

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*

RESPONDENT'S BRIEF IN OPPOSITION

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**RESTATEMENT OF THE
QUESTIONS PRESENTED**

- I. Whether the Sixth Circuit’s habeas ruling on petitioner’s ineffective-assistance claim, which was based in part on its conclusion that a competently-presented *McLaughlin* claim would have had a reasonable probability of persuading the state court that a Fourth Amendment violation had occurred, precluded the Tennessee Court of Criminal Appeals from holding in petitioner’s reopened direct appeal that no Fourth Amendment violation had occurred.
- II. Whether the Tennessee Court of Criminal Appeals correctly held that petitioner was arrested with probable cause.
- III. Whether the Tennessee Court of Criminal Appeals’ rejection of petitioner’s *McLaughlin* claim was correct in light of the trial court’s earlier finding that any delay in obtaining a probable-cause hearing was not intended as “a ruse” “to sweat” petitioner for a confession.

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OPINION BELOW

The opinion of the Tennessee Court of Criminal Appeals (Pet. App. 2a-41a) is unreported. The order of the Tennessee Supreme Court (Pet. App. 1a) denying review is also unreported.

JURISDICTIONAL STATEMENT

The Tennessee Court of Criminal Appeals issued its opinion on September 30, 2015. (Pet. App. 2a.) The Tennessee Supreme Court issued its order denying review on March 23, 2016. (Pet. App. 1a.) Justice Kagan extended petitioner's deadline to file his petition to July 21, 2016. The petitioner filed his petition on July 21, 2016, and invokes this Court's jurisdiction under 28 U.S.C. § 1257(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to the United States Constitution provides that 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"

STATEMENT OF THE CASE

A. Evidence Presented at Trial

In 1999, petitioner was convicted for the second-degree murder of Keith Milem and sentenced to twenty-one years of incarceration. Pet. App. 2a. He completed his sentence earlier this year due to credits earned. Pet. 6 n.23.

The evidence presented at trial showed that Milem visited petitioner's apartment on March 10, 1997, at the invitation of petitioner's roommate, Lakendra Mull. Pet. App. 5a-7a. Petitioner became jealous of Milem because he thought Milem was receiving attention from petitioner's girlfriend, who was also at the apartment. *Id.* Petitioner left the apartment approximately two hours after Milem arrived, returned briefly with his brother, departed a second time, returned again to pick up his gun, and then left for the final time. *Id.* at 5a.

About three hours after petitioner picked up his gun, just before 10:00 p.m., Mull left her apartment to drive Milem home and noticed that petitioner was parked across the street from the apartment complex. *Id.* When she and Milem pulled out of the apartment complex, petitioner began to follow them with his lights off and continued to follow them until they arrived at Milem's home three or four minutes later. *Id.* at 6a. When Mull turned her car around, petitioner flashed his "high beams" at her car. *Id.* Mull last saw Milem standing by his front door. *Id.*

As Mull pulled away from Milem's house, Milem's uncle, who lived with the victim, saw a car pull up and heard its occupant ask the victim to approach. *Id.* at 7a. The uncle then heard three gunshots coming from the car, rushed outside, and saw Milem lying in the street as the car pulled away. *Id.* at 7a-8a. Both the uncle and a responding police officer testified that Milem's hands were in his pockets. *Id.* at 8a. Milem died of multiple gunshot wounds, one of which severed his spinal cord. *Id.* at 15a. Officers recovered three nine-millimeter shell casings from the scene. *Id.* at 8a.

Material consistent with candle-wax was recovered from one of the bullet wounds. *Id.*

The State introduced a post-arrest statement from petitioner in which petitioner admitted to shooting Milem with a nine-millimeter handgun containing bullets that petitioner had previously filled with mercury and covered with candle wax, and to later hiding the gun in an abandoned building. *Id.* at 9a, 12a. In the statement, petitioner claimed that he shot Milem because Milem attacked him and grabbed his arm. *Id.* at 9a. Petitioner admitted following Mull's car to Milem's residence but claimed that he did so because he thought his girlfriend was in the car. *Id.* at 10a. Petitioner also admitted that he was suspicious that his girlfriend was in a relationship with Milem. *Id.*

Petitioner testified on his own behalf at trial. *Id.* at 12a. Petitioner again admitted to shooting Milem but claimed that he did so only after Milem hit him and dove into petitioner's car in an attempt to retrieve his handgun. *Id.* at 13a-14a. Petitioner admitted that he was "enraged" at the time of the shooting because he believed his girlfriend and Milem had begun a relationship. *Id.* at 14a. Petitioner also admitted that he had put mercury in the bullets contained in the handgun because the mercury would make the wound "more severe." *Id.* at 14a.

**B. Investigation Leading to Petitioner's
Arrest and Circumstances Surrounding
His Oral Confession and Subsequent
Written Confession**

On the evening of March 11, 1997, after interviewing Mull and learning of petitioner's potential involvement in Milem's death, Sergeant A.J. Christian and Officer Ernie McCommon of the Memphis Police Department visited the home of petitioner's mother, Marcia Daniels. R., Suppr. Hr'g Tr. Vol. 1, at 3.¹ When the officers were told that petitioner was not there, they departed. *Id.* at 3-4. The officers returned about 20 to 25 minutes later, however, after Daniels called to inform them that petitioner was now at her home. *Id.* at 4.² Upon their return, the officers questioned petitioner, asked to see his car, and took Polaroid photographs of the car. *Id.* at 4, 101-02. Afterwards, they took petitioner into custody. *Id.* at 4.

The officers then drove petitioner to the nearby police station where, after having been read his *Miranda* rights, he agreed to speak with the police. *Id.* at 4, 7. Petitioner initially denied any involvement in the murder and was booked into jail around 8:45 p.m. *Id.* at 9-10, 19-20.

It was undisputed that, between 4:05 p.m. and 6:52 p.m. on March 13, 1997, petitioner orally confessed to

¹ Citations to "R." are to the appellate record in the Tennessee Court of Criminal Appeals.

² Ms. Daniels, on the other hand, only recalled that the police visited her house once that evening. R., Suppr. Hr'g Tr. Vol. 1, at 101.

shooting Milem and repeated that confession in a written statement beginning at 7:20 p.m.

At 4:05 p.m. on March 13, 1997, petitioner agreed to speak with the police again and signed a waiver-of-rights form. *Id.* at 31; R. Suppr. Hr'g Ex. B. Petitioner called his mother at 6:52 p.m. R, Suppr. Hr'g Ex. C; R, Suppr. Hr'g Tr. Vol. 1, at 32-33, 55. Petitioner began to give a written statement to police, in which he admitted to shooting Milem, at 7:20 p.m. *Id.* at 34-35; R., Suppr. Hr'g Ex. D. He signed the written statement at 8:20 p.m., after calling his mother a second time. *Id.*

At some point between 4:05 p.m. and petitioner's first phone call to his mother at 6:52 p.m., petitioner also gave an oral statement to the police in which he admitted to shooting Milem. Petitioner testified as follows:

Q. Okay. Was [your talk with Sgt. McCommon on March 13, 1997] before or after you talked to your mom?

A. Before.

Q. Okay. So this happened before?

A. No, no—Yeah, before.

Q. So you did make—you made a statement—

A. To [McCommon]

Q. —implicating yourself in this crime prior to talking with your mother?

A. Yes, I did.

Q. Okay. And then you talked to your mother after that?

A. Mmm-hmmm (yes). I told her I was going to make a statement.

R., Suppr. Hr'g Tr. Vol. 2, at 192-93. Petitioner specified that the confession was oral: "Q. Okay. So you—you made a confession, oral confession to [Sgt. McCommon], right? A. Yeah." *Id.* at 194. His mother confirmed that, when she first spoke to her son that day, he told her that he had already given a statement to the police. R., Suppr. Hr'g Tr. Vol. 1, at 113. She further testified that the conversation happened that *afternoon*. R., Suppr. Hr'g Tr. Vol. 1, at 128.

Sgt. McCommon also testified that petitioner's first confession to the shooting of Milem was oral and that the confession was repeated in his subsequent written confession:

Q. Okay. And did you talk to [the petitioner] orally before taking a written statement?

A. Yes.

Q. Okay. And did he indicate the contents of this statement, this written statement orally before it was taken down in writing?

A. Yes.

Id. at 54.

The information petitioner provided in his oral and written confessions led the police to the murder weapon, which was recovered. *Id.* at 51-52.

C. Amended Motion for New Trial

After he was convicted, petitioner requested and received new counsel, who filed an amended motion for a new trial claiming, among other things, that "counsel for the defendant was ineffective in failing to move for suppression of the defendant's *confession* based on a violation of the defendant's Fourth Amendment rights.

State v. Huddleston, 924 S.W.2d 666 (Tenn. 1966) [sic].” R., Trial Technical Record at 55 (emphasis added).³ At the hearing that followed, Officer Charles Logan testified that the police had believed they had probable cause to arrest petitioner on the evening of March 11, 1997, based on the information provided by Mull earlier that same day. R., Mot. New Trial Hr’g Tr. Vol. 2, at 54, 55, 65, 66, 68. Officer Logan also testified that the police continued to investigate the homicide while they had petitioner in custody. *Id.* at 53-56. When asked why the police did not charge the defendant immediately if they had probable cause, Officer Logan replied that the police had that right. *Id.* at 58-59.

The trial court denied the amended motion for a new trial and specifically rejected petitioner’s claim that previous counsel was ineffective for failing to raise the *McLaughlin* claim in a motion to suppress. *Id.* at 132-33. The court ruled as follows:

I don’t find that there is any Huddleston violations or any Fourth Amendment violations.

. . .

I think the officers had reasonable suspicion to bring Mr. Norris in to question him about the case. I don’t think that there was any ruse on

³ In *Huddleston*, the Tennessee Supreme Court applied this Court’s holding in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), that a suspect’s warrantless detention is presumptively reasonable and not in violation of the Fourth Amendment if he receives judicial confirmation of probable cause for the arrest within 48 hours. *State v. Huddleston*, 924 S.W.2d 666, 671-76 (Tenn. 1996).

their part. I don't think there was any attempt to sweat him, as you put it, Mr. Brooks.

In my opinion, the officers were doing a good investigative job by bringing Mr. Norris in and questioning him. And I don't find that they kept him too long or that they in any way violated his rights. So I find that the ground has no basis.

Id. at 132-33.

D. First Direct Appeal

On direct appeal, the Tennessee Court of Criminal Appeals addressed petitioner's *McLaughlin*-based claim of ineffective assistance on the merits. *State v. Norris*, No. W2000-00707-CCA-R3-CD, 2002 WL 1042184, at *7-10 (Tenn. Crim. App. May 21, 2002) ("Norris I").⁴ To determine whether a *McLaughlin* violation had occurred, the court measured the time period between petitioner's arrest and his signing of his written statement. *Id.* The court determined that the arrest occurred at 8:45 p.m. on March 11, 1997, which were the time and date listed on the defendant's "arrest ticket," and that his written confession was signed at 8:20 p.m. on March 13, 1997. *Id.* at *9. Because that time period was less than 48 hours, the court found that the length of petitioner's detention was presumptively reasonable. *Id.* at *9. The court further found that the evidence did not preponderate against

⁴ Petitioner claims that his appellate counsel waived the *McLaughlin* claim. Pet. 2. This is incorrect: the Tennessee Court of Criminal Appeals reviewed the issue on the merits in the original direct appeal and did not find it waived. *Norris I*, 2002 WL 1042184, at *7-10.

the trial court's finding that petitioner was not held as a "ruse." *Id.* Therefore, the court held that trial counsel was not ineffective for failing to move for suppression of petitioner's confession on this basis. *Id.* at *10. The Tennessee Supreme Court denied review of this decision on February 3, 2003. *Id.* at *1.

E. Post-Conviction Proceedings and Appeal

After the Tennessee Court of Criminal Appeals affirmed petitioner's conviction on direct appeal, petitioner filed a petition for post-conviction relief alleging that his direct-appeal counsel was ineffective in connection with the *McLaughlin* issue. R., Post-Conviction Technical Record at 43-45. Petitioner testified at the post-conviction hearing that his mother, Daniels, invited the police into her home to interview petitioner around 7:00 p.m. on March 11, 1997: "Q. Okay. And [Daniels] gave the officers consent to come in? A. Yes, sir. Q. Okay. And now, that was about 7 o'clock, was it not? A. Somewhere around." R., Post-Conviction Hr'g Tr. Vol. 2, at 49. Daniels, on the other hand, testified that the police arrived early in the five o'clock hour that day. R., Post-Conviction Hr'g Tr. Vol. 1, at 20. She further testified that petitioner was arrested around 5:45 p.m. *Id.* at 20-21.

Daniels testified that the police station was approximately 5 1/4 miles from her house. *Id.* at 22. Officer Christian testified that he was at the police station with the petitioner by 7:30 p.m. that night. *Id.* at 14. There was no testimony regarding traffic conditions on the evening in question, speed limits, or how long it would ordinarily take to drive from Daniels' home to the police station.

Regarding his confessions, petitioner testified that he spoke with the police both before and after he called his mother around 6:50 p.m. on March 13th. R., Post-Conviction Hr'g Tr. Vol. 2, at 52-54. He further testified that police personnel typed his written statement at the same time he gave it. *Id.* at 33.

The post-conviction court denied relief, and the Tennessee Court of Criminal Appeals affirmed. R., Post-Conviction Technical Record at 66-67; *Norris v. State*, No. W2005-01502-CCA-R3-PC, 2006 WL 2069432, at *1 (Tenn. Crim. App. July 26, 2006) (“Norris II”). The Court of Criminal Appeals opted to examine the *McLaughlin* issue anew in light of the additional evidence presented at the post-conviction hearing. *Id.* at *8-9. This time, the court measured the length of petitioner’s pre-confession detention from 8:45 p.m. on March 11, 1997—the date and time listed on petitioner’s arrest ticket—to 7:20 p.m. on March 13, 1997, when petitioner began to give his written confession. *Id.* at *9. As less than 48 hours had elapsed between petitioner’s arrest and the written confession, the court held that appellate counsel was not ineffective in his presentation of the *McLaughlin* issue. *Id.* The Tennessee Supreme Court denied review on December 18, 2006. *Id.* at *1.

F. Federal Habeas Review

Petitioner then sought a writ of habeas corpus in federal court. The district court denied relief on June 23, 2010, and declined to grant a certificate of appealability. Order, *Norris v. Parker*, No. 2:07-cv-02793, ECF No. 47 (W.D. Tenn. June 23, 2010). The Sixth Circuit, however, granted the certificate on two issues: (1) whether trial counsel was ineffective for

failing to challenge the petitioner's confession as unconstitutional under *Brown v. Illinois*, 422 U.S. 590 (1975); and (2) whether appellate counsel was ineffective for inadequately challenging petitioner's confession under *McLaughlin*.

The Sixth Circuit reversed the district court and granted a conditional writ on August 26, 2013. *Norris v. Lester*, 545 F. App'x 320, 321 (6th Cir. 2013) ("Norris III"). With respect to the first issue, the Sixth Circuit agreed with the Tennessee Court of Criminal Appeals that the police had probable cause to arrest petitioner under the totality of the circumstances and that, consequently, trial counsel was not ineffective for failing to raise a challenge under *Brown v. Illinois*. *Norris III*, 545 F. App'x at 324-26.

With respect to the second issue, however, the Sixth Circuit disagreed with the Tennessee Court of Criminal Appeals and held that the petitioner's direct-appeal counsel was ineffective in his presentation of the *McLaughlin* issue. *Norris III*, 545 F. App'x at 326-29. The Sixth Circuit reasoned that the Court of Criminal Appeals' finding that the petitioner was not under arrest until 8:45 p.m. on March 11, 1997, was contrary to clearly established federal law. *Id.* at 327-28. The Sixth Circuit explained that 8:45 p.m. reflected the time the petitioner was booked into jail, but petitioner had actually been arrested at some earlier time when the police transported him in handcuffs from his mother's house to the police station. *Id.* at 328. The Sixth Circuit further reasoned that the Court of Criminal Appeals' finding that petitioner was in custody for less than 48 hours prior his confession was an unreasonable determination of fact given that

(1) the petitioner was at the police station at 7:30 p.m. on March 11, 1997; (2) the drive to the station likely began before 7:20 p.m.; and (3) petitioner's written confession began at 7:20 p.m. on March 13, 1997. *Id.* at 322, 328.

Based on this reasoning, the Sixth Circuit held that the petitioner's direct-appeal counsel was deficient "in failing to focus on the precise length of [the petitioner]'s detention and such argument *had a reasonable probability of persuading the state court that [the petitioner] had been in custody for over 48 hours prior to giving his statement on March 13.*" *Norris III*, 545 F. App'x at 328 (emphasis added). The court further held that there was a reasonable probability that the state court would have suppressed the petitioner's confession in part because "[t]here is evidence in the record suggesting that officers kept [the petitioner] detained to gather additional evidence." *Id.* at 328-29. Consequently, the court granted the conditional writ, which allowed the respondent warden to reopen the direct appeal within 180 days "to allow [the petitioner] to raise the *McLaughlin* issue on direct appeal." *Id.* at 329.

G. Reopened Direct Appeal

The State reopened petitioner's direct appeal within the prescribed time and allowed petitioner to raise the *McLaughlin* issue again, this time directly and with new counsel. Pet. App. 2a. In his reply brief before the state court, petitioner argued for the first time that, in light of the Sixth Circuit's decision on habeas review, Tennessee's collateral-estoppel doctrine now precluded the State from arguing that less than 48 hours had elapsed between his arrest and confession. R., Pet'r's

Reopened Direct Appeal Reply Br. at 4-7 (citing *Mullins v. State*, 294 S.W.3d 529, 537 n.3 (Tenn. 2009); *Hooker v. Haslam*, 393 S.W.3d 156, 165 n.6 (Tenn. 2012)). Petitioner argued that, consequently, a Fourth Amendment violation had necessarily occurred under *McLaughlin*, and the only issue left to determine was whether his confession should be suppressed. *Id.* at 1.

At oral argument, counsel for the State took the position that Tennessee's collateral-estoppel doctrine was inapplicable in this instance because the Sixth Circuit's 48-hour finding was not necessary to that court's disposition of petitioner's ineffective-assistance claim. The critical finding that supported the Sixth Circuit's ruling on the ineffective-assistance claim was that, had counsel competently briefed the *McLaughlin* issue, it would have had a reasonable probability of persuading the state court that a Fourth Amendment violation had occurred. Counsel further noted that, under Sixth Circuit precedent, reasonable probability was a lower standard than even a preponderance of the evidence.⁵

Because the *McLaughlin* issue was originally raised in petitioner's amended motion for new trial, the Tennessee Court of Criminal Appeals initially reviewed the issue only for plain error and affirmed the conviction. Pet. App. 2a-3a. The Tennessee Supreme

⁵ While there is no transcript of the oral argument, petitioner is mistaken that the State never disagreed with petitioner's position on collateral estoppel. Pet. 16 & n.29. Petitioner raised collateral estoppel for the first time in his reply brief in the reopened direct appeal proceedings, so the State's first opportunity to address that issue was at oral argument.

Court, however, remanded to the Court of Criminal Appeals with instructions to conduct a plenary review of the issue. *Id.*

On remand, the Tennessee Court of Criminal Appeals again affirmed petitioner's conviction. *Id.* at 3a. In doing so, the court implicitly accepted the State's argument that Tennessee's collateral-estoppel doctrine did not preclude the court from determining that less than 48 hours had elapsed between petitioner's arrest and confession. The court determined, based on its own review of the evidence, that less than 48 hours had elapsed between petitioner's arrest and the time of his "first confession" and that, consequently, petitioner's detention was not in violation of *McLaughlin* when his first confession occurred. *Id.* at 41a.

The Court of Criminal Appeals quoted the Sixth Circuit's opinion extensively and heeded that court's admonition that petitioner's booking time did not equate to the time of arrest under federal law. *Id.* at 25a-32a, 40a. The Court of Criminal Appeals considered all of the evidence in the record regarding when petitioner was taken into custody and concluded that that petitioner's time of arrest was "ambiguous at best" but at the earliest occurred at 5:45 on March 11, when Daniels testified that petitioner was taken to the police station. *Id.* at 40a. The court acknowledged that petitioner's written statement to police did not begin until 7:20 p.m. on March 13 but found that both petitioner and Sgt. McCommon had testified that petitioner orally confessed to shooting Milem before he gave his written statement, at some point between when petitioner signed a waiver of rights at 4:05 p.m. and his first phone call to his mother at 6:52 p.m. *Id.*

at 40a-41a. The court therefore concluded that petitioner “made his *first confession* before being in custody for more than forty-eight hours.” *Id.* at 41a.⁶

The Court of Criminal Appeals also repeated its earlier holding, which the Sixth Circuit had upheld on habeas review, that petitioner’s initial arrest was supported by probable cause. *Id.* at 38a-39a. Because petitioner was arrested with probable cause and confessed before he had been held for 48 hours, the Court of Criminal Appeals concluded that no Fourth Amendment violation had occurred and that petitioner’s confession therefore need not be suppressed. *Id.* at 41a. The Tennessee Supreme Court denied further review. *Id.* at 1a.

H. Proceedings to Obtain Unconditional Writ Due to Tennessee Court of Criminal Appeals’ Alleged Failure to Comply with Conditional Writ

After the Tennessee Court of Criminal Appeals issued its initial decision affirming petitioner’s conviction on plain-error review, petitioner filed a motion in federal district court contending that the Court of Criminal Appeals had violated the Sixth Circuit’s conditional writ of habeas corpus in holding that petitioner confessed within 48 hours of being arrested. *See Norris v. Holloway*, No. 2:07-cv-02793, ECF No. 58 (W.D. Tenn. Dec. 30, 2014). Petitioner asserted that the Sixth Circuit’s finding that petitioner’s confession occurred more than 48 hours

⁶ The court additionally noted that some of the delay was attributable to the petitioner. Pet. App. 41a.

after he was arrested precluded the Tennessee Court of Criminal Appeals from reaching a contrary conclusion in his reopened direct appeal. The district court concluded that the Tennessee Court of Criminal Appeals had “substantially complied” with the conditional writ issued by the Sixth Circuit and denied the motion. *Norris v. Holloway*, No. 2:07-cv-02793-JTF-egb, ECF No. 66 (W.D. Tenn. Sept. 30, 2015).

Petitioner then sought a certificate of appealability from the Sixth Circuit. *Norris v. Westbrook*, No. 15-6221, ECF No. 4 (6th Cir. Nov. 16, 2015). By that time, the Tennessee Court of Criminal Appeals had issued its decision affirming petitioner’s conviction under plenary review. Petitioner again argued that its ruling circumvented the Sixth Circuit’s conditional writ by finding that petitioner’s confession occurred within 48 hours of his arrest. The Sixth Circuit held that “[r]easonable jurists would not debate the district court’s conclusion that the Tennessee courts complied with [the Sixth Circuit’s] conditional grant of habeas corpus” and denied petitioner a certificate of appealability. *Norris v. Westbrook*, No. 15-6221, ECF No. 11-1 (6th Cir. May 31, 2016). Significantly, the Sixth Circuit explained that its conditional order “did not guarantee [petitioner] habeas relief and [did] not become the ‘law of the case.’” *Id.* at 5. The State had “cured the error that [the Sixth Circuit] previously identified”—i.e., the Sixth Amendment violation—by allowing petitioner to raise his *McLaughlin* claim on direct appeal. *Id.*

REASONS FOR DENYING THE PETITION**I. The Tennessee Court of Criminal Appeals' Determination That Petitioner First Confessed Within 48 Hours of Being Arrested Does Not Warrant This Court's Review.**

Petitioner contends that review is warranted to make clear that the Sixth Circuit's decision precluded the Tennessee Court of Criminal Appeals from determining that petitioner confessed within 48 hours of being arrested. Pet. 14. For several reasons, however, this Court's review is not warranted.

First, even assuming that ordinary principles of res judicata and collateral estoppel are applicable in the habeas context,⁷ Tennessee's collateral estoppel doctrine did not preclude the Court of Criminal Appeals from determining that petitioner confessed within 48 hours of being arrested. In Tennessee, the party asserting collateral estoppel must prove, among other things, "that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding" and that the issue was "necessary" to the judgment in the earlier proceeding. *Mullins*, 294 S.W.3d at 535. "Determinations of an issue or issues that are not necessary to a judgment

⁷ It is well-settled, of course, that 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. *See, e.g., Muniz v. United States*, 236 F.3d 122, 126 (2d Cir. 2001) ("[I]t is well-settled that res judicata has no application in the habeas corpus or § 2255 context.").

have the characteristics of dicta and will not be given preclusive effect.” *Id.*

The Sixth Circuit’s conclusion regarding the Tennessee Court of Criminal Appeals’ earlier determination on the 48-hour question does not satisfy this requirement. While that conclusion certainly *informed* the Sixth Circuit’s ultimate holding that petitioner had been denied effective assistance of appellate counsel in violation of the Sixth Amendment, the only conclusion that was actually *necessary* to the Sixth Amendment holding was that “[petitioner’s] attorney was deficient in failing to focus on the precise length of [petitioner’s] detention and such an argument had a reasonable probability of persuading the state court that [petitioner] had been in custody for over 48 hours prior to giving his statement” and that his confession should be suppressed. *Norris III*, 545 F. App’x at 328. The Sixth Circuit’s conclusion that there was a *reasonable probability* that the state court would be persuaded that petitioner confessed after 48 hours had passed, of course, in no way prevented the Tennessee Court of Criminal Appeals from reaching a contrary conclusion when the claim was actually presented to it by competent counsel.

Second, contrary to the assertions of petitioner, the Tennessee Court of Criminal Appeals did not fail to afford the Sixth Circuit’s decision the comity it was due. The Sixth Circuit held that petitioner’s right to effective assistance of appellate counsel under the Sixth Amendment had been violated and granted a conditional writ directing the State to “reopen [petitioner’s] appeal within 180 days to allow him to raise the *McLaughlin* issue on direct appeal.” *Id.* at

329. The Sixth Circuit did not direct the Tennessee Court of Criminal Appeals to reach a particular result with respect to that claim. Rather, the State was only required to give petitioner an opportunity to raise the claim with competent counsel. The State did exactly that, and the Tennessee Court of Criminal Appeals considered the claim and denied it on the merits.

Tellingly, the Sixth Circuit already rejected petitioner's argument that the Tennessee Court of Criminal Appeals somehow violated the Sixth Circuit's conditional writ or contravened its prior decision. In its order denying petitioner a certificate of appealability on that issue, the Sixth Circuit explained that its "conditional order did not guarantee [petitioner] habeas relief." *Norris v. Westbrook*, No. 15-6221, ECF No. 11-1, at 5 (6th Cir. May 31, 2016). All it guaranteed was that petitioner would have an opportunity to litigate his *McLaughlin* claim on direct appeal with competent counsel. The Sixth Circuit plainly did not view its earlier habeas decision as dictating to the state court that it *must* find a *McLaughlin* violation. Rather, the Sixth Circuit held only that a Sixth Amendment violation had occurred, and the conditional writ gave the State the chance to "cure[] [that] error," which it did by reopening petitioner's direct appeal and allowing petitioner to present his claim with competent counsel. *Id.*

Indeed, petitioner's attempt to read more into the Sixth Circuit's decision than the Sixth Circuit itself did turns comity on its head. The Sixth Circuit appropriately limited its federal habeas review to petitioner's ineffective-assistance claim and considered the underlying *McLaughlin* claim only insofar as

necessary to determine whether a Sixth Amendment violation had occurred. And by granting a conditional writ, the Sixth Circuit appropriately allowed the State to cure that Sixth Amendment violation rather than ordering petitioner's immediate release. The Sixth Circuit's approach is entirely consistent with the interests of federalism and comity that the Antiterrorism and Effective Death Penalty Act was intended to promote. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 435 (2000). By contrast, intervention by this Court at this late stage—after the Sixth Circuit already determined that the Tennessee Court of Criminal Appeals complied with its earlier decision—would undermine rather than further those interests.

Third, the Tennessee Court of Criminal Appeals' conclusion that petitioner had been arrested for less than 48 hours before he first confessed to shooting Milem is well supported by the record. The Sixth Circuit's discussion of the length of petitioner's pre-confession detention presupposed that petitioner confessed when he gave his written statement to officers at 7:20 p.m. *See Norris III*, 545 F. App'x at 328. As the Tennessee Court of Criminal Appeals found, however, petitioner also orally confessed to shooting Milem before petitioner gave his written statement, and that oral confession occurred sometime between 4:05 p.m., when petitioner signed a waiver-of-rights, and 6:52 p.m., when petitioner first called his mother. Pet. App. 40a-41a. Thus, the Court of Criminal Appeals' finding that less than 48 hours had elapsed between petitioner's arrest, which occurred at around 5:45 p.m. on March 11, 1997, at the earliest, and his "first confession," which occurred sometime between 4:05 p.m. and 6:52 p.m. on March 13, 1997, was

consistent with the record evidence. And that finding was not plainly contrary to the Sixth Circuit's 48-hour finding, since the Sixth Circuit's analysis focused on petitioner's written statement and not his earlier oral confession.

In sum, there is no need for this Court to grant review to clarify that the Tennessee Court of Criminal Appeals was precluded from determining that petitioner confessed within 48 hours of being arrested. The Court of Criminal Appeals was not precluded from making that finding under Tennessee's collateral-estoppel doctrine, and the Sixth Circuit already rejected petitioner's argument that the finding somehow violated the conditional writ that was issued based on petitioner's ineffective-assistance claim. Even if the collateral-estoppel doctrine applied, moreover, the Court of Criminal Appeals' finding was not irreconcilable with the Sixth Circuit's because the former was based on petitioner's earlier confession, which the Sixth Circuit did not consider.

II. The Tennessee Court of Criminal Appeals' Holding That Petitioner Was Arrested with Probable Cause Does Not Warrant This Court's Review.

Petitioner next contends that review is warranted to resolve a conflict among the lower courts concerning whether exculpatory facts that were known to the officer at the time of arrest must be considered in a probable-cause analysis. Pet. 20-21. Even assuming petitioner is correct that a conflict exists on that issue, this case is a poor vehicle to resolve that issue because the allegedly exculpatory evidence that existed in this

case was extremely weak and would not have changed the court's probable-cause determination.

Petitioner claims that the Court of Criminal Appeals improperly focused on Mull's statements to officers—namely, that petitioner was in possession of a gun on the night of the shooting, was jealous of Milem because he saw her talking to his girlfriend, and was seen driving alone in a maroon Grand Am in the vicinity of the shooting—and ignored statements by other witnesses that reported seeing the shooter in a white car with other passengers. Pet. 23. In fact, however, the Court of Criminal Appeals expressly considered the statement of Milem's uncle that he saw a white car pull up and “heard ‘two’ voices call to the victim.” Pet. App. 38a. The Court of Criminal Appeals nonetheless held that the officers had probable cause to arrest petitioner based on Mull's statement. This holding belies petitioner's claim that “[h]ad the Tennessee Court of Criminal Appeals considered the full totality of the circumstances, including exculpatory facts known to the officers at the time of arrest, it would not have reached the same conclusion.” Pet. 22. The court *did* consider exculpatory facts, and it still concluded that petitioner's arrest was supported by probable cause.

The Sixth Circuit also considered the allegedly exculpatory witness statements and similarly concluded that petitioner's arrest was supported by probable cause. Significantly, the Sixth Circuit is one of the circuits in which “the requirement to listen to exculpatory witness accounts is clearly established.” *Norris III*, 545 F. App'x at 325. In considering petitioner's ineffective-assistance claim based on

Brown v. Illinois, 422 U.S. 590 (1975), the Sixth Circuit held that, even taking into account all of the allegedly exculpatory statements of which the officers were aware at the time of petitioner’s arrest, Mull’s statement still provided officers with “ample probable cause” to arrest petitioner. *Id.* at 326. And the Sixth Circuit specifically rejected petitioner’s argument that the discrepancies in eyewitness descriptions of the shooter’s car were so exculpatory as to nullify any probable cause. *Id.* Based on that reasoning, the Sixth Circuit held that the Tennessee Court of Criminal Appeals’ determination “that there was probable cause for Norris’s arrest, and therefore no merit in his *Brown*-based ineffective-assistance claim, was not contrary to clearly established federal law” and denied petitioner relief with respect to that claim. *Id.* Ironically, petitioner seems to think that the Tennessee Court of Criminal Appeals should have ignored that part of the Sixth Circuit’s decision—just not the other part about the length of petitioner’s pre-confession detention.

Given that both the Sixth Circuit and the Tennessee Court of Criminal Appeals considered exculpatory witness statements in concluding that officers had probable cause for petitioner’s arrest, this case does not cleanly present this Court with an opportunity to resolve the alleged circuit split identified by petitioner, and review of the probable-cause issue is not otherwise warranted.

III. The Tennessee Court of Criminal Appeals' Holding That No *McLaughlin* Violation Occurred Does Not Warrant This Court's Review Because It Does Not Reflect an Unduly Narrow Reading of *McLaughlin* and Is Supported by the Trial Court's Finding that Petitioner Was Not Held for an Improper Purpose.

For his last issue, petitioner contends that this Court should grant review because the Tennessee Court of Criminal Appeals' decision on petitioner's *McLaughlin* claim “rest[ed] on the fundamentally flawed legal conclusion” that petitioner's detention was not illegal “just because it lasted less than 48 hours before a confession.” Pet. 23. Petitioner claims that there is a conflict among the lower courts as to 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. According to petitioner, the Tennessee Court of Criminal Appeals takes the narrow view that, as long as the initial arrest is supported by probable cause, any further delay within the 48-hour period—even for investigatory purposes—is fine. Pet. 24.

As was the case with the last issue, even assuming that the circuit conflict identified by petitioner exists, this case is a poor vehicle to resolve that issue for two reasons. *First*, contrary to petitioner's assertion, Tennessee courts do not read *McLaughlin* to mean that a petitioner may always be detained for 48 hours as long as there was probable cause to support the initial warrantless arrest. In fact, the Tennessee Supreme

Court recently held that “a delay shorter than forty-eight hours may still be considered unreasonable, and hence unconstitutional, 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.’” *State v. Bishop*, 431 S.W.3d 22, 42 (Tenn. 2014) (quoting *McLaughlin*, 500 U.S. at 56-57).⁸ This decision makes clear that, even if a suspect is arrested with probable cause and held for a period shorter than 48 hours, a *McLaughlin* violation may nonetheless occur if the probable-cause hearing is delayed for an improper purpose.

Second, although the Tennessee Court of Criminal Appeals did not expressly consider whether the officers held petitioner for an improper purpose, 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. Specifically, the trial court heard firsthand officers’ somewhat contradictory testimony as to whether they had probable cause to arrest the defendant prior to his confessions and whether they had any specific reason for the delay. R., Mot. New Trial Hr’g Tr. Vol. 2, at 8-9, 45, 53, 54, 55, 58-59, 65, 66, 68.⁹ Based on that firsthand observation,

⁸ In *Bishop*, the Tennessee Supreme Court specifically pointed to concerns that the Memphis Police Department was “using th[e] 48-hour hold procedure to gather ‘additional evidence to justify the arrest’” and noted that such a procedure, “even if limited to 48 hours or less” would “clearly run[] afoul” of *McLaughlin*. 431 S.W.3d at 43 n.9.

⁹ The Tennessee Court of Criminal Appeals noted this inconsistency in its opinion. “The [petitioner] points out that, at one point during Captain Logan’s testimony, he stated that he did

which allowed the court to consider not only the officers' statements, but also their body language and facial expressions, the trial court concluded that "there was [no] ruse on [the police's] part" and no "attempt to sweat [petitioner]." R., Mot. New Trial Hr'g Tr. Vol. 2, at 132-33. In short, the state court specifically considered whether the petitioner was held between March 11, 1997 and March 13, 1997 for an improper purpose and found that he was not. The Tennessee Court of Criminal Appeals' conclusion that no *McLaughlin* violation occurred is consistent with the trial court's finding and does not warrant this Court's review.

not have 'enough to charge' the [petitioner] 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 [petitioner] upon his initial arrest, and the Captain answered in the negative." Pet. App. 39a.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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