No. 18-8593
CAPITAL CASE

In the
Supreme Court of the United States

DONTAE CALLEN,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED
(Restated)

1. Whether a search warrant to preserve forensic evidence was properly issued when the magistrate, who had issued a similar search warrant concerning the same subject less than an hour before on the basis of a detailed and unquestionably adequate affidavit, issued the second search warrant after receiving a less detailed affidavit.

2. Whether this Court should hold Callen's petition pending the result of *Ramos v. Louisiana*, a wholly unrelated case.

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INTRODUCTION

Dontae Callen brutally murdered three members of his family—his grandaunt, her adult son, and his twelve-year-old cousin—by stabbing them dozens of times and setting their apartment on fire. No criminal mastermind, Callen left a trail of forensic evidence leading away from the crime scene, left more bloodstained items in the nearby home in which he was staying, and arrived at the hospital to see his grandaunt the next morning with her son's blood still on his body. Within hours of the murders, he was in police custody, and officers from the Birmingham Police Department presented multiple applications for search warrants and supporting affidavits, all designed to preserve fragile and easily lost forensic evidence, to one circuit judge. The first affidavit sufficiently stated probable cause for the warrant, but the second was less specific. Still, the judge issued both warrants. The trial court refused to suppress evidence seized during the second search, and the Alabama Court of Criminal Appeals found no error, as the cumulative information before the judge supplied ample probable cause for both warrants.

Callen contends that the Court of Criminal Appeals erred by looking beyond the four corners of the affidavit attached to the second search warrant to determine whether probable cause existed for the issuance of that warrant. He attempts to identify a circuit split, relying on cases with different facts

than those of his case. This claim is not cert-worthy; the split is questionable, and even if the Court of Criminal Appeals erred, *Leon*'s good-faith exception would permit the items seized to come into evidence.

Callen also requests that this Court hold his petition until the Court has decided *Ramos v. Louisiana*, a case raising the question of whether a non-unanimous guilt verdict can ever be constitutional. There is no reason for this Court to hold Callen's petition pending *Ramos*. Callen's jury unanimously convicted him of three counts of capital murder, and it retuned an 11–1 death recommendation—a recommendation not binding upon the trial court, which ultimately sentenced him to death. As the capital sentencing scheme in effect at the time of Callen's trial was constitutional, his death sentence was properly imposed, and there is no reason for this Court to wait to deny review.

STATEMENT OF THE CASE[1]

A. The murder of Bernice Kelly, Quortes Kelly, and Aaliyah Budgess

On the night of October 28–29, 2010, Bernice Kelly, her adult son, Quortes, and her twelve-year-old niece, Aaliyah Budgess, were viciously murdered in their apartment in Birmingham, Alabama. The three victims suffered numerous sharp-force wounds: eighteen for Bernice, thirty-three for Quortes, and at least thirty for Aaliyah.[2] Their apartment was then set on fire, and emergency personnel, alerted by neighbors, responded around 4 a.m. Bernice, who was alive, unconscious, and on fire when she was found, died at the hospital. Quortes and Aaliyah were dead when they were pulled out.[3]

The investigation soon focused on Dontae Callen, Bernice's grandnephew, who had previously lived with her.[4] The last person to see the victims alive was Faye Budgess, Aaliyah's mother, who had watched televised wrestling with her daughter, Quortes, and Callen that evening and

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1. In accordance with the Alabama courts' format for records on appeal, citations are as follows:
   Transcript on direct appeal: R.
   Clerk's record on direct appeal: C.
   Supplemental record on direct appeal: # Supp.
   The second supplemental record contains multiple numbered sections. For clarity, page numbers for "2 Supp." are given as if the document were a single 282-page volume.
2. R. 580, 601, 614, 631 (discussing wound 34).
3. R. 442, 444–50, 462–65 489–90.
4. R. 430–31, 862.

reported that Callen had walked with Quortes and Aaliyah back to Bernice's apartment around 10 p.m.[5]

Officer Roxann Murry, an evidence technician with the Birmingham Police Department, found a trail of evidence leading away from the crime scene and toward the home of Natasha Brown, where Callen was staying. She took samples from presumed bloodstains at Bernice's apartment, then found knives, a red-stained cloth, and red-stained mittens in a second location, a sewer one block away, a red-stained sock at a third location, a sheet that matched a sheet at the crime scene in the bushes at a fourth location, and finally, a bag of red-stained clothing and gym shoes—and a pair of shoes with Callen's ID inside them—at Brown's house. Another set of recovered shoes contained matches.[6]

Detective Warren Cotton, the lead investigator, spoke with members of Bernice's family that morning at the hospital and learned that Callen might have been among the last people to see her alive. When Callen arrived at the hospital after 7 a.m., Detective Cotton noticed that he seemed "extremely nervous" and had cuts on his hand, and had him taken to police headquarters.[7] Callen was Mirandized at 10:15 a.m. and eventually

5. R. 428–32.
6. R. 495–99, 505, 508, 514–16, 519–23, 524–28; 2 Supp. 38.
7. R. 823–25; 2 Supp. 147, 149, 226.

requested an attorney.[8] He refused a request for DNA samples, and while the officers waited for a search warrant for biological swabs, Callen was handcuffed to prevent him from wiping his hands.[9] The police then procured a search warrant, and Officer Murry photographed Callen.[10] He had a red stain in his ear, and Officer Murry also took swabs from his body and strands of his hair.[11] Officer April Denson, another evidence technician, was also called in to take photos of Callen and collect swabs and his clothing.[12]

Callen was left alone in the interview room for a time. After singing to himself and muttering "shit," he said, "You killed three people, God damn, big deal."[13] Twenty minutes later, he threw up and was taken to get water.[14] Around 2:30 p.m., Callen asked to make a phone call, but was denied.[15] He was given cheeseburgers and soda before 4 p.m.[16] Around 4:30, he was examined under an alternative light source for blood, and he became upset

8. C. 80, 90; R. 827; 2 Supp. 25, 236, 240, 256.
9. 2 Supp. 31, 89, 233.
10. R. 524. The search warrant for Callen's biological samples was first issued at 11:50 a.m., then reissued at 1:50 p.m. C. 587.
11. R. 537, 540.
12. R. 568, 570.
13. 2 Supp. 98–99.
14. 2 Supp. 99, 101.
15. 2 Supp. 104.
16. 2 Supp. 104, 106. The time is an approximation, assuming that 5:05 p.m., the time that Callen signed his second *Miranda* waiver, was close to 3:30 on Disc 2 of the interview discs prepared by the Birmingham Police Department. *See* 2 Supp. 26 (waiver).

and began to cry.[17] When he was returned to the interview room, Callen re-initiated contact, telling Detective Cotton, "I didn't mean to do it."[18] Detective Cotton informed Callen that he could not talk to Callen because Callen had requested an attorney, but that they could talk if he waived his rights.[19] Callen agreed and was Mirandized for a second time at 5:05 p.m.[20] He then admitted that he had "cut" the victims and started the fires in the apartment.[21]

The Alabama Department of Forensic Sciences tested twenty-seven samples, including swabs taken from Callen's ear, hands, and hair, two knives, the mittens, a jacket, a pair of shorts, a pair of jeans, a T-shirt, a paper towel, and cigarette butts.[22] The knife recovered from the sewer bore DNA belonging to three individuals, including at least one male; all three victims were included as potential contributors, and the odds of an unrelated person being a contributor was 1 in 552,000 African Americans or 1 in 428,000 Caucasians. The blood on the mittens belonged to at least two

17. 2 Supp. 108, 237, 241. These events were not included in the interview discs. However, a portion of the alternative light source test was recorded by a cameraman filming the investigation for *The First 48*. 2 Supp. 262–63; *see The First 48: Burning Rage/Fallen Soldier* (A&E television broadcast July 14, 2011) at 35:00–37:10.
18. 2 Supp. 109, 237–39, 241, 248.
19. 2 Supp. 242.
20. 2 Supp. 26, 240.
21. 2 Supp. 113, 115, 119, 122–24.
22. R. 662, 674–80, 751.

individuals, and both Callen and Quortes were included potential contributors.[23] Blood on the jacket matched Quortes's profile, while the majority of the DNA found on the interior collar of the jacket—the wearer's DNA—matched Callen.[24] Blood on the shorts and jeans also matched Quortes.[25] Finally, the swab taken from Callen's ear contained a mixture of DNA taken from at least two individuals, including Callen and Quortes. The mixture of traits was 5.6 billion times more likely to have come from Callen and Quortes than from Callen and another African-American donor.[26]

B. The search warrants

Of note to the matter at bar, three search warrants were issued within two hours on October 29, 2010, by Jefferson County Circuit Judge Teresa Pulliam. The first, a warrant to examine Callen's body and obtain biological samples, issued at 11:50 a.m.[27] No copy of this search warrant or the corresponding affidavit remained in the possession of the State at the time of Callen's trial, and prosecutors speculated that it was destroyed.[28]

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23. R. 690, 764–65. Specifically, the statistical estimate of an unrelated individual contributing to the mixture was 1 in 2300 African Americans or 1 in 10,900 Caucasians.
24. R. 693, 701–02, 767–68.
25. R. 704–05, 708, 771–73, 774–77.
26. R. 712-13, 779–80.
27. C. 572; *see* C. 587.
28. C. 573.

The second search warrant, authorizing a search of Natasha Brown's residence, was issued at 12:25 p.m.[29] The accompanying affidavit states:

> I, Detective Jerry Williams with the Birmingham Police Department, am the officer assigned to conduct an investigation concerning a homicide.
>
> On October 29, 2010, at approximately 4:30 A.M., units from the Birmingham Fire Department responded to a fire at a residence located at 1297 44th Street North, Birmingham, Alabama 35222. The bodies of three human victims were discovered inside the residence. Investigators from the Birmingham Police Department were called to the scene. Stab wounds were observed on the bodies and a homicide investigation was initiated. Following interviews with witnesses, Dantay [sic] CALLEN (B/M, DOB: 8/27/92) was identified as a possible suspect and was seen by witnesses near the residence prior to fire. Through further investigation, it was determined that CALLEN resided with his aunt, Natasha BROWN, at 561 41st Street North, Birmingham, Alabama 35222. Investigators confirmed with BROWN that CALLEN resides at the residence. BROWN further confirmed that CALLEN had been home earlier that morning and had changed clothes. CALLEN's clothing is still at the residence and may contain possible forensic evidence which would link CALLEN to the crime scene.
>
> Based on the above information, I have reason to believe, and do believe that there is evidence of the crime of arson and/or homicide at the residence location of 561 41st Street North, Birmingham, Alabama 35222[.][30]

The third search warrant was a replacement warrant for biological samples, and it issued at 1:50 p.m.[31] The accompanying affidavit states:

> I, Detective Cynthia Morrow, with the Birmingham Police Department, am investigating arson of the residence located at

29. C. 586–87.
30. C. 585.
31. C. 583.

> 1249 44th Street North, Jefferson County, Alabama. This arson occurred on October 29, 2010 at approximately 5:00 a.m.
>
> On October 29, 2010, the Birmingham Fire Department responded to a call at the above listed location and upon arrival discovered the residence engulfed in flames and proceeded to extinguish the fire. After distinguishing [sic] the fire, firefighters discovered three bodies. Also, in the residence and around the bodies officers observed what appeared [to be] pools of blood. Blood samples were collected from within the residence by Birmingham technicians. . . . While interviewing Dontae Callin [sic] he stated that he was at the location several hours prior to the incident. Also while Detective Cotton was interviewing Dontae Callin [sic] he observed what appeared to be a red liquid substance inside of his ear. Detective Cotton noticed numerous puncture wounds and scratches on the right side of his neck.
>
> Based upon the suspect, Dontae Callin [sic], being seen near the crime location, I have reason to believe, and do believe that the above individual is the contributor of the blood evidence collected at the scene of the arson. To further my investigation, it is necessary to obtain a sample of biological fluid, to-wit: saliva, from the person of Dontae Callin [sic].
>
> The requested evidentiary samples may be collected from the person of Dontae Callin [sic] by the swabbing of his cheeks and of his hands and nails, and an alternate light source and secured for comparison with the evidentiary samples previously collected in this investigation.[32]

As Judge Pulliam explained in a handwritten note:

> Original search warrant was sworn to and issued to Detective Morrow at 11.50 AM on this date. This search warrant was later VOIDED, as there was information contained therein, that was later proven to be unreliable. This search warrant was subsequently issued based on same information stating probable cause as first, minus this information.[33]

32. C. 583.
33. C. 587.

Two days prior to trial, defense counsel filed a motion to suppress the evidence recovered from the residence (the 12:25 p.m. warrant) based on an inadequate affidavit.[34] The prosecution argued that Detective Williams had outlined his personal knowledge and provided information obtained by the police department in the affidavit.[35] The defense objected to the introduction of items taken from the residence, but the court overruled their objections.[36]

C. The trial

Callen was indicted on three counts of capital murder in May 2011: murder of two or more persons pursuant to one scheme or course of conduct, murder of a person less than fourteen years of age, and murder committed during the commission of arson.[37] Callen was eighteen years old at the time of the murders and was determined to not be intellectually disabled after a hearing.[38] The jury found him guilty as charged on all counts.[39]

Following the penalty-phase presentation, the jury recommended 11–1 that Callen be sentenced to death.[40] At the time of Callen's trial, the jury's verdict as to penalty was advisory and not binding on the trial court, a

34. C. 555–57.
35. C. 580.
36. R. 525, 531, 533.
37. C. 131; *see* ALA. CODE §§ 13A-5-40(a)(9), (a)(10), (a)(15) (1975).
38. C. 92–94; *see* 2 Supp. 161 (listing date of birth as August 27, 1992).
39. C. 665–67.
40. C. 668.

scheme this Court upheld in Court in *Harris v. Alabama*.[41] The trial court held a sentencing hearing on August 20, 2013, heard additional testimony, accepted the jury's recommendation, and sentenced Callen to death.[42]

D. Post-trial and direct appeal

Defense counsel filed a motion for new trial, which was heard on October 16, 2013, and denied on October 22.[43]

On direct appeal, the Alabama Court of Criminal Appeals affirmed Callen's convictions in April 2017 but remanded for an amended sentencing order.[44] The court affirmed Callen's death sentence on return to remand four months later.[45] The Alabama Supreme Court denied certiorari in November 2018.[46]

The present petition for writ of certiorari followed.

41. 513 U.S. 504 (1995).
42. R. 1274; *see* C. 113–23 (sentencing order).
43. C. 126; R. 1276–83.
44. *Callen v. State*, CR-13-0099, 2017 WL 1534453 (Ala. Crim. App. Apr. 28, 2017).
45. *Callen v. State*, CR-13-0099, 2017 WL 3446533 (Ala. Crim. App. Aug. 11, 2017).
46. *Ex parte Callen*, No. 1170219 (Ala. Nov. 16, 2018).

REASONS THE PETITION SHOULD BE DENIED

No issue in Callen's petition is worthy of certiorari.

First, Callen's Fourth Amendment claim is meritless, and the split he identifies is questionable. This is a case in which a single judge issued three warrants seeking to preserve forensic evidence in the span of two hours, all concerning the primary suspect in a brutal triple homicide that had occurred less than twelve hours before. Any deficiencies in the affidavit accompanying the second search warrant application were covered by the affidavit accompanying the first and third applications. In short, it is uncontested that "the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing," and "the Fourth Amendment requires no more."[47]

Moreover, if the issuing magistrate erred by relying on the totality of the information before her, the officers executing the challenged search warrant did so in good faith, making this case a poor vehicle to examine the issue Callen raises.

Second, there is no reason for this Court to hold Callen's petition until a decision is announced in *Ramos v. Louisiana*.[48] *Ramos* questions the

47. *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).
48. No. 18-5924.

constitutionality of non-unanimous guilt verdicts, which is not at issue in Callen's case. The only non-unanimous verdict here was the jury's 11–1 death recommendation—which, under Alabama's capital sentencing scheme at the time, was not binding on the trial court.

For the reasons that follow, Taylor's petition is not cert-worthy.

I. Certiorari is unwarranted as to Callen's Fourth Amendment claim.

Callen first contends that this Court should grant certiorari to determine whether an appellate court, when determining whether probable cause existed to issue a search warrant, is limited in its review to the four corners of the affidavit submitted in support of the warrant. This claim is not cert-worthy.

As set forth above, Judge Pulliam issued three search warrants in this case within a two-hour period shortly after Callen was taken into custody. The first (the 11:50 a.m. warrant) was for biological samples from his person, but the affidavit contained certain unreliable material. As a result, the warrant was voided, then reissued at 1:50 p.m., "based on [the] same information stating probable cause as [the] first," minus the unreliable information.[49] In other words, the 11:50 a.m. affidavit was sufficient to

49. C. 587.

establish probable cause for a search of Callen's person, even with the erroneous information removed. Between these two warrants was the 12:25 p.m. warrant for a search of Natasha Brown's home, where Callen lived. The accompanying affidavit was less detailed than the affidavit used for the first and third applications, though it pertained to the same individual and the same crime.

The Court of Criminal Appeals considered the trial court's failure to suppress evidence taken pursuant to the 12:25 p.m. warrant and found no error:

> "The Fourth Amendment to the United States Constitution provides, in pertinent part, that '[t]he 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.' Thus, '[a] search warrant may only be issued upon a showing of probable cause that evidence or instrumentalities of a crime or contraband will be found in the place to be searched.' *United States v. Gettel*, 474 F.3d 1081, 1086 (8th Cir. 2007)."

Ex parte Green, 15 So. 3d 489, 492 (Ala. 2008).

> "'Probable cause to search a residence exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).' *United States v. Jenkins*, 901 F.2d 1075, 1080 (11th Cir.), *cert. denied*, 498 U.S. 901 (1990). . . . [T]here is no requirement of a 'showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.' *Texas v. Brown*, 460 U.S.

> 730, 742 (1983). Additionally, '[w]here a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a common sense manner, and should resolve doubtful or marginal cases according to the preference to be accorded to warrants.' *Maddox v. State*, 502 So. 2d 779, 785 (Ala. Crim. App. 1985), *affirmed in part, remanded on other grounds*, 502 So. 2d 786 (Ala.), *cert. denied*, 479 U.S. 932 (1986)."

Poole v. State, 596 So. 2d 632, 641 (Ala. Crim. App. 1992).

While it is true that the affidavit did not provide information concerning the name of the person or persons who had seen Callen near the residence before the murders or evidence of the time he was seen before the murders—the record clearly shows that three warrants were issued by the same judge within hours on October 29, 2010. As noted above, the first warrant is not in the record. However, the record shows that the affidavit in support of the warrant to obtain biological samples from Callen, the third warrant, was similar to the affidavit in support of the first warrant. As stated previously, the warrant to obtain biological samples contained the following information in that affidavit: "[W]hile Detective Cotton was interviewing Dontae Callen he observed what appeared to be a red liquid substance inside of his ear. Detective Cotton noticed numerous puncture wounds and scratches on the right side of his neck." (C. 583.)

When examining whether there is probable cause to issue a search warrant:

> "'This court must look at the totality of the information that was supplied to the magistrate before the warrant was issued. We do not 'restrict [our] review to the "four corners" of the affidavit. *United States v. Character*, 568 F.2d 442 (5th Cir. 1978).' *Wamble v. State*, 593 So. 2d 109, 110 (Ala. Crim. App. 1991)."

Moore v. State, 650 So. 2d 958, 965 (Ala. Crim. App. 1994).

> "'[I]f the affidavit is on its face insufficient to support a finding of probable cause, the State may then adduce testimony showing that the sufficient evidence was, in fact, before the issuing magistrate.' *Mayes v. State*, 260 So. 2d 403, 405 (Ala. 1972). *See Crittenden v. State*, 476 So. 2d 626 (Ala. Crim. App. 1983); *Oliver v. State*, 238 So. 2d 916 (Ala. 1970).
>
> "While an insufficient affidavit may be supplemented by oral testimony, the testimony must relate to the information actually disclosed to the issuing magistrate and not merely to information known by the affiant but undisclosed to the magistrate at the time of procuring the affidavit. *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971); *Davis v. State*, 500 So. 2d 472 (Ala. Crim. App. 1986). *See* W. LAFAVE, 2 SEARCH AND SEIZURE § 4.3 (1978)."

Swain v. State, 504 So. 2d 347, 352 (Ala. Crim. App. 1986).

In a similar fact situation, the Washington Court of Appeals in *State v. McReynolds*, 71 P.3d 663 (2003), stated:

> "The [defendants] apparently contend the analysis of the application for Warrant 5 must be limited to the four corners of the officers' affidavit. However, CrR 2.3(c) implicitly permits consideration of facts extrinsic to the affidavit. *See State v. Jansen*, 549 P.2d 32, *review denied*, 87 Wash. 2d 1015 (1976); *see also State v. Gonzalez*, 891 P.2d 743 (1995), *review denied*, 910 P.2d 481 (1996). In light of the requirement that warrant applications be evaluated in a commonsense manner, *State v. Partin*, 567 P.2d 1136 (1977), the court here properly considered the application for Warrant 5 in light of all of the events of the case, within the previous four days. . . ."

71 P.3d at 673.

Clearly Judge Pulliam was in possession of all the above information before signing the search warrant for Callen's residence. Cumulatively, all the evidence provided sufficient probable cause. Police knew that Callen had been the last person

> to see the three victims, Callen had cuts on his hands and scratches on his body, Callen had what appeared to be blood in one of his ears, police knew that the victims had been stabbed, and Callen had changed clothes. The circuit court did not err in denying Callen's motion to suppress the evidence seized as a result of the execution of the search warrant on Callen's residence, and Callen is due no relief on this claim.[50]

As Callen acknowledges, "Reviewing courts must examine the totality of the circumstances in determining whether an affidavit adequately supports a finding of probable cause,"[51] which is precisely what the Court of Criminal Appeals did in this case. Here, the judge issued three search warrants in short order, all pertaining to a single suspect in a triple homicide that had occurred less than twelve hours before, and all in search of forensic evidence that would tie Callen to the murders—evidence that could have easily been lost or destroyed. Based on the totality of the information that was before Judge Pulliam, there was probable cause for her to issue the search warrants.

This Court has never held that a reviewing court is limited to the four corners of the affidavit presented in support of a given search warrant and only that affidavit. The touchstone has always been whether sufficient evidence was "brought to the magistrate's attention,"[52] not whether the

50. *Callen*, 2017 WL 1534453, at *21–22 (citations edited).
51. *Gates*, 462 U.S. at 238; *see* Pet. 9.
52. *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964).

information was in one document or two. Accordingly, Federal Rule of Criminal Procedure 41 provides that a magistrate must issue a warrant "[a]fter receiving an affidavit *or other information*" that establishes probable cause, and that information can include sworn testimony, including testimony delivered over the phone.[53]

Moreover, the cases that Callen offers in support of his allegedly "better-reasoned view"[54]—i.e., that a reviewing court cannot consider additional affidavits before the issuing magistrate in its analysis—have distinguishable facts from Callen's. First, in *United States v. Frazier*, there were six search warrants issued concerning multiple individuals in the defendant's twenty-five-person drug organization, which were obtained after a four-year investigation and several controlled buys by a cooperating witness. The affidavit concerning the defendant lacked information present in the other five.[55] Though the Sixth Circuit determined that it was limited in its review to the four corners of the defective affidavit, it still found that the officer had acted in good faith in executing the search.[56] By contrast, in Callen's case, three search warrants were issued concerning a single defendant to preserve forensic evidence, within hours of a triple homicide.

53. FED. R. CRIM. P. 41(d) (emphasis added).
54. Pet. 11.
55. 423 F.3d 526, 529–30 (6th Cir. 2005).
56. *Id.* at 531, 533–36.

Second, in *United States v. Cordero-Rosario*, neither affidavit submitted in support of the two warrants concerning the defendant was sufficiently specific to establish probable cause[57]—again, quite different from the matter at hand, in which the 1:50 p.m. affidavit (the pared-down version of the 11:50 a.m. affidavit) established probable cause and filled in the weak spots of the 12:25 p.m. affidavit. Third, in *United States v. Abdul-Ganiu*, the affidavit for the search warrant concerning the defendant's apartment did not incorporate an anticipatory search warrant regarding a package shipped to him from India containing heroin. However, the package was opened within minutes of delivery, and the defendant was caught with the heroin on his person. His statements and subsequent evasive behavior helped establish the nexus between his criminal activity and his residence, and the court concluded that even if it had not, the good-faith exception would apply to the search.[58] In Callen's case, there was no anticipatory search warrant—the judge acted quickly to issue three warrants to preserve forensic evidence over the course of two hours.

57. 786 F.3d 64, 67–72 (1st Cir. 2015).
58. 480 F. App'x 128, 129–31 (3d Cir. 2012).

Moreover, as Callen acknowledges,[59] the Sixth Circuit has repeatedly failed to apply Callen's purported rule. In *Sovereign News Co. v. United States*, that court wrote:

> The Supreme Court stated that "affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). The same magistrate issued both warrants only seven days apart at the request of the same agent who was conducting the same investigation. The second affidavit recounted both the first search and the nature of the items collected. The affidavit then provided a list of materials whose titles and covers strongly suggested that they were of the same variety as those already seized. This court has allowed probable cause to be established by reading related affidavits in conjunction with one another. *United States v. Manufacturers National Bank of Detroit*, 536 F.2d 699 (6th Cir. 1976), *cert. denied*, 429 U.S. 1039, (1977).[60]

The timing was even tighter in Callen's case: the same judge issued the first and second search warrants approximately thirty-five minutes apart.

The supposed circuit split to which Callen directs this Court does not warrant certiorari review. Even if it did, however, this case would be a poor vehicle for review, as the good-faith exception set forth in *United States v. Leon*[61] would apply. Even if, arguendo, the first affidavit should not have been considered in finding probable cause for the second search warrant, the officers had a good-faith basis for relying on the search warrant: officers from

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59. Pet. 12.
60. 690 F.2d 569, 575 (6th Cir. 1982) (citations edited).
61. 468 U.S. 897 (1984).

the same agency were moving quickly to bring search warrants to one judge to preserve forensic evidence concerning one suspect, who had been taken into custody with injured hands and a spot of probable blood in his ear. Most important, the officers provided the magistrate with more than enough evidence to support her judgment that a search was warranted. Thus, even if there had been a problem with the issuance of the 12:25 p.m. search warrant, suppression of the evidence seized during that search was properly denied. Therefore, this Court should deny certiorari.

II. This Court should not hold Callen's petition pending the result of *Ramos v. Louisiana*.

Callen argues that this Court should hold his petition pending the outcome of *Ramos v. Louisiana*[62] because his jury returned an 11–1 death recommendation that was not binding on the trial court. This contention is meritless.

Ramos asks whether the rule of *Apodaca v. Oregon*[63] and *Johnson v. Louisiana*[64] permitting non-unanimous jury verdicts should remain constitutional. Both *Apodaca* and *Johnson* were concerned with convictions, not with questions of penalty-phase unanimity, much less penalty-phase

62. No. 18-5924.
63. 406 U.S. 404 (1972).
64. 406 U.S. 356 (1972).

unanimity in cases in which the *court* is the ultimate sentencer. This Court has never held that a defendant sentenced to death must be so sentenced by a unanimous jury—indeed, this Court has upheld sentencing schemes in which the jury's penalty-phase vote is a mere recommendation to the trial court, such as Alabama's former sentencing scheme, which the Court approved in *Harris v. Alabama*.[65] Alabama relied on *Harris* to sentence hundreds of murderers, including Callen, before amending its capital sentencing scheme in 2017. As Justice Kennedy noted, "the States' settled expectations deserve our respect."[66] Thus, Callen's potential claim would hinge on this Court first finding that non-unanimous guilt verdicts are unconstitutional in *Ramos*, then extending that holding to penalty-phase verdicts, and finally overturning *Harris*. This chain of events is simply too tenuous to provide cause for Callen's petition to be held pending a decision in *Ramos*.

65. 513 U.S. 504 (1995).
66. *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Kennedy, J., concurring).

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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