No. __-____

In the Supreme Court of the United States

TERRY JAMAR NORRIS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the Tennessee Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN S. MORAN
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
john.moran@kirkland.com

July 21, 2016

QUESTIONS PRESENTED

On August 26, 2013, the U.S. Court of Appeals for the Sixth Circuit granted Petitioner Terry Norris a conditional writ of habeas corpus, holding that Norris received ineffective assistance of counsel when appellate counsel waived a Fourth Amendment claim under *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991). *See Norris* v. *Lester*, 545 F. App'x 320, 326–29 (CA6 2013). The Tennessee courts had concluded that the *McLaughlin* claim lacked merit because Norris confessed within 48 hours of arrest. But the Sixth Circuit held that "[e]ven resolving all testimony conflicts in favor of the government, it was an unreasonable determination of fact to find that Norris was in custody for less than 48 hours at the time he began to confess." *Norris*, 545 F. App'x at 328 (citing 28 U.S.C. § 2254(d)(2)).

After reopening Norris's direct appeal, the Tennessee Court of Criminal Appeals below rejected Norris's *McLaughlin* claim on the merits, holding that Norris "made his first confession before being in custody for more than forty-eight hours." Pet. App. 41a.

The Questions Presented are:

(1) Whether the Sixth Circuit's "unreasonable determination of fact" holding under § 2254(d)(2) precluded the Tennessee Court of Criminal Appeals form relying on the same finding on the same record.

(2) Whether the Tennessee Court of Criminal Appeals erred in holding that police had probable cause to arrest Norris without giving weight to exculpatory facts known to the arresting officers.

(3) Whether the Tennessee Court of Criminal Appeals erred in rejecting Norris's *McLaughlin* claim where police held him without a probable cause hearing for the express purpose of "further investigation."

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Page(s)

Statutes

Other Authorities

Terry Jamar Norris respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Court of Criminal Appeals in this case.

OPINION BELOW

The opinion of the Tennessee Court of Criminal Appeals (Pet. App. 2a) is unreported. The order of the Tennessee Supreme Court denying Norris's application for permission to appeal and designating the Tennessee Court of Criminal Appeals' opinion "Not for Citation" (Pet. App. 1a) is also unreported.

JURISDICTION

The Tennessee Court of Criminal Appeals issued its opinion on September 30, 215. Pet. App. 2a–41a. On March 23, 2016, the Tennessee Supreme Court denied an application for permission to appeal. Pet. App. 1a. On June 10, 2016, JUSTICE KAGAN extended the time within which to file a petition for a writ of certiorari by 30 days, to and including July 21, 2016 (15A1257). This Court has jurisdiction under 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST., amend. IV.

The Antiterrorism and Effective Death Penalty Act provides in relevant part:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

Terry Norris was convicted in violation of his well-established Fourth Amendment rights because the State's case relied on evidence obtained through a protracted warrantless detention wherein his probable cause hearing was delayed for days solely so that the police could conduct further investigation. *See generally County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991). The United States Court of Appeals for the Sixth Circuit granted Norris a conditional writ of habeas corpus based on its holdings (a) that Norris received ineffective assistance of counsel when his appellate lawyer waived his *McLaughlin*

claim and (b) that the state court's holding that the claim lacked merit (and thus that counsel reasonably waived the claim) was "based on an unreasonable determination of the facts in light of the evidence presented in the State Court," 28 U.S.C. § 2254(d)(2). *See Norris* v. *Lester*, 545 F. App'x 320, 328 (CA6 2013). After reopening Norris's direct appeal, however, the Tennessee Court of Criminal Appeals affirmed his conviction based on precisely the same factual determination that the Sixth Circuit had held to be unsupported by the record. The court further erred by holding that the police had probable cause to arrest Norris, without giving any weight to exculpatory facts known to officers at the time of arrest, and by failing to hold that the delay of Norris's probable cause hearing for purposes of "further investigation" violated the Fourth Amendment. These errors and the lower-court conflicts implicated by the decision below warrant this Court's review.

A. Factual Background

On March 10, 1997, Keith Milem was found shot to death outside his home in Memphis, Tennessee. The Memphis Police Department identified Petitioner Terry Norris as a potential suspect based on a tip from his roommate, Lakendra Lavonne Mull. Mull had told police that Norris owned a gun, that he was jealous of the victim, and that he was near the victim's house at the time of the shooting.[1] Yet, while the roommate testified that Norris was alone driving his burgundy 1993 Grand Am, the officer

---

[1] Hearing on Motion for a New Trial, Mar. 10, 2000 ("New Trial Hr'g") at 51-52.

who responded to the shooting testified that "[t]he consensus of the witnesses" was that the shooter drove "a white box-type Chevy" occupied by "two to three" individuals.[2] The Memphis Police nonetheless "decided that [Norris] was a good suspect for this homicide."[3]

The next day, Tuesday, March 11, 1997, the Memphis Police arrested Norris at the home of his mother, Marcia Norris Daniel.[4] Police handcuffed Norris, put him in the back of their squad car, and transported him to the police station.[5] Sgt. Christian testified that he and his partner "took [Norris] into custody" at his mother's home, and that Norris was not free to leave at that point.[6] Ms. Daniel testified that it was approximately 5:45 p.m. when police handcuffed her son and put him in their squad car.[7] Norris concurred, testifying that he was taken to the police station during the daylight and that it was certainly before 7 p.m.[8] No state witness testified to the contrary.

Police transported Norris five miles through rush-hour traffic to the Homicide Office "for a formal interview."[9] They read Norris his *Miranda* rights

---

2 Trial Tr. 200, 231.

3 New Trial Hr'g at 2.

4 Hearing on Motion to Suppress Statement, May 27-29, 1998 ("Suppression Hr'g"), at 3-4.

5 Hearing on Petition for Post-Conviction Relief, Jan. 21, 2005 ("Post-Conviction Hr'g"), at 14.

6 Suppression Hr'g, at 4; Post-Conviction Hr'g at 14.

7 Post-Conviction Hr'g at 21.

8 *Id.* at 30-31.

9 Suppression Hr'g, at 4; Post-Conviction Hr'g at 22.

and asked him to sign a waiver-of-rights form.[10] Norris refused to sign but agreed to speak to the police.[11] Police began a "formal interview" at 7:30 p.m.[12] When Norris refused to confess, he was "booked" and placed in a holding cell at 8:45 p.m.[13]

Norris spent the night of March 11 in jail. Police did not interrogate Norris on March 12; instead, they spent the day conducting "further investigation."[14] Norris remained in jail the night of March 12. On March 13, police took Norris out of his cell and interrogated him again.[15] Norris eventually agreed to give a statement, in exchange for being allowed to call his mother first.[16] Norris was not able to reach his mother until 6:52 p.m.[17] Norris began his statement at 7:20 p.m.; he completed and signed it at 8:20 p.m.[18] Only after the police obtained this statement was Norris finally taken to a magistrate for a probable cause hearing the following day, March 14—over 60 hours after his arrest.[19]

---

10 *See Norris* v. *State,* No. W2005-01502-CCA-R3-PC, 2006 WL 2069432, at *8 (Tenn. Crim. App. July 26, 2006).

11 *Id.*

12 Suppression Hr'g, at 4; Post-Conviction Hr'g at 14.

13 Suppression Hr'g, at 19.

14 New Trial Hr'g, at 67.

15 Suppression Hr'g, at 44-46.

16 Order Denying Petition for Post-Conviction Relief, June 10, 2005 ("Post-Conviction Order") at 7.

17 Suppression Hr'g, at 55.

18 Post-Conviction Hr'g, State's Ex. 3 (Norris's written statement).

19 New Trial Hr'g, at 68.

The officer in charge of the investigation, Cpt. Logan, later admitted that Norris was arrested simply for "investigative purposes," and was then "held for further investigation" when he refused to confess.[20] This police conduct was consistent with an established practice by the Memphis Police Department of placing suspects on "48-hour hold" for the purpose of investigation. A report from the Judicial Commissioners of the General Session Court in Shelby County, Tennessee (wherein Memphis lies), suggests that these 48-hour holds were at one time used "approximately 1,000 times per year." Steven J. Mulroy, *"Hold" On: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 Case W. Res. L. Rev. 815, 826 (2013). When pressed on why he "decided to hold [Norris] and just keep on investigating," before bringing Norris to a magistrate, Cpt. Logan said "we had that right."[21]

B. Conviction & Direct Appeal

Norris was charged with second-degree murder in Shelby County. At trial, the State introduced Norris's written statement and a gun to which Norris had directed police.[22] Norris was found guilty and sentenced to twenty-one years in prison.[23] Although

---

[20] *Id.* at 66-67.

[21] New Trial Hr'g, at 58–59.

[22] *See State* v. *Norris*, No. W200000707CCAR3CD, 2002 WL 1042184, at *1–4 (Tenn. Crim. App. May 21, 2002).

[23] *Id.* at *1. Norris completed his sentence earlier this year due to credits earned. The completion of Norris's sentence does not moot his direct appeal. *See Sibron* v. *New York*, 392 U.S. 40, 57 (1968) ("[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal

Norris's counsel raised the *McLaughlin* issue before the trial court, he explicitly disclaimed any such argument before the Court of Criminal Appeals. Norris's conviction was affirmed on direct appeal. *See State* v. *Norris*, No. W200000707CCAR3CD, 2002 WL 1042184 (Tenn. Crim. App. May 21, 2002).

C. State Post-Conviction Proceeding

Norris petitioned for post-conviction relief, arguing that his appellate counsel was ineffective for failing to raise the *McLaughlin* claim on direct appeal. Because Norris's claim was based on counsel's failure to raise a *McLaughlin* claim, the post-conviction litigation centered on whether Norris had a meritorious claim.

After conducting a hearing, the post-conviction court credited the testimony of Norris's mother that police took Norris into custody at 5:45 p.m. on March 11, 1997—over 48 hours before Norris began his confession at 7:20 p.m. on March 13, 1997.[24] The post-conviction court nonetheless denied relief on the theory that Norris "cannot claim the time period was over forty-eight (48) hours when it was due to his desire to speak with his mother before making his statement."[25]

On appeal, the Court of Criminal Appeals appeared to reject the post-conviction court's theory that Norris's prolonged detention was his own fault for refusing to confess unless and until he spoke to his mother. *See Norris* v. *State*, No. W2005-01502-

---

consequences will be imposed on the basis of the challenged conviction.").

24 Post-Conviction Order at 7–8.

25 *Id.* at 8.

CCA-R3-PC, 2006 WL 2069432, at *9 (Tenn. Crim. App. July 26, 2006) (addressing the timing of Norris's arrest without addressing his request to speak with his mother). Instead, the court held that Norris had not been "arrested" for 48 hours before confessing because he was not "arrested" until he was booked at 8:45 p.m. *Id.* Based on this holding, the Court of Criminal Appeals denied Norris's ineffective assistance of counsel claim.

D. Federal Habeas Corpus Proceeding

Norris then petitioned for a writ of habeas corpus in the U.S. District Court for the Western District of Tennessee, arguing again that his appellate counsel was ineffective for failing to raise a *McLaughlin* claim. *See Norris,* 545 Fed. App'x at 323. The district court denied the petition, deferring to the state court's holding that Norris did not have a meritorious *McLaughlin* claim. *See id.* at 327.

The Sixth Circuit unanimously reversed, holding that the rejection of Norris's *McLaughlin* claim was "contrary to clearly established federal law." *Id.* at 328. Under clearly established federal law, "Norris was arrested when 'taken into custody,'" at his mother's house. *Id.* The Sixth Circuit further determined that, "[e]ven resolving all testimony conflicts in favor of the government, it was an unreasonable determination of fact to find that Norris was in custody for less than 48 hours at the time he began to confess." *Id.*

In assessing the prejudicial effect of appellate counsel's failure to raise the *McLaughlin* claim, the Sixth Circuit observed that, under the Tennessee Supreme Court's decision in *State* v. *Huddleston*, 924 S.W.2d 666 (Tenn. 1996), "the purpose and

flagrancy of the official misconduct" is the "the most important" factor in determining whether evidence obtained in violation of *McLaughlin* is "fruit of the poisonous tree." *Id.* at 328–329. The Sixth Circuit found that this factor strongly favors suppression here because "the record contains no alternative explanation for Norris's prolonged detention" other than evidence "suggesting that officers kept Norris detained to gather additional evidence." *Id.* Accordingly, the court held that "there is a reasonable probability that the confession would have been suppressed," as "fruit of the poisonous tree," had the *McLaughlin* issue been raised on direct appeal. *Id.*

Having found that Norris's *McLaughlin* rights were violated and that appellate counsel's deficient performance was prejudicial, the Sixth Circuit granted Norris's petition for a conditional writ of habeas corpus and ordered the State to release Norris or to reopen his direct appeal to allow him to pursue his *McLaughlin* claim.

E. Reopened Direct Appeal

The State moved on January 16, 2014 to recall the mandate in the Tennessee Court of Criminal Appeals and to allow briefing on the *McLaughlin* issue. The court granted that motion on February 4, 2014. On November 18, 2014, the Court of Criminal Appeals issued an opinion rejecting Norris's *McLaughlin* claim on plain-error review. *See State* v. *Norris*, No. W2000-00707-CCA-R3CD, 2014 WL 6482823 (Tenn. Crim. App. Nov. 18, 2014), *appeal granted* (Apr. 22, 2015).

Petitioner Norris filed a *pro se* application for permission to appeal to the Tennessee Supreme

Court, arguing *inter alia* that the Court of Criminal Appeals had erred in applying a plain-error standard of review. On April 22, 2015, the Tennessee Supreme Court ordered the Court of Criminal Appeals to apply *de novo* review:

> "Upon consideration of the application for permission to appeal of Terry Norris and the record before us, the Court is of the opinion that the application should be, and is hereby, granted for the purpose of remanding the case to the Court of Criminal Appeals for plenary review, rather than plain-error review, of the issue of whether Mr. Norris's confession should have been suppressed pursuant to *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), and *State* v. *Huddleston*, 924 S.W.2d 666 (Tenn. 1996)." April 22, 2015 Rule 11 Order.

The State sought rehearing, but the Tennessee Supreme Court denied that petition on May 15, 2015.

On July 27, 2015, Norris filed an unopposed motion for the Court of Criminal Appeals to accept new briefing, which would have given the State the opportunity to address the *McLaughlin* claim under the *de novo* standard. The Court of Criminal Appeals denied that request on August 7, 2015, and issued a new opinion on September 30, 2015, again denying relief on Norris's *McLaughlin* claim. Pet. App. 2a–41a. The new opinion contained mainly cosmetic changes from its November 18, 2014 opinion; portions which said the court was applying a plain-error standard now stated that they were applying a *de novo* standard.

The Court of Criminal Appeals explained that the first step in its analysis was to "address * * * whether the police had probable cause to arrest the Defendant at the time of the arrest." Pet. App. 36a. In explaining its "conclusion that the police officers had probable cause to arrest the Defendant," the court offered its version of "what police knew at the time of the Defendant's arrest," Pet. App. 37a–38a:

> "The police knew that the murder in this case occurred on March 10, 1997. Police began an investigation of the homicide, and the Defendant was identified as a 'suspect.' Before the Defendant's arrest, officers had spoken with Lakendra Mull, who informed them that the Defendant was her cousin's boyfriend and that he was a jealous individual who had gotten the impression that her cousin had been speaking to the victim. The Defendant was living with Ms. Mull at the time of the shooting, and, on the day of the shooting, Ms. Mull had seen him retrieve from the apartment a weapon that he often carried. On the night of the shooting, Ms. Mull gave the victim a ride home, and she noticed that the Defendant was following them in his vehicle, a maroon Grand Am, without his headlights illuminated, despite the late hour. After she dropped off the victim, she passed the Defendant in his vehicle. He was still proceeding towards the victim's home, and he illuminated his car lights. Police officers had Ms. Mull's statement at the time of the Defendant's arrest. They also had the statement of Charles Milem, the victim's uncle. He told

> officers that he saw the victim get out of a car before the shooting. He heard another car, that looked white, pull up, and heard 'two' voices call to the victim. He then heard three gunshots and saw the victim lying in the street. We conclude that Ms. Mull's statement gave officers probable cause for the Defendant's arrest. It indicated that the Defendant had the means to commit the crime because he was in possession of a weapon the day of the shooting. Further, Ms. Mull's statement showed that the Defendant had a motive to commit the crime because he was jealous and angry with the victim because he had been speaking with the Defendant's girlfriend. Finally, her statement proved that the Defendant had the opportunity to commit the crime as he followed Ms. Mull to the victim's home on the night of the shooting, shortly before the shooting occurred. This statement gave the officers sufficient probable cause for the Defendant's arrest." Pet. App. 38a–39a.

The court omitted from its account facts that undermined the weight of Mull's statements, including "[t]he consensus of the witnesses" that the shooter drove "a white box-type Chevy" occupied by "two to three" individuals.[26] The court thus failed to account for these facts in its probable-cause determination.

The Court of Criminal Appeals then turned to the reasonableness of Norris's prolonged warrantless

---

26 Trial Tr. 231.

detention under *McLaughlin*. The court acknowledged that the officer in charge had "admitted that the Defendant 'refused to talk' when he was arrested and that he held him for 'further investigation.'" Pet. App. 33a. And it further acknowledged Norris's argument that the insistence by police that they had a "right" to hold him for investigation "reflects a misunderstanding of *McLaughlin*." *Id.* That is because, under *McLaughlin*, a delayed probable-cause hearing does not "pass[] constitutional muster simply because it is provided within 48 hours." 500 U.S. at 56. Instead, delay of less than 48-hour may violate the Fourth Amendment if it is unreasonable, such as delay "for purposes of gathering additional evidence to justify the arrest." *Id.* In rejecting Norris's claim, however, the Court of Criminal Appeals limited its analysis to determining "whether * * * the Defendant was in custody for more than forty-eight hours before he gave his statement." Pet. App. 40a.[27]

In addressing the time between Norris's arrest and his confession, the Court of Criminal Appeals recounted the evidence from the very same record that the Sixth Circuit had reviewed. *See* Pet. App. 40a–41a. After recounting that evidence, the court stated that "[w]hile not totally clear, it appears that the Defendant made his first confession before being in custody for more than forty-eight hours." Pet.

---

[27] Under settled law, the State carried that burden on *de novo* review to prove that the statement was admissible. *See Huddleston*, 924 S.W.2d at 675 ("The burden of proving, by a preponderance of the evidence, the admissibility of the challenged evidence rests on the prosecution.") (citing *Brown* v. *Illinois*, 422 U.S. 590, 603–04 (1975)).

App. 41a. The court then concluded that Norris's "detention was not illegal" and affirmed his conviction. *Id*.[28]

Norris now seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Make Clear That the Sixth Circuit's § 2254(d)(2) Determination Precluded the Tennessee Court of Criminal Appeals from Making the Same "Unreasonable Determination of the Facts" on the Same Record.

The Court of Criminal Appeals' finding that Norris confessed within 48 hours of his arrest flatly contradicts the Sixth Circuit's holding that, "it was an unreasonable determination of fact to find that Norris was in custody for less than 48 hours at the time he began to confess" "[e]ven resolving all testimony conflicts in favor of the government."

---

[28] Even though the State had abandoned the argument by the time this case reached the Sixth Circuit, the Court of Criminal Appeals also resurrected the suggestion that "part of the delay was caused by the Defendant's desire to speak with his mother." Pet. App. 41a. The only reasonable delays under *McLaughlin* are those caused by "logistical problems" such as "unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available," and "obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest." *McLaughlin*, 500 U.S. at 55-57. There is no legal basis under *McLaughlin* for holding that police can continue to detain a suspect without a probable cause hearing just because the suspect insists that he will not answer questions unless he is allowed to speak to his mother. To the contrary, that is exactly the sort of improper police conduct that the Fourth Amendment prohibits.

Norris, 545 F. App'x at 328. The Court should grant review to make clear that a federal habeas court's holding that a factual finding was "an unreasonable determination of the facts in light of the evidence presented in the State court record," 28 U.S.C. § 2254(d)(2), precludes a State court in subsequent proceedings from making the same finding on the same record.

The collateral-estoppel effect of a federal habeas judgment in subsequent state criminal proceedings is an important question of federal law. It is well-established that the preclusive effects of federal judgment in state court is an "issue * * * of federal law." *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994); *see also Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 129 n.1 (1941) ("Pleading a federal decree as res judicata in a state suit raises a federal question reviewable in this Court."); *Myers* v. *Int'l Trust Co.*, 263 U.S. 64, 69 (1923) ("The case here * * * presents the federal question whether full faith and credit was given to the judgment of a federal court."); *Crescent City Live-Stock Landing & Slaughter-House Co.* v. *Butchers' Union Slaughter-House & Live-Stock Landing Co.*, 120 U.S. 141, 146 (1887) ("The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the constitution and laws of the United States * * * ."). It is also an issue that uniquely calls for this Court's guidance, since no other federal court has the opportunity to address it. *See Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U.S. 518, 525 (1986) ("Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through

the state-court system and certiorari from this Court.").

The issue is also an important one. The doctrine of collateral estoppel serves the important functions of "reliev[ing] parties of the cost and vexation of multiple lawsuits, conserv[ing] judicial resources, and, by preventing inconsistent decisions, encourag[ing] reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). It also "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.* at 96 (citing *Younger* v. *Harris*, 401 U.S. 37, 43–45 (1971)). And particularly in the criminal context, it is also a matter of fundamental fairness. If an adverse ruling against a prisoner in state criminal proceedings has preclusive effect in a federal § 1983 action, *see Allen*, 449 U.S. at 105, an adverse ruling against the State in federal habeas proceedings must, as a matter of fairness and comity, be given preclusive effect in subsequent criminal proceedings.

On the merits, it is beyond reasonable question that the Sixth Circuit's ruling precluded the finding that Norris confessed within 48 hours—indeed, the State has never articulated any contrary position.[29]

---

[29] After the Tennessee Court of Criminal Appeals reopened the direct appeal and Norris filed his opening brief, the State filed a response brief which asserted that Norris confessed within 48 hours of arrest, *see* State TCCA Resp. Br. 31 ("[T]he defendant confessed within 48 hours of his arrest, and his detention was presumptively reasonable under *Huddleston* and *McLaughlin*."), notwithstanding the Sixth Circuit's holding that this was an unreasonable determination of fact on the record. Norris then promptly raised the issue of collateral estoppel in his reply brief, explaining that the Sixth Circuit's holding precluded reconsideration of that issue. *See*

As a leading treatise notes, "[i]t would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts." 18B Wright & Miller, *Federal Prac. & Proc.* § 4468 (2d ed.). And all of the traditional elements of issue preclusion are satisfied here:

> "[I]ssue preclusion arises in a second action on the basis of a prior decision when the same 'issue' is involved in both actions; the issue was 'actually litigated' in the first action, after a full and fair opportunity for litigation; the issue was "actually decided" in the first action, by a disposition that is sufficiently 'final,' 'on the merits,' and 'valid'; it was necessary to decide the issue in disposing of the first action, and—in some (mostly older) decisions—the issue occupied a high position in the logical hierarchy of abstract legal rules applied in the first action; the later litigation is between the same parties or involves nonparties that are subject to the binding effect or benefit of the first action; the role of the issue in the second action was foreseeable in the first action, or it occupies a high position in the logical hierarchy of abstract legal rules applied in the second action; and there are no special considerations of fairness, relative judicial authority, changes of law, or the like, that warrant remission of the ordinary rules of

---

Norris TCCA Reply Br. 4–7. As noted above, the Court of Criminal Appeals later denied a request for supplemental briefing, and the State waived any response to Norris's subsequent Application for Permission to Appeal.

> preclusion." 18 Wright & Miller, *supra*, § 4416.

The Sixth Circuit, applying the appropriate deference to the Tennessee Court of Criminal Appeals under § 2254(d)(2), squarely addressed the question whether the state-court record could support a finding that Norris confessed within 48 hours of his warrantless arrested and answered, "No." That issue was actually litigated and decided following a full and fair opportunity for the parties to address it; the Sixth Circuit's judgment is final and valid; and its holding was necessary to the disposition of the action because § 2254(d)(2) is a threshold requirement for habeas relief under AEDPA. Furthermore, while Jerry Lester, the warden at the prison where Norris was incarcerated, was the nominal respondent in the federal habeas proceedings, it is well-established that the State is a "real part[y] in interest" in federal habeas proceedings. *Knewel* v. *Egan*, 268 U.S. 442, 448 (1925); *see also Will* v. *Michigan Department of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity * * * is no different from a suit against the State itself.").[30] And there is no countermanding reason not to apply ordinary principles of preclusion in this instance; if anything, the concerns of fairness and comity that motivate the preclusion rule are especially strong in

---

[30] An in any event, principles of issue preclusion "do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Richards* v. *Jefferson County, Alabama*, 517 U.S. 793 (1996).

this context where a federal court issued a writ of habeas corpus to remedy a state court's violation of a defendant's federal constitutional rights.

To be sure, this aspect of Norris's case is *sui generis*. There is no lower-court split over whether a federal court's § 2254(d)(2) determination precludes a state court from making the same unreasonable finding on the same record. But that is only because the error below was so egregious. State courts need not raise and apply the principles of collateral estoppel to avoid relying on factual findings that a federal habeas court has already held to be an unreasonable determination of the facts. While the first Question Presented does not implicate a split of authority among lower courts, it is nevertheless an appropriate, and indeed important, exercise of this Court's supervisory power. This case implicates a direct conflict between a final, binding ruling of the U.S. Court of Appeals and the decision of the Tennessee Court of Criminal Appeals below. If anything, the principles of comity that motivate the Court to grant review to resolve conflicts between state and federal courts are even stronger here, where the very same parties are involved.

This Court has specifically directed litigants to seek review by writ of certiorari when state courts fail to give the required preclusive effect to federal judgments, *see Parsons Steel*, 474 U.S. at 525, and Petitioner respectfully submits that this is an appropriate case in which to exercise that review.

II. The Court Should Grant Review to Resolve a Conflict Among the Lower Courts and Hold That a Probable-Cause Determination Must Account for Exculpatory Facts Known to the Arresting Officer.

This Court's review is also warranted because the decision below furthers a conflict among lower courts concerning whether a probable-cause determination must account for exculpatory facts known to the arresting officer—which it must.

The decision below may have passed muster under the law of some circuits, which allow such determinations to rest on inculpatory facts known to the arresting officer, without any requirement to account for exculpatory facts. *See, e.g.*, *Tangwall* v. *Stuckey*, 135 F.3d 510, 518 (CA7 1998) (holding that subsequent exculpatory facts learned by an arresting officer were "immaterial" where a prior witness identification supported probable cause).

But many circuits have rejected this approach and held that a probable cause determination must be based on the totality of the circumstances—including both inculpatory and exculpatory facts—known to the arresting officer. *See Panetta* v. *Crowley*, 460 F.3d 388, 395 (CA2 2006) ("[A]n officer may not disregard plainly exculpatory evidence."); *Reedy* v. *Evanson*, 615 F.3d 197, 216 (CA3 2010) (reversing probable-cause determination which gave "little weight to the highly significant exculpatory facts"); *Logsdon* v. *Hains*, 492 F.3d 334, 341 (CA6 2007) ("[T]he initial probable cause determination must be founded on both the inculpatory *and* exculpatory evidence known to the arresting officer, and the officer cannot simply turn a blind eye toward

potentially exculpatory evidence.") (quotations omitted); *Kuehl* v. *Burtis*, 173 F.3d 646, 650 (CA8 1999) ("An officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists."); *United States* v. *Ortiz-Hernandez*, 427 F.3d 567, 574 (CA9 2004) (holding that an arresting officers "may not disregard facts tending to dissipate probable cause") (quotation omitted); *Howard* v. *Gee*, 538 F. App'x 884, 890 (CA11 2013) ("[A]n officer who unreasonably and recklessly disregards evidence that exonerates a suspect cannot reasonably believe that probable cause exists.").

The majority approach is also the correct one. This Court has made clear that probable cause under the Fourth Amendment requires a showing that "the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Henry* v. *United States*, 361 U.S. 98, 102 (1959). While this Court has never expressly "specified that exculpatory facts must be considered," *Norris*, 545 F. App'x at 325–26, it has nevertheless made clear that "the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations" remains the core framework for assessing probable cause. *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). When balancing the totality of the circumstances, a police officer cannot pick and choose *which circumstances* to rely on for an arrest: "the Fourth Amendment requires that [courts and law enforcement] analyze the weight of all the evidence—not merely the sufficiency of the incriminating evidence—in determining whether * * * [there was] probable cause to arrest" a suspect.

Kuehl, 173 F.3d at 650. Considering the circumstances in their totality necessarily includes weighing *all* the facts known to an arresting officer, regardless of whether those facts support or undermine probable cause.

Until this Court clearly establishes that exculpatory facts must be included in the probable-cause analysis, individuals like Petitioner Norris will continue to endure violations of their Fourth Amendment rights without a meaningful opportunity for recourse. As noted above, this Court's holding in *Stone* v. *Powell*, 428 U.S. 465 (1976), precludes most state prisoners from seeking federal habeas relief based on Fourth Amendment violations. And even where that hurdle is overcome, AEDPA prohibits federal habeas relief based on federal constitutional rights that have not been clearly established by this Court. *See* 28 U.S.C. § 2254(d)(1). Indeed, when Norris raised a federal habeas claim for ineffective assistance of counsel based on his trial lawyer's failure to challenge the probable cause for his arrest, the Sixth Circuit held that § 2254(d)(1) precluded relief because, "[a]lthough the requirement to listen to exculpatory witness accounts is clearly and explicitly established in the law of [the Sixth Circuit], it is not as clearly established by the Supreme Court." *Norris*, 545 F. App'x at 325. This Court has the opportunity to clearly establish that important Fourth Amendment principle here.

Had the Tennessee Court of Criminal Appeals considered the full totality of the circumstances, including exculpatory facts known to officers at the time of arrest, it would not have reached the same conclusion. The court held that officers had probable

cause to arrest Norris relying solely on his roommate's statement, which established (1) that he owned a gun, (2) that he may have been jealous of the victim for talking to his girlfriend, and (3) that he had been seen driving alone in a maroon Grand Am in the vicinity of the shooting. Pet. App. 38a–39a. But the roommate, Mull, was not a witness to the shooting. There were, however, several witnesses, and they gave statements to the police describing the shooter as driving "a white box-type Chevy" occupied by "two to three" individuals. Trial Tr. 231. Given these statements from witnesses at the scene, the statements from Norris's roommate—which were not tied to the crime—did not create probable cause to arrest. Moreover, even if the Court were less confident about the weight of these witness statements, the Court of Criminal Appeals plainly failed to account for them, and the Court would have the option of announcing the appropriate standard and leaving application of that standard to the Court of Criminal Appeals on remand in the first instance.

III. The Court Should Grant Review to Resolve a Conflict Among the Lower Courts and Hold That Delaying Presentment for Purposes of Investigation Is Presumptively Unreasonable, Even Where There Is Probable Cause for an Initial Arrest.

Even if one were to assume both that the police had probable cause to arrest Norris and that he confessed within 48 hours of his arrest, the decision below would still rest on the fundamentally flawed legal conclusion that Norris's prolonged warrantless detention was "not illegal" just because it lasted less than 48 hours before a confession. Pet. App. 41a.

That error too warrants this Court's review. Indeed, lower courts are split over how to interpret this Court's statement in *McLaughlin* that delay is unreasonable if it occurs "for the purpose of gathering additional evidence to justify the arrest." 500 U.S. at 56 (emphasis added).

Some lower courts—including the Tennessee Court of Criminal Appeals—have read this language from *McLaughlin* to mean that delay for investigatory purposes is unreasonable only if it is necessary to create probable cause; if the police already have probable cause, then a 48-hour hold is fine under the Fourth Amendment.[31] This line of

---

[31] *See United States* v. *Daniels*, 64 F.3d 311, 314 (CA7 1995) (holding that investigative delay was reasonable where it was "not conducted to justify [the suspect's] arrest" but instead "to collect more evidence against [him]"); *United States* v. *Sholola*, 124 F.3d 803, 820 (CA7 1997) ("[P]olice may conduct further investigation of a crime to 'bolster' the case against a defendant while the defendant remains in custody, and they may likewise hold an individual while investigating *other* crimes that he may have committed, *so long as they have sufficient evidence to justify holding the individual in custody in the first place.*") (emphasis in original); *Riney* v. *State*, 935 P.2d 828, 825 (Alaska Ct. App. 1997) ("*Gerstein* and *McLaughlin* do not bar the police from pursuing their investigative efforts, so long as probable cause for the arrest is decided on the basis of the government's evidence at the time of the arrest."); *Otis* v. *State*, 217 S.W.3d 839, 847 (Ark. 2005) ("[T]he *McLaughlin* court condemned as unreasonable a search for additional evidence only when the evidence is being sought in order to justify the arrest. Here, because Otis confessed to the shooting shortly after being brought to the police station, the officers already had a sufficient amount of evidence to justify his arrest."); *Peterson* v. *State*, 653 N.E.2d 1022, 1025 (Ind. Ct. App. 1995) ("[A]t the time of Peterson's arrest, the State had already gathered substantial evidence that Peterson was involved in the crimes at issue. * * * This evidence lends little credence to

cases sanctions a 48-hour hold in virtually every instance, since probable cause is already a requirement for a warrantless arrest. *See generally United States* v. *Watson*, 423 U.S. 411 (1976). While the Tennessee Court of Criminal Appeals below did not specifically discuss this line of cases, its decision is consistent with it, since the court's finding of probable cause would arguably obviate the need to address the investigative hold so long as it lasted less than 48 hours.[32]

---

the claim that the State needed a delay to gather evidence of probable cause prior to Peterson's initial hearing, as would be necessary to circumvent the presumptively reasonable 48 hour detention period."); *State* v. *Brown*, No. W2013–00182–CCA–R3–CD, 2014 WL 4384954, at *16 (Tenn. Crim. App. Sept. 5, 2014) (holding that "[a]ny delay in a judicial determination in this case was not shown to be 'for the purpose of gathering additional evidence to justify the arrest'" where "there was probable cause to arrest Defendant" at the time of his arrest). Two of the three panel members below joined in the the *Brown* opinion.

[32] This Court could conclude, however, that investigative delay is unreasonable only if undertaken to make up for a lack of evidence to support probable cause, but also that the subjective intent of the officers is relevant to this inquiry—in which case Norris's claim would still be viable. While officers' subjective motivations are irrelevant in the ordinary probable-cause analysis, *see Devenpeck* v. *Alford*, 543 U.S. 146, 153–54 (2004), it does not follow that subjective motivations are irrelevant under *McLaughlin*, which looks to the "purpose" of the delay, 500 U.S. at 56, rather than what a reasonably prudent person would make of the circumstances, *see Henry*, 361 U.S. at 102. Here, the record supports the conclusion that officers prolonged Norris's warrantless detention because they subjectively believed that they lacked probable cause and needed additional evidence to support it:

Other lower courts have rejected that narrow approach, however, and have interpreted *McLaughlin* to mean that investigative delay is always presumptively unreasonable, regardless whether there was probable cause for the initial arrest. *See, e.g.*, *Willis* v. *Chicago*, 999 F.2d 284, 288–89 (CA7 1993) (finding a *McLaughlin* violation where "[t]he arrest yet to be judicially scrutinized was used as an opportunity to build a separate case against [the suspect]" because such delay is "analogous" to "delays for the purpose of 'gathering additional evidence to justify the arrest'"); *see also Lopez* v. *City of Chicago*, 464 F.3d 711, 714 (CA7 2006) ("[D]elays for the purpose of gathering additional evidence are per se unreasonable under *McLaughlin*."); *People* v. *Jenkins*, 122 Cal. App. 4th 1160, 1175-76 (2004) ("The detention was used solely to question defendant about the shootings. Defendant's postarrest detention unquestionably violated the Fourth Amendment, even though it extended less than 48 hours."); *United States* v. *Davis*, 174 F.3d 941, 944 (CA8 1999) ("[A] delay may be unreasonable if it is motivated by a desire to uncover additional evidence to support the

---

"[Logan:] Based on [the statements of Lakendra Mull and Charles Milem] we decided that [the Defendant] was a good suspect for this homicide.

[The Defendant's Attorney:] * * * but did you have probable cause to charge him?

[Logan:] Well, after picking him up and getting him in the office and talking to him, he admitted to it.

* * *

[The Defendant's Attorney:] You had strong suspicions, and you held him to do further investigation; is that correct?

[Logan:] Yes, we did." Pet. App. 31a.

arrest or to use the suspect's presence solely to investigate the suspect's involvement in other crimes."); *Artley* v. *City of Detroit*, No. 199080, 1998 WL 1990893, at *3 (Mich. Ct. App. July 17, 1998) (entertaining a claim that "the purpose of the delay * * * was to elicit an incriminating statement from [the suspect]").[33]

These divergent approaches to evaluating investigative holds under *McLaughlin* present an important issue which warrants this Court's review. *See, e.g.*, Daniel A. Horwitz, *The First 48: Ending the Use of Categorically Unconstitutional Investigative Holds in Violation of* County of Riverside *v.* McLaughlin, 45 U. Mem. L. Rev. 519, 529 (2015) ("[T]he Supreme Court should promptly resolve the growing dispute over the proper interpretation of *McLaughlin* * * * [and] articulate with unmistakable clarity that law enforcement may never intentionally delay a warrantless arrestee's constitutional right to a prompt judicial determination of probable cause for investigative reasons under any circumstances.").

---

[33] *See also Farr* v. *Paikowski*, No. 11–C–789, 2013 WL 160268 at *7 (E.D. Wis. Jan. 14, 2013) ("The defendants concede that the real purpose for arresting Farr was simply to interrogate her about the man involved in the Complete Car Care incident and then let her go. This concession renders Farr's detention *per se* unreasonable under *Gerstein.* By analogy to the example given in *McLaughlin*—that a delay to gather evidence justifying the arrest renders the detention unreasonable—it is also unreasonable to use a lawful arrest as a pretext to gather evidence about a crime committed by another individual."); *Commonwealth* v. *Woodley*, No. 9211358, 1993 WL 818559 at *7 (Mass Super. Ct. Oct. 12, 1993) ("[A] delay is unreasonable when it is contrived by the police to elicit incriminating statements.") (citing *Commonwealth* v. *Hodgkins*, 401 Mass. 871, 877 (1988)).

The narrow reading of *McLaughlin*, which holds that investigatory delay is always reasonable so long as probable cause existed for the arrest, undermines the very goal of vindicating the Fourth Amendment principle "recognized in *Gerstein* that a person arrested without a warrant is entitled to a fair and reliable determination of probable cause and that this determination must be made promptly." 500 U.S. at 55. For one, limiting the prohibition on investigatory holds to instances where a suspect's Fourth Amendment rights have already been violated (by warrantless arrest without probable cause) renders the constitutional protection essentially meaningless. This approach also exacerbates the effects of hindsight bias, since "'post hoc reviews of probable cause determinations inevitably bias the outcome because the judge knows that the police * * * uncovered evidence of criminal behavior." Horwitz, *supra*, at 555 (quoting *Introduction: Appreciating Bill Stuntz*, *in* The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz 4 (Michael Klarman et al. eds., 2012)).

Nor is there any compelling law-enforcement interest that points the other way. If the police already have (by hypothesis) sufficient evidence to support probable cause, and they do not have other legitimate administrative concerns that would already justify delay under *McLaughlin*, then the real benefit to police is not the opportunity to investigate. They can always continue to investigate *after* presentment anyway. Instead, this narrow reading of *McLaughlin* gives police the opportunity to investigate without the procedural rights that attach where presentment and arraignment are

combined—including the rights to counsel, to be informed of the charges, and to bail. *Cf. McLaughlin*, 500 U.S. at 55. That is not a governmental interest for which the Fourth Amendment reasonableness standard is meant to account.

The ramifications of allowing investigatory holds when probable cause exists are not just academic either. These disparate interpretations have allowed some police forces to seamlessly incorporate investigative delays into their practices, and courts adhering to a narrow interpretation of *McLaughlin* have upheld the practice so long as there happened to be enough evidence at the time to allow the State to justify the arrest after the fact. *See* Horwitz, *supra*, at 528. Tennessee, whence this case arises, employed the most pervasive use of this practice for a long time. *See id.* at 529. As noted above, in the Memphis area alone, "such investigative holds were used by law enforcement 'approximately 1,000 times per year.'" *Id.* (citing Mulroy, *supra*, at 846). Consistent with this practice, the Memphis Police Department held and questioned Norris for two days until he confessed; yet even then, he was not given a probable cause hearing until the next morning, at which time the State used his confession to support his arrest.

The Court should grant review to resolve the split among the lower courts over how to interpret *McLaughlin*'s prohibition on investigative delay and to make clear that such delay is presumptively unreasonable whether or not the police have probable cause to make an arrest and even if the delay lasts less than 48 hours.

IV. This Case Represents a Superior Vehicle to Address Legal Questions of National Importance.

This is a rare case which presents a Fourth Amendment claim that was first raised over fifteen years ago, and has been addressed by both state and federal courts, yet arrives on direct appeal under a *de novo* standard of review with several important questions preserved and squarely presented.

While unusual, this posture makes the case an ideal vehicle for this Court's review. There are three well-developed issues, each of which presents an opportunity for this Court to provide much-needed guidance on adjudicating Fourth Amendment claims in particular or federal constitutional claims more broadly. Two of those issues implicate splits of authority among the lower courts. And a favorable ruling on any one of these three issues would result in further proceedings, if not outright reversal of the decision below.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

JOHN S. MORAN
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
john.moran@kirkland.com

July 21, 2016

APPENDIX

APPENDIX CONTENTS

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE v. TERRY NORRIS

Criminal Court for Shelby County

No. 97-08293

No. W2000-00707-SC-R11-CD.

ORDER

Upon consideration of the application for permission to appeal of Terry Norris and the record before us, the application is denied. The opinion of the Court of Criminal Appeals is designated "Not For Citation" in accordance with Supreme Court Rule 4(E)(1).

Additionally, John S. Moran has filed a motion to appear *pro hac vice* on behalf of Mr. Norris, which is granted.

PER CURIAM

PAGE, Roger, A.J., not participating.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON
September 3, 2014 Session

STATE OF TENNESSEE v. TERRY NORRIS

Direct Appeal from the Criminal Court for Shelby County

No. 97-08293 James C. Beasley, Jr., Judge

No. W2000-00707-SC-R11-CD – Filed September 30, 2015

In this procedurally complex case, a Shelby County jury convicted the Defendant, Terry Norris, of second degree murder in 1999, and the trial court sentenced him to twenty-one years of incarceration. After several proceedings and filings, discussed in detail below, the U.S. Sixth Circuit granted the Defendant habeas corpus relief unless the State allowed the Defendant to reopen his original direct appeal and raise an issue regarding whether his confession should have been suppressed pursuant to *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The State allowed the Defendant to reopen his appeal. On appeal, the Defendant contends that the trial court erred when it denied his motion to suppress his confession to police because he gave his confession after being held for more than forty-eight hours without a probable cause hearing. This Court addressed the issue pursuant to plain error review. *State v. Terry Norris*, No. W2000-00707-CCA-R3-CD, 2014 WL 6482823 (Tenn. Crim. App., at Jackson,

Nov. 18, 2014), *perm. app. denied* (Tenn. Apr. 22, 2015). The Defendant filed a Rule 11 application, pursuant to the Tennessee Rules of Appellate Procedure, to the Tennessee Supreme Court. Our Supreme Court granted the application and remanded the case to this Court for plenary review. The State filed a petition to rehear, which the Tennessee Supreme Court denied on May 15, 2015. After our plenary review, we conclude that the Defendant is not entitled to relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which ROGER A. PAGE and ROBERT L. HOLLOWAY, JR., JJ., joined.

John Moran, Nashville, Tennessee, and Kellen S. Dwyer, Washington, D.C. (on appeal); Michael Johnson and Garland Erguden, Memphis, Tennesee (at trial, for the appellant, Terry Norris.

Robert E. Cooper, Jr., Attorney General and Reporter; Andrew C. Coulam, Assistant Attorney General; William L. Gibbons, District Attorney General; and Karen Cook, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts and Procedural History

A. Trial

In July 1997, a Shelby County grand jury indicted the Defendant for one count of second degree murder. In our opinion denying the Defendant's first appeal, we summarized the facts presented as follows:

> On March 10, 1997, nineteen-year-old victim Keith Milem was found shot to death outside the home where he lived with his uncle. On the evening of March 11, 1997, the Defendant was taken into custody by police and questioned about the crime. On March 13, 1997, the Defendant confessed to shooting the victim. The Defendant informed police of the location of the murder weapon, a nine-millimeter semiautomatic pistol, and police recovered the gun and submitted it for testing. Results of tests performed on the gun indicated that the fatal shots had indeed been fired from the Defendant's gun.
>
> At trial, Lakendra Lavonne Mull testified that she and the Defendant were roommates at the time of the crime, and she reported that at that time, the Defendant was dating her cousin, Lateeska Newberry. Mull explained that the victim was also her distant cousin, and she stated that Newberry and the victim had known one another since attending elementary school together. Mull characterized the victim and Newberry as her "best friends."
>
> Mull testified that on March 10, 1997, the victim, Newberry, and a third friend

named Tim visited her apartment during the afternoon. Mull stated that the Defendant was present at their apartment when the victim initially arrived, and she reported that the Defendant spoke to the victim briefly upon the victim's arrival. Approximately two hours after the victim arrived at the apartment, the Defendant left and later returned with his brother. At the time the Defendant returned, the victim, Newberry, Tim and Mull were engaged in conversation, and the victim and Tim were drinking alcoholic beverages. Mull testified that the Defendant and his brother stayed only ten minutes upon their return to the apartment before departing a second time. Mull testified that the Defendant subsequently telephoned her to tell her that he had left his gun at the apartment, and he soon returned to pick up the gun. Mull explained that her young daughter lived with them, and the Defendant generally did not leave the gun in the apartment with Mull's daughter. After picking up the gun, the Defendant left for a final time.

Mull recalled that approximately three hours after the Defendant picked up his gun, she drove the victim home. Mull testified that the victim was "kind of staggering because he had been drinking." However, she maintained that the victim "probably was more sleepy than full of alcohol" because he had not drunk "all that

much" while at her apartment. Mull recalled that when she left her apartment at approximately 9:55 p.m., she saw the Defendant parked across the street from their apartments in his "burgundy or maroon" 1993 Grand Am. She stated that when she pulled out of the apartment complex, she saw the Defendant begin to follow her car without his lights on, and she testified that the Defendant followed her car to the victim's home, a drive which Mull testified took three to four minutes. Mull reported that after she dropped the victim off in front of his home and turned her car around, the Defendant flashed his "high beams" at her car. Mull stated that she last saw the victim standing at the door to his home as she drove away.

Mull reported that the Defendant did not return home on the night of the murder, but she stated that the Defendant called her once that night. She recalled that at approximately 6:00 a.m. the following morning, the Defendant returned to their apartment to pick up clothes.

Mull testified that the Defendant normally carries a gun. Mull further testified that approximately a week prior to the homicide, she saw the Defendant put mercury covered with candle wax on the tips of bullets. When she asked him what he was doing, the Defendant explained that the mercury "makes the bullet explode when it enters something."

On cross-examination, Mull acknowledged that she told police she believed the Defendant thought that his girlfriend, Lateeska Newberry, was in her car on the night of the murder. She explained to police that she thought the Defendant was jealous after seeing the victim and Newberry together at her apartment earlier in the evening. She stated that she had known the Defendant to be jealous "[o]ver [Newberry]." However, she stated that while the victim was at her apartment on the day of the murder, the victim and Newberry were not affectionate and were "sitting across the room from each other."

Charles Edward Milem, the victim's uncle, testified that the victim was living with him at the time of his death. Milem testified that he was in his bedroom when the victim was shot. Milem recalled that from his bedroom window, he saw the victim get out of Mull's car and walk to the front porch of their home. As Mull's car pulled away, Milem saw another car immediately pull up on "the wrong side of the street." Milem next heard the victim ring the doorbell, and he then heard voices calling the victim. Milem testified, "One voice said, hey. My nephew repeated, who [sic] there, who [sic] there. And another voice immediately said, come here." Following this, Milem heard three gunshots, which he claimed came from the car that had pulled up after the victim was

dropped off. At this point, he could no longer see the victim standing in the street. Milem rushed to the door, saw the victim lying in the street, and saw a car pull away. Milem stated that the car from which the shots were fired "looked white up under the street lights" and "sound[ed] like a Cutlass." When Milem approached the victim, he noticed that the victim's hands were still in his pockets.

Byron Braxton of the Memphis Police Department testified that he was called to the crime scene on March 10, 1997. He recalled that when he arrived at the scene, paramedics were already there. Braxton testified that he saw the victim lying face-down in the middle of the street, and when the paramedics rolled him over, Braxton saw that the victim's hands were still in his pockets. He stated, "[T]he shooter wasn't there to our knowledge. The consensus of the witnesses were that they saw a white box-type Chevy headed toward [a nearby street]. It was occupied by two to three male blacks. But they really couldn't give a description on the individual." Officers recovered three nine-millimeter shell casings from the scene. They also found a bullet lodged in the door of a house near the home in which the victim lived.

The State introduced the Defendant's March 13, 1997 statement through the testimony of Memphis Police Sergeant

Dwight Woods. Woods participated in taking the Defendant's statement, which includ[ed] the following:

> Terry, do you know Keith Milem?
>
> A. Yes.
>
> Q. Are you aware that Keith Milem was shot and killed on Monday, March 10, 1997 at approximately 10:00 PM in front of 610 Loraine Drive?
>
> A. Yes.
>
> Q. Did you shoot Keith Milem?
>
> A. Yes.
>
> Q. What did you shoot Keith Milem with?
>
> A. A Smith and Wesson 9mm Automatic.
>
> Q. How many times did you shoot Keith Milem?
>
> A. I don't know.
>
> Q. Why did you shoot Keith Milem?
>
> A. Because he attacked me and hit me in the face and grabbed my arm.
>
> Q. Terry, tell me in your own words exactly what occurred before, during and after the shooting?
>
> A. Well from a couple of days before the shooting I heard my roommate Kim and my girlfriend Ranata talking about their cousin Keith or "Black" which is what they called him and I was

suspicious about him the whole time and the day of the shooting he came to my home at 1104 Craft Road #1 (Southern Hills Apartments). I came home at about 9:00 that evening and saw him and my girlfriend talking. He was on the couch and she was on the love seat directly in front of him talking. So, I left[,] * * * thinking that they may be having a relationship, I was mad.

I left my apartment and when I returned I saw my roommates [sic] car leaving the apartments and I thought my girlfriend was in the car also so I followed them to talk to my girlfriend but when they got to Keith's house Ranata was not in the car so I stopped to talk to Keith. I called Keith to the car and asked him what was up and he asked what was I talking about and I asked was him and Ranata in a relationship and he told me that it wasn't my business so I told him that it was my business and it seems as if he saw my gun on the seat and looking at the gun, he hit me on the left side of my face and like dove into the car. I grabbed my gun, he grabbed my arm and I snatched away from him and pointed my gun at him and pulled the trigger. When I saw him fall, I took off. After I left I went to the Kings Gate Apartments and got into a fight with a young man and then I went to Orange

Mound where I hid my gun in [an] abandoned apartment building on Arbra.

Q. Terry, when you were following Kim and Keith, did you have your lights on or off?

A. I had my lights on but I turned them off when we got to the corner of Tulane and Shelby Drive to see who was in the car but I could not.

Q. Terry, what direction did you leave after you shot Keith?

A. East on Loraine towards Tulane, I turned left and went north on Tulane to Shelby Drive. Turned right on Shelby Drive and went east.

Q. Terry, describe your car that you drive?

A. I drive a burgundy Pontiac Grand AM, 1993, 2-door SE.

Q. Terry, does your car have fog lights on it?

A. Yes sir, it has white fog lights.

Q. Terry, do you know if Keith was drinking or drunk?

A. Yes. He was drinking a gallon of wine with a friend in my home when I left. When I left and came back, he was still drinking some of the wine a while later.

Q. Terry, were you drinking or using any type [of] drugs?

A. No sir.

Q. Terry, did you recently put the mercury out of a thermometer into the end of the bullets that were in your gun and cover the ends with candle wax?

A. Yes sir[,] * * * I did that but not recently. It was when I first moved in to [sic] the apartment.

Q. Terry, when you first encountered Keith, was it your intention to shoot him?

A. No.

Q. Terry, is there anything else you can add to this statement that would aid in this investigation?

A. Yes sir, I'm sorry for what happened. I wish I could take it back.

Q. Did you give this statement of your own free will without any promises, threats or coercion?

A. Yes.

Q. Were you advised of your rights before you gave this statement?

A. Yes.

The Defendant testified on his own behalf at trial. He claimed that on one of the occasions while he was away from his apartment on the afternoon prior to the murder, he received a page from his

girlfriend, who was at his apartment with Mull and the victim. The Defendant stated that as he drove back to his apartment in response to the page, he passed Mull's car on the road. He testified that he believed his girlfriend was in the car with Mull, and he therefore "blinked" his lights at Mull's car. The Defendant maintained that when Mull didn't stop, he blew his horn and flashed his lights a second time. He then followed her. The Defendant maintained that he turned off his lights in order to see who was in Mull's car. He explained, "I couldn't see because her car * * * had been in an accident. It was real * * * crushed up on one side, and I couldn't see in it." The Defendant stated that he followed Mull's car, continuing to try to get her attention, but eventually lost the car after he turned around.

The Defendant testified that after losing sight of Mull's car, he saw the victim standing in the yard of his uncle's home. The Defendant recalled that he "called [the victim] over" to his car. When the victim approached, according to the Defendant, the two men engaged in an argument about the Defendant's girlfriend. The Defendant described the victim as angry and stated that the victim's speech was slurred. The Defendant maintained that during the argument, the victim hit him, and he tried to "fend [the victim] off." The Defendant claimed that the victim then "dove in[to]"

his car, while still hitting the Defendant, and attempted to grab the Defendant's gun, which was in plain view. According to the Defendant, he tried to push the victim out of the car, and as he pushed the victim away, he raised his gun and shot the victim.

The Defendant admitted that at the time he shot the victim, he was "enraged." The Defendant also admitted that on the night of the murder, he was "suspic[ious]" that the victim and Newberry, his girlfriend, were starting a relationship. He testified that on the day of the shooting, he and Newberry were in "a fight" and were not really speaking. The Defendant recalled that he was "upset at [his] girlfriend."

The Defendant testified that on the day of the shooting, he retrieved his gun from the apartment that he shared with Mull because of Mull's "under-age daughter and just for safety reasons." He admitted to putting mercury on the tips of bullets, stating that "if [the mercury] got into a person * * * it would make the wound more severe." However, the Defendant maintained that he altered his bullets solely "for protection."

A videotaped deposition of Dr. O.C. Smith, an assistant medical examiner for Shelby County and Deputy Chief Medical Examiner for western Tennessee, was admitted into evidence. In his deposition, Smith stated that he performed the

autopsy on the victim in this case. He stated that the victim died of multiple gunshot wounds. Smith specified that three bullets entered the Defendant's body, two of which exited the victim's body. Smith stated that one of the bullets which entered the victim's body severed the victim's spinal cord, rendering him incapacitated with "no voluntary control over his extremities."

Dr. Smith retrieved a "plastic property material" from the interior of one of the victim's bullet wounds that he concluded was "consistent with candle-wax." Smith explained that "some people will [put candle wax on the tip of a bullet] to cause a bullet to behave more like a full-metal jacket." He stated that a "full-metal jacket" is a bullet "that does not deform or fragment, and therefore * * * does not cause increase[d] suffering." He further explained that "[t]here's a concept out in the community, especially in the media industry, that if a hollow-point bullet is filled with metallic liquid mercury and that liquid mercury would be held in place by some devise [sic], that if that bullet contacts the body at high speed it will cause an almost explosive effect on the tissue."

Smith also noted a "pre-death" injury to the victim's "ring finger on his left hand that is a[n] evulsive type or a tearing type of laceration that peeled the skin down

> towards the finger-tip." He explained that "something snagged the skin with sufficient force to peel the skin down." Smith further noted "what is known in layman's terms * * * as powder burns, or a stipple type pattern on the inside of [the victim's] left wrist." Smith stated that "stipple will mark the skin out to about twenty-four inches, for most handguns." Finally, Smith noted an injury on the back of the victim's head comprised of "a large area of bruising[,] * * * some skin scraping and * * * some skin tearing." He explained, "It's an injury due to contact with a broad, blunt object. Certainly a fall to the ground can cause something like that."

State v. Terry Norris, No. W2000-00707-CCA-R3-CD, 2002 WL 1042184, at *1-6 (Tenn. Crim. App., at Jackson, May 21, 2002), *perm. app. denied* (Tenn. Nov. 4, 2002).

Following a trial, the jury convicted the Defendant of second degree murder, and the trial court sentenced him to twenty-one years in the Tennessee Department of Correction. *Id.* at *1.

The Defendant appealed his conviction to this Court. *Id.* He contended that: (1) his counsel were ineffective for failing to move for suppression of the Defendant's confession based upon a violation of his Fourth Amendment rights; and (2) his counsel were ineffective for arguing a defense theory to the jury that was inconsistent with both the Defendant's wishes and testimony. *Id.* We concluded that the Defendant's confession was not obtained in violation of his Fourth Amendment rights and, thus, that his

counsel were not ineffective for failing to file a motion to suppress his statement based on the delay between the time of his arrest and the judicial determination of probable cause. *Id.* We further concluded that any error by defense counsel concerning the choice of defense strategy did not result in prejudice to the Defendant. *Id.* We therefore affirmed the judgment of the trial court. *Id.*

The Defendant appealed this Court's holding to the Tennessee Supreme Court. *Id.* The Tennessee Supreme Court denied his request for permission to appeal. *Id.*

B. Petition for Post-Conviction Relief

The Defendant filed a *pro se* petition for post-conviction relief, followed by an amended petition after the appointment of counsel and a supplement to the amended petition. The Defendant alleged that appellate counsel was ineffective for not correctly stating his issue pursuant to *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996). In *Huddleston*, our Supreme Court held that a judicial determination of probable cause must occur within forty-eight hours of a warrantless arrest to protect a defendant's Fourth Amendment rights. 924 S.W.2d at 672 (adopting *McLaughlin*, 500 U.S. 44). A confession obtained in violation of this forty-eight-hour time line is subject to being excluded under a "fruit of the poisonous tree" analysis. *Id.* at 674.

This Court summarized the facts presented at the petition for post-conviction relief hearing as follows:

[Defendant's] Proof

At the [Defendant's] evidentiary hearing, Lieutenant A.J. Christian of the Brighton

Police Department testified that in 1997 he was a detective with the Memphis Police Department's Homicide Bureau involved in the [Defendant's] case. Christian said that the [Defendant's] arrest report showed that he was in police custody at the homicide office on March 11, 1997, at 7:30 p.m. He could not recall the exact time that the [Defendant] was taken into custody and explained that the arrest ticket would have the actual time and that the arrest narrative report "was just a supplement documenting the course of action that was taken after he was taken into custody."

Marcia Daniel, the [Defendant's] mother, testified that on March 11, 1997, police officers "called between 4:30 [p.m.] and five looking for [the Defendant]." Daniel located the [Defendant] and said he arrived home "between five and 5:15 [p.m.]." The police, who had arrived at the residence "maybe three to five minutes" before the [Defendant], left with him "approximately about 5:45" p.m. Daniel testified that she told trial counsel, but not appellate counsel, of these events. Daniel acknowledged that the [Defendant] called her on March 13, 1997, and that, although she could not recall the time of the phone call, he told her he had agreed to talk to the police but wanted to talk with her first.

Trial counsel testified that during his representation of the [Defendant], he believed he had "open-file discovery" from the State. Asked if he was aware that the [Defendant] was in police custody at 7:30 p.m. on March 11, 1997, trial counsel stated "that either [he] was aware or [he] should have been aware. [He], frankly, [did not] remember if anything was on the arrest ticket or not." Trial counsel said that at the time he argued the [Defendant's] motion to suppress his statement to police, he was aware of the "[t]he 48 hour rule" announced in *Huddleston* but acknowledged he "failed to raise that issue." Trial counsel also acknowledged that he did not object to the definition of "knowingly" in the jury instructions. On cross-examination, trial counsel testified that prior to the [Defendant] giving his statement on March 13, 1997, he was presented with "an advice of rights form" at 4:05 p.m. and signed it at 4:12 p.m.

The [Defendant] testified that he told appellate counsel that he was arrested at his mother's house on March 11, 1997, "[b]efore 7 p.m." and that more than forty-eight hours passed before he gave his statement to police on March 13, 1997. He acknowledged that the advice of rights form showed that he was given the form at 4:05 p.m. and that he signed it at 4:12 p.m. on March 13, but said he did not put the time on it and could not recall exactly

what time he signed it, only remembering "[it] was after the evening meal in the jail." The [Defendant] also acknowledged signing his police statement at 8:20 p.m. and said that he actually gave the statement verbally before this time.

On cross-examination, the [Defendant] acknowledged that he was not in custody at 4:05 p.m. on March 11, 1997. He testified that the police initially came to his mother's house that day at 6:05 p.m., but left because he was not at home, and then returned "[s]omewhere around" 7:00 p.m. to question him. He acknowledged that he agreed to talk to the police on March 13, 1997, in exchange for being allowed to talk to his mother, stating that he was able to reach her at 6:50 p.m.

State's Proof

Appellate counsel testified that he represented the [Defendant] on his motion for a new trial and on appeal. Discussing the [Defendant's] *Huddleston* claim, which he raised in the [Defendant's] motion for a new trial and on appeal, appellate counsel said he focused on the fact that the [Defendant's] confession "was clearly illegal" because "from the record [the police] didn't have probable cause to arrest [the Defendant] in the first place." Asked if he thought the amount of time the [Defendant] was in custody prior to giving his confession was a valid issue to pursue, appellate counsel answered that he

> "apparently" did not because he did not raise it on appeal. As for the jury instructions defining "knowingly," appellate counsel stated that "there's no question that there was an error in the jury instructions, but [he did not] think there was any question that it was harmless error" and, therefore, did not raise it in the motion for a new trial or on appeal.

Terry Jamar Norris v. State, No. W2005-01502-CCA-R3-PC, 2006 WL 2069432, at *5-6 (Tenn. Crim. App., at Jackson, July 6, 2006), *Tenn. R. App. P. 11 application denied* (Tenn. Dec. 18, 2006).

Addressing the issues, this Court affirmed the post-conviction court's dismissal of the Defendant's petition for post-conviction relief. Concerning the *Huddleston* issue, we stated:

> The [Defendant] argues that "appellate counsel was ineffective for failing to show at [his] motion for new trial hearing that [his confession] was given more than 48 hours after his arrest in violation of *State v. Huddleston*." However, in the [Defendant's] direct appeal, this Court determined there was no *Huddleston* violation.

Id. at *8. The Court went on to quote from our decision in the Defendant's direct appeal. *Id.* at *8-9. The Court then noted that the post-conviction court, in its order dismissing the petition for post-conviction relief, found the Defendant's *Huddleston* argument to be without merit. *Id.* at *9. We quoted the post-conviction court's findings:

> Although the *Huddleston* issue was addressed on direct appeal, the Court will quickly address the issue in regard to the ineffective assistance of counsel claim against Appellate Counsel. [The Defendant] asserts that his statement should be excluded as "fruit of the poisonous tree" because it was given after forty-eight (48) hours of detention with no probable cause determination. However, the testimony does not support the claim. The [Defendant] signed an Advice of Rights form at 4:12 P.M. on March 13, 1997. The testimony of [the Defendant's] mother indicated the police left her home around 5:45 P.M. on March 11, 1997. The [Defendant] admitted that he was not in custody at 4:05 P.M. on March 11, 1997; and also admitted he agreed to talk with police around 4:05 P.M. on March 13, 1997. The [Defendant] stated that he agreed to speak with police in order to get a phone call to his mother. His testimony further indicated that he then tried to contact his mother but was unable to reach her until about 6:50 P.M. on March 13, 1997. The Police stuck to their word and waited until the [Defendant] was able to speak to his mother before taking his statement. The [Defendant] cannot claim the time period was over forty-eight (48) hours when it was due to his desire to speak with his mother before making his statement.

Id. Our Court went on to hold:

> We agree with the post-conviction court that this issue is without merit. Although the [Defendant] contends that his direct appeal would have turned out differently had appellate counsel showed that he was in custody more than forty-eight hours at the time he gave his statement to police, he has failed to meet his burden of showing that he actually was in custody more than forty-eight hours prior to giving his confession at 7:20 p.m. on March 13, 1997. On direct appeal, this court found the [Defendant] was arrested at 8:45 p.m. on March 11, 1997. At the post-conviction hearing, there was only conflicting testimony offered as to when the [Defendant] was taken into custody, but no records were entered into evidence to show that this court erred when, on direct appeal, it concluded that the [Defendant] was arrested on March 11, 1997, at 8:45 p.m. Accordingly, the record supports the determination of the post-conviction court that this claim is without merit.

Id.

C. Habeas Corpus Petitions

On February 23, 2007, the Defendant filed a *pro se* petition for a writ of habeas corpus in the Circuit Court of Lauderdale County, alleging that his conviction was void because at the time he was sentenced, Tennessee Code Annotated section 40-35-209(e) did not provide for 100% sentencing as a violent offender. On February 26, 2007, the habeas corpus court summarily dismissed the petition,

finding that there was nothing on the face of the judgment to show that the Defendant's conviction was void or that his sentence had expired. The habeas corpus court noted that Tennessee Code Annotated section 40-35-501, in effect at the time of the Defendant's sentencing, mandated a 100% release eligibility date for a conviction for second degree murder. The Defendant then filed an appeal to this Court, and we affirmed the habeas corpus court's judgment. *Terry Jamar Norris v. Tony Parker, Warden*, No. W2007-00594-CCA-R3-HC, 2007 WL 4245730, at *1 (Tenn. Crim. App., at Jackson, Dec. 3, 2007).

On December 10, 2007, the Defendant filed a *pro se* habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Tennessee. *Terry Jamar Norris v. Jerry Lester, Warden*, 545 F. App'x 320, 323 (6th Cir. 2013). As relevant to the appeal before us, the Defendant contended that his appellate counsel was ineffective because he failed to effectively argue that his confession should be suppressed because he gave it after being held for more than forty-eight hours without a probable-cause determination, in violation of the forty-eight-hour rule in *McLaughlin. Id.* The district court found that all of these claims lacked merit and denied a certificate of appealability (COA). Regarding the Defendant's *McLaughlin* claim, the district court said "Norris * * * cannot overcome his failure to demonstrate that he was actually in custody more than forty-eight hours before giving his confession."

The United States Court of Appeals for the Sixth Circuit granted the Defendant's COA on two issues,

only one of which is relevant here: whether the Defendant's appellate counsel was ineffective for inadequately presenting a challenge to the Defendant's confession based on *McLaughlin*. *Id.*

The Sixth Circuit held:

> [The Defendant] contends that (1) his appellate counsel was deficient for failing to argue on direct appeal that [the Defendant's] right to a prompt probable-cause determination was violated under *McLaughlin*; and (2) that there is a reasonable probability that [the Defendant] would have prevailed on direct appeal had the *McLaughlin* issue been raised.
>
> In *McLaughlin*, the Supreme Court explained the circumstances in which a proper warrantless arrest can lead to a Fourth Amendment violation if a probable-cause determination is not held promptly. 500 U.S. at 47, 111 S.Ct. 1661. The Court created a burden-shifting standard that sought to balance the constitutional right to a prompt probable-cause determination with the "reasonable postponement" and "inevitable" delays that could result from "paperwork and logistical problems," especially in jurisdictions where probable-cause determinations are combined with other pretrial procedures. *See id.* at 55, 111 S. Ct. 1661. If a probable-cause determination occurred within 48 hours of arrest, the burden is on the arrestee to demonstrate that the probable-cause

determination was "delayed unreasonably." *Id.* at 56-57, 111 S.Ct. 1661. Delays "for the purpose of gathering additional evidence to justify the arrest," as well as delays "for delay's sake" were given as examples of unreasonable delay. *Id.* at 56, 111 S. Ct. 1661. However, where more than 48 hours elapsed between arrest and probable-cause determination, the burden of proof lies with the prosecutor, who must demonstrate "the existence of a bona fide emergency or other extraordinary circumstance" beyond the ordinary logistics involved in combined proceedings. *Id.* at 57, 111 S. Ct. 1661.

In *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996), the Tennessee Supreme Court held that "the exclusionary rule should apply when a police officer fails to bring an arrestee before a magistrate [for a probable cause determination] within the time allowed by *McLaughlin*." *Huddleston*, 924 S.W.2d at 673. The *Huddleston* court held that the "fruit of the poisonous tree" analysis should determine whether to suppress statements made during a detention that violates *McLaughlin*. *Id.* at 674 (citations omitted). Where the state courts refer to a "*Huddleston* violation," they are referring by implication to a *McLaughlin* violation.

[The Defendant's] appellate counsel alerted the court to the existence of *McLaughlin* on direct appeal, but did not

present a *McLaughlin* challenge to [the Defendant's] confession. Without citing *McLaughlin*, the opening appellate brief argued that [the Defendant's] confession must be suppressed under *Huddleston* (which merely applies *McLaughlin*) and focused primarily on subjective intent as one would for a *McLaughlin* claim. In his reply brief, appellate counsel discussed *McLaughlin* and the 48-hour presumption directly, but then stated that [the Defendant] complained of a *Brown* violation. Certainly appellate counsel did not argue that [the Defendant] had been held for over 48 hours without a probable cause determination, nor did he dissect the record to demonstrate this, as would have been necessary to any *McLaughlin* challenge.

On direct appeal, the TCCA sua sponte dismissed the possibility of a *McLaughlin* claim on the grounds that [the Defendant] was held less than 48 hours, *State v. Norris*, 2002 WL 1042184 at *9, a conclusion based on an arrest time of 8:45 p.m. on March 11, when Norris was booked into jail, *see id.* at *7. At [the Defendant's] post-conviction appeal, the TCCA stood by that arrest time because it concluded that, even after a post-conviction evidentiary hearing, "there was only conflicting testimony offered as to when the petitioner was taken into custody." *See Norris v. State*, 2006 WL 2069432 at *9. Thus, the TCCA resolved

this ineffective-assistance claim entirely on the merits of the underlying alleged *McLaughlin* violation, specifically on the 48-hour calculation.

Treating the 8:45 p.m. booking time as the arrest time was contrary to clearly established federal law. Even if there is no formal arrest, a person is considered seized for Fourth Amendment purposes when, under the circumstances, a reasonable person would not believe himself free to leave. *See Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). It is undisputed that [the Defendant] was transported in handcuffs from his mother's home to the police station. Officer Christian testified that, at the time [the Defendant] was put into the squad car, he was "taken into custody" and confirmed that [the Defendant] was not free to leave. Officer McCommon testified that he and Officer Christian went "[t]o pick [the Defendant] up at his home and bring him in for a statement." Under these circumstances, a reasonable person would not feel free to "decline the officers' request[]." *See Florida v. Bostick*, 501 U.S. 429, 436, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). Accordingly,[the Defendant] was arrested when "taken into custody" by Officers Christian and McCommon.

However, the TCCA's conclusion does not rely solely on the 8:45 p.m. arrest time,

but also notes that testimony conflicted as to when [the Defendant] was taken into custody. Even resolving all testimony conflicts in favor of the government, it was an unreasonable determination of fact to find that [the Defendant] was in custody for less than 48 hours at the time he began to confess. Even if we discount entirely the testimonies of [the Defendant] and Daniels favoring an earlier time of arrest, it is undisputed that [the Defendant] was already at the police station at 7:30 p.m. on March 11 and had begun talking with Sergeant Christian. To find that [the Defendant] was in custody for less than 48 hours before confessing would require one to believe that [the Defendant] was free to go at 7:20 p.m. on March 11, and that police took less than ten minutes to tell him he was being taken into custody, handcuff him, place him in the back of the cruiser, drive him five-and-a-quarter miles, bring him into the police station, and begin their interview. This is simply implausible. Notwithstanding the conflicts in testimony, the state court's determination that [the Defendant] was in custody for less than 48 hours prior to confessing was an unreasonable determination of fact.

Although [the Defendant's] attorney was deficient in failing to focus on the precise length of [the Defendant's] detention and such an argument had a reasonable probability of persuading the state court

that [the Defendant] had been in custody for over 48 hours prior to giving his statement on March 13, that fact alone is not enough to prove prejudice. Even if the state court had concluded that there were more than 48 hours of detention prior to confession, under *Huddleston*, Tennessee courts must find that the confession was "fruit of the poisonous tree" in order to suppress it. 924 S.W.2d at 674-75. The court would have had to consider four factors: "(1) the presence or absence of Miranda warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and finally, of particular significance, (4) the purpose and flagrancy of the official misconduct." *See id*. Quoting *McLaughlin*, 500 U.S. at 56, 111 S.Ct. 1661, the *Huddleston* court held that "delay for the purpose of gathering additional evidence to justify the arrest" supports a finding of purposeful police misconduct. *Id.* at 676.

There is evidence in the record suggesting that officers kept [the Defendant] detained to gather additional evidence. Captain Logan testified:

> [Logan:] Based on [the statements of Lakendra Mull and Charles Milem] we decided that [the Defendant] was a good suspect for this homicide.

> [The Defendant's Attorney:] * * * but did you have probable cause to charge him?
>
> [Logan:] Well, after picking him up and getting him in the office and talking to him, he admitted to it.
>
> * * *
>
> [The Defendant's Attorney:] You had strong suspicions, and you held him to do further investigation; is that correct?
>
> [Logan:] Yes, we did.

Furthermore, the record contains no alternative explanation for [the Defendant's] prolonged detention. *See McLaughlin*, 500 U.S. at 57, 111 S. Ct. 1661 (listing examples of appropriate reasons for delay: "transporting arrested persons from one facility to another, handling late-night bookings * * * , obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest"). Since purpose is the most important of the four factors and the burden of proof would have been on the government instead of [the Defendant], there is a reasonable probability that the confession would have been suppressed if [the Defendant's] appellate counsel had raised the *McLaughlin* issue in a reasonably competent manner and persuaded the court on direct appeal that

> [the Defendant's] pre-confession detention was longer than 48 hours.
>
> * * *
>
> Accordingly, we grant the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254(d), unless the [the State] reopens [the Defendant's] appeal within 180 days to allow him to raise the *McLaughlin* issue on direct appeal.

Norris, 545 F. App'x at 326-69.

After the Sixth Circuit's judgment, the State reopened the Defendant's appeal to allow him to raise the *McLaughlin* issue. That is the issue currently before this Court.

II. Analysis

On appeal, the Defendant contends that the violation of his *McLaughlin* rights requires that his confession be suppressed. He asserts that the Memphis Police violated the Defendant's right to a prompt probable cause hearing as required by *McLaughlin*. He notes that the police arrested him without a warrant and confined him to jail for three nights before taking him to a magistrate for a probable cause determination. Further, as the Sixth Circuit noted, the record contains no alternative explanation for the Defendant's prolonged detention besides the police's desire to gather additional evidence. The State responds by first contending that our review of this issue is limited to plain error because the Defendant did not raise this issue during his suppression hearing and only did so during his motion for new trial by indirectly addressing it as an ineffective assistance of counsel claim. The State

originally addressed the Defendant's arguments by contending that the issue should be reviewed for plain error and that the Defendant could not show that the trial court committed plain error when it admitted the confession. We previously agreed with the State and addressed the issue for plain error. *Norris*, 2014 WL 6482823, at *12-13. The Defendant appealed to the Tennessee Supreme Court, and it remanded the case to this Court for plenary review and not pursuant to the plain error doctrine.

The Defendant asserts that his confession was given after he was illegally detained for more than forty-eight hours. He notes that, among other things, Captain Logan admitted that the Defendant "refused to talk" when he was arrested and that he held him for "further investigation." He points to Captain Logan's response that he held the Defendant for further investigation and interrogation because "we had that right." The Defendant avers that this reflects a misunderstanding of *McLaughlin*, which allows for a reasonable postponement of a probable cause determination while police cope with everyday problems of processing suspects but does not give police the "right" to arrest suspects without a warrant and interrogate them for forty-eight hours before beginning the process of taking the suspect before a magistrate.

The State counters that the Defendant cannot prove that his rights have been violated because, first, the Sixth Circuit improperly found that the Defendant was detained for more than forty-eight hours. The State asserts that, "Though there is some ambiguity in the trial-court record, the record fairly indicates that the confession occurred within 48

hours of the [D]efendant's arrest." The State points out that both Sergeant McCommon and the Defendant testified that the Defendant made an oral confession to police *before* he spoke with his mother on the telephone. The State next asserts that the Defendant's argument that the police held him for an improper purpose fails because (1) he has not shown a *Huddleston* violation and (2) he has not shown that consideration of the error is necessary to do substantial justice because the record shows that the police continued to investigate the crime while the Defendant was detained but not that they detained him so that they could get further evidence to justify the Defendant's arrest.

We begin with the proposition that "[b]oth the state and federal constitutions protect against unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered is subject to suppression." *State v. Echols*, 382 S.W.3d 266, 277 (Tenn. 2012). Our Supreme Court has recognized three categories of police interactions with private citizens: "(1) a full-scale arrest, which requires probable cause; (2) a brief investigatory detention, requiring reasonable suspicion of wrongdoing; and (3) a brief police-citizen encounter, requiring no objective justification." *Id.* (citing *State v. Daniel*, 12 S.W.3d 420, 424 (Tenn. 2000)).

The law requires that, when a person is arrested without a warrant, he or she must be brought "before a magistrate to 'seek a prompt judicial determination of probable cause.'" *Bishop*, 431 S.W.3d 22, 42 (Tenn. 2014) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (holding that "the Fourth Amendment

requires a timely judicial determination of probable cause as a prerequisite to detention")); *see also State v. Huddleston*, 924 S.W.2d 666, 672 n.2 (Tenn. 1996). Tennessee Rule of Criminal Procedure 5(a)(1) provides that "[a]ny person arrested - except upon a capias pursuant to an indictment or presentment - shall be taken without unnecessary delay before the nearest appropriate magistrate." The Tennessee Supreme Court has recently stated that "a delay of less than forty-eight hours is presumptively reasonable" and that when the delay exceeds forty-eight hours, the State must show that "a bona fide emergency or other extraordinary circumstance' caused the delay." *Bishop*, 431 S.W.3d at 42 (quoting *McLaughlin*, 500 U.S. at 56). Nonetheless, even a delay of less than forty-eight hours may be *unreasonable* "if the delay is 'for the purpose of gathering additional evidence to justify the arrest' or if the delay is motivated by ill will against the arrested individual, or delay for delay's sake." *Id.* (quoting *McLaughlin*, 500 U.S. at 56). "Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities." *McLaughlin*, 500 U.S. at 56-57.

The remedy for failing to bring an arrestee before a magistrate without unnecessary delay is exclusion of "any evidence obtained by virtue of a suspect's unlawful detention," unless an exception to the exclusionary rule applies. *Id.* (citing *Huddleston*, 924 S.W.2d at 673-75). However, "when a suspect is

arrested based on probable cause, the ensuing detention is typically not illegal until it 'ripens' into a *Gerstein* violation." *Id.* (citing *Huddleston*, 924 S.W.2d at 675). "Obviously, if [an arrestee's] statement was given prior to the time the detention ripened into a constitutional violation, it is not the product of the illegality and should not be suppressed." *Huddleston*, 924 S.W.2d at 675.

The first question we must address is whether the police had probable cause to arrest the Defendant at the time of his arrest. "Probable cause * * * exists if, at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are 'sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.'" *Echols*, 382 SW.3d 266, 277-78 (Tenn. 2012) (quoting *State v. Bridges*, 963 S.W.2d 487, 491 (Tenn. 1997)); *see Beck v. Ohio*, 379 U.S. 89, 91(1964). "Probable cause must be more than a mere suspicion." *Echols*, 382 S.W.3d at 278 (quoting *State v. Lawrence*, 154 S.W.3d 71, 76 (Tenn. 2005)). However, probable cause "deal[s] with probabilities[,] * * * not technical[ities,] * * * the factual and practical considerations of everyday life on which reasonable and prudent [persons] * * * act.'" *Id.* (quoting *State v. Day*, 263 S.W.3d 891, 902 (Tenn. 2008)); *see Brinegar v. United States*, 338 U.S. 160, 175 (1949). Moreover, a determination of probable cause encompasses the accumulation of information known to law enforcement collectively if a sufficient nexus of communication exists between the arresting officer and a fellow officer with pertinent knowledge. *Echols*, 382 S.W.3d at 278 (citation omitted).

When determining whether the police possessed probable cause, "the courts should consider the collective knowledge that law enforcement possessed at the time of the arrest, provided that a sufficient nexus of communication existed between the arresting officer and any other officer or officers who possessed relevant information." *Bishop*, 431 S.W.3d at 36. Such a nexus exists when the officers are relaying information or when one officer directs another officer to act. *Id.* It matters not whether the arresting officers themselves believed that probable cause existed. *Id.* (citing *Huddleston*, 924 S.W.2d 666, 676 ("[An officer's] subjective belief that he did not have enough evidence to obtain a warrant is irrelevant to whether or not probable cause actually existed.")). When determining the existence of probable cause, the courts should also consider the entire record, including the proof adduced at both the suppression hearing and the trial. *Id.* at 36-37 (citing *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998)).

In this case, the Defendant never specifically asserted to the trial court that the police did not have probable cause to arrest him. Accordingly, much of the evidence needed to determine whether the police had probable cause to arrest the Defendant must be pieced together from the record. When he appealed his case to the Tennessee Supreme Court, the Defendant argued that this Court did not properly determine that there existed probable cause at the time of arrest. We again disagree, and we maintain our conclusion that the police officers had probable cause to arrest the Defendant.

During the motion to suppress hearing, the trial, and during the motion for new trial hearing, evidence was presented about what police knew at the time of the Defendant's arrest. The police knew that the murder in this case occurred on March 10, 1997. Police began an investigation of the homicide, and the Defendant was identified as a "suspect." Before the Defendant's arrest, officers had spoken with Lakendra Mull, who informed them that the Defendant was her cousin's boyfriend and that he was a jealous individual who had gotten the impression that her cousin had been speaking to the victim. The Defendant was living with Ms. Mull at the time of the shooting, and, on the day of the shooting, Ms. Mull had seen him retrieve from the apartment a weapon that he often carried. On the night of the shooting, Ms. Mull gave the victim a ride home, and she noticed that the Defendant was following them in his vehicle, a maroon Grand Am, without his headlights illuminated, despite the late hour. After she dropped off the victim, she passed the Defendant in his vehicle. He was still proceeding towards the victim's home, and he illuminated his car lights. Police officers had Ms. Mull's statement at the time of the Defendant's arrest. They also had the statement of Charles Milem, the victim's uncle. He told officers that he saw the victim get out of a car before the shooting. He heard another car, that looked white, pull up, and heard "two" voices call to the victim. He then heard three gunshots and saw the victim lying in the street. We conclude that Ms. Mull's statement gave officers probable cause for the Defendant's arrest. It indicated that the Defendant had the means to commit the crime because he was in possession of a weapon the day of the shooting.

Further, Ms. Mull's statement showed that the Defendant had a motive to commit the crime because he was jealous and angry with the victim because he had been speaking with the Defendant's girlfriend. Finally, her statement proved that the Defendant had the opportunity to commit the crime as he followed Ms. Mull to the victim's home on the night of the shooting, shortly before the shooting occurred. This statement gave the officers sufficient probable cause for the Defendant's arrest.

The Defendant points out that, at one point during Captain Logan's testimony, he stated that he did not have "enough to charge" the Defendant at the time of his arrest. Later during that same testimony, however, Captain Logan was asked whether he was testifying that the police did not have probable cause to charge the Defendant upon his initial arrest, and the Captain answered in the negative. Regardless, "[i]t matters not whether the arresting officers themselves believed that probable cause existed." *Bishop*, 431 S.W.3d at 36. We conclude that the record evinces that the police did, in fact, have probable cause to arrest the Defendant after receiving Lakendra Mull's statement on the evening of March 11, 1997.

"[W]hen a suspect is arrested based on probable cause, the ensuing detention is typically not illegal until it 'ripens' into a *Gerstein* violation." *McLaughlin*, 500 U.S. at 56-57. (citing *Huddleston*, 924 S.W.2d at 675). "Obviously, if [an arrestee's] statement was given prior to the time the detention ripened into a constitutional violation, it is not the product of the illegality and should not be suppressed." *Huddleston*, 924 S.W.2d at 675. The

question we must now address is whether the record proves that the Defendant was in custody for more than forty-eight hours before he gave his statement.

At the hearing on the motion to suppress the Defendant's statement, the evidence revealed that the Defendant was taken into police custody for questioning without a warrant on the evening of March 11, 1997. Officers transported the Defendant to the Memphis Police Department Homicide Office for a formal interview. There, he was advised of his rights. According to officers, the Defendant refused to sign a waiver of rights form but agreed to talk to the officers. At the time, the Defendant denied any involvement in the death of the victim. At 8:20 p.m. on March 11, 1997, the Defendant was allowed to telephone his mother. Officers then booked the Defendant into jail. The Defendant's "arrest ticket" indicated that the Defendant was arrested at 8:45 p.m. on March 11, 1997.[1]

The evidence of the times of the Defendant's arrest and his first statement are ambiguous at best. The Defendant's mother indicated the police left her home around 5:45 p.m. on March 11, 1997. The Defendant admitted that he was not in custody at 4:05 p.m. on March 11, 1997, and also that he agreed to talk with police around 4:05 p.m. on March 13, 1997. An officer who participated in questioning the Defendant testified that on March 13, 1997, the Defendant signed a waiver of rights form at 4:05 p.m. The Defendant then told officers that he did not wish

---

[1] Although Sergeant A. J. Christian discussed an "arrest ticket" during his testimony at the hearing on the motion to suppress, we find nothing in the record concerning the admission into evidence of such an item or a copy thereof.

to make a statement until he spoke to his mother. Both Sergeant McCommon and the Defendant testified that the Defendant orally confessed to this killing *before* he spoke with his mother but after he signed the waiver of rights form. The Defendant then spoke with his mother at 6:52 p.m. This means that his first confession occurred between 4:05 p.m. and 6:52 p.m. on March 13, 1997. At 7:20 p.m., the Defendant made another statement to the officers, in which he confessed to shooting the victim. At 8:20 p.m., the Defendant signed the typewritten statement that he made to police. The officers then allowed the Defendant to make another phone call at 8:23 p.m. According to one officer, during the Defendant's interview on March 13, the officers provided him a meal.

While not totally clear, it appears that the Defendant made his first confession before being in custody for more than forty-eight hours. It also appears that part of the delay in the forty-eight hour time frame was caused by the Defendant's desire to speak with his mother. Because of the ambiguity and because some of the delay is attributable to the Defendant, we conclude that the Defendant's detention was not illegal. Accordingly, we affirm the judgment of the trial court.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the trial court's judgment.

_____

ROBERT W. WEDEMEYER, JUDGE