

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY WHEELER,
Petitioner,

v.

RON NEAL, Superintendent,
Respondent.

**APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS**

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Counsel for Petitioner

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

The Petitioner, Anthony Wheeler, respectfully requests a 60-day extension of time, to and including Friday, November 22, 2019, 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 order denying the Petitioner a certificate of appealability on June 25, 2019, in Anthony Wheeler v. Neal, Seventh Circuit Case No. 18-3167. A copy of that order is attached to this application. Absent an extension of time, the petition for a writ of certiorari would therefore be due on Monday, September 23, 2019. The Petitioner is

depositing this request in the United States mail six 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 of the Indiana Court of Appeals under 28 U.S.C. § 1254(1).

3. The Petitioner was convicted in 1989 on 8 counts related to two sexual in 1988. He was 19 years old at the time of the assaults. While out on bond before trial, the Petitioner was arrested and charged for an additional sexual assault. The evidence supporting the new charge was so weak that the Petitioner's bond was not revoked, and the charge for the third sexual assault was later dismissed a month before the Petitioner's trial on the first set of charges and two months before the Petitioner was sentenced.

Nevertheless, the Petitioner's arrest for the then-dismissed charge for the third sexual assault was used as the sole aggravating circumstance to enhance the Petitioner's sentence to 90 years from what would have been a sentence of something like 50 years. At this point, 30 years later, with good-time credit, the Petitioner has served a sentence equal to what he would have served for a murder conviction in Indiana in 1989.

In 2014, 26 years later, the Petitioner, *pro se* and from prison, successfully litigated the expungement of his arrest for the third sexual assault. The expungement of that arrest was, as a matter of Indiana law, a judicial determination that either no crime had been committed or that the Petitioner had

had nothing to do with whatever crime might have been committed. *See* Ind. Code § 35-38-5-1(a)(2).

In the Indiana state courts, the Petitioner pursued post-conviction relief for two claims: 1) he had been denied his federal right to due process when he was sentenced to 90 years based on inaccurate information, *see United States v. Tucker*, 404 U.S. 443 (1972) and *Townsend v. Burke*, 334 U.S. 736 (1948); and 2) his trial lawyer had been ineffective for failing to investigate the circumstances of the Petitioner's arrest for the third sexual assault. The Indiana courts denied relief for these claims. *See Wheeler v. State*, Indiana Court of Appeals No. 49A02-1509-PC-1436 (Ind. Ct. App. April 4, 2016) (mem.), *reh'g denied, trans. denied*.

Having lost in the state courts, Wheeler, again *pro se*, pursued federal habeas relief under 28 U.S.C. § 2254 on the same two claims. The district court denied relief and certificated of appealability. *See Wheeler v. Superintendent*, Northern District of Indiana Case No. 3:12-cv-238 (N.D. Ind. July 12, 2018) (Judgment, D.E. 53). The petitioner filed a timely notice of appeal and later filed a detailed request for a certificate of appealability in the Seventh Circuit.

4. In this Court, the Petitioner will be challenging the Seventh Circuit's denial of a certificate of appealability. This Court has been clear that the standard for a certificate of appealability to issue under 28 U.S.C. § 2253(c)(2) is quite low and that it is a mistake for circuit courts of appeals to decide whether a certificate of appealability should issue on the merits. *See Buck v. Davis*, 137 S. Ct. 759, 773 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 327–28 (2003). On their face, the

Petitioner's constitutional claims satisfy the low standard of § 2253(c)(2). The trial court clearly sentenced the Petitioner to 90 years based on materially inaccurate information—for something that either never happened or that the Petitioner had nothing to do with. And if the Petitioner, *pro se* and from prison, 26 years after the fact, successfully litigated the expungement of his arrest for the third sexual assault, a fairminded jurist would have to agree that the Petitioner's trial lawyer could have achieved the same result by promptly investigating the circumstances of that arrest and that, as a result, there is a reasonable probability that the Petitioner's sentence would have been less than 90 years.

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, undersigned counsel has been occupied almost exclusively with three things: 1) preparation for oral argument that was held on September 10, 2019, in the United States Court of Appeals for the Seventh Circuit in a cross-appeal in *Kimbrough v. Neal*, Seventh Circuit Case Nos. 18-3145 & 18-3153; 2) briefing in the district court in *Brown v. Brown*, Southern District of Indiana Case No. 1:13-cv-1981-JMS-DML, Indiana's first case involving a claim under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013); and 3) my teaching duties at the Indiana University Maurer School of Law and the federal habeas litigation clinic I direct there.

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

CONCLUSION

Wherefore, the Petitioner, Anthony Wheeler, respectfully requests a 60-day extension of time, to and including Friday, November 22, 2019, to file a petition for a writ of certiorari.

Respectfully submitted,



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