No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

DONTAE CALLEN, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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March 21, 2019

CAPITAL CASE

QUESTIONS PRESENTED

I. Where an affidavit does not support a finding of probable cause for the issuance of a search warrant, does the Fourth Amendment allow a reviewing court, in evaluating whether there was probable cause for the search, to consider information from an affidavit for a separate search that may have been before the magistrate?

II. Additionally, given that a non-unanimous jury recommendation authorized Mr. Callen's death sentence, should this Court hold his petition pending the result in Ramos v. Louisiana, No. 18-5924, 2019 WL 1231752 (U.S. Mar. 18, 2019), which asks whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?

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PETITION FOR WRIT OF CERTIORARI

Dontae Callen respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Callen's convictions and remanding for the trial court to make specific findings of fact concerning two of the aggravating circumstances, Callen v. State, No. CR-13-0099, 2017 WL 1534453 (Ala. Crim. App. Apr. 28, 2017), is attached at Appendix A. The opinion of the Alabama Court of Criminal Appeals affirming Mr. Callen's sentence, Callen v. State, No. CR–13–0099, 2017 WL 3446533 (Ala. Crim. App. Aug. 11, 2017), and that Court's order denying Mr. Callen's application for rehearing on December 8, 2017, are attached at Appendix B. The order of the Alabama Supreme Court denying Mr. Callen's petition for a writ of certiorari, Ex parte Callen, No. 1170219 (Ala. Nov. 16, 2018), is unreported and attached at Appendix C.

JURISDICTION

On April 28, 2017, the Alabama Court of Criminal Appeals affirmed Mr. Callen's convictions, Callen v. State, No. CR-13-0099, 2017 WL 1534453 (Ala. Crim. App. Apr. 28, 2017), and on August 11, 2017, the same court affirmed Mr. Callen's death sentence, Callen v. State, No. CR–13–0099, 2017 WL 3446533 (Ala. Crim. App. Aug. 11, 2017). On December 8, 2017,the Court of Criminal Appeals denied rehearing. On

November 16, 2018, the Alabama Supreme Court denied Mr. Callen's petition for a writ of certiorari. Ex parte Callen, No. 1170219 (Ala. Nov. 16, 2018). On February 6, 2019, Justice Thomas extended the time for filing this petition for a writ of certiorari to March 21, 2019. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution 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.

The Sixth Amendment to the United Stats Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This is a case in which the death penalty has been imposed. On May 27, 2011, Dontae Callen was indicted on three counts of capital murder pursuant to Alabama Code sections 13A-5-40(a)(9),(10),(15), in connection with the deaths of Bernice Kelly, Quortes Kelly, and Aaliyah Budgess. (C. 131.)[1] On July 11, 2013, Mr. Callen was convicted on all counts. (C. 665-67.) The next day, the jury returned an 11-1 recommendation for a sentence of death. (C. 668.) On September 4, 2013, the trial court sentenced Mr. Callen to death. (C. 123.)

A. FACTUAL BACKGROUND

Dontae Callen was born to a mother who suffered from posttraumatic stress disorder, depression, and anxiety as a result of being sexually and physically abused by her father when she was a child. (C. 1046-50.) She had an IQ of 70, struggled to form relationships, and became addicted to drugs. (C. 1048-49; R. 65.)

When Dontae was a young child, his mother repeatedly abandoned him and his siblings. (C. 1001, 1557, 1754; R. 1051-53, 1057, 1076.) She would often just leave Dontae on his grandmother's porch and take off. (R. 1060.) At one point, she told the Department of Human Resources (DHR) that she did not want custody of her children. (R. 65.) When abandoned by his mother, Dontae bounced between the homes of different relatives, who would put him out when they did not have the money to care for him or did not want him around. (R. 1053-55, 1068, 1076-77.) Throughout Dontae's

[1]"C." refers to the clerk's record; "R." refers to the trial record; and "SH." refers to the record of the suppression hearing.

childhood, DHR held 13 hearings to try to figure out where he could live. (R. 65.) During the limited periods when Dontae's mother would allow him to move back in, she or her significant others would physically abuse him and then abandon him again. (C. 1062, 1150.)

Dontae was essentially left to raise himself. (R. 1051-53, 1057.) At different times throughout his childhood, he went without a bed (C. 1316, 1334, 1557), clothes (C. 1001-02), and food (C. 993, 1557). When he was 11 years old, a neighbor called DHR because Dontae was hungry and begging him for food. (C. 993.)

Dontae attended multiple schools, had multiple learning disabilities, and received consistently failing grades. (R. 65-66.) A fifth grade achievement test placed him "in the very low level of academic capability." (R. 53, 55.) At school, "other kids called [him] stupid and a bitch." (R. 64.) At the age of 16, he received an IQ score of 69. (C. 2074; R. 40-41.) He repeated both the tenth and eleventh grades and failed the Alabama graduation test both times he took it. (R. 53-54.) He never read a book cover to cover, did not understand decimals or fractions, could not do long division, and could not write a paper. (R. 63-64.) He also was unable to count by threes (one, four, seven, etc.). (R. 61-62.)

In terms of his mental health, Dontae was diagnosed with "significant depression" at the age of 12. (C. 1026.) He also suffered from posttraumatic stress disorder, severe anxiety disorder, and dissociative disorder but received no treatment. (R. 1088, 1099-1105.) As a result of these disorders, Dontae would slip into a dissociative state when he was being sexually abused, which happened often. (R.

1106.) His 33-year-old cousin, Quortes Kelly, sexually molested him on multiple occasions, including in the early morning hours of October 29, 2010. (C. 597, 602.)

That same morning, the fire department responded to smoke emanating from Dontae's aunt's apartment and found her, Mr. Kelly, and 12-year-old Aaliyah Budgess. (R. 442-53.) Each had been stabbed more than 15 times and died from those wounds. (R. 580, 596, 601, 612, 635, 637.) The police collected evidence from the scene and surrounding areas. (SH. 11-12.) The police also sought and obtained a search warrant for Mr. Callen's residence based on an affidavit consisting of statements by unidentified sources that Mr. Callen had been near the crime scene at some point. (C. 585-86.) They searched Mr. Callen's residence and collected clothes and shoes. (R. 524-27.)

Dontae accompanied his family to the hospital to check on his aunt and cousins. (R. 1061-62.) After he was taken into custody, he told the police that he had recently turned 18 years old, that he had no criminal history, and that he had not finished high school. (C. 1947, 1972, 1976.) He said that he had nothing to do with his relatives' deaths (C. 1947-91), and that another man had been visiting with Quortes Kelly when he left the apartment the night before (C. 1962-63). He also repeatedly attempted to invoke his right to remain silent. (C. 1961, 1967, 1969, 1970, 1971, 1979; Disc 1, 1:17:35.) The police purposefully ignored these attempts and alternately threatened him and suggested that they might help him. (C. 1981, 1983; SH. 46, 49-50.)

When Mr. Callen requested an attorney, the police handcuffed him behind his

back, limited his access to basic needs, and gave him inconsistent and confusing information as to whether he could obtain an attorney. (C. 1996, 2010, 2016.) He was kept in the interrogation room for a total of ten hours, and the police refused to tell him when he would be moved. (C. 2014.) Periodically, the police swabbed Mr. Callen's hands, nails, cheeks, forearm, and ear, cut his hair, and exposed him to an alternate light source. (C. 574, 1999; SH. 52.) The police also told Mr. Callen that he was lucky they had not chopped his head off. (C. 2018-19.)

Mr. Callen eventually gave an inculpatory statement. (C. 2021.) He told the police that he loved his relatives and did not mean to kill them (C. 2025), that it was "like it wasn't me doing it," (C. 2029), and that he could not remember much of what happened (C. 2027, 2028, 2029, 2031, 2033). His little cousin Aaliyah had been like a sister to him, and he had always tried to protect her. (R. 1056, 1059.) Mr. Callen was subsequently charged with capital murder of two or more persons and of a person under the age of 14, as well as capital murder during an arson. (C. 131.)

B. PROCEEDINGS BELOW

Prior to trial, Mr. Callen moved to suppress the items seized from his residence because the search warrant was not based upon sufficient probable cause. (C. 556.) The trial court denied the motion. (C. 102; R. 380, 384.)

At trial, the State presented clothes, shoes, and a pillow case seized from Mr. Callen's residence (C. 793-826; R. 523-29), as well as mittens, knives, a sheet, and a towel found near the scene and a swab from Mr. Callen's ear (C. 768-89; R. 514-23).

The State's forensic scientist testified that there was a high probability that the blood found on various articles of clothing from Mr. Callen's residence was contributed by Quortes Kelly (R. 764-78), and that the blood on one of the knives was contributed by the three victims (R. 761-62). She also testified that there was a high probability that the blood in Mr. Callen's ear was contributed by Mr. Callen and Mr. Kelly. (R. 779-82.) The State also presented the incriminating portion of Mr. Callen's statement to police. (R. 847-48.)

On appeal, Mr. Callen argued that the trial court's failure to suppress the fruits of the search of his residence violated his right to be free from unreasonable searches and seizures. The Alabama Court of Criminal Appeals held that a separate affidavit in support of a different search, which was submitted to the same magistrate, provided sufficient probable cause for the search of the residence. Callen v. State, No. CR-13-0099, 2017 WL 1534453, at *21-22 (Ala. Crim. App. Apr. 28, 2017). The Alabama Supreme Court denied Mr. Callen's petition for writ of certiorari. Ex parte Callen, No. 1170219 (Ala. Nov. 16, 2018).

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO DETERMINE IF AN APPELLATE COURT, WHEN DETERMINING WHETHER PROBABLE CAUSE EXISTED FOR THE ISSUANCE OF A SEARCH WARRANT, MUST RELY ON THE SOLE AFFIDAVIT SUBMITTED IN SUPPORT OF THE SEARCH OR CAN CONSIDER AN AFFIDAVIT SUBMITTED IN SUPPORT OF A DIFFERENT SEARCH.

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures" and requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. To determine whether there is probable cause, a magistrate must decide "whether, given all of the circumstances set forth in the affidavit before him, . . . 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).

At some point during the morning of October 29, 2010, Detective Williams of the Birmingham Police Department submitted an application and affidavit requesting a search warrant for 561 41st Street North in Birmingham, Alabama. (C. 585.) In the affidavit, Detective Williams relayed that investigators confirmed with Natasha Brown that she lived at the aforementioned address, that Dontae Callen lived with her, and that he had changed his clothes that morning. (C. 585.) The following statement in the affidavit was the sole mention of any connection between Mr. Callen and the crime:

> Following interviews with witnesses, Dantay [sic] CALLEN (B/M, DOB: 8/27/92) was indentified [sic] as a possible suspect and was seen by witnesses near the residence prior to the fire.

(C. 585.)

Based on the affidavit, the magistrate issued a search warrant for the residence. (C. 586.) At trial, the prosecution moved to introduce clothes, shoes, and a pillow case seized from the residence. (C. 793-826; R. 523-29.) The defense filed a motion to suppress the clothes seized from the residence because "the Affidavit did not present sufficient probable cause." (C. 556.) The trial court denied the motion (C. 102; R. 380, 384), and the prosecution used these items to connect Mr. Callen to the crime (R. 766-78).

Reviewing courts must examine the totality of the circumstances in determining whether an affidavit adequately supports a finding of probable cause. Gates, 462 U.S. at 238. Highly relevant to this determination are the veracity, reliability, and basis of knowledge of the sources of information in the affidavit. See, e.g., Alabama v. White, 496 U.S. 325, 328 (1990).

Here, Detective Williams's affidavit, which was the only evidence presented by the State in support of a finding of probable cause for the search of the residence, contained no information as to the veracity, reliability, or basis of knowledge of the "witnesses" who identified Mr. Callen as a possible suspect and saw him near the scene of the crime. (C. 585.) The affidavit contained no information about who these sources were, whether they were reliable, or on what their opinions were based. (C. 585.) The affidavit also did not specify when the sources observed Mr. Callen near the scene. (C. 585.) All the affidavit conveyed was that people saw Mr. Callen, a relative of the

victims who lived a few blocks away from them, near the scene at some point prior to the fire. (C. 585.) The affidavit's "mere conclusory statement [gave] the magistrate virtually no basis at all for making a judgment regarding probable cause," and thus the resulting search violated the Fourth Amendment. Gates, 462 U.S. at 239; Aguilar v. Texas, 378 U.S. 108, 114-15 (1964) (finding inadequate officer's statement that "affiants have received reliable information from a credible person and do believe that [drugs] are being kept at the above described premises"), abrogated on other grounds by Gates, 462 U.S. at 230.

The Alabama Court of Criminal Appeals found that a separate affidavit for the collection of biological samples had been presented to the same magistrate prior to issuance of the warrant to search the residence. Callen v. State, No. CR-13-0099, 2017 WL 1534453, at *21 (Ala. Crim. App. Apr. 28, 2017). The lower court found that this affidavit for biological samples stated that Mr. Callen had a red liquid substance in his ear and wounds and scratches on his neck. Id.[2] The lower court held that this information, in combination with the report from unidentified witnesses that Mr.

[2]At 1:50 p.m., the magistrate issued a warrant to Detective Cynthia Morrow for the collection of biological samples from Mr. Callen. (C. 587.) On the warrant, the magistrate noted that she issued a warrant for the collection of biological samples at 11:50 a.m. but then voided it because it contained "unreliable information." (C. 587.) The magistrate also noted that the second warrant relied on the same information as the first warrant - that Mr. Callen had what appeared to be a red liquid substance in his ear and wounds and scratches on his neck - minus the unreliable information. (C. 587.) The original warrant for the collection of biological samples was not presented at the suppression hearing or included in the record, apparently because it was destroyed by the police. (C. 573, 578; R. 379.)

Callen was near the scene of the crime, rose to the level of probable cause to search the residence. Id. at *22.

The lower courts generally agree that "[t]he review of the sufficiency of the evidence supporting probable cause is limited to the information presented in the four corners of the affidavit." United States v. Berry, 565 F.3d 332, 338 (6th Cir. 2009); see also, e.g., United States v. Solomon, 432 F.3d 824, 827 (8th Cir. 2005) (same); United States v. Anderson, 453 F.2d 174, 175 (9th Cir. 1971) (same). However, the lower courts are divided over whether that review must be limited to the affidavit submitted in support of the search or can include additional affidavits submitted in support of other searches or arrests. The better-reasoned view, applied in cases in three federal circuits, is that an affidavit requesting a particular warrant must be evaluated individually to determine whether that affidavit supports a finding a probable cause for issuance of that particular warrant.

In United States v. Frazier, 423 F.3d 526 (6th Cir. 2005), a police officer submitted six separate affidavits in support of his request for warrants for six separate searches. Id. at 530. The affidavits were missing information critical to a finding of probable cause, and the magistrate directed the officer to add the information to each of the affidavits. Id. The officer added the information to the first five affidavits but not to the sixth, and the magistrate issued all six warrants. Id. The Sixth Circuit noted that "a judge's initial probable cause determination is limited to the four corners of the affidavit." Id. at 535. Because the necessary information was not contained in

the sixth affidavit, the warrant issued based on that affidavit did not meet the Fourth Amendment's probable cause requirement. Id. at 533; see also United States v. Cordero-Rosario, 786 F.3d 64, 72 (1st Cir. 2015) (finding neither of two affidavits established probable cause based on analyzing each independently); United States v. Abdul-Ganiu, 480 Fed. Appx. 128, 130 (3d Cir. 2012) (evaluating second affidavit independent of first affidavit where second affidavit failed to incorporate the earlier warrant); but see Sovereign News Co. v. United States, 690 F.2d 569, 575 (6th Cir. 1982) (finding probable cause can "be established by reading related affidavits in conjunction"); United States v. Dudek, 560 F.2d 1288, 1292-93 (6th Cir. 1977) (same).

At the same time, other federal and state courts, joined now by the Alabama court below, have considered all of the affidavits before a magistrate in determining whether probable cause existed for the issuance of a particular warrant. In Kaiser v. Lief, 874 F.2d 732 (10th Cir. 1989), the magistrate was presented with a complaint in support of a search warrant and a complaint in support of an arrest warrant. Id. at 733. While holding that the complaint in support of the search warrant established probable cause, the Tenth Circuit also stated that "the magistrate could rely on the facts contained in the complaint on which the arrest warrant was based in making the determination on probable cause to issue the search warrant." Id. at 735; see also United States v. Fogarty, 663 F.2d 928, 930 (9th Cir. 1981) (noting that magistrate could rely on arrest warrant affidavit for facts necessary to constitute probable cause for search warrant); United States v. Serao, 367 F.2d 347, 350 (2d Cir. 1966) (holding

that commissioner could consider information from all affidavits before him as support for probable cause to search apartment), remanded for further consideration on other grounds by Piccioli v. United States, 390 U.S. 202 (1968); People v. Scott, 227 P.3d 894, 897 (Colo. 2010) (finding that affidavit for initial search of residence could be considered in combination with second affidavit for subsequent search in determining whether probable cause existed for subsequent search).

In weighing whether to issue a search warrant, a magistrate considers the information presented in support of a finding of probable cause for that particular search. See, e.g., United States v. Luong, 470 F.3d 898, 904 (9th Cir. 2006) ("[A]ll data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath.") (citation omitted). Presuming the magistrate considered information presented in support of warrants for other searches and arrests undermines the strong protection from unreasonable searches written into the Constitution. See Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (noting that changes since authoring of fundamental constitutional concepts "have made the values served by the Fourth Amendment more, not less, important").

Currently, if a magistrate is presented with an affidavit that does not support a finding of probable cause but is also presented with a second affidavit for a separate warrant that contains additional information, the constitutional consequences for the defendant turn on where he or she happens to be tried. This Court should grant

certiorari to address this issue and resolve the split in the courts below.

II. THIS COURT SHOULD HOLD THIS PETITION PENDING THE RESULT IN RAMOS V. LOUISIANA, WHICH COULD IMPLICATE THE CONSTITUTIONALITY OF THE NON-UNANIMOUS JURY VERDICT THAT AUTHORIZED MR. CALLEN'S DEATH SENTENCE.

Mr. Callen was sentenced to death based on the jury's 11 to 1 verdict. (C. 123, 668.) This Court recently granted a certiorari in Ramos v. Louisiana to determine "[w]hether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict." Petition for Writ of Certiorari, Ramos v. Louisiana, No. 18-5924, 2019 WL 1231752 (Sept. 7, 2018).

In State v. Ramos, 231 So. 3d 44 (La. Ct. App. 2017), the Louisiana Fourth Circuit Court of Appeal relied upon Apodaca v. Oregon, 406 U.S. 404 (1972), in holding that a non-unanimous guilty verdict in second-degree murder trial was constitutional. Ramos, 231 So. 3d at 53-54. In the controlling opinion in Apodaca, Justice Powell recognized that "unanimity is one of the indispensable features of federal jury trial," Johnson v. Louisiana, 406 U.S. 366, 369 (1972) (Powell, J., concurring in judgment), but held that this feature was not required in state criminal trials, id. at 373.

Should this Court grant relief to the petitioner in Ramos, this will likely have implications for the constitutionality of the jury's non-unanimous vote to sentence Mr. Callen to death. See, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); see also Hurst v. State, 202

So. 3d 40, 59 (Fla. 2016) (finding non-unanimous jury recommendations of death violate Sixth and Eighth Amendments); id. at 61 ("Florida is one of only three [states] that does not require a unanimous jury recommendation for death."). Unless this Court holds Mr. Callen's petition pending the decision in Ramos, Mr. Callen will face significant procedural obstacles to challenging the constitutionality of the non-unanimous jury verdict in his case based on that decision. See Green v. Fisher, 565 U.S. 34, 38 (2011) (holding that "clearly established Federal law" limited to this Court's precedents at time of state court's decision on direct appeal); see also id. at 41 (noting that petitioner missed "two obvious means of asserting his claim," including filing petition for writ of certiorari requesting remand in light of intervening decision).

Mr. Callen therefore requests that this Court hold this petition pending the decision in Ramos and then grant, vacate, and remand for consideration of that decision by the Alabama courts.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully Submitted,

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