conviction

appeal, App., *infra*, 12a–17a, is reported as *McWhorter v. State* (*McWhorter III*), 993 N.E.2d 1141 (Ind. 2013).

JURISDICTION

The Indiana Court of Appeals issued its decision and judgment on December 26, 2018, and denied rehearing. Petitioner timely sought review of that judgment by the Indiana Supreme Court, which was denied on June 18, 2019. App., *infra*, 2a. On September 12, 2019, Justice Kavanaugh granted an extension of time to November 15, 2019, in which to file this petition in Application No. 19A260. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides in relevant part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

The Fourteenth Amendment provides in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

Indiana Code Annotated § 35–42–1–1 (Burns. Supp. 2014), the version of the murder statute applicable to both of Petitioner's trials, defined the offense of murder in relevant part: "A person who: (1) knowingly or intentionally kills another human being . . . commits murder a felony."

Indiana Code Annotated § 35–42–1–3(a) (Burns Supp. 2012), the version of the voluntary manslaughter statute applicable to both of Petitioner's trials, defined the offense of voluntary manslaughter in two degrees, as a Class B and as a Class A

felony, and provided in relevant part: "A person who knowingly or intentionally: (1) kills another human being . . . while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon."

STATEMENT OF THE CASE

Introduction

This case presents a paradigmatic violation of the Fifth Amendment's Double Jeopardy Clause. Unlike the federal murder-manslaughter statutory scheme, in which manslaughter has fewer elements than murder, the Indiana scheme of murder and voluntary manslaughter inverts the elemental burden. In Indiana, while murder is the knowing killing of another person, manslaughter is the knowing killing of another person by means of a deadly weapon while acting under sudden heat. As a matter of punishment, voluntary manslaughter may be the lesser offense; but as a matter of proof and federal constitutional law—for the purposes of the Double Jeopardy Clause—voluntary manslaughter is the greater offense.

After Petitioner had been acquitted of the knowing killing of Amanda Deweese, he was "retried" and convicted on an amended charging information, no less, for the knowing killing of Amanda Deweese while acting under sudden heat and by means of a deadly weapon. In his direct appeal after his "retrial," Petitioner raised the same double jeopardy claim he is raising again in this petition, and the Indiana Court of Appeals rejected it. This Court should summarily reverse that court's

judgment, because it is plainly contrary to every relevant double jeopardy decision of this Court.

A jury acquitted Petitioner of murder—specifically for:

1) the knowing

2) killing

3) of Amanda Deweese.

Verdict, August 3 2006, App, *infra*, 10a; *see also McWhorter III*, App., *infra*, 16a ("Here however McWhorter was acquitted of murder . . . ."), 13a (quoting the elements instruction on murder from Final Instruction No. 3 at Petitioner's first trial). The jury's verdict also convicted Petitioner for the supposed "lesser included offense" of voluntary manslaughter as a Class A felony. Verdict, App., *infra*, 10a; *see also McWhorter III*, App., *infra*, 3a.

In state post-conviction proceedings, Petitioner's voluntary manslaughter conviction was vacated based on a claim of trial ineffective assistance, and the Indiana Supreme Court authorized Petitioner's "retrial" for voluntary manslaughter and reckless homicide. *McWhorter III*, App., *infra*, 17a.

The original charging information alleged that Petitioner "knowingly killed Amanda Deweese." Original Charging Information, December 5, 2005, App., *infra*, 11a. After the Indiana Supreme Court permitted Petitioner's "retrial," the State amended the charging information for that "retrial" to add two additional elements

not present in the original charging information. The amended information charged that Petitioner:

1) knowingly

2) killed

3) Amanda Deweese

4) while acting under sudden heat

5) by means of a deadly weapon

Amended Charging Information for Voluntary Manslaughter as a Class A Felony, January 25, 2017. App., *infra*, 9a. Lest there be any doubt that Petitioner was, in fact, charged with two additional elements after his acquittal for murder, the two charging informations appear on the following two pages as well as in the Appendix.

STATE OF INDIANA)
) SS:
COUNTY OF HENRY)

IN THE HENRY SUPERIOR COURT I

CASE NO. 33D01- 0512 MR 0001

FILED

DEC 05 2005

CLERK HENRY SUPERIOR COURT NO. 1

FILE STAMP

STATE OF INDIANA)
)
)
)
VS.)
)
)
)
ANDREW W. MCWHORTER)
DOB: 10-25-1977)

INFORMATION FOR:

MURDER
a felony
I.C. 35-42-1-1(1)

The undersigned, being sworn upon his oath, says that on or about December 2, 2005, in Henry County, State of Indiana, Andrew W. McWhorter did knowingly kill another human being, to-wit: Amanda L. Deweese, all of which is contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Indiana.

Butch Baker
Henry County Prosecutor's Office

STATE OF INDIANA	)	IN THE HENRY CIRCUIT COURT I
	) SS:	
COUNTY OF HENRY	)	CAUSE NO. 33C01-0512-MR-0001
STATE OF INDIANA	)	
	)	
VS.	)	
	)	
ANDREW W. McWHORTER DOB: 10-25-1977	)	

INFORMATION

Comes now Ed Manning of the Henry County Sheriff's Department, being duly sworn upon his oath, and states as follows:

VOLUNTARY MANSLAUGHTER, A CLASS A FELONY

On or about December 2, 2005, in Henry County, Indiana, Andrew W. McWhorter did knowingly kill another human being, while acting under sudden heat, by means of a deadly weapon, to wit: shot and killed Amanda Deweese. All of which is against the peace and dignity of the State of Indiana and contrary to the form of the statute made and provided in such case, to-wit: I.C. 35-42-1-3 and constitutes a Class "A" Felony.

Ed Manning
Henry County Sheriff's Department

Subscribed and sworn to before me a Notary Public in and for said State and County this 24th day of January, 2017.

My Commission Expires:

Notary Public
Residing in Rush County, Indiana

ANNETTE KAY COFFIN
Rush County
My Commission Expires
October 29, 2022

APPROVED BY ME:

PHILIP U. CAVINESS - 20059-29
Special Prosecuting Attorney
Term Expires: 12/31/14

Whatever Indiana state law says about the relationship between murder and voluntary manslaughter as a Class A felony, a comparison of the original charging information with the amended charging information shows plainly that Petitioner was "retried" for a greater offense (voluntary manslaughter)—the offense with more elements—after having been acquitted of a lesser offense (murder)—an offense with two fewer elements.

The Double Jeopardy Clause does not permit this.

A. Background through Petitioner's First Direct Appeal

In December 2005, under Indiana Code § 35–42–1–1 (Burns. Supp. 2014), the State of Indiana charged Petitioner with murder in connection with the death of his girlfriend, Amanda Deweese. Petitioner had learned that Deweese had engaged in sexual relations with another man while pregnant with Petitioner's child. Petitioner, who was intoxicated at the time, confronted her and asked for the return of the engagement ring he had given her. In the course of the ensuing altercation, Petitioner shot Deweese. *McWhorter III*, App., *infra*, 13a. Petitioner's defense at trial was that the shooting was accidental. *Id.*

Petitioner's first jury was instructed on murder and also on the offenses of Class A voluntary manslaughter and reckless homicide. It expressly acquitted Petitioner of the murder charge but convicted him of Class A voluntary manslaughter, returning a compound verdict form it had been given: "We, the Jury, find the Defendant, Andrew W. McWhorter, not guilty of murder, but guilty of

voluntary manslaughter, a Class A felony, as a lesser included offense of murder." *McWhorter III*, App., *infra*, 13a.

The Indiana Court of Appeals affirmed the conviction in Petitioner's first direct appeal. *McWhorter v. State* (*McWhorter I*), 872 N.E.2d 218 (Ind. Ct. App. 2007) (unpublished table decision), *trans. denied*.

B. State Post-Conviction Proceedings

In state post-conviction proceedings, a unanimous panel of the Indiana Court of Appeals vacated Petitioner's conviction for a trial ineffective assistance claim and held that Petitioner could not be retried. *McWhorter v. State* (*McWhorter II*), 970 N.E2d 770, 778–79 (Ind. Ct. App. 2012), *trans. granted*, *vacated*, *and summarily aff'd in part by McWhorter v. State* (*McWhorter III*), 993 N.E.2d 1141 (Ind. 2013). In vacating Petitioner's conviction, the Indiana Court of Appeals focused on the jury instructions at trial. The jury was told that only if it failed to convict for murder could it then proceed to consider "included offenses." *See McWhorter III* n.1, App., *infra*, 13a–14a (quoting Final Instruction No. 3 from Petitioner's first trial). The Indiana Court of Appeals held that Petitioner's trial lawyer had been ineffective for failing to object to Final Instruction No. 3 with its serious sequential error:

> The jury was led by the sequential error of the instruction to, as a practical matter, find that McWhorter did not knowingly or intentionally kill Deweese, but that he did knowingly or intentionally kill Deweese while

> acting in sudden heat. That which does not exist cannot be mitigated. Counsel's failure to object was deficient performance.

McWhorter II, 970 N.E.2d at 777.[1]

As a matter of issue preclusion, *see Ashe v. Swenson*, 397 U.S. 436, 443 (1970), the *McWhorter II* panel of the Indiana Court of Appeals also held that Petitioner could be retried for reckless homicide, but not for Class A felony voluntary manslaughter. *McWhorter II*, 970 N.E.2d at 778 ("This contemporaneous verdict form functioned as an acquittal of Voluntary Manslaughter, which requires the same intent as Murder.").

The State sought review by the Indiana Supreme Court of the retrial issue only. That court permitted Petitioner's "retrial" for Class A felony voluntary manslaughter, concluding that issue preclusion was no bar to that "retrial":

> [W]e conclude that a rational jury could have based McWhorter's acquittal on an issue other than whether he acted knowingly. Particularly given the presence of an instruction on voluntary manslaughter (flawed though it may have been), it is certainly conceivable that a rational jury could have determined that McWhorter acted knowingly but did so under mitigating circumstances.

McWhorter III, App., *infra*, 17a.

The sequential error in Final Instruction No. 3 at Petitioner's first trial was the first mistake; the failure by Petitioner's trial lawyer to object to that instruction was the second. The third and fourth mistakes were the application of issue preclusion,

---

[1] Indiana is not an "acquittal first" or "hard transition" state. *Compare Blueford v. Arkansas*, 132 S. Ct. 2044, 2053 (2012) ("Arkansas' model jury instructions require a jury to complete its deliberations on a greater offense before it may consider a lesser."). So the sequential instruction in this case was an error of Indiana law.

first by the Indiana Court of Appeals, and then again by the Indiana Supreme Court.

As will appear in detail below, claim preclusion barred Petitioner's "retrial" for Class A voluntary manslaughter. And this Court has instructed that when offenses are "the same" for double jeopardy purposes, there is no need to resort to collateral estoppel and issue preclusion analysis:

> Because we conclude today that a lesser included and a greater offense are the same under *Blockburger* [*v. United States*, 284 US 299 (1932)], we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by *Ashe* [*v. Swenson*, 397 U.S. 436 (1970)] and [*In re*] *Nielsen*[, 131 U.S. 176 (1889)].

Brown v. Ohio, 432 U.S. 161, 167 (1977). This, of course, makes sense, because where the offenses are "the same," claim preclusion (direct estoppel) is the question, not issue preclusion (collateral estoppel).

C. Petitioner's "Retrial" on an Amended Charging Information for Class A Voluntary Manslaughter that Added Two Entirely New, Additional Elements

As already noted, pages 4–5, *supra*, before Petitioner's second trial, the State amended the charging information to add two new elements to the original murder charge: "while acting under sudden heat" and "by means of a deadly weapon."

The evidence at Petitioner's second trial was essentially the same as the evidence at his first trial.[2] Petitioner was convicted of Class A voluntary

[2] The evidence, if there was any, that Petitioner had killed Deweese "while acting under sudden heat," came from the prior testimony at Petitioner's first trial of Petitioner's grandmother, Barbara Gibbs, who had died between the first trial and the second. (In (Continued)

manslaughter, this time as a principal charge, and again sentenced to 75 years in prison. *McWhorter IV*, App., i*nfra*, 5a.

D. *McWhorter IV*: The Decision in Petitioner's Second Direct Appeal and for which Petitioner Seeks Review by this Court

In his second direct appeal from his now-second voluntary manslaughter conviction, Petitioner raised the claim he raises again here—that having been expressly acquitted of the knowing killing of Deweese, the Double Jeopardy Clause prohibited Petitioner's "retrial" for the knowing killing of Deweese while acting under sudden heat and by means of a deadly weapon. Over a dissent on grounds not at issue here, a two-judge majority of the Indiana Court of Appeals panel disposed

---

McWhorter II, the Indiana Court of Appeals said that there had been no evidence that Petitioner had acted "while under sudden heat" and that the voluntary manslaughter instruction given at Petitioner's first trial should not have been given, because it lacked "evidentiary support." *McWhorter II*, 970 N.E.2d at 776.) At his second trial, Petitioner objected to the use of Gibbs's prior testimony under Indiana Evidence Rule 804(b)(1), which is identical to Federal Evidence Rule 804(b)(1).

At Petitioner's first trial, the State had had to disprove the existence of sudden heat beyond a reasonable doubt to obtain a murder conviction, which it failed to do. At Petitioner's second trial, under the amended charging information for Class A voluntary manslaughter as the principal charge, the State had to prove the existence of sudden heat beyond a reasonable doubt. Petitioner claimed on appeal that Gibbs's testimony was inadmissible at his second trial, because Petitioner's "motive" to cross-examine Gibbs at his second trial was not the remotely "similar" to his "motive" to cross-examine Gibbs at his first trial; between the two trials, the State's burden of persuasion with respect to the existence of sudden heat had entirely reversed.

Despite the language of Rule 804(b)(1) requiring a "similar motive" at two proceedings to examine a witness for that now-unavailable witness's prior testimony to be admissible at a second proceeding, the Indiana Court of Appeals said: "McWhorter was highly incentivized to highlight any problem with her perception and recollection and to elicit from her any evidence that tended to negate or lessen his criminal culpability. Thus, we conclude that McWhorter had a similar motive in both his first and second trials." *McWhorter IV*, App., *infra*, 6a. In addition to being absurd, it is entirely contradicted by the decision of the same court in *McWhorter II*, Petitioner's post-conviction appeal, in which the court said: "The theory of McWhorter's defense was that an accidental shooting had occurred; defense counsel employed an 'all or nothing' strategy seeking acquittal while realizing that the jury might instead convict McWhorter of Murder." *McWhorter II*, 970 N.E.2d at 770.

of the claim relying on the Indiana Supreme Court's decision in *McWhorter III*, Petitioner's post-conviction appeal: "the Indiana Supreme Court expressly directed that 'neither the prohibition of double jeopardy nor the doctrine of collateral estoppel preclude retrial for reckless homicide or voluntary manslaughter.'" Given the Indiana Supreme Court's decision in *McWhorter III*, we reject McWhorter's double jeopardy contention. *McWhorter IV*, App. *infra,* 6a (citation omitted) (footnote omitted). The *McWhorter IV* majority also recited the entirely unobjectionable proposition:

> It is well-settled that "a defendant may be retried for a lesser offense, of which he was convicted at the first trial, after that conviction is reversed on appeal, and this is true even though the first trial also resulted in a verdict of acquittal on a greater offense." *Griffin v. State*, 717 N.E.2d 73, 78 (Ind. 1999) (citing *Price v. Georgia*, 398 U.S. 323, 326–27 (1970)).

McWhorter IV, App., *infra*, 6a (parallel citation omitted).

What *is* objectionable, as Petitioner argued in the state courts, and what the *McWhorter IV* majority ignored is that Petitioner was "retried" for the *greater* offense of Class A voluntary manslaughter which, as a principal charge, requires proof of two additional elements that murder, the lesser included offense, does not.

REASON FOR GRANTING THE PETITION

The Indiana State Courts Have Made an Egregious Error of Federal Constitutional Law, and the Court Should Summarily Reverse the Judgment Below.

Petitioner is straightforwardly asking for summary reversal of the judgment below. The Indiana state courts have repeatedly refused to consider, even, Petitioner's plainly correct argument that the Double Jeopardy Clause barred his

"retrial" for voluntary manslaughter as a Class A felony after his acquittal for murder. Such extraordinary errors of constitutional law happen rarely, should not happen at all, and should be intolerable when they do happen. After decades of double jeopardy decisions by this Court, there is simply no disagreement of authority—because there *could* be none—that after an acquittal for an offense containing three relevant elements, the Double Jeopardy Clause prohibits a so-called "retrial" for an offense that contains the same three elements plus two more. It is no different than if Petitioner had been acquitted of simple robbery and then charged and convicted at a "retrial" for armed robbery causing injury. Yet Petitioner is serving a 75-year sentence after just such a "retrial."

A. For Double Jeopardy Purposes, Murder and Voluntary Manslaughter the Same Offense.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Court applied the Double Jeopardy Clause against the States in *Benton v. Maryland*, 395 U.S. 784 (1969).

In *Blockburger v. United States*, 284 U.S. 299 (1932), the Court stated the now well-established "same elements" test for whether two offenses are the same for federal double jeopardy purposes: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304; *accord United States v. Dixon*, 509 U.S. 688, 696 (1993).

Indiana Code Annotated § 35-42-1-1 (Burns. Supp. 2014), the version of the murder statute applicable to both of Petitioner's trials, defined the offense of murder in relevant part: "A person who: (1) knowingly or intentionally kills another human being . . . commits murder a felony."

Indiana Code Annotated § 35-42-1-3(a) (Burns Supp. 2012), the version of the voluntary manslaughter statute applicable to both of Petitioner's trials, defined the offense of voluntary manslaughter in two degrees, as a Class B and as a Class A felony, and provided in relevant part: "A person who knowingly or intentionally: (1) kills another human being . . . while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon."

Under *Blockburger*, murder and voluntary manslaughter (in either of its versions) are the "same offense": each does not require proof of a fact that the other does not. Murder and voluntary manslaughter as a Class B felony are literally the same offense: the knowing or intentional killing of a human being. Murder and voluntary manslaughter as a Class A felony are the "same offense" within the meaning of *Blockburger*, because proof of the elements of Class A voluntary manslaughter—the knowing or intentional killing of a human being by means of a deadly weapon—necessarily constitutes proof of murder—the knowing or intentional killing of a human being. Murder and Class A voluntary manslaughter do not, then, each require proof of a fact that the other does not.

And when Class A voluntary manslaughter is the principal charge, as it was at Petitioner's second trial, and not submitted to a jury as a lesser included offense, "while acting under sudden" heat is fact necessary for conviction, *see Brantley v. State*, 91 N.E.3d 566, 571 (Ind. 2018), and therefore a second additional element unnecessary for proof of murder.

B. As a Matter of Well-Established Federal Constitutional Double Jeopardy Law, Class A Voluntary Manslaughter as a Principal Charge is a Greater Inclusive Offense of Murder, Not a Lesser Included Offense, Because It Requires Proof of Two Elements Murder Does Not.

As shown in the preceding section, Class A voluntary manslaughter as a principal charge contains two elements that murder does not: "by means of a deadly weapon" and "while acting under sudden heat." That makes Class A voluntary manslaughter a greater inclusive offense of murder, not a lesser included offense. *See Brown*, 432 U.S. at 168 ("As is invariably true of a greater and lesser included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater . . . ."). And, as *Brown* makes clear, which offense is greater and which is lesser for double jeopardy analysis under *Blockburger* is a question of federal constitutional law.

C. Petitioner's Express Acquittal of Murder Terminated Jeopardy on and Barred his "Retrial" for Any Greater Offense, *i.e.*, Class A Voluntary Manslaughter.

An explicit acquittal terminates jeopardy on the acquitted charge. *Evans v. Michigan*, 568 U.S. 313, 328 (2013) ("There is no question that a jury verdict of acquittal precludes retrial, and thus bars appeal of any legal error that may have

led to that acquittal."). Petitioner's first jury expressly acquitted him of murder. The Indiana Supreme Court specifically noted that Petitioner was acquitted of murder in his first trial. *McWhorter III*, App., *infra*, 16a ("Here however McWhorter was acquitted of murder . . . ."). Petitioner's second trial was not a mere retrial on the original murder charge or a lesser included offense of the murder charge. The State tried McWhorter the second time on an amended information that added two new elements. It was not a "retrial" in any sense of the word.

Of course, this Court has held that where a jury considers murder and acquits, but convicts for a lesser included offense, retrial may only be had on a lesser included offense of murder. *Price v. Georgia*, 398 U.S. 323 at 326–27 (1970). That is the unobjectionable proposition used by the *McWhorter IV* majority to defeat Petitioner's double jeopardy argument.

Also, it is well-established that had Petitioner been properly charged with and convicted of Class A voluntary manslaughter, his successful appeal of that conviction on grounds other than sufficiency of the evidence would not bar retrial on the same charge. *See*, *e.g.*, *United States v. Tateo*, 377 U.S. 463, 465 (1964) ("[Double Jeopardy] does not preclude the Governments retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction.").

But that is not what happened. Again, a comparison of the original and amended charging informations makes clear, Petitioner was first acquitted of the lesser offense, murder, and then "retried" and convicted for the greater offense, Class A voluntary manslaughter.

D. Only Twice in Thirty-Five Years Have Indiana Appellate Decisions Recognized the Anomaly That the Lesser-Culpability Crime of Class A Voluntary Manslaughter is a Greater Inclusive Offense of Murder, Not a Lesser Included Offense.

This anomaly of Indiana law was recognized in *Ross v. State*, 877 N.E.2d 829, 836 (Ind. Ct. App. 2007) ("Class A felony voluntary manslaughter requires the State to prove an element—use of a deadly weapon—not found in the murder statute and . . . cannot be considered an inherently lesser included offense of murder."). *Ross* was an ineffective-assistance case, and the court went on to say: "[W]e cannot deem trial counsel ineffective for failing to note an incorrect or overbroad statement of the law that apparently has escaped the notice of our courts for twenty years." *Id.* Indeed, the Indiana cases are legion that mistakenly speak of Class A voluntary manslaughter as "a lesser-included offense of murder." *E.g.*, *Horan v. State*, 682 N.E.2d 502, 507 (Ind. 1997) ("Voluntary manslaughter is inherently included in a Murder charge.").

Only one other time, in a footnote in *Massey v. State*, 955 N.E.2d 247 (Ind. Ct. App. 2011), has an Indiana appellate court recognized *Ross*'s correct observation that, for double jeopardy purposes, Class A voluntary manslaughter is a greater inclusive offense of murder and not a lesser included offense. *Id.* at 256 n.6.[3]

For decades, Indiana courts have recited the incorrect proposition that Class A voluntary manslaughter is a lesser included offense of murder. The Indiana

[3] *Massey* also recognized also that a charging information *could* make Class A voluntary manslaughter a factually included offense by alleging the use of a deadly weapon. 955 N.E.2d at 256 n.6. But the original information charging Petitioner with murder did not allege the use of a deadly weapon—or any means, for that matter. Original Charging Information, App., *infra*, 11a.

Supreme Court made the same mistake—again—in *McWhorter III*: "the State seeks to retry him for the lesser-included offense of voluntary manslaughter." *McWhorter III*, App., *infra*, 16a. And, yet again, the *McWhorter IV* majority made the mistake: "It is well-settled that a defendant may be retried for a lesser offense . . . ." *McWhorter IV*, App., *infra*, 6a. Either court, had it correctly understood the relationship of Class A voluntary manslaughter as the greater inclusive offense of murder, would not have permitted Petitioner's "retrial."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Maryrachel Durso
Jose Moncada
Willow Thomas
Benjamin Adams
Indiana University Maurer School of Law
*Federal Habeas Project**
211 South Indiana Avenue
Bloomington, IN 47405
(812) 855-8885

Michael K. Ausbrook
Counsel of Record
P.O. Box 1554
Bloomington, IN 47402
(812) 322-3218
mausbrook@gmail.com

Counsel for Petitioner

November 15, 2019

* The representation of the Petitioner by a clinic affiliated with the Indiana University Maurer School of Law does not reflect any institutional views of the Maurer School of Law or Indiana University.