No. 21-7703

IN THE
Supreme Court of the United States

TYRONE WORTHAM,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

PETITIONER'S REPLY BRIEF

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611

JEFFREY T. GREEN
LAURI A. BONACORSI†
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005

ANGIE LOUIE*
THE LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
199 Water Street, 5th Fl.
New York, N.Y. 10038
alouie@legal-aid.org

Counsel for Petitioner

*Counsel of Record

August 17, 2022

† Ms. Bonacorsi is admitted only in Illinois and is practicing law in the District of Columbia pending admission to the D.C. bar and under supervision of principals of the firm who are members in good standing of the D.C. bar.

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INTRODUCTION

There is no jurisdictional bar to this Court's review. The State claims that the apparent "interlocutory," non-final nature of this case counsels against review. Resp. Br. at 6. But here the *Miranda* issue *is* final—there is no chance that any lower state court will revisit it.

The New York Court of Appeals did not disturb Mr. Wortham's judgment of conviction. At most, the Court of Appeals carved out an evidentiary question for the lower state courts to consider in a *Frye* hearing. But remand was limited to that singular issue. All other aspects of Mr. Wortham's case, including determinations for his *Miranda* challenge, were final. Faced with such circumstances, Mr. Wortham sought a writ of certiorari—a necessary step to prevent his federal claim from being time-barred. Sup. Ct. R. 13.1.

Precedent supports Mr. Wortham's approach. Here, "the federal claim has been finally decided"—there is no dispute about that. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975). Even though there are "further proceedings on the merits in the state courts to come," *id.*, how those proceedings unfold will not affect the decision on this federal claim.

If Mr. Wortham loses his *Frye* hearing—and as the State concedes—he will only be able to appeal the *Frye* hearing decision and there will be no re-review of his *Miranda* claim. Resp. Br. at 8. If he wins the *Frye* hearing, the State would again, in a new trial, use his un-*Mirandized* statements against him, and Mr. Wortham would be barred from challenging any such admission. When such circumstances have been presented in prior cases, this Court has not hesitated to grant review. See *Cox Broad.*, 420 U.S. at 481; *Florida*

v. *Meyers*, 466 U.S. 380, 381 n.a1 (1984). It should so again here.

Bereft of its jurisdictional argument, the State's opposition falls apart. Indeed, its brief is notable for what it does not dispute. It does not dispute that federal and state courts are split over interpretation of the booking exception. Resp. Br. at 12.

It likewise acknowledges that the exception does not give law enforcement officers a blank check to ask suspects, at any point and in any situation, where they live. *Id.* at 15. And it acknowledges that officers here did more than just ask Mr. Wortham where he lived when they booked him. To the contrary, they posed (1) several inculpatory questions, (2) at the scene, (3) while executing a search warrant of a location, (4) where there was probable cause of contraband.

Had these circumstances been at hand in the Sixth Circuit, *United States* v. *Pacheco-Lopez*, 531 F.3d 420 (6th Cir. 2008); the federal district court for the District of Columbia, *United States* v. *Peterson*, 506 F. Supp. 2d 1 (D.D.C. 2007); or any jurisdiction employing a pure objective test, Mr. Wortham's statements would have been excluded at trial. In New York state, they were not. That is a jurisdictional split, pure and simple, warranting this Court's review.

I. THIS COURT HAS JURISDICTION TO GRANT REVIEW IN THIS CASE.

Mr. Wortham's conviction still stands and his opportunity to challenge the *Miranda* ruling in the state courts has ended. The Court of Appeals has remanded the case only for a *Frye* hearing, and this remedy precludes Mr. Wortham from litigating the *Miranda* issue further. Specifically, as explained by the Court of Appeals in its remittitur, if Mr. Wortham loses the *Frye* hearing and "the court determines after a *Frye* hearing

that the evidence is admissible, defendant may challenge *that determination* on direct appeal." Pet. App. 11a (emphasis added). At that point, Mr. Wortham is barred from any further review of the *Miranda* issue, with any future appeal limited to the trial court's *Frye* ruling ("that determination"). By fashioning this remedy and providing no further avenue for an appeal, the Court of Appeals itself has conveyed that the *Miranda* issue is now final.

Indeed, even the State concedes that "[d]epending on the outcome of the *Frye* hearing, there will either be a new trial or further appellate proceedings to challenge the trial court's *Frye* determination." Resp. Br. at 8. Because Mr. Wortham's conviction *still* stands, and because any appeal of the *Frye* determination would be limited to that issue alone, the *Miranda* issue became final when the Court of Appeals rejected Mr. Wortham's *Miranda* claim, notwithstanding its decision to remit the case back for a *Frye* hearing – the only surviving claim. A criminal defendant has only 90 days from an entry of judgment below to petition for certiorari from this Court. See 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. Thus, Mr. Wortham would be unable to wait until after he loses the *Frye* hearing to seek certiorari from this Court as he would be time-barred.

The State's argument that "rather than affirming petitioner's conviction and sentence, the Court of Appeals reversed and remitted for further proceedings, including a hearing and possibly a new trial" is misleading. Resp. Br. at 8. Judge Wilson, in his dissent, pointed out that, although Mr. Wortham has a new hearing, his conviction has not been vacated and he is still serving his sentence for the conviction. Pet. App 22a–27a. If Mr. Wortham loses the *Frye* hearing, he is allowed to challenge only the adverse *Frye* determination on appeal. *Id.* at 11a. Even if Mr. Wortham wins

the *Frye* hearing and is granted a new trial with DNA evidence precluded, the Court of Appeals has already ruled that his un-*Mirandized* statements fall under the pedigree exception and would thus be admissible at trial. And if Mr. Wortham wins at the new trial, the Court of Appeals' ruling will never be reviewed.[1] Thus, this is a case "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broad.*, 420 U.S. at 481.

This Court has repeatedly found jurisdiction to address important federal issues in cases in a similar procedural posture as Mr. Wortham's. In *Florida* v. *Meyers*, the Florida court ordered a new trial based on an improper automobile search. The state petitioned, and this Court granted certiorari, stating, "[the] decision on the federal constitutional issue is reviewable at this time because if the State prevails at the trial, the issue will be mooted; and if the State loses, governing state law . . . will prohibit it from presenting the federal claim for review." *Id*. at 381 n.a1. Mr. Wortham stands in the same position here.

Also, in *Kansas* v. *Marsh*, this Court found finality on the federal question where the state's highest court had remanded the case for a new trial. 548 U.S. 163 (2006). The Kansas Supreme Court that had declared the state's death penalty law to be facially unconstitutional, overturned Marsh's death sentence and remanded the case for a new trial. *Id.* at 166–67. Like

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[1] The state trial court's adjournment of the *Frye* hearing until after the Supreme Court litigation has terminated—and the State's consent to this procedure – also suggests that all parties understand that the federal question *must* be determined at this time.

Meyers, there was no final judgment on the federal issue in the state courts. Nonetheless, this Court found that its review was "now or never," that is, if it did not hear the issue at that point, there would be no later opportunity for review. *Id.* at 168.

Jefferson v. *City of Tarrant*, 522 U.S. 75 (1997), and *Johnson* v. *California*, 541 U.S. 428 (2004), are inapposite. In both, the state's highest court's judgment was not final and, because of the posture of the cases, further review of the constitutional issues was available. In *Jefferson*, the Alabama Supreme Court decided the federal law issue on an interlocutory certification from trial court which only affected two of the four claims, then remanded the case for further proceedings on the remaining state-law claims. *Jefferson*, 522 U.S. at 77. Thus, this Court held that petitioners "will be free to seek our review once the state-court litigation comes to an end." *Id.* at 82–83. In *Johnson*, the Supreme Court of California remanded the *entire* case to the appellate court for further proceedings. *Johnson*, 541 U.S. at 429. Thus, as this Court opined, petitioner "could once more seek review of his *Batson* claim in the Supreme Court of California – albeit unsuccessfully – and then seek certiorari on that claim from this Court." *Id.* at 430–31.

Mr. Wortham's case is different. Unlike the petitioners in *Jefferson* and *Johnson*, where the *entire* case was remitted from the state's highest court for further proceedings, the Court of Appeals has fashioned a remedy that has forced Mr. Wortham—who still stands convicted—to seek review of the *Miranda* issue at this junction.

The State also urges this Court to deny certiorari "[e]ven if the interlocutory posture of the New York Court of Appeals' decision did not technically deprive this Court of jurisdiction," because this Court should

"avoid" reaching constitutional question before the need to decide them. Resp. Br. at 11–12 (citing *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1998)). But this position ignores the fact that the federal question is ripe for review for three reasons.

First, as argued in Mr. Wortham's petition for certiorari, and supported by two amici, there is an entrenched circuit split on the "booking exception" to *Miranda* and both the courts and law enforcement are in desperate need of guidance on what questions they may ask a suspect in custody. Second, resolution of this question affects the outcome of Mr. Wortham's case *even if* he succeeds in suppressing the DNA evidence after a *Frye* hearing. Without that DNA evidence, Mr. Wortham's self-incriminating statements made before he was given *Miranda* warnings are the lynchpin of the case against him. And if this Court finds for Mr. Wortham and suppresses his statements, he would be immediately entitled to a new trial.

Finally, the entrenched split among the various courts has resulted in the uneven application of federal law and constitutional protections. Nor is it evident that this important question would arise again soon: Mr. Wortham's case is typical of those where defendants' challenge many issues in an appellate proceeding. The State's suggestion that this Court should await a "moonshot" single issue case runs headlong into the reality that search warrants are executed every day throughout this country, and this Court should step forward to ensure that all Americans are treated equally in their every-day interactions with law enforcement.[2]

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[2] In *Marsh* and *Meyers*, cases relied on by Mr. Wortham in which the Court held that the federal question fell under the third *Cox Broadcasting* exception, the State was the petitioner. *See e.g.*,

II. THE STATE'S OPPOSITION ONLY HIGHLIGHTS THE DIVISION OF AUTHORITY AND THE APPROPRIATE POSTURE OF MR. WORTHAM'S CASE.

The State maintains that "[t]he facts of [Mr. Wortham's] case . . . do not implicate any [ ] split" on the proper application of the booking exception to *Miranda*, characterizing the officer's questioning of Mr. Wortham as a "straightforward request for an arrestee's address . . . made solely for booking purposes . . . and in accordance with routine procedure." Resp. Br. at 1.

But that simply assumes the answer to the question presented; in other words, whether officers who are not engaged in "booking" at all can ask questions that might elicit incriminating answers. The officers in Mr. Wortham's case were at a home, executing a search warrant and far beyond a station-house where Mr. Wortham's personal identifying information (including his residential address) might have been relevant to booking. Accordingly, the divide among state and federal courts on the scope of the booking exception is implicated here. Such question begging only serves to highlight the split of authority, its significance, and the need for guidance on whether the test should be objective or subjective.

The State highlights just a couple of cases in its effort to show that the "booking exception" is essentially unbounded. But even such cherry-picking misses the mark—if anything, the cases spotlighted in the opposition make plain the split of authority.

Colorado v. *Connelly*, 474 U.S. 1050, 1053 (1986) (Memorandum of Brennan J. and Stevens J. in grant of certiorari and certification of an additional question) (urging the Court to protect constitutional rights in criminal cases).

Applying the analysis from *United States* v. *Pacheco*, for example, would support suppression. As the Sixth Circuit in *Pacheco* explained, whether a question is subject to the booking exception requires more than asking whether it is biographical on its face; instead, the "reviewing court [must] carefully scrutinize the facts, as 'even a relatively innocuous series of questions may, in light of the factual circumstances . . . be reasonably likely to elicit an incriminating response." 531 F.3d at 423–24 (quoting *United States* v. *Avery*, 717 F.2d 1020, 1025 (6th Cir. 1983)).

The factual circumstances identified in *Pacheco* as removing questioning from the purview of the booking exception included that the questioning occurred "in a private home" that was "ostensibly linked to" a crime, rather than at the police station, and occurred during an investigation. *Id.* at 424–25. Accordingly, critical to an objective analysis of the booking exception is whether the questioning occurred outside the stationhouse. See *id.* at 425 ("[a]pplication of the booking exception is most appropriate at the station, where administrative functions such as bookings normally take place."). The State's attempt to reduce the rule in *Pacheco* to an "acknowledge[ment] that questions about residence for booking purposes fall squarely within the pedigree exception," Resp. Br. at 15, fails to capture the weighing of circumstances required by the Sixth Circuit, including for seemingly "innocuous" questions such as where a person lives. *Pacheco*, 531 F.3d at 424.

The State also tries to rely on *Peterson* to suggest that biographical questions fall within the booking exception. Resp. Br. at 15. It argues that *Peterson* could be used against Mr. Wortham because both the instant case and *Peterson* involved so-called "administrative

concerns." But here, the State failed to identify *any* legitimate administrative concern at hand when the officer was executing a search warrant and entitled to detain persons who lived at the residence as well as those who did not. See *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981). Accordingly, *Peterson* provides more reason for the Court to clarify the proper application of the booking exception among its many variations.

And the State ignores the Ninth Circuit's decision in *United States* v. *Williams*, which applies a wholly objective test that looks to whether a reasonable police officer might "know" a suspect's answer may incriminate him. 842 F.3d 1143, 1147 (9th Cir. 2016). "[E]ven routine questioning may amount to interrogation." *Id.* The State's assertions "that such questions [were] posed routinely, and that the deputy asked the questions for a non-investigatory purpose," were facts that the Ninth Circuit expressly disregarded in concluding the booking exception did not apply. *Id.* at 1148.

These cases make clear that had Mr. Wortham's case been heard in a different jurisdiction—for example, in the Sixth or Ninth Circuits—his statements to the officer would have been suppressed, as the questioning took place not at the police station, but at a home where officers had probable cause to believe contraband was located. The officers already had reason to associate anyone found at the home with a crime under investigation. Under these circumstances, asking Mr. Wortham where he lived was reasonably likely to elicit incriminating information, warranting suppression of his response. See *id.*; *Pacheco*, 531 F.3d at 423–24. Yet the New York Court of Appeals' treatment of an of-

ficer's intent as outcome-determinative led to the opposite result. Mr. Wortham's case is therefore implicated by this fractured state of the booking exception.[3]

CONCLUSION

For these reasons and the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611

JEFFREY T. GREEN
LAURI A. BONACORSI†
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005

ANGIE LOUIE*
THE LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
199 Water Street, 5th Fl.
New York, N.Y. 10038
alouie@legal-aid.org

Counsel for Petitioner

*Counsel of Record

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[3] In a final effort to ward off review, the State avers that any error here was "harmless," an argument which "could be further strengthened depending on the outcome of the upcoming *Frye* hearing." Resp. Br. at 17. That assertion fails. *See Hemphill* v. *New York*, 142 S. Ct. 681, 693 n.5 (2022) (noting that harmlessness questions are best left to state courts on remand, to "assess the effect of [the] erroneously admitted evidence in light of substantive state criminal law." (quoting *Lilly* v. *Virginia*, 527 U.S. 116, 139 (1999)).