No. 16-104

# 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*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## INTRODUCTION

On March 11, 1997, Petitioner Terry Norris was eighteen years old. Officers arrested him without a warrant and held him in jail for three nights without a probable-cause hearing. This was routine in Memphis, Tennessee, where Norris was just one of thousands of citizens subjected to investigatory "48-hour holds" in violation of the Fourth and Fourteenth Amendments under *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991). *See* Steven J. Mulroy, *"Hold" On: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 Case W. Res. L. Rev 815, 826 (2013).

Today, Norris is thirty-eight. He sat in prison through myriad appeals and post-conviction proceedings, including a successful federal habeas petition that reopened his direct appeal so he could finally raise his *McLaughlin* claim. The court below then rejected that claim based on three fundamental legal errors: (i) finding that Norris confessed within 48 hours of arrest notwithstanding the Sixth Circuit's final determination that the same finding on the same record was unreasonable under 28 U.S.C. § 2254(d)(2); (ii) evaluating probable cause without giving weight to exculpatory evidence, in conflict with the decisions of several lower courts; and (iii) failing to hold that the investigatory hold was unreasonable *even if* there was probable cause and less than 48 hours before the confession, again in conflict with the decisions of several lower courts.

The State does not dispute that Norris has preserved each of these important questions of federal law or that two implicate established splits among the lower courts. Correcting any one of these

errors would warrant reversing the judgment below. The State's arguments in opposition to certiorari are meritless, and the Court should grant review.

## I. The § 2254(d)(2) Determination Precluded the Court Below from Making the Same "Unreasonable Determination of the Facts" on the Same Record.

To start, the Court should grant plenary review or summarily reverse to make clear that a state court cannot affirm a prisoner's conviction based on a factual finding after a federal habeas court has made a final determination that the same finding was an "unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), on the same record.

The key components here are not in dispute: In earlier state-court proceedings, the Tennessee courts rejected Norris's claim of ineffective assistance of counsel, holding that his *McLaughlin* claim was meritless (and he could thus show neither deficient performance nor prejudice) because he confessed within 48 hours of arrest. *See Norris* v. *State*, No. W2005-01502-CCA-R3-PC, 2006 WL 2069432, at *9 (Tenn. Crim. App. July 26, 2006). In granting habeas relief, the Sixth Circuit held under 28 U.S.C. § 2254(d)(2) that, "[n]otwithstanding the conflicts in testimony, the state court's determination that Norris was in custody for less than 48 hours prior to confessing was an unreasonable determination of fact." *Norris* v. *Lester*, 545 F. App'x 320, 328 (CA6 2013). Then, after reopening Norris's direct appeal, the Tennessee Court of Criminal Appeals affirmed his conviction based on its "conclusion that petitioner had been arrested for less than 48 hours before he confessed." Opp. 20; *see also* Pet. App. 41a.

Under principles of collateral estoppel, the Sixth Circuit's final judgment precluded that finding in Norris's reopened appeal. The State makes several arguments (at 17–21) in an attempt to sidestep this conclusion. But none has merit.

1. The State first frames the collateral-estoppel question as a matter of Tennessee law. *See* Opp. 17 (citing *Mullins* v. *State*, 294 S.W.3d 529, 535 (Tenn. 2009)). As the petition makes clear (at 15–16), that is wrong. A federal judgment's preclusive effect in subsequent state proceedings is a federal question. *See, e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994). This Court has not only jurisdiction to address the issue, but also a special imperative to do so, since no other federal court may review those determinations. *See Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U.S. 518, 525 (1986). The State cannot escape review simply by citing Tennessee law.[1]

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[1] The State questions only in passing (at 17) whether "ordinary principles of res judicata and collateral estoppel are applicable in the habeas context." Apparently, the State believes that, because "res judicata does not operate to bar a federal court exercising habeas jurisdiction from relitigating a federal constitutional issue that has already been decided in state court," Opp. 17 n.7, it might also allow a state court to relitigate federal constitutional issues that have already been decided in federal court. Of course, the Supremacy Clause and the very nature of "the great and efficacious writ," 3 Blackstone 131, explain why federal habeas courts may revisit constitutional claims already decided in state courts (subject to AEDPA's strictures). And they also explain why state courts may not in like manner relitigate issues conclusively resolved by federal habeas courts. Indeed, that the State would even suggest that Tennessee courts remain free to ignore federal habeas rulings just further goes to show why this Court's intervention is needed.

2. The State's main contention (at 18) is that collateral estoppel does not apply here because the § 2254(d)(2) determination supposedly "*informed* the Sixth Circuit's ultimate holding" but was not "actually *necessary*." (Emphasis in original). The court below did not invoke this theory; the State offers it only as an alternative argument for affirmance. But the theory is entirely without merit.

The State is correct that, to have preclusive effect, a ruling must be "necessary" to the earlier judgment. *Accord* Pet. 17 (quoting 18 Wright & Miller, *Federal Prac. & Proc* § 4416 (2d ed.)). But the State can assert that the § 2254(d)(2) determination was unnecessary only by ignoring black-letter law. As this Court has admonished time and again, § 2254(d)—which Congress enacted in 1996 as part of the Antiterrorism and Effective Death Penalty Act (AEDPA)—imposes "threshold restrictions * * * on granting federal habeas relief to state prisoners." *Renico* v. *Lett*, 559 U.S. 766, 796 (2010).

It is undisputed that the claim Norris raised in his federal habeas petition "was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). The Sixth Circuit was thus prohibited under AEDPA from granting habeas relief *unless* it made one or both of the determinations under subsection (d). *Accord* Brief for Appellee 12, *Norris* v. *Lester*, 545 F. App'x 320, 328 (6th Cir. 2013). The Sixth Circuit's § 2254(d)(2) determination was therefore "necessary" because it was a mandatory precondition to granting habeas relief on a claim adjudicated on the merits in state court.

The Sixth Circuit's determination under § 2254(d)(1) that the Tennessee courts' earlier ruling

was also contrary to clearly established law, *see Norris*, 545 F. App'x at 328, does not affect the necessity of the § 2254(d)(2) determination. The State has not raised (and thus has forfeited) any contrary argument, but it would not have merit at any rate. The Sixth Circuit itself said that its § 2254(d)(1) determination was not sufficient because "the TCCA's conclusion [that Norris confessed within 48 hours did] not rely solely on the 8:45 p.m. arrest time, but also note[d] that testimony conflicted as to when Norris was taken into custody." *Norris*, 545 F. App'x at 328. The court thus had to go further to hold 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.* The § 2254(d)(1) ruling thus was not a genuinely independent holding.

Moreover, even if the determination were independent, alternative holdings must *both* be afforded preclusive effect where each was sufficient to support the earlier judgment. *See Anderson* v. *C.I.R.*, 698 F.3d 160, 165 (CA3 2012) ("[A]ll independently sufficient alternative findings should be given preclusive effect.") (quotation omitted); *see also Magnus Elecs., Inc.* v. *La Republica Argentina*, 830 F.2d 1396, 1402 (CA7 1987); *In re Westgate-California Corp.*, 642 F.2d 1174, 1176 (CA9 1981); *Irving Nat. Bank* v. *Law*, 10 F.2d 721, 724 (CA2 1926) (Hand, J.) ("[I]f a court decides a case on two grounds, each is a good estoppel.").[2]

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[2] There is also no question, and the State raises none, that the same issue was addressed in both cases. *See* Pet. 18. In making its § 2254(d)(2) determination, the Sixth Circuit

3. The State next confuses the issues of compliance with the Sixth Circuit's mandate and collateral estoppel (at 18–20) in an effort to show that "the Tennessee Court of Criminal Appeals did not fail to afford the Sixth Circuit's decision the comity it was due." But *of course* the Tennessee courts complied with the Sixth Circuit's mandate and reopened Norris's direct appeal. That was not a matter of comity, but of coercion: the Sixth Circuit's conditional writ compelled the State either to reopen Norris's direct appeal or to release him from custody. Had the State failed to comply, Norris would have had recourse before the Sixth Circuit. The issue of collateral estoppel, by contrast, is a wholly separate question that Norris properly raised with the Tennessee courts and subsequently presented to this Court. *See Parsons Steel*, 474 U.S. at 525.

The State is thus off-base in criticizing Norris (at 15–16, 19–20) for his unsuccessful *pro se* effort to obtain an unconditional writ from the Sixth Circuit. The Sixth Circuit denied Norris's effort precisely on the ground that federal court was not the proper venue to raise an argument ultimately sounding in collateral estoppel. The unpublished order from the clerk (not the habeas panel) denying Norris a certificate of appealability cited *Patterson* v. *Haskins*, 470 F.3d 645 (CA6 2006), which held that the issuance of a conditional writ "constitutes a 'final judgment'" and that arguments (like Norris's) based on the law-of-the-case doctrine failed because "'[l]aw-

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necessarily decided not only that Norris *did not* confess within 48 hours based on the state-court record, but also that "[r]easonable minds reviewing the record [could not] disagree." *Wood* v. *Allen*, 558 U.S. 290, 301 (2010) (quotation omitted).

of-the-case rules * * * do not involve preclusion by final judgment,'" *id.* at 661 (quoting 18B Wright & Miller, *Federal Prac. & Proc* § 4478 (2d ed.)). *See* Order 5, *Norris* v. *Westbrooks*, No. 15-6221, ECF No. 11-1 (CA6 May 31, 2016). Preclusion by final judgment is a matter of collateral estoppel. Thus, contrary to the State's suggestion, the rejection of Norris's *pro se* effort only further demonstrates why the proper way for Norris to pursue his argument was to invoke collateral estoppel in the Tennessee courts and to seek review in this Court when the state courts failed to apply it.

Norris is not claiming, as the State suggests (at 19), that the Sixth Circuit "dictate[d] to the state court that it *must* find a *McLaughlin* violation." The Tennessee courts could have held, for example, that Norris's Fourth Amendment rights were not violated because the State had "demonstrate[d] the existence of a bona fide emergency or other extraordinary circumstance" to justify a delay of over 48 hours, *McLaughlin*, 500 U.S. at 57—*if* the record supported such a finding (which it did not). But under established principles of collateral estoppel, the Sixth Circuit's final judgment *did* preclude the Tennessee courts from rejecting the *McLaughlin* claim based on a finding that he confessed within 48 hours of arrest.[3]

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[3] The State's attempt to justify the finding below (at 20–21) is wrong, but more importantly irrelevant since collateral estoppel prohibits relitigating the issue.

## II. A Probable-Cause Determination Must Account for Exculpatory Facts.

In opposing review on the conceded circuit split over whether exculpatory evidence must be considered in a probable-cause determination (at 21–23), the State does not dispute the cert-worthiness of the issue. It instead makes two arguments for why the issue is not presented here. Neither is correct.

1. The State claims that the court below did consider the exculpatory eyewitness testimony in making its probable-cause determination. Opp. 22 (citing Pet. App. 38a). But that is incorrect. The court first recounted the potentially inculpatory statement from Norris's roommate; then it noted the inconsistent testimony from the eyewitness; and finally, it "concluded that [*the roommate's*] statement gave officers probable cause for the Defendant's arrest." Pet. App. 38a (emphasis added). In further explaining its analysis, the court did not discuss the exculpatory evidence. *See* Pet. App. 39a. Thus, contrary to the State's assertion, the opinion below shows that the court did *not* consider this evidence in its probable-cause determination.

2. The State next argues (at 22–23) that the Sixth Circuit's habeas decision—which also addressed a claim that Norris's trial counsel was ineffective for failing to challenge probable cause—undermines Norris's claim. But the State mischaracterizes the Sixth Circuit's opinion. The court held that "the requirement to listen to exculpatory witness accounts is clearly and explicitly established in the law of [the Sixth Circuit], [but] is not as clearly established by the Supreme Court." *Norris*, 545 F. App'x at 325. It then further held that

"the conflicts in testimony identified by Norris do not demonstrate that the state courts *ignored clearly established federal law or relied on an unreasonable determination of fact* in their finding that police had probable cause to arrest Norris." *Id.* at 326 (emphasis added). The court thus recognized that "there was a discrepancy in the descriptions of the car," but concluded that it was "not clearly established under federal law that such a discrepancy, given the totality of the circumstances, conclusively exonerates Norris." *Id.*

That holding in no way undermines the claim presented to this Court. First and foremost, the Sixth Circuit's ruling was necessarily and expressly limited by AEDPA. *See supra* at 4–5. The claim here arrives on direct review; AEDPA does not apply. Second, as explained in the petition (at 23), the Court could choose only to review the legal question whether a court must weigh exculpatory evidence and leave the application for remand.

## III. Investigative Delay Is Unreasonable, Even Where There Is Probable Cause.

Finally, the Court should grant review to resolve the split among the lower courts 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. Here too, the State does not dispute the existence of this split or the cert-worthiness of the issue. The State offers two arguments against review, but both are wrong.

1. The State first argues (at 24–25) that Tennessee courts are already on the defendant-friendly side of the split. But that is plainly wrong.

The State invokes *State* v. *Bishop*, 431 S.W.3d 22 (Tenn. 2014), but that opinion merely repeats *McLaughlin*'s language—"for the purpose of gathering additional evidence to justify the arrest"—without further explanation. That is because, in *Bishop*, the court held that the *McLaughlin* issue had been forfeited, *see id.* at 42–43, and that the defendant could not satisfy the "substantial justice" prong of the plain-error standard, *see id.* at 43–45. The Tennessee Supreme Court thus had no occasion to address the split at issue here.

By contrast, as the petition notes (at 25 n.31), the Tennessee Court of Criminal Appeals—in a decision by two of the three judges on the panel below—is one of several state courts to hold that "*McLaughlin* * * * permit[s] delays for the purpose of gathering additional evidence if law enforcement has already acquired sufficient evidence to justify the defendant's arrest in the first place." 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, 521 & n.13 (2015) (citing *State* v. *Brown*, No. W2013-00182-CCA-R3-CD, 2014 WL 4384954, at *16 (Tenn. Crim. App. Sept. 5, 2014)). The State simply ignores that fact.

Moreover, if the panel had read *McLaughlin* to prohibit investigative delays of less than 48 hours where probable cause already existed, it would have had to offer an explanation for rejecting the claim. The record showed that officers "held [Norris] to do further investigation," Pet. App. 31a, with no other explanation for the delay. The opinion below would thus make no sense under the State's view. The

court below plainly understood *McLaughlin* the same way it had in *Brown*.

2. The State lastly contends (at 25) that "the trial court previously found that officers did not delay petitioner's probable cause hearing as a 'ruse' or 'to sweat' petitioner for a confession." The decision below did not rest on that basis. But in any event, the issue here is the reasonableness of Norris's prolonged detention under the Fourth Amendment, not the voluntariness of his confession under the Due Process Clause. It is irrelevant that the police did not commit *other* acts of misconduct. It is also remarkable that the State would rely on the trial court's ruling, which concluded that "the officers had *reasonable suspicion* to bring Mr. Norris in to question him about the case" and "were doing a good investigative job by bringing Mr. Norris in and questioning him." R., Mot. New Trial Hr'g Tr. Vol. 2, at 132–33 (emphasis added).[4] That ruling—which sanctioned a prolonged investigative detention based on mere reasonable suspicion—was plainly wrong under even the narrowest reading of *McLaughlin*.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition should be granted.

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[4] For the Court's convenience, petitioner notes that this transcript is available through Pacer as part of the record in Norris's federal habeas proceeding. *See* Appendix 1D, Doc. 3, *Norris* v. *Parker*, No. 2:07-cv-02793-BBD-egb, ECF No. 35-9 (W.D. Tenn. Jan. 7, 2009).

Respectfully submitted,

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