

No. ____

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

ANDREW McWHORTER

Petitioner,

v.

THE STATE OF INDIANA,

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 of Record

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, Andrew McWhorter, respectfully requests a 60-day extension of time, to and including Friday, November 15, 2019, to file a petition for a writ of certiorari. In support of this application, the Petitioner says:

1. The Indiana Court of Appeals issued its decision affirming the Petitioner's conviction for voluntary manslaughter on December 26, 2018. *McWhorter v. State*, 117 N.E.3d 614 (Ind. Ct. App. 2018), *reh'g denied, trans. denied*. A copy of that decision is attached to this application. The Petitioner sought rehearing in the Indiana Court of Appeals, which was denied, and then sought review by the Indiana

Supreme Court. The Indiana Supreme Court denied review on June 18, 2019. A copy of the order denying review is attached to this application. Absent an extension of time, the petition for a writ of certiorari would therefore be due on Monday, September 16, 2019. The Petitioner is filing this application by deposit in the United States mail at least ten days before the petition's due date. *See* Sup. Ct. R. 13.5.

2. The court to which certiorari would be directed is the Indiana Court of Appeals. This Court has jurisdiction to review the judgment of the Indiana Court of Appeals under 28 U.S.C. § 1257(a).

3. After he had been acquitted of murder and a convicted of voluntary manslaughter, the Petitioner's voluntary manslaughter conviction was vacated in state post-conviction proceedings. *See McWhorter v. State*, 993 N.E.2d 1141 (Ind. 2013), *reh'g denied*. The Petitioner was re-tried and re-convicted in 2017 of voluntary manslaughter. Together with a recidivist enhancement, the Petitioner received a total sentence of 75 years. As noted above, the Petitioner's conviction was affirmed by the Indiana Court of Appeals, *McWhorter v. State*, 117 N.E.3d 614 (Ind. Ct. App. 2018), *reh'g denied, trans. denied*; that court denied rehearing; and the Indiana Supreme Court denied transfer.

4. The Petitioner will be raising two issues in this Court. First, the Petitioner's retrial was barred by the Double Jeopardy Clause of the Fifth Amendment. At his first trial for murder, Petitioner's jury acquitted him of the knowing killing of Amanda Deweese. *See McWhorter v. State*, 993 N.E.2d at 1146 ("Here however

McWhorter was acquitted of murder . . .”). At his second trial, which was for a charge of voluntary manslaughter after the State of Indiana had amended the charging information, the Petitioner was convicted of the knowing killing of Amanda Deweese “by means of a deadly weapon” “while acting under sudden heat.” The second charge for voluntary manslaughter contained two elements that the first charge for murder did not: “by means of a deadly weapon” and “while acting under sudden heat.” The Double Jeopardy Clause of the Fifth Amendment clearly barred the Petitioner’s retrial on a charge that contained two elements that the original charge, for which the Petitioner had been acquitted, did not. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (*per curiam*); *Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013).

Second, the Due Process Clause of the Fourteenth Amendment did not permit the Petitioner’s first trial for voluntary manslaughter as a lesser included offense of murder, because the first charging information did not allege all the elements of voluntary manslaughter. The Petitioner therefore had no notice at his first trial that he could be tried or convicted for voluntary manslaughter a first time, much less a second. The Petitioner’s “retrial” and “re-conviction” for voluntary manslaughter therefore violated the Petitioner’s federal right to due process. *See Schmuck v. United States*, 489 U.S. 705, 717–18 (1989) (“It is ancient doctrine of both the common law and of the constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him.”).


5. The Petitioner is requesting an extension of time to file a petition for a writ of certiorari, first because undersigned counsel is attempting to recruit counsel for the Petitioner. Second, undersigned counsel has been occupied almost exclusively with three things: 1) preparation for oral argument 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.

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

CONCLUSION

Wherefore, the Petitioner, Andrew McWhorter, respectfully requests a 60-day extension of time, to and including Friday, November 15, 2019, to file a petition for a writ of certiorari.

Respectfully submitted,



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September 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2019, I served one copy of the foregoing Application for Extension of Time to File Petition for Writ of Certiorari to the Indiana Court of Appeals by United States mail, first-class postage pre-paid to the following:

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