No. __-___

IN THE

Supreme Court of the United States

RIO SHAREESE JONES,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Criminal Appeals of Texas—now creating a 7-7 split in the federal courts of appeals and State courts of last resort—affirmed the denial of Petitioner Rio Shareese Jones's motion to suppress a search warrant based on an affidavit that did not contain any specific statement as to the time or date when the facts relied upon occurred. The court concluded that the affiant's assertion that he "recently" received information from a confidential informant regarding undated drug sales at Mr. Jones's residence, and his averment of a subsequent undated controlled buy at the residence was sufficient to establish probable cause under the Fourth Amendment to search that location. With its opinion, the Court of Criminal Appeals joined two federal courts of appeals and four State courts of last resort in rejecting the conclusion of three federal courts of appeal and four State courts of last resort that a warrant application containing no times or dates whatsoever fails to establish probable cause. This mature split of authority requires the Court's resolution.

The question presented is:

Whether, in an attempt to establish that evidence of a crime will be found in a particular location when the search is conducted, an affidavit lacking any specific statement as to the time when the facts relied upon occurred is sufficient to establish probable cause under the Fourth Amendment to search that location.

PARTIES TO THE PROCEEDING

Petitioner is Rio Shareese Jones, defendant-appellant below.

Respondent is the State of Texas, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Rio Shareese Jones respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas (Pet. App. 1a) is reported at 364 S.W.3d 854. The court's order denying rehearing is unreported. Pet. App. 123a.

JURISDICTION

The Court of Criminal Appeals of Texas issued an opinion on March 28, 2012. The court's judgment became final when it denied rehearing on May 9, 2012. This Court has jurisdiction under 28 U.S.C. § 1257.

LEGAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

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

INTRODUCTION

Probable cause under the Fourth Amendment 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). The "probable-cause requirement looks to

whether evidence will be found *when the search is conducted* . . . ." *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (emphasis in original). Indeed, the Court has long emphasized the centrality of time to the probable-cause analysis—"it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States*, 287 U.S. 206, 210 (1932).

Despite this Court's consistent emphasis on the importance of temporal specificity in search warrant affidavits, the federal courts of appeals and State courts of last resort are intractably divided on whether such specificity is, in fact, *required*. The courts are thus split as to whether an affidavit that completely omits any specific reference to the time or date on which the underlying facts occurred is one of the "limits beyond which a magistrate may not venture in issuing a warrant." *Gates*, 462 U.S. at 239.

Here, the Court of Criminal Appeals of Texas joined the Fourth and Fifth Circuit Courts of Appeals and the high courts of Tennessee, Montana, Pennsylvania, and Virginia in holding that an affidavit lacking any specific reference to a time or date when the underlying activity occurred can support a finding of probable cause under the Fourth Amendment to search a location. Diametrically opposed to this position, however, are the First, Sixth, and Ninth Circuit Courts of Appeals and the high courts of Delaware, Alabama, Michigan, and Washington, which recognize that without some specific indication of when the underlying events occurred, there is no basis to determine whether

evidence will be found when the search is conducted. In fact, within months of the decision of the Court of Criminal Appeals here, the Supreme Court of Washington entered its own opinion staking out its position on the opposite side of the split.

This Court should grant review to resolve this conflict and establish that an affidavit wholly lacking in specific time references is not sufficient to establish probable cause under the Fourth Amendment to search a location.

STATEMENT OF THE CASE

A. The Search

On November 6, 2007, Officer Allen Bjerke of the Texas City Police Department submitted a search warrant application to Judge Darrell Apffel. The application requested a no-knock warrant to search 219 North Pine Road, Texas City. Without providing any basis for the source of his knowledge, Officer Bjerke's affidavit asserted that Petitioner Rio Shareese Jones lived at that location. Although the affidavit stated Mr. Jones had been arrested "for both evading arrest and resisting arrest in 2005 and 2007," it did not elaborate on those arrests. Pet. App. 136a. The affidavit did not state when or where the arrests occurred, nor did it contend that the arrests were in any way related to the object of the search.

Instead, the warrant affidavit explained that Officer Bjerke "recently received information from a confidential informant" that crack cocaine was being sold out of 219 North Pine Road. Pet. App. 132a. The affidavit did not, however, specify the date Officer Bjerke received this information, nor define "recently" with respect to any timeframe, nor did it

specify the date the informant made his observation or otherwise obtained this information.

According to the affidavit, after his "recent[]" contact with the confidential informant, Officer Bjerke "began a narcotics investigation" into activity at 219 North Pine Road, although no specific date for the commencement of that investigation was provided. *Id.* The affidavit also stated that Officer Bjerke enlisted another confidential informant who "corroborated information about 219 North Pine Road that Affaint [sic] has previously received from other confidential informants." Pet. App. 133a. But the affidavit did not elaborate on the nature of the "information" that purportedly was corroborated by the confidential informants or when that information was "previously received" by Officer Bjerke.

The investigation's capstone was a controlled buy from 219 North Pine Road. The affidavit did not, however, specify the date of this controlled buy. All the affidavit reflects is that the controlled buy occurred "after" Officer Bjerke's "recent[]" receipt of the information from the confidential informant. Based on these circumstances, none of which was accompanied by a single reference to the date or time of its occurrence, or even any time frame within which any of the information was obtained, the affidavit stated that Officer Bjerke "believe[d] that a violation of the Texas Controlled Substances Act is currently taking place at 219 North Pine Road." Pet. App. 134a-35a.

Judge Apffel issued the requested warrant on November 6, 2007. Pet. App. 128a. That day, Officer Bjerke and fellow police officers executed the warrant. They discovered and seized unlawful drugs,

guns, and some United States currency. Pet. App. 32a-33a. The officers then arrested Mr. Jones for narcotics offenses.

B. Proceedings in the Trial Court

The State of Texas charged Mr. Jones with firearm and drug offenses, trying him in the 405th District Court in Galveston County. Asserting that his right against unreasonable searches and seizures had been violated, Mr. Jones sought the suppression of the evidence seized in the November 6 search. Mr. Jones claimed, *inter alia*, that the search warrant affidavit failed to specify when any of the events described therein occurred so as to establish probable cause that contraband would be found at the location of the search when the warrant was executed. Pet. App. 137a.

At the suppression hearing, the State offered no evidence other than the search warrant and affidavit. The trial court concluded as a matter of law that the affidavit for the search warrant established probable cause to search 219 North Pine Road. The trial court also concluded as a matter of law that the affidavit "contains sufficient information to show that the act or event upon which probable cause was based occurred within a reasonable time prior to making the affidavit." Pet. App. 126a. The court thus denied Mr. Jones's suppression motion.

Before voir dire began, Mr. Jones objected again to the admission of any evidence obtained as a result of the November 6 search warrant. That objection was overruled, and evidence arising from the search was introduced at trial. Pet. App. 48a-49a. The jury then convicted Mr. Jones of possession of a firearm by a felon and two drug possession offenses. The court

sentenced Mr. Jones to 99 years in prison for each offense, with the sentences to run concurrently. Pet. App. 4a.

C. Proceedings in the Court of Appeals for the First Judicial District

Mr. Jones appealed his conviction to the Court of Appeals for the First District of Texas. The divided three-judge panel affirmed the conviction 2-1. The majority opinion emphasized two circumstances: the affidavit used the word "recently," and the facts reported in the affidavit indicated a "continuing criminal operation." Pet. App. 48a. In the majority's view, these two circumstances united to make the affidavit adequate. The court therefore held "that the temporal references within the affidavit allowed the magistrate to determine there was a substantial basis for concluding that a search would uncover evidence of wrongdoing." *Id.*

The court "hasten[ed] to add that including specific dates and times is the preferred practice for preparing an affidavit supporting a request for a search warrant." Pet. App. 48a. It admonished that its opinion "should not be misunderstood to countenance the use of vague terms such as 'recently.'" *Id.*

Mr. Jones sought, and was granted a rehearing from the panel. The disposition of the case remained unchanged, but the panel issued a new opinion superseding its earlier one. This one likewise accepted that "the failure to include specific dates and times of relevant events described in the affidavit . . . is not a model demonstration of the basis of the affiant's knowledge of circumstances suggesting [probable cause]." Pet. App. 45a. Still, the panel adhered to its

conclusion that non-specific temporal references were sufficient to establish probable cause.

Justice Sharp, who had dissented from the initial panel decision, filed a written dissent from the decision on rehearing. The dissent emphasized that under the law, a magistrate may only rely on information within "the four corners of [the] affidavit" when deciding the existence of probable cause. Pet. App. 104a. And looking within the four corners of this affidavit, Justice Sharp did not find information "sufficiently specific as to the time of the incident that provides the basis for probable cause—the controlled buy." Pet. App. 102a.

The court also denied Mr. Jones's petition for rehearing en banc. Justice Jennings, joined by Justices Higley and Sharp, dissented. The dissent criticized the panel majority's "erroneous" answer to a "straightforward question." Pet. App. 108a. The decision, it explained, "will come as a surprise to experienced law-enforcement officers and magistrates," who would "recognize the need for . . . specific time frames to establish probable cause for a search." *Id.*

D. Proceedings in the Court of Criminal Appeals

Mr. Jones sought, and was granted discretionary review from the Court of Criminal Appeals of Texas. This review also resulted in a divided court. The majority emphasized that Officer Bjerke's receipt of information from the confidential informant was "recent[]," and that "the controlled buy . . . was even more recent than the information that the affiant cited as 'recently' acquired." Pet. App. 19a. In the majority's view, these circumstances sufficed to sustain the warrant.

Judge Price filed a concurring opinion. He found it "troubling that a reviewing court should have to parse the language of a search warrant affidavit as meticulously as the Court is compelled to do today before it can conclude that a magistrate's finding of probable cause has a substantial basis in fact." Pet. App. 22a. Judge Price emphasized that without a "concrete date," the magistrate "might just as readily have found that the warrant affidavit . . . lacked sufficient temporal specificity to provide probable cause to believe that crack cocaine would *presently* be found at 219 North Pine Road." *Id.* Deference to the magistrate led Judge Price to concur. But Judge Price noted that he would have also deferred to the opposite ruling, had the magistrate ruled the other way and concluded that the affidavit was insufficient.

Judge Meyers dissented. "I have read the affidavit here ten times," he commented, "and cannot find the continuing operation that the majority 'infers.'" Pet. App. 27a. That concept was not "clearly stated" in the affidavit, and therefore could not have been "reviewed by the magistrate." Pet. App. 28a. The affidavit's lack of specificity in that regard, combined with its lack of specificity about the time of the receipt of information and its lack of specificity about the time of the controlled buy, led Judge Meyers to conclude that the search warrant was invalid. Judge Johnson dissented without opinion. Pet. App. 2a.

This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The Court should grant review to resolve the substantial split among federal courts of appeal and State courts of last resort on whether, in an attempt

to establish that evidence of a crime will be found in a particular location when the search is conducted, an affidavit lacking any specific statement as to the time when the facts relied upon occurred is sufficient to establish probable cause under the Fourth Amendment to search that location

To establish probable cause, a search warrant affidavit must demonstrate a "'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Grubbs*, 547 U.S. at 95 (quoting *Gates*, 462 U.S. at 238). Because the probable-cause requirement, "looks to whether evidence will be found *when the search is conducted* . . . ." *Id.* (emphasis in original), "the facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past." *United States. v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993), *quoted in Grubbs*, 547 U.S. at 95 n. 2.

A necessary predicate to the question whether the facts in an affidavit are sufficiently close in time to the issuance of the warrant is some specification as to *when* the events described in the affidavit transpired. Although this Court has concluded that the ultimate conclusion whether probable cause exists is the product of a "commonsense, practical question," it has also recognized that there are "limits beyond which a magistrate may not venture in issuing a warrant." *Gates*, 462 U.S. at 230, 239. This petition presents the question whether reliance on an affidavit that does not include a single specific time reference to the criminal activity at issue marks one such limit.

This issue is of great importance because of the overwhelming number of cases involving search warrant challenges and the mounting evidence that magistrates are merely serving as a rubber stamp for the police. There is increasing conflict in lower court decisions in this area, leading to the inconsistent resolution of such cases among the circuits and State courts of last resort.

This case presents an exceptional opportunity to bring clarity to this conflicted area of the law. The affidavit at issue did not include any specific time reference to establish when the underlying facts occurred. Moreover, Mr. Jones could not have been convicted if the evidence arising from the search had been suppressed. This Court's review is warranted.

I. COURTS ARE IRRECONCILABLY SPLIT OVER THE NECESSITY FOR SPECIFIC TEMPORAL INDICIA TO ESTABLISH PROBABLE CAUSE

The issue presented by this petition has given rise to a now 7-7 split among federal courts of appeal and State courts of last resort. Because the courts are intractably divided as to the need for specific time references in a warrant affidavit, this Court should grant review.

A. The Federal Courts Of Appeals Are Divided

1. Many of the federal courts of appeal have addressed the problem presented by this petition, but they have reached starkly different conclusions. The First, Sixth, and Ninth Circuits are on one side of this split. The Fourth and Fifth Circuits are on the other. And the Eighth Circuit straddles the divide.

2. One line of authority requires an affidavit to provide specific information concerning the timing of the facts that it reports. These cases reject affidavits containing only vague temporal indicators such as the use of the present tense or words such as "recently."

The First Circuit's decision in *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966), is the "leading case" supporting the view that affidavits lacking specific chronological indicators cannot establish probable cause. Wayne R. LaFave, 2 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.7(b) at 397 (4th ed. 2004). In that case, the court concluded that a warrant was defective where "the times of receipt by the affiant of information from his informant and of his detection of the order [of mash emanating from a still] were not stated in the affidavit." *Rosencranz*, 356 F.2d at 313. The court observed that "[o]fficers with information of questionable recency could escape embarrassment by simply omitting averments as to time." *Id.* at 316. The court added that an affidavit's use of the present tense to provide a temporal reference for the affidavit's averments cannot cure this defect, because "[t]he present tense is suspended in the air; it has no point of reference." *Id.*; *see also United States v. Salvucci*, 599 F.2d 1094, 1096 (1st Cir. 1979), *reversed on other grounds by* 448 U.S. 83 (1980) (relying on *Rosencranz* for the proposition that "[t]he absence of any reasonably specific averment as to the time of this conversation [overheard by an informant] is fatal to the warrant").

The Sixth Circuit likewise requires affidavits to establish the temporal context of the facts they

report. As long ago as 1925, the Sixth Circuit held that an affidavit is invalid if it is "silent as to the time element." *Staker v. United States*, 5 F.2d 312, 314 (6th Cir. 1925). The court criticized an affidavit averring that the affiant "has smelled the fumes from a still making intoxicating liquors," noting that "[s]o far as the affidavit shows, the officer might have smelled the fumes months before the affidavit was made." *Id.* at 313-14. In *United States v. Boyd*, 422 F.2d 791 (6th Cir. 1970), the Sixth Circuit invalidated a warrant based on a similarly dateless affidavit. There the affiant simply averred that he "detected the odor of fermenting mash emanating from the rear of the dwelling." *Id.* at 792. Like the First Circuit in *Rosencranz*, the court rejected a present-tense exception to the requirement for a specific time reference, expressing concern about "the possibility of ancient information parading beneath the protective mask of a bland, 'present tense' warrant." *Id.* (quoting *Rosencranz*, 356 F.2d at 318).

More recently, in *United States v. Hython*, 443 F.3d 480, 486 (6th Cir. 2006), the Sixth Circuit invalidated a warrant where "the affidavit offer[ed] no clue as to when [the] single controlled buy [discussed in the affidavit] took place." The court emphasized that the single, undated controlled buy described in the affidavit was not supported by any further direct police investigation of the location searched, such as observation or monitoring of the residence, a second controlled buy, or any other surveillance that would establish an ongoing and continuous operation. As the court explained, "[b]ecause probable cause has a durational aspect, at least some temporal reference point is necessary to ascertain its existence." *Id.* Although the court, in

dictum, noted that the affidavit lacked "even a reference to 'recent activity,'" *id.*, the reasoning of *Staker* and *Boyd* establishes that such a vague reference would not have salvaged the warrant.

The Ninth Circuit also demands specific dates. *Kohler v. United States*, 9 F.2d 23 (9th Cir. 1925) and *Poldo v. United States*, 55 F.2d 866 (9th Cir. 1932), both held warrants inadequate in light of the failure of the underlying affidavits to provide temporal context. In *Kohler*, the affidavit referred to "information sworn to by persons who have repeatedly bought" liquor from the defendant, and "also by others who have seen [the defendant] carrying what was supposed to be liquor from" the search location, but no dates or times were provided. 9 F.2d at 24. And, in *Poldo*, the affiant merely stated that he "observed" the defendant with contraband, but "did not disclose the date on which his observations were made." 55 F.2d at 866-68.

Time, the Ninth Circuit has said, is "the essence of the affidavit." *Poldo*, 55 F.2d at 868. The lack of temporal references in an affidavit invalidates the warrant. *See also United States v. Anderson*, 453 F.2d 174, 176 (9th Cir. 1971) ("As long ago as 1932, we held that a search warrant which was defective for lack of the time of observation could not be cured by oral testimony dehors the affidavit.") (citing *Poldo*).

3. On the other side of the ledger are those federal circuits that, like the Court of Criminal Appeals here, content themselves with dateless affidavits. The Fourth Circuit has sustained a warrant where the timing of the facts reported could supposedly be inferred from other circumstances

mentioned in the underlying affidavit. *United States v. Lalor*, 996 F.2d 1578, 1581-82 (4th Cir. 1993), *cited in* Rachel A. Campbell, *When Are Facts Offered in Support of Search Warrant for Evidence of Federal Drug Offense So Untimely as to Be Stale*, 13 A.L.R. Fed. 2d 1 § 4 (2006). In *Lalor*, the court acknowledged that the "informants' reports omit any reference to the time period during which the drug sales occurred." *Lalor*, 996 F.2d at 1582. However, the court observed that the affidavit was "written in the present tense, suggesting that the activity is ongoing," and concluded that the defendant's arrest for cocaine possession "just five days prior to issuance of the warrant" permitted the magistrate to "reasonably infer that the drug activity was ongoing" even though there was no indication that the defendant was arrested at the location for which the search warrant was issued. *Id.*

Likewise, the Fifth Circuit has held that affidavits lacking specific temporal references will suffice when the object of the search is an ongoing criminal activity, even when there is no indication of when the reported criminal activity began. In *United States v. McKeever*, 5 F.3d 863, 865 (5th Cir. 1993) (per curiam), the court reversed a suppression order where a confidential informant's statements that "he ha[d] purchased marijuana from [defendant] on several occasions" were undated. However, because the affidavit identified the dates on which the property searched was purchased and a building constructed thereon, the court was "not convinced that the lack of specific dates deprived the magistrate of essential information in determining probable cause." *Id.* at 866.

In *United States v. Thomas*, 973 F.2d 1152 (5th Cir. 1992), the court analyzed a warrant executed at the site of a suspected vehicle theft ring where defendants ground down and restamped vehicle identification numbers on stolen cars. The affidavit merely stated that the defendant "is altering" stolen vehicles and that criminal instruments "are being concealed" at the location. *Id.* at 1156 n.4. Nonetheless, because "[a]ll of these statements are in the present tense, and describe ongoing criminal activity," the court concluded that "[w]hile [the] affidavit failed to mention any dates connecting the suspected crime to the defendant, we do not find this oversight to be fatal." *Id.* at 1157. *See also United States v. Lewis*, 332 F. App'x 951, 955 (5th Cir. 2009) (per curiam) (relying on *Thomas* for the proposition that affidavit failing to state date is not defective where it stated that drugs and paraphernalia "'are'—i.e.—now being concealed on the premises").

Even these courts, however, acknowledge the difficulties posed by their position. The Fourth Circuit, for example, has admonished that "a time frame should [be] disclosed." *Lalor*, 996 F.2d at 1582; *see also id.* ("This court has already cautioned the police about the need to specify time periods in warrant applications."). Similarly, the Fifth Circuit has described a dateless affidavit as "far from perfect," *Thomas*, 973 F.2d at 1157, and has cautioned magistrates that allegations of continuing activity are entitled to little weight when "the affidavit fail[s] to include the date that the [drug] sales allegedly took place," *McKeever*, 5 F.3d at 866.

4. Finally, the Eighth Circuit's case law is internally inconsistent. On the one hand, *United*

States v. Button, 653 F.2d 319 (8th Cir. 1981), held that an affidavit alleging drug distribution but lacking specific dates could not establish probable cause to search the target's house. It reached that conclusion even though the affidavit suggested that the object of the search was a continuous criminal operation. *See id.* at 322 n.5 (affidavit alleged that the defendant had been "continuously suppling [*sic*]" drugs); *see also United States v. Kennedy*, 427 F.3d 1136, 1142-43 (8th Cir. 2005) (affirming suppression of evidence seized based, in part, on *Button*'s reasoning regarding the need for specific time references).

On the other hand, *United States v. Formaro*, 152 F.3d 768 (8th Cir. 1998), points the other way. That case upheld a search based on undated assertions of controlled purchases at the search location. The court concluded that the affiant's statements that the suspect "had been under investigation since January 1996" was sufficient to support ongoing drug activity. *Id.* at 770; *see also United States v. Stevens*, 439 F.3d 983 (8th Cir. 2006) (upholding search even though "there were no dates or time frames in the affidavit").

B. State High Courts Are Also Split On This Issue.

1. State courts of last resort have had as long as the federal courts to address the issue this case presents. But they have fared no better. They, too, are irreconcilably divided over the necessity for affidavits to identify specific dates on which the alleged criminal activity occurred in order to establish probable cause for a search.

2. On one side of the divide are the highest courts of Washington, Delaware, Alabama, and Michigan.

These courts refuse to sanction warrants based on affidavits that contain only vague chronological references.

Less than a month before the decision in this case became final, the Supreme Court of Washington dramatically reaffirmed the vitality of this split when it addressed the identical question at issue here, and reached a result contrary to that of the Court of Criminal Appeals of Texas. In *State v. Lyons*, 275 P.3d 314, 316 (Wash. 2012) (en banc), the court considered the sufficiency of an affidavit stating "[w]ithin the last 48 hours" a confidential informant "stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address." The court concluded that the affidavit did not establish probable cause, explaining that the time frame in which the informant "contacted detectives and relayed the tip . . . reveals nothing about when the [informant] observed marijuana growing." *Id.* at 319.

In *Sisson v. State*, 903 A.2d 288 (Del. 2006), the Delaware Supreme Court affirmed the vitality of the seminal rule stated by *Pierson v. State*, 338 A.2d 571 (Del. 1975). *Pierson* analyzed an affidavit that "contain[ed] no statement as to times or dates, except the date of notarization. …The only hint of time is the use of the past tense by the affiant." *Id.* at 572 & n.1 (quoting statements in affidavit that "information has been obtained" and "was present," and that the informant "took part in numerous burglaries" and received merchandise from the defendant). The Supreme Court of Delaware explained that time is so "essential" to a finding of probable cause that "failure to state when the alleged facts occurred is fatally

defective." *Id.* at 573. Moreover, the court explained that stale information will not support a finding of probable cause, and that absent a specific chronology in the warrant affidavit, there is no way for the magistrate to judge the staleness of the facts on which probable cause was predicated. *Id.; cf. Sisson*, 903 A.2d at 298-99 (distinguishing *Pierson* on the basis that the warrant application in the earlier case "contained *no times or dates whatsoever*" and therefore failed to establish probable cause to search).

In *Horzempa v. State*, 290 So. 2d 220 (Ala. 1974), the Supreme Court of Alabama affirmed the reversal of a conviction obtained pursuant to a deficient warrant. In addressing an averment in the warrant affidavit that informants had been in the residence to be searched "on several occasions recently," and that there had been drugs there, the court explained that "'[w]hat is meant by "recent", is incapable of exact or precise definition . . . .'" *Id.* at 222 (quoting *White v. State*, 72 Ala. 195 (1882)). Vague references such as "recently" would not suffice, particularly where the term was not directly linked to the informant's purchase or observation of contraband. *See also Ex Parte Green*, 15 So. 3d 489, 490-91, 495 (Ala. 2008) (affidavit stating that affiant "had received information" and that affidavit "believe[d]" contraband was on premises failed to establish probable cause that methamphetamine operation was ongoing).

Likewise, the Supreme Court of Michigan has recognized that terms such as "quite recent" are insufficient to establish probable cause. *People v. Hilber*, 269 N.W.2d 159, 164-65 (Mich. 1978)

(plurality opinion) (affiant's statements that odor of marijuana was "strong" and "quite recent" insufficient to provide a specific time reference) (*abrogated on other grounds by People v. Taylor*, 564 N.W.2d 24 (Mich. 1997)), *cited in* LaFave § 3.7(b) at 396 n.82 (accepting *Hilber* as the law of Michigan on this issue). The court explained that, "because of [the affiant's] indefinite and indeterminate terminology, the judge had no basis for determining the time frame in which" the contraband was present at the location to be searched. *Hilber*, 269 N.W.2d at 165.

3. On the other side of this divide are the highest courts of Montana, Pennsylvania, Tennessee, and Virginia. These courts hold that affidavits can establish probable cause even though they do not specifically describe the timing of the facts they report.

But they are not all committed to this position in equal measure. The Supreme Court of Tennessee has held that an affiant's averments that the defendant is "now" in possession of liquor and that an informant had "just recently" seen liquor on the premises were enough *on their own* to establish probable cause. *Ellison v. State*, 212 S.W.2d 387, 388 (Tenn. 1948) (relying on *Waggener v. McCanless*, 191 S.W. 2d 551 (Tenn. 1946), which approved a search warrant based on an affidavit reciting that illegal liquor sales had been made "within the last few days"); *see also* LaFave § 3.7(b) at 395 n.76 (discussing *Waggener* as the position of Tennessee in this split of authority).

Montana, Pennsylvania, and Virginia will endorse affidavits relying solely on non-specific time references such as "recently" or "now" where the affidavit suggests an ongoing criminal operation. For

example, in *State v. Walston*, 768 P.2d 1387, 1390 (Mont. 1989), the Supreme Court of Montana analyzed an affidavit reporting an informant's statements that he "recently had heard defendant state he was growing marijuana within the house and that he was selling marijuana within the Libby city limits." *See also* LaFave § 3.7(b) at 395 n.76 (discussing *Walston* as the position of Montana in this split of authority). The court reasoned that the term "'recently' connotes a period of time relatively near the disclosure of information," and also emphasized that the informant described his own personal observations on at least two different occasions over a five month span, suggesting ongoing criminal activity. 768 P.2d at 1390.

Similarly, in *Commonwealth v. Jones*, 668 A.2d 114, 118 (Pa. 1995) (plurality opinion), the Supreme Court of Pennsylvania affirmed a conviction where the search warrant affidavit stated that a resident of the location to be searched had "just" been observed selling drugs, and an informant stated that he had personally observed drugs at that location "within the past two months." *See also* John M. Burkoff, *Search Warrant Law Deskbook* § 5.4 (2012) (acknowledging *Jones* as the law of Pennsylvania in this split of authority).

Finally, the Supreme Court of Virginia, in *Huff v. Commonwealth*, 194 S.E.2d 690, 695-96 (Va. 1973), concluded that terms such as "in recent weeks" and "on a recent date" were "variable and relative, but the magistrate could reasonably conclude from the factual context" that contraband was likely to be present when the search was conducted. In so holding, the court conceded that there were no

specific time references, but emphasized that the investigation was conducted "over a long period of time" and the "events and circumstances described [in the affidavit] were not isolated or occasional but frequent, recurrent, and persistent." *Id.* at 695; *see also* LaFave § 3.7(b) at 395 n.76 (discussing *Huff* as the position of Virginia in this split of authority).

II. THE PETITION PRESENTS AN IMPORTANT AND RECURRING ISSUE

In United States District Courts alone, magistrate judges handle more than 43,000 search warrant applications a year, more than twice as many as just twenty years ago. *See* Sourcebook of Criminal Justice Statistics, table 1.84.2010 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t1842010.pdf (last visited August 2, 2012). Each of these applications, and the tens of thousands submitted to state courts every year, are subject to the Fourth Amendment's probable-cause requirement. As this petition demonstrates, however, few constitutional provisions are so inconsistently applied.

In the span of a month earlier this year, two State courts of last resort—the Court of Criminal Appeals here and the Supreme Court of Washington—addressed the need for specific time references in a warrant, reaching diametrically opposed conclusions. *Compare Jones*, 364 S.W.3d at 863 (decided on March 28, 2012), *with Lyons*, 275 P.3d at 316 (decided on April 26, 2012). Those decisions are merely the latest in the series of decisions addressing the issue presented by this petition.

Indeed, treatises have long commented on the entrenched nature of the disagreement between courts such as the Court of Criminal Appeals here

and courts demanding specific time references. Professor LaFave has observed that "the numerical majority of the decisions on this issue" condone affidavits relying on little more than the use of the present tense to establish the timeliness of the underlying facts. LaFave § 3.7(b) at 396 & n.85. Nonetheless, he concludes that the "better view" is that verb tense and other vague references to time are insufficient to establish probable cause under the Fourth Amendment. *Id.* § 3.7(b) at 396-97 & nn.86-89. Review is necessary because this issue is frequently recurring and likely to become increasingly more pervasive.

Moreover, this issue is of exceptional importance. Because far more search warrant applications are granted than denied, "[t]he general assumption is that the search warrant process is a rubber-stamp process. The leading study of that process tends to validate that assumption." William J. Stuntz, *Local Policing After the Terror*, 111 YALE L. J. 2137, 2183 n.142 (2002) (citing Richard Van Duizend et al., THE SEARCH WARRANT PROCESS, 32 n.29 (1985)). The validity of this assumption is further supported by the body of case law approving search warrants relying on affidavits containing no specific reference to the time when the facts relied upon in the affidavit occurred. *See Rosencranz*, 356 F.2d at 317 (concluding that if an affidavit lacking a specific time reference were "adjudged valid, it is difficult to see how any function but that of a rubber stamp remains for" magistrates).

The number of courts permitting magistrates to act as rubber stamps is of particular concern given this Court's long-held view that "[t]he proceeding by

search warrant is a drastic one," and that the "abuse" of that proceeding requires that it "be liberally construed in favor of the individual." *Sgro*, 287 U.S. at 210. Thus, this Court has consistently held that warrants predicated on "mere conclusory statement[s]" will not stand. *Gates*, 462 U.S. at 239. Permitting warrants to issue on the basis of conclusory statements that evidence will exist at the time of the search does not effectuate the Fourth Amendment's goals. This Court's review is required to return the Fourth Amendment to its rightful role as a bulwark against government over-reaching. *See Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (Fourth Amendment's fundamental principle "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."); *Skinner v. Railway Executives' Ass'n*, 489 U.S. 602, 613-14 (1989) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction.").

III. THE COURT OF CRIMINAL APPEALS' ERROR DETERMINED THE OUTCOME HERE

1. This case presents an excellent vehicle for review because the failure of the courts below to suppress the evidence arising from the search of Mr. Jones's residence is outcome-determinative. The evidence obtained from that search was the sole basis for conviction. As Justice Sharp recognized in his dissent to the Court of Appeals' opinion on rehearing, "[a]bsent evidence arising from the search conducted pursuant to the warrant, [Mr. Jones] would not have been convicted." Pet. App. 105a.

2. Moreover, the decision is plainly inconsistent with this Court's precedent. The Court has long emphasized the centrality of time to the probable-cause analysis, describing it as "manifest" that the facts described in an affidavit must be "closely related" in time to the issuance of the warrant. *Sgro*, 287 U.S. at 210. When analyzing probable cause, the key consideration is whether the affidavit establishes that "evidence will be found *when the search is conducted*." *Grubbs*, 547 U.S. at 95 (emphasis in original).

Where there is no indication of when the facts in the affidavit occurred, there is no way of determining that those facts are "sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past." *Wagner*, 989 F.2d at 75, *quoted in Grubbs*, 547 U.S. at 95 n.2. There is no "substantial basis" for concluding that probable cause exists under these circumstances. *Gates*, 462 U.S. at 238-39 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)); *cf. Sisson*, 903 A.2d at 298-99 (recognizing that when a "warrant application contain[s] *no time or date whatsoever* … the affidavit fail[s] to establish probable cause").

The affidavit here does not identify when *any* of the facts averred allegedly took place. It does not even provide a general time frame (*e.g.*, two weeks ago, two months ago, two years ago). *See United States v. Harris*, 403 U.S. 573, 575 (1971) (affirming validity of warrant where affidavit stated that informant had purchased contraband "within the past 2 weeks" and knew of a person who had purchased contraband "within the past two days"). Although the

affidavit states that the *affiant* "recently received information from a confidential informant in reference to crack cocaine being sold out of" the specified location, it does not identify when the *informant* obtained that information. Pet. App. 132a.. The affidavit refers to an investigation commenced some time "after" the affiant's receipt of the informant's undated information, but does not give any explanation as to when that investigation began or when the affiant arranged a controlled buy at the location. *Id.* Despite having failed to identify when any of these events occurred, the affiant asserted his belief that a crime was "currently taking place" at 219 North Pine Road. Pet. App. 134a-35a.

At base, the warrant was grounded on (1) the fact that Mr. Jones had two prior arrests that, on the face of the warrant, do not appear to have any nexus to drug possession or distribution at 219 North Pine Road, (2) undated information from confidential informants regarding alleged drug activity at that location, and (3) an undated controlled buy from that location. Because there is no specific time reference as to when any of the alleged drug activity at 219 North Pine Road occurred, there is no way to determine how much time passed between those events and the magistrate's issuance of the warrant. *Cf. Andresen v. Maryland*, 427 U.S. 463, 478 n.9 (1976) (rejecting staleness challenge where affidavit established that investigation concluded three months earlier, and that activity had been observed just three weeks prior to the warrant's issuance).

Nor is there any basis to determine that there was ongoing criminal activity. The affiant only observed a single controlled buy at 219 North Pine Road.

Every other reference in the affidavit to alleged drug activity at that location is predicated on a confidential informant's undated conveyance of conclusory observations that are themselves undated. "[A] combination of undated, conclusory information from an anonymous source and an undated general allegation of personal observation by the affiant, with no other reasonably specific clues to the time of their happening, is inadequate" to establish probable cause. *Rosencranz*, 356 F.2d at 318. An ongoing criminal activity theory cannot be credited where there is no reference point to determine when the activity purportedly began.

3. Between them, the Court of Appeals and the Court of Criminal Appeals produced six separate opinions addressing the sufficiency of the warrant affidavit here. The reasoning of those opinions, individually and collectively, strongly supports reversal.

Even the majority and concurring opinions acknowledged the affidavit's deficiencies. The Court of Appeals majority noted that the affidavit's vagueness was "not a model demonstration of the basis of the affiant's knowledge . . . ." Pet. App. 45a. The Court of Criminal Appeals majority described the affidavit as "imprecise." Pet. App. 2a. Judge Price, concurring in the Court of Criminal Appeals' decision, found it "troubling that a reviewing court should have to parse the language of a search warrant affidavit as meticulously as" it was compelled to do in order to find the warrant "*marginally* enough" to justify the issuance of a warrant. Pet. App. 21a-22a. He concluded that "[a] police affiant who is unable to persuade a neutral and detached magistrate of probable cause in the wake of such imprecision should not

hope to rely on the imagination of subsequent reviewing courts to bail him out." Pet. App. 23a.

In bailing Officer Bjerke out, however, the courts below relied on their collective imagination. The Court of Appeals majority noted that its review was "limited to the four corners of the affidavit" Pet. App. 71a, but did so only after discussing dates that were omitted from the affidavit, Pet. App. 66a-67a. It then characterized Mr. Jones's challenge to the specificity of the affidavit as a "staleness" challenge Pet. App. 74a, and cobbled together a sequence of events based on the affidavit's use of terms such as "recently," "after," and "currently," to conclude that "the affidavit adequately suggested a continuing criminal operation" and thus the warrant was not based on stale information. Pet. App. 75a, 76a, 80a.

The Court of Criminal Appeals majority repeated these errors, and supplemented its analysis with unsupportable inferences gleaned from the affidavit. It summarily concluded that the affidavit's reference to unrelated "past" arrests of Mr. Jones in 2005 and 2007 "permitted the magistrate to infer a definite outer limit for when the events giving rise to probable cause took place . . . ." Pet. App. 18a. Although the affidavit did not provide any link between the arrests and the alleged drug activity at 219 North Pine Road, the majority contemplated that "[t]he magistrate could reasonably infer from the affidavit that the 'recent' acquisition of information about drug selling was far closer in time to the warrant process than the 'past' evading or resisting arrest incident that occurred sometime in 2007." *Id.*

As Justice Sharp recognized in his dissent in the Court of Appeals, a significant error of the majority

was its framing of Mr. Jones's challenge as one to the staleness of the affidavit, rather than its specificity. Where an affidavit does not sufficiently specify when the key facts took place, there is no way to determine whether those facts are stale. And, if there is an insufficient indication of when *any* of the criminal activity occurred, the contention that the activity is "ongoing" does not cure the lack of specificity. Vague references to ongoing criminal activity at "some time in the past," do not establish probable cause to search. *Wagner*, 989 F.2d at 75, *quoted in Grubbs*, 547 U.S. at 95 n. 2; *see also United States v. Cooper*, 682 F.2d 114, 116 (6th Cir. 1982) (noting that stale information is different from information that is altogether undated); *Pierson*, 338 A.2d at 573 ("Here, the magistrate could not even make a judgment as to staleness because there was no chronology in the affidavit.").

In his dissent from the denial of en banc consideration in the Court of Appeal, Justice Jennings noted a related error in the analysis adopted by the court. Although the majority placed heavy reliance on the affidavit's use of the term "recently," that term described the time frame in which the informant conveyed information to the affiant, not the time frame in which the informant acquired the pertinent information, which is the inquiry that matters. Pet. App. 115a-18a; *see* LaFave § 3.7(b), at 391 n. 67 ("The time needed is the time of the facts relied upon to establish probable cause, not the time that these facts were conveyed to law enforcement authorities"). In essence, the Court of Appeals made an impermissible "double inference"—that the affiant "recently" received information from an informant and therefore

the informant must also have recently obtained that information. *Rosencranz*, 356 F.2d at 316.

Judge Meyers, dissenting from the Court of Criminal Appeals' decision, also recognized the dangers of relying on inferred dates to establish probable cause—"courts will determine that there is a continuing criminal operation any time officers have more than one encounter or mention of a defendant." Pet. App. 25a. Anticipating that the Court of Criminal Appeals' decision would "open[] the door to a lower standard," Judge Meyers reiterated, "[t]he warrant here did not support a general finding of probable cause since it lacked a time frame, nor did it demonstrate to the magistrate that there was an ongoing criminal operation." Pet. App. 27a.

4. Finally, it is noteworthy that the State did not argue below that, even if probable cause were lacking, the evidence from Mr. Jones's residence should not be suppressed because it was seized in good-faith reliance on the search warrant. *See United States v. Leon*, 468 U.S. 897, 923 (1984). Accordingly, the issue has been waived. *See Bath Iron Works Corp. v. Office of Workers' Comp. Programs*, 506 U.S. 153, 162 n.12 (1993).

In any event, the affidavit supporting the warrant was plainly deficient, and no officer could have had an objectively reasonable belief in the existence of probable cause. A number of courts have found that the *Leon* good faith exception to the exclusionary rule does not apply where, as here, the affiant fails to indicate the date of the information that supported the warrant request. *See, e.g.*, *United States v. Huggins*, 733 F. Supp. 445, 449 (D.D.C. 1990) (suppressing evidence where affidavit did not provide date of con-

trolled purchase because "a reasonably well-trained officer would have known that more was needed"); *United States v. Corrigan*, 809 F. Supp. 567, 568 (M.D. Tenn. 1992) (suppressing evidence where "affiant neglected to indicate the date" officer received the information which formed the basis of his warrant request); *United States v. Turner*, 713 F. Supp. 714, 719 (D. Vt. 1989) (suppressing evidence where "age of the tip could not be determined because the affiant neglected to indicate the date the informant observed the allegedly illegal activity").

Under the circumstances here, the probable cause analysis merges into the good faith analysis. A reasonable officer would understand that a specific temporal reference is necessary to establish probable cause that evidence will be present when the warrant is executed. Where a warrant is as grossly deficient as the one at issue here, there can be no good faith. *See* LaFave § 3.7(b), at 391 n.67 ("When 'the omission of any reference to time is so complete that none can be inferred,' then the affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,' so that the evidence obtained in executing the warrant cannot be admitted under the *Leon* good faith rule.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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