No. _____

IN THE
Supreme Court of the United States

Tyrone Dexter Christian,
Petitioner,
v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari
To the Sixth Circuit Court of Appeals

Petition for a Writ of Certiorari

Lucille A. Jewel*
Wade V. Davies
UNIVERSITY OF TENNESSEE
COLLEGE OF LAW
APPELLATE LITIGATION CLINIC
1505 W. Cumberland Ave.
Knoxville, TN 37996

Counsel for Appellant

*Counsel of Record

QUESTIONS PRESENTED

In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court sanctioned a "totality of the circumstances" approach for evaluating the factors relevant for determining probable cause. Several federal courts of appeals have concluded that this Court's totality of the circumstances test requires analysis of each individual probable cause factor followed by an evaluation of the factors as a whole. In *United States v. Leon*, 468 U.S. 897 (1984), this Court held that while the exclusionary rule should not apply to bar evidence when an officer relies in good-faith on a search warrant, it should apply to bar evidence when the warrant is objectively devoid of facts supporting probable cause.

The questions presented for review are:

I. Whether the lower court erred in finding probable cause to search petitioner's home when the court viewed the search warrant affidavit as a whole and failed to individually analyze the weight of each factor.

II. Whether the lower court erred when the court found that the good-faith exception to the exclusionary rule should apply to permit the introduction of evidence seized from petitioner's home, even though the search warrant affidavit was overly vague and conclusory and failed to provide a minimal connection between the alleged criminal activity and petitioner's home.

LIST OF PARTIES

The petitioner is Tyrone Dexter Christian, the defendant and defendant-appellant in the court below. The respondent is the United States of America, the plaintiff and plaintiff-appellee in the court below.

RELATED CASES

United States v. Christian, 1:15-cr-00172, U.S. District Court for the Western District of Michigan. Judgment entered July 11, 2017.

United States v. Christian, No. 17-1799, U.S. Court of Appeals for the Sixth Circuit. Judgment entered May 31, 2019.

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INTRODUCTION

Law enforcement obtained a warrant to search petitioner Christian's home after finding drugs in the car of a non-resident who was earlier seen near the home. The warrant affidavit (the Affidavit) listed information about the drugs found in the non-resident's car along with other old and uncorroborated information about Christian. This Court should grant certiorari because in finding that there was probable cause to search Christian's home, a divided Sixth Circuit departed from well-settled Fourth Amendment principles set forth by this Court. The court's method of analyzing whether the warrant was supported by probable cause—looking at the document from a bird's-eye view without assessing each piece of information first—conflicts with the probable cause decisions of this Court and with other federal courts of appeals, which mandate that a rational, fact-based process be used to determine the existence of a nexus between the place to be searched and the criminal activity alleged.

The Sixth Circuit's flawed probable cause analysis also produced deep errors in the court's application of the exclusionary rule. The exclusionary rule should apply under the circumstances of this case and others like it. The majority decision creates a dangerous precedent likely to green-light unreasonable home searches based on flimsy information, particularly in neighborhoods where crime is prevalent. This Court should grant review to correct the lower court's substantial errors, which raise serious Fourth Amendment issues.

OPINIONS BELOW

The Sixth Circuit's panel opinion was issued on June 26, 2018 and was published at 893 F.3d 846. App. at 1. The Sixth Circuit's September 17, 2018 order to vacate the panel decision and rehear the case en banc was published at 904 F.3d 421. App. At 45. The Sixth Circuit's May 31, 2019 decision upon rehearing en banc was published at 925 F.3d 305. App. at 47.

JURISDICTION

The Sixth Circuit's decision upon rehearing en banc was entered and filed on May 31, 2019. App. at 47. This Court has jurisdiction under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution reads:

> 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.

U.S. Const. amend. IV.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The Investigation of Non-Resident Rueben Thomas

The Grand Rapids police became interested in searching Christian's home after observing non-resident Rueben Thomas near Christian's home on the afternoon of September 3, 2014. Trial Tr. Vol. I at PageID 1126–27, 1131–32, ECF No. 152. That day, the police tracked Thomas's vehicle from approximately 1:33 p.m. until approximately 5:30 p.m., observing him as he drove from Grandville Avenue to a grocery store, two drug stores, and back. *Id.* at 1131–36. At 5:30 p.m., officers observed Thomas drive away from Grandville Avenue and enter Interstate 96, heading west. *Id.* at 1136. To further the investigation, the surveilling police officers requested other nearby officers to try and stop Thomas's car for a traffic infraction. *Id.* A police officer operating out of Hudsonville, Michigan, pulled Thomas over for a cracked windshield. *Id.* at 1144–45. During that stop, the police searched Thomas's vehicle and found heroin behind Thomas's passenger seat. *Id.* at 1148–49; Search Warrant Aff., App. at 96. Hudsonville, where Thomas was arrested, is approximately twelve miles away from Grandville Avenue in Grand Rapids.[1]

[1] Christian respectfully requests that, pursuant to Fed. R. Evid. 201, this Court take judicial notice that the center of Hudsonville, Michigan is a 12.1 mile (or, per Google Maps estimate, a 17-minute) drive from Christian's home. *See* Driving Directions from 618 Grandville Avenue SW, Grand Rapids, Michigan to Hudsonville, Michigan, http://maps.google.com (follow "Directions" hyperlink; then search starting point field for 618 Grandville Avenue SW and search destination field for Hudsonville, Michigan).

The Warrant to Search Christian's Home

After arresting Thomas, Grand Rapids police focused their investigation on the inside of Christian's home, located at 618 Grandville Avenue, the street where Thomas was observed. Warrant Aff., App. at 93-98. On the evening of September 3, 2014, Officer Thomas Bush submitted an affidavit in support of a search warrant seeking to uncover controlled substances, records, and firearms inside the home. *Id.* The Affidavit was four-and-a-half pages long, but only one page contained information specific to Christian. *Id.* at 95-96.

The Affidavit recounted that on September 3:

> Surveillance was established at 618 Grandville Avenue. Surveillance observed a suspect, later determined to be Rueben Thomas walk away from the area of 618 Grandville Avenue and leave the area in a vehicle. Surveillance was continued on the vehicle being driven by Rueben Tomas as a traffic stop was conducted for a civil infraction. During the traffic stop of Rueben Thomas, approximately 20 grams of heroin was seized from the vehicle and Rueben Thomas was the only occupant of the vehicle. In a post Miranda statement, Rueben Thomas admitted that he had recently been at an address on Grandville Avenue in the City of Grand Rapids but denied being at 618 Grandville Avenue contrary to observations of the law enforcement officers.

App. at 96. The Affidavit then included some remote information on Christian, which from the most to the least remote included the following:

- Past incidents (drug convictions and home searches) from Christian's criminal history, occurring over a nineteen-year period, the most recent being an arrest four years earlier. *Id.* at 95–96.

- Nine-month old, non-specific "information on several drug traffickers, including Tyrone Christian, . . . including names, nicknames, phone numbers, and residences" from an informant's tip, stated to be "credible and reliable," but containing no factual detail for that credibility determination. *Id.* at 96.
- An eight-month-old controlled drug purchase that failed to indicate the quantity, quality, or price of the drugs purchased. *Id.*
- Four- and five-month-old information from unknown subjects stating that "Tyrone Christian is a large-scale drug dealer" and that these "subjects" had "purchased large quantities of heroin and crack cocaine [from Christian's home] in the last four to five months." *Id.*

Early on September 4, police executed the search warrant on Christian's home. Tr. Vol. I at PageID 1171–72, ECF No. 152. The search uncovered contraband drugs and firearms. Based on the fruits of the search, on September 8, the police arrested Christian and a federal grand jury indicted him on September 9, 2015.

Christian's Motion to Suppress the Search of his Home

Before Christian's trial in the United States District Court for the Western District of Michigan, his counsel filed a motion to suppress the evidence found in his home on the basis that there was no probable cause for the search. *See United States v. Christian*, 893 F.3d 846, 851 (6th Cir. 2018). District Court Judge Robert Jonker denied Christian's motion. *Id.* At the conclusion of his trial, Christian was convicted on all counts. *Id.* On July 10, 2017, Christian was sentenced to 210

months in prison and six years of supervised release. *See* Judgment at PageID 1799, 1800, ECF No. 168.

Proceedings Below

On direct appeal, Christian challenged the district court's denial of his motion to suppress evidence as well as its improper admission of hearsay testimony.[2] On June 26, 2018, a panel majority of the Sixth Circuit granted Christian's appeal, holding that probable cause to search his home did not exist because the supporting Affidavit failed to establish a nexus between Christian's home and drug activity. *United States v. Christian*, 893 F.3d 846, 854–65 (6th Cir. 2018) (hereinafter "*Christian I*"), *vacated by United States v. Christian*, 925 F.3d 305 (6th Cir. 2019) (reh'g en banc) (hereinafter "*Christian II*). The majority also held that the Affidavit's glaring deficiencies rendered it a "bare-bones" affidavit to which the *Leon* good-faith exception to the exclusionary rule did not apply. *Id.* at 867–68. Judge Rogers dissented, opining that there was probable cause; that the *Leon* good-faith exception applied; and that the hearsay evidence was harmless. *Id.* at 871–77.

On September 17, 2018, a majority of the Sixth Circuit's judges in regular service voted to rehear this case en banc. 904 F.3d 421 (6th Cir. 2018). Both sides filed supplemental briefs; oral arguments were held on March 20, 2019. On May 31,

[2] Respondent did not make the hearsay issue part of its en banc petition for a rehearing but did request that the court make a harmfulness ruling on the issue. The court below did, in fact, find that the hearsay error was not harmful. If this Court orders the Sixth Circuit to review its en banc decision, then Christian respectfully requests that the harmfulness issue be revisited as well.

2019, in an opinion authored by Judge Rogers, ten Sixth Circuit judges held that there was probable cause to search Christian's home and that, in addition, the good-faith exception to the exclusionary rule should apply.[3] In the opinion, the majority decided that the language in the Affidavit concerning Rueben Thomas and 618 Grandville Avenue was sufficient to establish a connection to Christian's home. *Christian II*, 925 F.3d at 313. The majority held that each of the Affidavit's other informational points, while perhaps not "suffic[ient] to establish probable cause on its own," still established probable cause because "the whole is often greater than the sum of its parts." *Id.* at 311.

Judge Gilman, joined by five other Sixth Circuit judges, authored a dissenting opinion. The dissent would have found that there was not probable cause because the Affidavit failed to "provide any 'particularized facts' connecting [Christian's home] to drug activity at the time the search warrant was executed." *Id.* at 319, 333 (Gilman, J., dissenting). Acknowledging this Court's decision in *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018), the dissent analyzed probable cause by first looking at each point of information in the Affidavit and then considering each piece of evidence together. *Christian II,* 925 F.3d at 320, 330–31. Using this analytic method, the dissent determined that the affidavit failed to

[3] Judge White declined to find that there was probable cause to search Christian's home but concurred in the overall decision to affirm the district court on the basis that the good-faith exception to the exclusionary rule applied. *Christian II*, 925 F.3d at 319 (White, J., concurring). Judge Thapar, joined by Judges Nalbandian, Murphy, and Readler, filed a concurring opinion opining that courts should be able to look beyond the four corners of a warrant affidavit and inquire into the observations and knowledge of the investigating officers to determine whether the *Leon* good-faith exception should apply. *Id.* at 314-319 (Thapar, J., concurring).

"establish anything more than a speculative connection between drug activity and the Residence at the time of the search." *Id.* at 330. The dissent also determined that the *Leon* good-faith exception to the exclusionary rule should not apply because the Affidavit's deficiencies were so glaring that that no reasonable police officer could rely on the Affidavit to conduct the search of petitioner's home. *Christian II*, 925 F.3d at 332–33 (Gilman, J., dissenting). The dissent noted that applying the exclusionary rule would incentivize police officers to not only be more careful in drafting warrant affidavits, but to also perform additional investigatory police-work rather than relying on stale, vague, and unreliable information to obtain entry into a home. *Id.* at 335. The dissent concluded its discussion of the *Leon* good-faith exception by pointing out that "[i]n the present case . . . the officers could have and should have done a lot more." *Id.*

REASONS FOR GRANTING THE PETITION/ARGUMENT

I. This Court should review this case because, in concluding that there was probable cause to search Christian's home, the court below markedly departed from settled Fourth Amendment principles.

The lower court's decision will increase the number of constitutionally troubling home searches that law enforcement executes. By placing too great of an emphasis on the *quantity* of information relevant for determining probable cause, the lower court's decision instructs law enforcement officers that there is little need to engage with the *quality* of the information included in a search warrant affidavit. The decision authorizes law enforcement to disregard the constitutional rights of the accused by failing to ensure that there is a connection between a home and

alleged criminal activity before that home can be entered. Because of this palpable ex ante impact, this Court should review this case.

The Fourth Amendment states that "no warrants shall issue, but upon probable cause, supported by oath or affirmation." U.S. Const. amend. IV. The "'chief evil' deterred by the Fourth Amendment is the physical invasion of the home." *Payton v. New York*, 445 U.S. 573, 585 (1980). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). That the home should be protected from arbitrary government intrusion dates back to the English common law, where any person's home was considered a "castle" that the King could not enter. *Miller v. United States*, 357 U.S. 301, 307 (1958) (quoting William Pitt, Earl of Chatham, in a 1763 speech).

A magistrate initially determines probable cause based on the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983). When determining whether the totality of the circumstances in an affidavit establishes probable cause, reviewing courts look to whether the magistrate had a "substantial basis for determining the existence of probable cause." *Gates*, 462 U.S. at 239. The substantial basis standard requires facts connected both in time and place to the alleged criminal activity. *See Sgro v. United States*, 287 U.S. 206, 211 (1932). A magistrate's determination of probable cause "should be paid great deference," *Gates*, 462 U.S. at 236, but that deferential review "is not boundless." *United States*

v. Leon, 468 U.S. 897, 914 (1984). When the evidence, viewed as a whole, does not support a substantial basis for probable cause, the magistrate's determination will not be upheld. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984).

The crux of the Fourth Amendment is that a government search must be reasonable. *See Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 539 (1967) ("Reasonableness is . . . the ultimate standard" for evaluating a Fourth Amendment claim); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (Fourth Amendment analysis requires inquiry into the "reasonableness of a particular search or seizure in light of the particular circumstances"). Reasonableness is synonymous with both "constitutionality and a process of rational analysis." *See* Ronald J. Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. Ill. L. Forum 763, 763. Fourth Amendment analysis looks for the existence of "specific and articulable facts," "rational inferences," and applies an "objective standard" that asks "would *the facts* available to the officer . . . warrant a reasonable caution in the belief that the action taken was appropriate?" *Terry*, 392 U.S. at 21–22 (emphasis added, internal citations and quotation marks omitted). While probable cause analysis should be "fluid," *Florida v. Harris*, 568 U.S. 237, 244 (2013), as well as "commonsense" and "non-technical," *Gates*, 462 U.S. at 235–36, this does not change the requirement that a rational process should be applied to determine if there are *facts* to support a determination that criminal activity is occurring in the home at the time of the search. *See Terry*, 392 U.S. at 21–22; *see also Navarette v. California*, 572 U.S. 393 (2014) (In the context of reasonable suspicion, one step below probable

cause, there must be a "particularized and objective basis" that criminal activity is occurring).

The court below departed from these established probable cause principles in two ways. First, the lower court's method of analyzing whether the warrant was based on probable cause—looking at the document from a bird's-eye view without assessing each piece of information first—fails to support a fully rational process for determining whether there was a substantial basis for the search. Second, the majority's holding departed from this Court's mandated requirement that there be a nexus—based on factual, reliable, and current information—between the place to be searched and the alleged criminal activity. In the future, the lower court's decision will authorize invasive home searches based on intuition and instinct rather than rational and factual analysis, which is the proper constitutional process. This Court should grant review to correct this troublesome course.

A. This Court should grant review because the lower court analyzed the search warrant as a whole without assessing the weight of each factor first, an approach that conflicts with this Court's decision in *Illinois v. Gates* as well as other federal courts of appeals.

Viewing an affidavit as a whole without individually assessing each factor conflicts with this Court's decision in *Illinois v. Gates*. Prior *to Illinois v. Gates*, some courts relied on *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), to hold that basis of knowledge and reliability/veracity were "analytically severable" elements, meaning that the absence of one element would prevent a piece of information from being considered in the probable cause calculus. *See Gates*, 462 U.S. at 225–27, 230 n.5. After *Gates*, it is no longer required

that each piece of information in an affidavit contain both a (1) basis of knowledge and (2) indicia of reliability/veracity. *Id.* The totality of the circumstances test adopted in *Gates* allows information that is weak or absent in one area to still be considered in the calculus if it is strong in another area. The *Gates* test also allows a piece of information, containing sufficient indicia of reliability/veracity or basis of knowledge, to bolster information lacking these indicia. In order to perform this analysis, *Gates* requires an inquiry into the weight of each piece of information. The lower court's analysis, which did not assess each factor relevant for the determination of probable cause, conflicts with the essence of this Court's decision in *Gates*.

The decision below is also problematic because it allows independently weak pieces of information, each carrying little basis of knowledge or reliability/veracity, to accomplish a bolstering effect by being considered *in toto*. *Gates*, however, was intended to allow a *stronger* piece of information to bolster *weaker* information. In *Gates*, law enforcement bolstered an anonymous, unverified tip that defendants were engaging in drug trafficking with boots-on-the-ground surveillance, which corroborated the information in the anonymous tip. *Gates,* 462 U.S. at 225–27. *Gates* does not support the proposition that a combination of very weak pieces of information can add up to more than their weight.

The en banc decision also conflicts with the decisions of other federal courts of appeal, which agree that the totality of the circumstances test should include two steps—examining each factor individually and then together as a whole. *See United*

States v. Valenzuela, 365 F.3d 892, 897 (10th Cir. 2004) ("[I]n assessing the totality of the circumstances, a reviewing court 'must examine the facts individually in their context to determine whether rational inferences can be drawn from them' that support a probable cause determination.") (internal citations omitted); *United States v. Rodriguez-Escalera*, 884 F.3d 661, 668 (7th Cir. 2018) (citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018)) ("[T]he totality of the circumstances test does not bar courts from discussing factors separately."); s*ee also United States v. Dion*, 859 F.3d 114, 125 (1st Cir. 2017) (In analyzing individual police observations giving rise to probable cause, the court analyzed each point of information individually while being "mindful of the totality of the circumstances."); *United States v. Myers*, 308 F.3d 251, 260 (3d Cir. 2002) (holding that a totality of the circumstances approach requires a court to analyze the facts concerning probable cause individually in their "proper context."). In applying the totality of the circumstances test, courts may not "arrive at probable cause simply by *piling hunch upon hunch*." *Valenzuela*, 365 F.3d at 897 (emphasis added).

The court below incorrectly relied on *District of Columbia v. Wesby* to support its position that taking a summary view of an affidavit, without inquiring into the weight and credibility of the affidavit's individual ingredients, is the proper method for evaluating probable cause. *Christian II*, 925 F.3d at 311. In *Wesby*, this Court reversed a D.C. Circuit panel and found that District of Columbia police had probable cause to arrest individuals for unlawful entry. *Wesby*, 138 S. Ct. at 586. This Court criticized the panel decision for viewing each fact "in isolation rather

than as a factor in the totality of the circumstances" and for dismissing "any circumstances . . . susceptible of innocent explanation." *Id.* at 588. This Court reiterated that the totality of the circumstances test "precludes . . . [a] divide and conquer analysis." *Wesby*, 138 S. Ct. at 588 (citing *United States v. Arvizu*, 534 U.S. 266, 274 (2002)).

However, the *Wesby* Circuit Court panel employed an approach that was drastically different from that employed by the panel majority and en banc dissent here. A reading of the *Wesby* Circuit Court decision reveals that the D.C. Circuit Court panel did not consider all of the facts and circumstances encountered by the police at the time of the arrests. *See Wesby v. District of Columbia*, 765 F.3d 13, 19–24 (D.C. Cir. 2014), *rev'd by District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). In fact, the *Wesby* Circuit Court panel dismissed entire facts from the mix, without ever returning to them again. *See id.* at 20, 23. Similar to this Court's decision in Wesby, in *Arvizu*, this Court overruled the Ninth Circuit because it individually considered, then rejected altogether, several factors relevant for reasonable suspicion without considering the factors together as a whole. *See United States v. Arvizu*, 232 F.3d 1241, 1251 (9th Cir. 2000), *rev'd and remanded*, 534 U.S. 266 (2002). In contrast, in this case, the panel majority and the en banc dissent considered each and every piece of information in the Affidavit, assessing each factor individually, then viewing some of the factors in tandem, and then analyzing them together as a whole. *See Christian I*, 893 F.3d at 863–65; *Christian II*, 925 F.3d at 320–31 (Gilman, J., dissenting).

In this case, the panel majority and the en banc dissent employed the correct approach. The en banc majority correctly noted that "not all search warrant affidavits include the same ingredients," and that is the "mix" that is important, *Christian II*, 925 F.3d at 312 (quoting *United States v. Hines*, 885 F.3d 919 (6th Cir. 2018)). But in order to consider the mix of ingredients, one must first determine what those ingredients are. The en banc majority erred by simplistically categorizing the rest of the information in the Affidavit as "relevant data points" without looking into the substance of each point. *Id.* at 311. It was error to conclude that probable cause existed from a distant vantage point, without evaluating whether the mix ingredients contained a factual basis, whether the ingredients could be considered reliable, and whether the ingredients were connected in time to the search.

In this case, police officers saw a third-party suspect, later found in possession of drugs, near Christian's home. This vague information gave rise to a hunch that drugs would be found in Christian's home. Law enforcement did not seek to corroborate the hunch with additional police surveillance, however. Instead, they clawed back into Christian's history to cobble together bits and pieces of low-value information to establish probable cause. The *Gates* totality of the circumstances test does not authorize this kind of bootstrapping approach for establishing probable cause.

Prematurely jumping ahead to a large-scale view of probable cause carries the risk that searches will be authorized based on a series of hunches and

suspicions that each carry no weight, jeopardizing the entrenched principle that a search must be reasonable and must be founded on the facts. This court's totality of the circumstances test requires reviewing courts to first look at each factor in context and then consider them in a holistic fashion to determine if probable cause is present. The en banc majority, by skipping an important step in the analytic process, has decided the case in a way that conflicts with this Court's precedent as well as the precedents of other federal courts of appeals. These conflicts present an important Fourth Amendment issue that should be resolved by this Court.

B. This Court should grant review because the decision below, which found probable cause to search a home based on vague, conclusory, and old information, directly conflicts with this Court's Fourth Amendment precedents.

In conflict with decisions of this Court, the lower court concluded that there was probable cause even though there was not an adequate connection, or nexus, between Christian's home and the alleged criminal activity. Review is warranted because, by giving such short shrift to the nexus requirement, the lower court's holding drastically hollows out the Fourth Amendment's substance. Before law enforcement can enter a citizen's home, there must be a nexus between the place to be searched and the alleged criminal activity. And, that nexus must be based on factual, reliable, and timely information. *See Md. Penitentiary Warden v. Hayden*, 387 U.S. 294, 307 (1967) (linking "nexus" to the probability that evidence will be found in a particular place); *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) ("Probable cause has come to mean more than bare suspicion. . . [It] exists where the facts and circumstances . . . [come from] reasonably trustworthy information . . .

and warrant a man of reasonable caution in the belief that an offense has been or is being committed."); *see also Illinois v. Gates*, 462 U.S. at 230 (holding that "veracity, reliability, and basis of knowledge" still remain "highly relevant" under the totality of the circumstances test for probable cause); *Sgro v. United States*, 287 U.S. at 210 (1932) ("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."). Without a nexus requirement, home searches would be transformed into the type of open-ended searches favored by the British authorities in the pre-revolutionary era, the exact type of searches the Fourth Amendment was designed to prohibit. *See* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1369–1371 (1983).

By concluding that probable cause existed to search Christian's home, primarily because a third party was earlier seen near the home and was later found in possession of drugs (but with no stated connection to Christian), the lower court eviscerated the Fourth Amendment's nexus requirement. The Affidavit lacked any information that the magistrate could rely on to find probable cause. There was no thread to connect Christian's home to the drugs found in Thomas's car, and no connection between Thomas and Christian. Even if Thomas had been on Christian's property, there was nothing in the Affidavit to connect those drugs to the inside of Christian's home—which was twelve miles away from where Thomas was detained. The other information presented to the magistrate in the affidavit was either

unreliable or fatally points too far back into the past. Here, there were informational points in the Affidavit, but each point represented an impermissible hunch or suspicion—rather than facts. As the dissenting opinion pointed out, even when combined together, these hunches failed to add up to probable cause. *Christian II*, 925 F.3d at 329–332 (Gilman, J., dissenting).

The lower court's nexus error was enabled because, by not evaluating each piece of information in the Affidavit individually before undertaking a holistic analysis, the lower court stepped over the substantive factors that this Court (and federal courts of appeals) have enshrined into probable cause analysis. If the standard is to broadly view all factors for a general sense of probability without *any* individual analysis, then it is entirely possible that mere hunches can result in probable cause if they are plentiful enough. Even though probable cause is not a high bar, there must be more than a mere suspicion or hunch to justify a search, particularly a search of a home. *See Arvizu*, 534 U.S. at 274. Because a hunch is insufficient to establish reasonable suspicion for a *Terry* stop, then *a fortiori*, a hunch (or series of hunches) is not sufficient to establish probable cause. T*erry v. Ohio*, 392 U.S. 1, 27 (1968).

The lower court's decision will negatively impact future Fourth Amendment jurisprudence because it encourages a finding of probable cause based on instinct and intuition rather than logical reasoning standards. Although probable cause is a lenient standard, it must still be grounded in a rational analysis of the facts. The lower court's decision will authorize future home searches based on tenuous

connections often present in high-crime neighborhoods (e.g., homes that have criminal histories and crimes committed by individuals seen in the neighborhood). Accordingly, the majority decision creates a troubling precedent likely to make residents of high-crime neighborhoods targets for unreasonable home searches. This Court should grant review to correct the lower court's error.

II. This Court should grant review because the lower court's decision—allowing the admission of seized evidence when the warrant affidavit could not have been reasonably relied upon to establish probable cause—critically conflicts with this Court's past decisions.

A. The lower court's undue expansion of the exclusionary rule's good-faith exception conflicts with this Court's decision in *United States v. Leon*.

The unnecessarily large lens that the lower court used to evaluate the Affidavit produced a cascade effect, infecting the analysis of whether the exclusionary rule should apply in this case. Not evaluating each factor to assess its factual basis, reliability, and timeliness produced the faulty conclusion that there was some connection between ongoing criminal activity and Christian's home. This conclusion is not rational, however, when the lens is first focused on each piece of information in the Affidavit before widening it to view the whole. Further, it is not unreasonable to ask police officers to look (however briefly) at each piece of information in an affidavit to check for probable cause.

The purpose of the *Leon* exception to the exclusionary rule is to prevent suppression of evidence when suppression would not deter police misconduct. *United States v. Leon*, 468 U.S. at 920–21. If an officer is acting in objective good-

faith, executing a search on the belief that a warrant is valid, then the exclusionary rule's deterrent purpose would not be achieved. *Id.* at 921. Accordingly, the good-faith exception only applies to save the fruits of unlawful searches when the officer's reliance on a defective warrant is "objectively reasonable." *Id.* at 926. A warrant may be objectively unreasonable if it is based on false statements, a magistrate's impartial rubber stamp, a facially deficient warrant or, as is the case here, when an affidavit "is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable." *Id.* at 923. An objectively unreasonable affidavit has become known as a "bare-bones" affidavit. *Id.*

"[G]ood faith is not a magic lamp for police officers to rub whenever they find themselves in trouble." *United States v. Zimmerman*, 277 F.3d 426, 438 (3d Cir. 2002) (quoting *United States v. Reilly*, 76 F.3d 1271, 1280 (2d Cir. 1996)). Although the determination of the good-faith exception's applicability involves "a less demanding inquiry" than an inquiry into the existence of probable cause, it nonetheless "requires examination of the affidavit for particularized facts that indicate veracity, reliability, and basis of knowledge and go beyond bare conclusions and suppositions." *United States v. McPhearson,* 469 F.3d 518, 526 (6th Cir. 2006). The standard for the good-faith exception is permissive, but there must be "some modicum" that connects criminal activity to the place to be searched. *United States v. Tucker*, No. 17-3503, 2018 WL 3752492, at *5 (6th Cir. 2018). And, "not every iota of evidence qualifies as a modicum." *Id.*

Here, the lower court greatly expanded *Leon* beyond its original intent and made it disproportionately difficult to apply the exclusionary rule's protections in a case, like this one, where simple math makes it clear that probable cause does not exist. *See Leon*, 468 U.S. at 923. The lower court's decision will authorize future investigators to cobble together unreliable, old, and disconnected information, obtain a warrant to perform an invasive home search, and have the search upheld as long as the affidavit contains informational text. The decision discourages inquiry into the substance of an affidavit and encourages fact-finders to rely too heavily on the quantity of text, notwithstanding the shoddiness of the information's quality.

Leon made it clear that the exclusionary rule should still apply toward affidavits that are objectively unreasonable. 468 U.S. at 923. Even under *Leon's* permissive standard for evaluating probable cause in the context of officer good-faith, the Affidavit's dearth of factual, reliable, and timely information vitiates the reasonable reliance necessary to show good faith. The logic of the decision below, which would admit evidence as long as the search warrant affidavit contained a sufficient quantity of information (regardless of quality), makes it virtually impossible to exclude evidence obtained in an objectively unreasonable fashion. Because the lower court's holding directly conflicts with *Leon*, it should be reviewed.

B. The lower court's decision conflicts with core premises of the exclusionary rule—to provide consequences for constitutional violations and to encourage law enforcement to incorporate the rights of the accused into their investigatory procedures.

The lower court's expansion of *Leon* negates the core principles that animate the exclusionary rule—that there should be serious consequences for constitutional violations and police officers should be incentivized to incorporate a concern for the rights of the accused into their investigatory procedures. Since 1914, federal courts have suppressed evidence if law enforcement obtained that evidence illegally. *See Weeks v. United States*, 232 U.S. 393, 398 (1914). The exclusionary rule operates on the theory that if the government is able to use unconstitutionally obtained evidence against the accused at trial, then the Fourth Amendment "is of no value." *Mapp v. Ohio,* 367 U.S. 643, 648 (1961) (quoting *Weeks*, 232 U.S. at 393). By demonstrating that "society attaches serious consequences to violation of constitutional rights," the exclusionary rule incentivizes police officers to "incorporate Fourth Amendment ideals into their value system." *Stone v. Powell*, 428 U.S. 465, 492 (1976). Courts applying the exclusionary rule "hope to instill . . . a greater degree of care toward the rights of an accused" in officers conducting future investigations. *United States v. Leon*, 468 U.S. at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)). A concern arose, however, as to the "substantial social costs exacted by the exclusionary rule" when its application allows "some guilty defendants [to] go free." *Id.* at 907. Accordingly, in *Leon*, this Court authorized an exception to the exclusionary rule where the cost of suppression

(hampering the prosecution of guilty defendants) outweighs the benefit (deterring of police misconduct). *Id.* at 913.

However, the good-faith exception, as the name implies, is an *exception,* meant to be applied in instances where "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921. The exception was not intended to be a refuge for officers every time they are confronted with a Fourth Amendment violation; rather, the exception is appropriately reserved only for those violations where there is "nothing more that [the officer] 'could have or should have done under the[ ] circumstances to be sure his search would be legal.'" *United States v. McClain*, 444 F.3d 556, 566 (6th Cir. 2006) (quoting *United States v. Thomas*, 757 F.2d 1359, 1368 (2d Cir. 1985)). The exception is not available for police misconduct that can be categorized as systemically or grossly negligent or evincing a reckless disregard for Fourth Amendment principles. See *Leon*, 468 U.S. at 919; *Herring v. United States*, 555 U.S. 135, 144–45, 147 (2009). In evaluating the good-faith exception, "all of the circumstances . . . can be considered." *Leon*, 468 U.S. at 923 n.23.

In cases like this one, the exclusionary rule's deterrence benefit outweighs its cost. As the dissenting opinion noted, applying the exclusionary rule would incentivize officers to use credible and current information in their application to search homes and disincentivize overreliance on the shadowy market for intelligence operated by criminal informants. *See Christian II*, 925 F.3d at 332–33

(Gilman, J., dissenting). Instead of cobbling together bits and pieces of disconnected and outdated information to create a semblance of probable cause, law enforcement would be encouraged to perform additional police work to connect a home to the criminal activity before gaining permission to search inside. *Id.* Officers would be reminded of their duty to reasonably corroborate their hunches and suspicions and ensure recency in the allegations used to support a search. In the context of this case, which involves old information about the resident of a home, applying the exclusionary rule would further accord with the settled legal premise in the law that evidence of a person's years-old wrongdoing is not indicative of present wrongdoing. *Cf, e.g.*, Fed. R. Evid. 404(b). Here, the exclusionary rule's deterrent effect would reduce "the perception of unlawful or intrusive police conduct," which would engender better relations between communities and the police. *Gates*, 462 U.S. at 236–37. Finally, applying the exclusionary rule would prevent homeowners from being targeted for home searches based merely on the criminal conduct of third parties earlier seen near the home.

Suppression would also be consistent with the fundamental purpose of the Fourth Amendment, which is to prevent arbitrary and undue invasions of the home. *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 585 (1980) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (internal citations omitted); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (the "sanctity of private dwellings" is the interest "ordinarily afforded the most stringent Fourth Amendment protection"); *Silverman v. United*

States, 368 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and be free from unreasonable government intrusion."). Disincentivizing the police from searching homes without obtaining recent, reliable, and factual information will also limit the number of unreasonable searches that occur, reducing the amount of harm occurring from invasive tactical team searches. *See* Radley Balko, *Overkill, The Rise of Paramilitary Police Raids in America*, Cato Institute White Paper 3–4 (2006), https://object.cato.org/sites/cato.org/files/pubs/pdf/balko_whitepaper_2006.pdf (Demonstrating the tragic results of the proliferation of militarized police raids on homes, most often based on information from unreliable confidential informants ("snitches")).

In *Leon*, this Court held that the exclusionary rule should not apply *per se* but should be applied when it will have a deterrent effect on individual police officers. 468 U.S. at 897 (1984). *Leon*'s sharpening of the exclusionary rule should not be read to discount the extraordinary constitutional gravity of an invasion of a person's home. Applying the exclusionary rule here would accomplish a significant deterrent effect in the circumstances of this case and others like it. This Court should grant review to resolve the imbalance created by the lower court's decision and re-orient future cases toward the exclusionary rule's purpose of protecting citizens from Fourth Amendment violations arising out of systemically unconstitutional investigatory procedures.

CONCLUSION

For these reasons, this Court should grant the Petition for a Writ of Certiorari and the Sixth Circuit's decision should be reversed. Respectfully submitted,

/s/ Lucille A. Jewel*
Wade V. Davies
UNIVERSITY OF TENNESSEE
COLLEGE OF LAW
APPELLATE LITIGATION CLINIC
1505 W. Cumberland Ave.
Knoxville, TN 37996

Counsel for Appellant

*Counsel of Record

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0111p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TYRONE DEXTER CHRISTIAN,

Defendant-Appellant.

No. 17-1799

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:15-cr-00172-1—Robert J. Jonker, Chief District Judge.

Reargued En Banc: March 20, 2019

Decided and Filed: May 31, 2019

Before: COLE, Chief Judge; MOORE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON,GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, NALBANDIAN, READLER, and MURPHY, Circuit Judges.

COUNSEL

REARGUED EN BANC: Lucille A. Jewel, UNIVERSITY OF TENNESSEE, Knoxville, Tennessee, for Appellant. Jennifer L. McManus, UNITED STATES ATTORNEY'S OFFICE, Grand Rapids, Michigan, for Appellee. **ON SUPPLEMENTAL BRIEF:** Lucille A. Jewel, William A. Beasley, Benjamin A. Johnson, Benjamin K.P. Merry, UNIVERSITY OF TENNESSEE, Knoxville, Tennessee, for Appellant. Jennifer L. McManus, Timothy P. Verhey, UNITED STATES ATTORNEY'S OFFICE, Grand Rapids, Michigan, for Appellee.

ROGERS, J., delivered the opinion of the court in which GIBBONS, SUTTON, GRIFFIN, KETHLEDGE, THAPAR, BUSH, LARSEN, NALBANDIAN, READLER, and MURPHY, JJ., joined, and WHITE, J., joined in the judgment. THAPAR, J. (pp. 12–19), delivered a separate concurring opinion in which NALBANDIAN, MURPHY, and READLER, JJ., joined. WHITE, J. (pg. 20), delivered a separate opinion concurring in the judgment and in

Part I of the dissent. GILMAN, J. (pp. 21–44), delivered a separate dissenting opinion in which COLE, C.J., MOORE, CLAY, STRANCH, and DONALD, JJ., joined, and WHITE, J., joined in part.

OPINION

ROGERS, Circuit Judge. Based on a five-page-long search-warrant affidavit—which included evidence from a confidential informant and other sources, a controlled buy, and direct police-officer surveillance—a magistrate determined that there was probable cause to search 618 Grandville Avenue, Tyrone Christian's home, for evidence of drug trafficking. That search uncovered a large amount of heroin, some cocaine and marijuana, and two loaded guns. Convicted of various drug and firearm crimes, Christian argues on appeal that the search was not supported by probable cause. Christian questions each factual assertion in the affidavit as insufficient to show probable cause, while the Government contends that a common-sense examination of the totality of the circumstances, in light of the deference that a court owes to warrant-issuing magistrates, is required by cases like *Illinois v. Gates*, 462 U.S. 213 (1983), and *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). For the reasons that follow, the district court properly denied Christian's suppression motion.

I.

On September 3, 2015, Officer Thomas Bush, a law enforcement officer for the Grand Rapids Police Department, submitted an affidavit in support of a search warrant for the residence of suspected drug trafficker Tyrone Christian at 618 Grandville Avenue in Grand Rapids, Michigan. The affidavit provided the following information in support of Officer Bush's belief that there was probable cause to search Christian's home: (1) Christian had a history of drug trafficking at 618 Grandville, which included drug-related arrests after two separate raids in 2009 and 2011, along with four prior felony convictions for drug-related offenses between 1996 and 2011; (2) a "credible and reliable" informant had contacted law enforcement in December 2014 to notify them that Christian was dealing drugs; (3) law enforcement successfully conducted a controlled buy from Christian in January 2015; (4) between May and September 2015, four

different subjects told law enforcement that Christian was dealing drugs and that they had personally purchased drugs from him; (5) law enforcement had established surveillance at 618 Grandville and observed a man named Rueben Thomas "walk away from the area of [the residence] and leave the area in a vehicle," after which officers stopped Thomas and discovered heroin in his car; and (6) Thomas subsequently "admitted that he had recently been at an address on [Grandville Avenue]," but he "denied being at [Christian's residence] contrary to observations of the law enforcement officers."

A magistrate judge approved the warrant, and police officers conducted a drug raid at Christian's home just after midnight on September 4, 2015. During the raid, officers seized cocaine, marijuana, over 80 grams of heroin, a cutting agent, and two loaded guns. The Government charged Christian with possession of heroin with intent to distribute, being a felon in possession of a firearm, and possession of a firearm in furtherance of drug trafficking.

Christian moved to suppress the evidence obtained from the September 3 search warrant. The district court denied the motion, determining that the affidavit provided sufficient information to establish probable cause and that in any event the *Leon* good-faith exception would apply regardless of the probable cause determination. A jury convicted Christian on all counts, and the district court sentenced Christian to 210 months in prison.

Christian now appeals the district court's denial of his motion to suppress, arguing that the affidavit did not establish probable cause and that the *Leon* good-faith exception to the exclusionary rule should not apply. He also challenges the district court's admission of testimony about a jail call that occurred between Thomas and Thomas's girlfriend, Tanisha Edwards, before Christian was arrested. Edwards testified during trial that she told Thomas that Christian "got the groceries out" of their house, where the "groceries" referred to a gun and drugs. The Government introduced the testimony to help explain why law enforcement later found a gun and drugs buried in the backyard behind the home of Christian's mother.

II.

A.

The search-warrant affidavit at issue here provided an ample basis for probable cause, and the question is really not even close. The affidavit first outlined Christian's extensive history with drugs—four felony drug convictions from 1996, 2002, 2009, and 2011, at least two of which were for drug trafficking. In 2009 and 2011, search warrants executed at Christian's home, 618 Grandville, the same place searched here, uncovered evidence of drug trafficking that each time resulted in Christian's arrest.

The affidavit next detailed the reasons why officers believed that Christian had gone back into business. In December 2014, a "credible and reliable informant" advised Officer Bush, the affiant, that Christian was again dealing drugs. The informant also provided information about other traffickers, including "names, nicknames, phone numbers, residences utilized by the drug traffickers and information regarding specific drug transactions." Officer Bush independently corroborated "much of the information provided" by this informant. In January 2015, under the direction of Officer Bush, the informant executed a controlled purchase of drugs from Christian. In addition, "[w]ithin the last four months" preceding the search, meaning from May to September of 2015, several other informants stated that "Tyrone Christian is a large scale drug dealer" and that "they [had] purchased large quantities of heroin and crack cocaine from Christian at [his residence] in the last four to five months."

That brings us to September 3, 2015, the day of the search, when, according to the affidavit, officers established surveillance "at 618 Grandville Avenue." The officers observed Rueben Thomas "walk away from the area of 618 Grandville Avenue and leave the area in a vehicle." After stopping him for a traffic violation, officers found "approximately 20 grams of heroin" in the form of "'chunk[s]' that appeared to have been removed from a larger portion of heroin." Thomas denied having been at 618 Grandville but admitted having been at another address on that street. Crucially, the affidavit recounted that Thomas's denial was "contrary to observations of the law enforcement officers."

Viewing the "totality of the circumstances," *Florida v. Harris*, 568 U.S. 237, 244 (2013), through the "lens of common sense," as the Supreme Court has instructed, *id.* at 248, the conclusion is inescapable: there was probable cause to believe that a search of 618 Grandville would uncover evidence of drug trafficking. Most readers of the affidavit would have been surprised if it did not.

Indeed, one element of the affidavit was independently sufficient for probable cause: the surveillance of Rueben Thomas. Christian argues that there was no "nexus" between Thomas and 618 Grandville because the affidavit states merely that officers saw Thomas "walk away from the area of 618 Grandville Avenue," rather than entering or leaving that residence. But that selective, out-of-context reading is contradicted even by other parts of the affidavit, which later states that "Rueben Thomas . . . denied being at [the residence], *contrary to observations of the law enforcement officers*." (Emphasis added.) While this is not a direct statement that Thomas was seen entering or leaving 618 Grandville, the law does not require such a direct statement. Indeed, our precedents require us to eschew such a formal requirement. "Affidavits are not required to use magic words[.]" *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000) (en banc). Because our job is not to reweigh the assertions in an affidavit but to ask whether the magistrate had a substantial basis for his conclusion, *United States v. Perry*, 864 F.3d 412, 415 (6th Cir. 2017), the later phrase in the affidavit cannot be read out of existence. Rather, the deferential nature of our review means that we should take that later statement—i.e., that Thomas's denying that he was at 618 Grandville was "contrary to observations of the law enforcement officers"—to reconcile any doubt about where the officers saw Thomas walk away from.

Under that proper view of the affidavit, and paying the appropriate "great deference" to the magistrate's probable-cause determination, *Gates*, 462 U.S. at 236, the surveillance evidence provided a substantial basis for concluding that probable cause existed. Argument to the contrary is unavailing. Any possible contradiction between "from the area of" and "contrary to observations of the officers" is more readily attributable to the "haste of a criminal investigation" under which officers often draft an affidavit supporting a search warrant. *See id.* at 235. Such haste was certainly present here: Officer Bush applied for and received the warrant on the same

day of the purportedly infirm surveillance and search. To boot, police officers are mostly non-lawyers who must draft search-warrant affidavits "on the basis of nontechnical, common-sense judgments." *Id.* at 235–36. With the benefit of hindsight, perhaps the affiant could have been more precise. But our precedents do not require such an exacting degree of specificity. For example, in our recent published opinion in *United States v. Tagg*, 886 F.3d 579 (6th Cir. 2018), we held that probable cause existed to search the defendant's home for child pornography despite the supporting documents' failure to state that the defendant had actually clicked on or viewed an online file containing child pornography. *Id.* at 585–90. In doing so, we explained that probable cause is not the same thing as proof. *See id.* at 589–90. Likewise, the affidavit here need not have definitively stated that Thomas was seen leaving 618 Grandville. Rather, it need only have "allege[d] facts that create a reasonable probability" that he did. *See id* at 589. From there, the remaining inferences needed to connect 618 Grandville to Christian's drug trafficking are quite straightforward, given Christian's history of dealing drugs and the officers' finding heroin in Thomas's car. Under a common-sense reading of the affidavit, then, its description of the 618 Grandville surveillance easily exceeds the "degree of suspicion," *id.* at 586, needed to establish probable cause.

Moreover, the officers who saw Thomas were assigned to "establish[] [surveillance] at 618 Grandville Avenue," not the entire area around it. Assuming those officers were doing their jobs, the fact that they saw Thomas at all probably means that he was very near 618 Grandville. At the very least, that would be far from an arbitrary inference for a magistrate to draw. In addition, the heroin found in Thomas's car appeared to "have been removed from a larger portion of heroin." These facts further supported the magistrate's determination that there was probable cause to believe that evidence of drug dealing would be found at 618 Grandville.

The affidavit hardly relies alone on the Thomas surveillance, however. There is also Christian's lengthy history of dealing drugs from 618 Grandville, the controlled purchase from 618 Grandville, and the numerous tips that Christian was recently dealing large quantities of drugs from 618 Grandville, all of which provide further evidence still that probable cause existed. When it comes to probable cause, "the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation." *See Wesby*, 138 S. Ct. at 588 (citing *United States v. Arvizu*, 534 U.S. 266, 277–78 (2002)). Even if each of these additional items would not

suffice to establish probable cause on its own, each factual allegation—whether ultimately deficient or not—is still a relevant data point in the "totality of the circumstances" constellation, rather than an independent thing to be lined up and shot down one by one. As in *Wesby*, where the Supreme Court firmly repudiated the Court of Appeals' attempt to isolate and explain away each piece of evidence, here too "the totality of the circumstances gave the officers plenty of reasons," 138 S. Ct. at 589, to believe that there was evidence of drug trafficking in Christian's home.

Probable cause therefore existed, and it is not a close call. The opposite conclusion can be reached only by engaging in the kind of "hypertechnical[,] . . . line-by-line scrutiny," *United States v. Woosley*, 361 F.3d 924, 926 (6th Cir. 2004), of the affidavit explicitly forbidden by the Supreme Court, *see Gates*, 462 U.S. at 235–36, 245 n.14. In *Wesby*, the Court explained that "this kind of divide-and-conquer approach is improper," because "[a] factor viewed in isolation is often more 'readily susceptible to an innocent explanation' than one viewed as part of a totality." 138 S. Ct. at 589 (quoting *Arvizu*, 534 U.S. at 274). That is the case here too, where alone some parts of the affidavit might be criticized but taken together they point clearly to one conclusion: that Christian was dealing drugs from 618 Grandville.

We are accordingly compelled to hold that there was probable cause in this case, especially given the undemanding character of the probable-cause standard and the deferential nature of our review. Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Tagg*, 886 F.3d at 585 (quoting *Wesby*, 138 S. Ct. at 586). Time and again the Supreme Court has emphasized that "[p]robable cause 'is not a high bar'" to clear. *Wesby*, 138 S. Ct. at 586 (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)). Where, as here, a magistrate has issued a search warrant based on probable cause, we "do[] not write on a blank slate." *Tagg*, 886 F.3d at 586. Rather, the magistrate's probable-cause determination "should be paid great deference," *Gates*, 462 U.S. at 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)), and we overturn that decision only "if the magistrate arbitrarily exercised his or her authority," *United States v. Brown*, 732 F.3d 569, 573 (6th Cir. 2013) (citing *United States v. Greene*, 250 F.3d 471, 478 (6th Cir. 2001)). We are "not permitted to attempt a de novo review of probable cause." *Tagg*, 886 F.3d

at 586 (citing *Gates*, 462 U.S. at 238–39; *United States v. King*, 227 F.3d 732, 739 (6th Cir. 2000)).

The conclusion that probable cause existed to search Christian's home is compelled, moreover, by our recent published decision in *United States v. Hines*, 885 F.3d 919 (6th Cir. 2018), in which we emphasized the importance of the totality-of-the-circumstances approach: "Not all search warrant affidavits include the same ingredients," we said before recognizing that "[i]t is the mix that courts review to decide whether evidence generated from the search may be used or must be suppressed." *Id.* at 921–22. The affidavit at issue in *Hines*, like the one here, was substantial. Both included, among other things, recent evidence of drug-related activity: there, a confidential informant's statement that one day earlier he had seen drugs at the subsequently searched home; here, the officers' finding heroin in Thomas's car after having observed his leaving 618 Grandville. But the takeaway from *Hines* most salient here is methodological, not analogical: *Hines* requires us to look holistically at what the affidavit does show, instead of focusing on what the affidavit does not contain, or the flaws of each individual component of the affidavit. Doing the former establishes probable cause here. Rejecting probable cause on the affidavit in this case would therefore fly in the face of *Hines*, a well-reasoned precedential decision.

B.

Apart from whether the affidavit contained enough to establish probable cause, Christian's suppression motion was properly denied because of the good-faith exception of *United States v. Leon*, 468 U.S. 897 (1984). Under *Leon*, the exclusionary rule does not bar from admission "evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." *Id.* at 905. If somehow the affidavit at issue here could be deemed insufficient to establish probable cause, then this is a case in the very heartland of the *Leon* exception. Contrary to Christian's argument, the affidavit was not "bare bones." We reserve that label for an affidavit that merely "states suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." *United States v. Washington*, 380 F.3d 236, 241 n.4 (6th Cir. 2004) (quoting *United States v. Van Shutters*, 163 F.3d 331, 337 (6th Cir. 1998)). To further describe the bare-

bones standard is to show why it does not apply here. We have said that, to be considered bare bones, an affidavit must be "so lacking in indicia of probable cause" as to make an officer's "belief in its existence [ ] objectively unreasonable." *United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005). In *United States v. Williams*, 224 F.3d 530 (6th Cir. 2000), we described how woefully deficient an affidavit must be before it meets this standard:

> An example of a "bare bones" affidavit is found in *Gates*, 462 U.S. at 239, where the Court, pointing to one from *Nathanson v. United States*, 290 U.S. 41 (1933), said, "A sworn statement of an affiant that 'he has cause to suspect and does believe that' liquor illegally brought into the United States is located on certain premises will not do." Another illustration was taken from *Aguilar v. Texas*, 378 U.S. 108 (1964), that "[a]n officer's statement that 'affiants have received reliable information from a credible person and believe' that heroin is stored in a home, is likewise inadequate." *Gates*, 462 U.S. at 239. Thus, a "bare bones" affidavit is similar to, if not the same as, a conclusory affidavit. It is "one which states 'only the affiant's belief that probable cause existed.'" *United States v. Finch*, 998 F.2d 349, 353 (6th Cir. 1993) (quoting *United States v. Ciammitti*, 720 F.2d 927, 932 (6th Cir. 1983)).

Williams, 224 F.3d at 533.

Although one can split hairs with the affidavit in this case, it is impossible to deny that it contains factual allegations, not just suspicions or conclusions. Importantly, each factual allegation, regardless of any infirmities, at least purports to link Christian to drug trafficking at 618 Grandville. An affidavit need only present "*some* connection, regardless of how remote it may have been," *United States v. White*, 874 F.3d 490, 497 (6th Cir. 2017) (quoting *Laughton*, 409 F.3d at 749–50), or, in other words, establish a "minimally sufficient nexus between the illegal activity and the place to be searched," *United States v. Brown*, 828 F.3d 375, 385 (6th Cir. 2016) (quoting *United States v. Carpenter*, 360 F.3d 591, 596 (6th Cir. 2004) (en banc)), to avoid the bare-bones designation and thus be one upon which an officer can rely in good faith. The affidavit here necessarily satisfies this low requirement. To hold otherwise would be to equate the five-page, extensively sourced affidavit here with the short, conclusory, and self-serving ones for which the bare-bones designation ought to be reserved.

Our decision in *United States v. Hython*, 443 F.3d 480 (6th Cir. 2006), is almost completely inapposite here. We held there that the affidavit—which recounted only a single,

undated controlled purchase—did not satisfy the good-faith exception. *Id.* at 486, 488–89. Although the affidavit linking 618 Grandville to drug dealing did include information about a controlled purchase that Christian contends was stale, any similarity between this case and *Hython* ends there. This case is like *Hython* only if, engaging in the methodological error forbidden by the Supreme Court in *Wesby*, one completely ignores most of the affidavit by discounting each item one by one. Indeed, *Hython* by negative inference supports the existence of good-faith reliance here by showing just how unsubstantiated an affidavit must be to fail to qualify under *Leon*'s good-faith exception.

This is a particularly egregious case to misapply the good-faith exception given the utter lack of police wrongdoing. The "exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916. As the Supreme Court explained in *Leon*, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922. This balance supports the principle that, as we said in *Carpenter*, the good-faith exception requires "a less demanding showing than the 'substantial basis' threshold required to prove the existence of probable cause in the first place." 360 F.3d at 595–96 (quoting *United States v. Bynum*, 293 F.3d 192, 195 (4th Cir. 2002) (citation omitted)). Refusing to adhere to those decisions in a case like Christian's would unduly exalt the Fourth Amendment interest marginally served by deterring nonculpable conduct over the public interest in combatting crime—and would amount to effective disregard of Supreme Court precedent as well as our own.

C.

Finally, it is questionable to conclude that the district court erred by admitting the challenged telephone-call evidence. In any event, we may affirm if we can say with "fair assurance" that any such error did not "substantially sway[]" the judgment. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). That is the case here. As explained above, the evidence obtained in accordance with the search warrant was properly admitted. Because suppression was correctly denied, the jury properly heard, for example, evidence that officers found 70 grams of heroin next to two loaded guns in Christian's basement and cocaine and marijuana in other parts

of the house, that the DNA found on one of the guns matched Christian's, and that Christian's cell phone contained text messages about drug trafficking. Considering that evidence, the phone call added relatively little: it connected Thomas and Christian, which provided a basis for the jury to conclude that Christian had sold drugs to Thomas, and it linked Christian to a third gun. But even had that evidence not been admitted, no jury could have acquitted Christian on these charges. The evidence against him was too damning. Admitting the phone-call statements was therefore harmless.

III.

The judgment of the district court is affirmed.

CONCURRENCE

THAPAR, Circuit Judge, concurring. I concur in the majority opinion. There was probable cause to search Tyrone Christian's house, and, at the very least, the officers executed that search in good faith. But because of our precedent, we must ignore critical evidence of which the officers undisputedly knew and isolate the good-faith analysis to the four corners of the affidavit. *See United States v. Laughton*, 409 F.3d 744, 751–52 (6th Cir. 2005). I write separately to explain why *Laughton*'s limit on the good-faith exception conflicts with Supreme Court precedent and should be overruled.

I.

Officer Thomas Bush's affidavit included a number of facts linking Christian and his house to drug trafficking: (1) Christian had four drug-crime convictions in the past nineteen years (two of which involved conduct that occurred at his house); (2) a confidential informant had purchased drugs from Christian at his house nine months earlier; (3) within the past four months, several "subjects" told the officers that they had purchased "large quantities" of drugs from Christian at his house; and, finally, (4) on the day of the search, officers stopped Rueben Thomas after they saw him leave the "area of" Christian's house and discovered 20 grams of heroin in Thomas's car. R. 42-1, Pg. ID 114–15. Critically, Thomas's heroin showed *current* drug dealing at Christian's house, supplementing the older information in Bush's affidavit. But the link between Thomas's heroin and Christian's house was blurry because the affidavit was vague. The affidavit did not say that the officers saw Thomas interact with Christian or that they saw Thomas inside Christian's house—only that they saw him "walk away from the area of" Christian's house. *Id.* at 115.

Still, the magistrate believed the affidavit was good enough and granted the officers' request for a search warrant. After obtaining the warrant, the officers searched Christian's house and uncovered extensive evidence of drug dealing: marijuana, cocaine, heroin, drug packaging materials, and two guns. Based on this evidence, Christian was convicted of possessing a

controlled substance with intent to distribute, possessing a firearm in furtherance of drug trafficking, and being a felon in possession of a firearm.

Christian claims the evidence against him should have been suppressed, arguing that the officers lacked probable cause to search his house and that the good-faith exception to the exclusionary rule does not apply. Because of *Laughton*, the parties' good-faith arguments are restricted to the language of the affidavit. And because that language is vague on a critical point—the link between Thomas's heroin and Christian's house—the parties parse through the affidavit and debate the best interpretation of its language (almost as if they were interpreting a statute).

But uncontroverted evidence shows that on the day of the search, surveilling officers twice observed Thomas interacting *with* Christian *at* Christian's house. First, Thomas met with Christian for "approximately five minutes" in the driveway of his house. R. 152, Pg. ID 1131–32. Then, later that afternoon, Thomas returned and went inside for about two hours. After he left, the officers stopped him and discovered the heroin. These facts link Thomas and his heroin to Christian and his house. But, unfortunately, they were left out of the affidavit. The first encounter did not make it into the affidavit at all, and the second one did only in the vague terms described above.

Laughton confines us to the words of that vague affidavit in evaluating whether the good-faith exception applies. We cannot consider the officers' actual observations or determine the reason those observations did not make it into the affidavit.

II.

Laughton is wrong. To see why, we need to start with first principles. The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. But it does not spell out how we are to protect that right. When the Fourth Amendment was ratified, the only way to enforce its protections was through private tort suits against officers—the exclusionary rule, Section 1983, and *Bivens* actions did not yet exist. *See Collins v. Virginia*, 138 S. Ct. 1663, 1676 (2018) (Thomas, J., concurring) ("Historically, the only remedies for unconstitutional searches and seizures were 'tort suits' and

'self-help.'"); *Gardner v. Neil*, 4 N.C. 104, 104 (1814) (stating that "the action of trespass is the only proper form of action" for a Fourth Amendment violation); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1176–78 (1991); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1840 (2016).

That changed in 1914 when the Supreme Court first excluded evidence obtained in violation of the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383 (1914). The facts in *Weeks* were extreme: officers, lacking any particularized information or a warrant, broke into the defendant's home, took incriminating documents, then returned and took even more. *See id.* at 386, 393–94. To deter such flagrant misconduct by law enforcement, the Supreme Court created the exclusionary rule. *Id.* at 393–94; *see also United States v. Leon*, 468 U.S. 897, 906, 908, 916–17 (1984). The underlying premise is that police are less likely to engage in misconduct if they know that any evidence obtained thereby will be inadmissible at trial.

But the Supreme Court has recognized that suppression often comes with its own "substantial" costs—both to the criminal justice system (letting the guilty (and possibly dangerous) go free) and to the truth-seeking process. *Leon*, 468 U.S. at 907–08. So the Supreme Court has repeatedly reminded us that suppression should always be "our last resort, not our first impulse." *Herring v. United States*, 555 U.S. 135, 140 (2009) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)) (internal quotation mark omitted). In turn, several principles constrain the application of the exclusionary rule. First, exclusion is not an individual right but a rule aimed at deterrence. *Id.* at 141. Second, a Fourth Amendment violation is a necessary—but not a sufficient—ground for exclusion. *Id.* Third, and perhaps most importantly, the value of any future police deterrence must outweigh suppression's "substantial social costs." *Hudson*, 547 U.S. at 596.

Assuming there is a Fourth Amendment violation, how exactly should courts balance the costs versus the benefits of suppression? Again, the Supreme Court tells us: look at the misconduct. Exclusion must deter egregious misconduct—misconduct "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 U.S. at 144. In contrast, when officers act in an objectively reasonable but mistaken manner, exclusion serves no purpose. *Leon*, 468 U.S. at

919. That is so even if that mistake violated a suspect's Fourth Amendment rights. *See Hudson*, 547 U.S. at 596.

In short, the ultimate focus must be on the nature of police misconduct. That conduct must exhibit "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights" to trigger the exclusionary rule. *Davis v. United States*, 564 U.S. 229, 238 (2011) (internal quotation marks omitted); *Herring*, 555 U.S. at 144 (adding systemic negligence to the list).

III.

Of course, focusing on police misconduct does not excuse courts from looking at the affidavit. Indeed, the affidavit is where courts must start. *Leon*, 468 U.S. at 915. But the ultimate inquiry is whether, considering "all of the circumstances," the officers acted reasonably when relying on the blessing of the judge. *Herring*, 555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n.23). And to make this determination, "we must consider the actions of all the police officers involved." *Id.* at 140 (citing *Leon*, 468 U.S. at 923 n.24).

This is where *Laughton* went astray. *Laughton*'s refusal to look beyond the affidavit is, in effect, a judgment that factual omissions are always culpable misconduct. To start, *Leon* precludes such an all-or-nothing approach to the exclusionary rule. 468 U.S. at 922 n.23, 923 n.24 (explaining that good faith depends on "all of the circumstances"). But more importantly, the underlying premise is not true—omitted facts usually do not stem from misconduct at all but from isolated negligence or the time pressures that officers often face during investigations. Indeed, an officer would have practically no incentive to leave *favorable* information out of an affidavit. *See Hudson*, 547 U.S. at 596 (stating "the value of deterrence depends upon the strength of the incentive to commit the forbidden act"). Doing so would only increase the chance that a magistrate may reject the warrant application and "leav[e] the officer empty-handed." *United States v. Thomas*, 908 F.3d 68, 74–75 & n.3 (4th Cir. 2018).

Because there is no nefarious conduct to deter, the best that excluding evidence may do in this scenario is encourage more careful affidavit drafting. While that is a laudable goal, it is not worth the substantial costs of exclusion. *See Herring*, 555 U.S. at 141; *Hudson*, 547 U.S. at 596. Those costs are particularly high in an omitted-facts situation: when an officer *in fact* reasonably

relied on the magistrate's warrant for a search, and that search yielded evidence proving that the defendant is *in fact* guilty. Under that scenario, the exclusionary rule cannot "pay its way." *Davis*, 564 U.S. at 238 (quoting *Leon*, 468 U.S. at 919).

The Supreme Court's instruction to focus on culpability is enough to show that the good-faith analysis must consider facts that are not included in the affidavit. But the Supreme Court has been even more explicit. In *Sheppard*, an officer under severe time pressure used the wrong warrant application form for his search (a form for drugs rather than murder). *Massachusetts v. Sheppard*, 468 U.S. 981, 986 (1984). The magistrate judge explained that edits were necessary but only made some of them; as a result, the warrant still authorized only a search for drugs. *Id.* at 986–87. Despite the obvious error, the Court held that the good-faith exception applied. In doing so, it rejected the argument that the officers' reliance on a facially invalid warrant undermined good faith. Given the circumstances, "[t]he officers . . . took every step that could reasonably be expected of them." *Id.* at 987–89. Among other things, they thoroughly investigated the suspect in a short amount of time, sought the advice of a district attorney, presented the warrant application to a judge, and trusted that he had fixed it. *Id.* at 984, 988–89. Those facts were not in the affidavit but still were relevant to the *Sheppard* court. Thus, *Sheppard* "forecloses . . . a categorical rule" that the good-faith exception depends entirely on the face of the warrant itself. *United States v. Franz*, 772 F.3d 134, 146 (3d Cir. 2014); *accord United States v. Frazier*, 423 F.3d 526, 534–35 (6th Cir. 2005). And *Sheppard*'s logic extends to affidavits and any other documents in a warrant application.

Indeed, our sister circuits have applied the good-faith exception when affidavits (often prepared under time pressure) omitted a few words that were needed to establish probable cause. *See, e.g.*, *United States v. McKenzie-Gude*, 671 F.3d 452, 456–57, 460 (4th Cir. 2011); *United States v. Martin*, 297 F.3d 1308, 1320 (11th Cir. 2002). Even the Tenth Circuit, which purportedly follows a "four corners" rule, still considers (1) additional information presented to the issuing judge, (2) "information relating to the warrant application process," and (3) "testimony illuminating how a reasonable officer would interpret factual information contained in an affidavit." *See United States v. Knox*, 883 F.3d 1262, 1272 & n.9 (10th Cir. 2018).

In addition, we already allow courts to look outside facially *valid* documents to see if there was a Fourth Amendment violation that compels suppression. For example, if a facially valid warrant was rooted in culpable misconduct, then the good-faith exception does not apply. *See Herring*, 555 U.S. at 146 ("If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified . . . ."); *see also Franks v. Delaware*, 438 U.S. 154, 155–56 (1978). Likewise, a facially valid warrant cannot support good faith if the officers purposely withheld damaging information from it to present an "incomplete and misleading" picture to the magistrate. *United States v. West*, 520 F.3d 604, 611–12 (6th Cir. 2008). In other words, we *already* consider facts outside the affidavit when evaluating good faith—we just consider facts that *undermine* probable cause and ignore facts that support it. Under *Laughton*, outside facts are a one-way ratchet in favor of criminals. This disparity upsets the cost-benefit balance at the heart of the good-faith exception: we should only undermine the truth-finding function of the criminal justice system when necessary to deter culpable misconduct.

IV.

What would a world without *Laughton* look like in practice? No court can envision every situation in which good faith does or does not apply. But a few things are clear. Whenever an affidavit's four corners are thorough enough to satisfy *Leon*, the good-faith exception applies (barring some sort of culpable misconduct by the police). Indeed, *Leon* is a low bar. An affidavit exceeds the *Leon* bar when it contains "*some* connection" between "the illegal activity and the place to be searched," even if that connection is "remote" and supported by only a slight "modicum of evidence." *United States v. White*, 874 F.3d 490, 496–97 (6th Cir. 2017) (quoting *United States v. Carpenter*, 360 F.3d 591, 596 (6th Cir. 2004) (en banc) (internal quotation marks omitted)). Too often courts raise the *Leon* bar, making it practically indistinguishable from the probable cause standard itself.[1] Doing so effectively eliminates the

[1]In a perfect world, *Laughton* would not be as problematic because the good-faith exception would apply unless the affidavit was skeletal. Yet courts have extended the "bare bones" exception to good faith well beyond Supreme Court precedent. This case is a perfect example. *Leon* itself said that an affidavit supports good faith when it "provide[s] evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." 468 U.S. at 926. That is what we have here, as the dueling majority and dissent

good-faith exception, or at the very least reduces it to a limited, narrow role. But when properly applied, *Leon* means that in *most* cases an affidavit will satisfy the good-faith exception. In the instances when an affidavit is vague on a critical point, however, courts must go further and ask whether the officers were objectively culpable in relying on that affidavit. To answer that question, courts must consider all the circumstances that bear on the officers' culpability, including any time pressure that the officers were under, what facts were known to the officers but omitted from the affidavit, and how defective the affidavit was without that omitted information.

The dissent claims that this culpability-focused approach would entail a subjective "expedition into the minds of police officers." Dissenting Op. Part II (quoting *Leon*, 468 U.S. at 922 n.23). Yet the Supreme Court already explained that looking at an "officer's knowledge and experience . . . does *not* make the test . . . subjective." *Herring*, 555 U.S. at 145–46 (emphasis added). Courts are not "inquiring into the subjective beliefs of law enforcement officers" when they consider "actual uncontroverted facts" known to them. *McKenzie-Gude*, 671 F.3d at 460–61 (citing *Herring*, 555 U.S. at 145). Neither the good-faith exception nor Supreme Court precedent require that we bury our heads in the sand and ignore uncontroverted evidence. We should follow the Supreme Court's lead and consider such evidence when determining the officers' culpability. *See Herring*, 555 U.S. at 146–47; *Sheppard*, 468 U.S. at 987–89. To do anything less is to ignore the very purpose for the exclusionary rule in the first place.

Indeed, this case proves the point. Surveilling officers *twice* observed Thomas interacting *with* Christian *at* Christian's house. That is an uncontroverted fact, not a subjective belief. And that fact, had it been included in the affidavit, would have at the very least established good faith under *Leon*. A tight time constraint, not culpable conduct, is the most likely reason that this information was left out. *See* Majority Op. Part II.A. In contrast, if officers saw Thomas at a different house meeting with someone other than Christian, this would be a different case. In that light, the vague language in the affidavit ("the area of" Christian's house) would objectively appear to be intentional obfuscation rather than negligent oversight.

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opinions show. But despite this thoughtful disagreement, the dissent continues further to say that the affidavit cannot even satisfy good faith.

R. 42-1, Pg. ID 115. And under those circumstances, the outside facts would support suppression. But with the facts we have, suppressing the evidence serves no societal purpose.

In short, courts can only apply the good-faith exception by evaluating officer conduct and can only evaluate officer conduct by looking beyond the four corners of the affidavit. The time has come for us to get in line with the Supreme Court's good-faith doctrine. We should overrule *Laughton*.

CONCURRING IN THE JUDGMENT

HELENE N. WHITE, Circuit Judge, concurring in the judgment. I join in Part I of Judge Gilman's opinion. However, because I conclude that the search-warrant affidavit was sufficient to justify a reasonably well-trained officer's good-faith reliance on the magistrate's finding of probable cause, *United States v. White*, 874 F.3d 490, 496 (6th Cir. 2017), I concur in the result of the majority opinion.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. Considering the totality of the circumstances, I believe that the facts set forth in the affidavit fail to establish a "fair probability" that drug activity was occurring at Christian's residence (the Residence) at the time the search warrant was executed. *See United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010). I also do not think that the exception established in *United States v. Leon*, 468 U.S. 897 (1984), applies in the present case because the affidavit does not establish a sufficient nexus between the Residence and drug activity at the time of the search.

The majority's conclusion that the issue of probable cause is "really not even close" strikes me as totally unsupportable. *See* Maj. Op. 4. Unlike the majority, I acknowledge that whether there was probable cause and whether the good-faith exception is met are close calls. But I ultimately conclude that the affidavit falls short because it does not provide any "particularized facts" connecting the Residence to drug activity at the time that the search warrant was executed. *See United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006). I therefore respectfully dissent.

I. PROBABLE CAUSE

"To establish probable cause adequate to justify issuance of a search warrant, the governmental entity or agent seeking the warrant must submit to the magistrate an affidavit that establishes 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Brooks*, 594 F.3d at 492 (quoting *United States v. Berry*, 565 F.3d 332, 338 (6th Cir. 2009)). This requires "a nexus between the place to be searched and the evidence sought," *McPhearson*, 469 F.3d at 524 (quoting *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc)), at the time the warrant is issued, *United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006). The probable-cause standard is practical and nontechnical. *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005). In other words, a reviewing court should consider the "totality of the circumstances" rather than "engage in line-by-line scrutiny of the warrant

application's affidavit." *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008). But the court must limit its "review of the sufficiency of the evidence supporting probable cause . . . to the information presented in the four-corners of the affidavit." *Frazier*, 423 F.3d at 531.

The totality-of-the-circumstances approach requires us to examine each piece of evidence in the affidavit to assess its probative value and then determine whether those pieces of evidence are as a whole sufficient to establish probable cause. *Gardenhire v. Schubert*, 205 F.3d 303, 315 (6th Cir. 2000) (explaining that, in the context of an arrest, "[p]robable cause determinations involve an examination of all facts and circumstances within an officer's knowledge at the time of an arrest" (quoting *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999))); *United States v. Valenzuela*, 365 F.3d 892, 897 (10th Cir. 2004) ("[C]ourts may not engage in a 'divide-and-conquer' analysis of facts to determine whether probable cause existed. *However, neither may a court arrive at probable cause simply by piling hunch upon hunch.* Thus, in assessing the totality of the circumstances, a reviewing court 'must examine the facts individually in their context to determine whether rational inferences can be drawn from them' that support a probable cause determination." (emphasis added) (citations omitted)).

A. Observations of Thomas

I will begin by analyzing the probative value of the evidence presented in the four corners of the affidavit, starting with the officers' observations of Thomas. Then, as the Supreme Court instructed in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), I will consider each piece of the evidence "as a factor in the totality of the circumstances." *See id.* at 588 (citations omitted).

According to the affidavit, law-enforcement officers observed Thomas "walk away from the area" of the Residence and leave in a vehicle on the day that the search warrant was issued. They followed Thomas and stopped him after an unknown period of time for a driving infraction. During the stop, the officers found approximately 20 grams of heroin in Thomas's vehicle. Crucially, the affidavit does not state that the officers saw Thomas entering or leaving the Residence, even though their surveillance was targeted specifically at that property. Nor does it say that Thomas was seen with Christian. In fact, the affidavit does not assert any connection at all between Christian and Thomas.

True enough, the affidavit states that, during the traffic stop, "Rueben Thomas admitted that he had recently been at an address on Grandville Avenue in the City of Grand Rapids but denied being at 618 Grandville[,] contrary to observations of the law enforcement officers." But I decline to interpret this "contrary to observations" statement as an indication that the officers saw Thomas actually entering or leaving the Residence itself. Officer Bush was undoubtedly aware that any evidence of Thomas being at the Residence would be highly relevant to the probable-cause determination, but chose instead to state simply that Thomas was seen walking in "the area of 618 Grandville"—a vague description that does not place Thomas at the Residence. Absent a direct statement that Thomas was seen entering or leaving the Residence, or even at the Residence in any sense, I find no basis to read such a factual assertion into the affidavit.

The majority, on the other hand, contends that the affidavit's lack of a direct statement that Thomas was at the Residence is attributable to the "haste of a criminal investigation," Maj. Op. 5 (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)), and that no "magic words" are required, Maj. Op. 5 (quoting *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000) (en banc)). But the affidavit's inclusion of the specific, nontechnical language "from the area" appears to me more consistent with an honest acknowledgement that the officers did not observe Thomas at the Residence itself. In fact, the common-sense meaning of the language "from the area" suggests that Thomas was near but not at the Residence when observed by the officers.

The majority also notes that the affidavit "need only have 'allege[d] facts that create a reasonable probability" that "Thomas was seen leaving 618 Grandville." Maj. Op. 6 (alteration in original) (quoting *United States v. Tagg*, 886 F.3d 579, 589 (6th Cir. 2018)). This statement reflects a subtle but crucial error. The affidavit must contain facts establishing that probable cause exists to believe that *evidence of drug activity will be present in the Residence at the time of the search*. Stated differently, probable cause must be established in relation to whether there is evidence of drug activity in the Residence, not in relation to whether Thomas was seen leaving the Residence. *See United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010) ("To establish probable cause adequate to justify issuance of a search warrant, the governmental entity or agent seeking the warrant must submit to the magistrate an affidavit that establishes 'a fair probability

that contraband or evidence of a crime will be found in a particular place.'" (quoting *United States v. Berry*, 565 F.3d 332, 338 (6th Cir. 2009))).

This leaves us to consider the significance of the following: A single individual with no known connection to Christian was seen walking away from the area of the Residence and then leaving that area in a car. He was followed by officers for an unknown amount of time to a subsequent location where a traffic stop was conducted, during which heroin was found in the vehicle. If this provides any nexus at all between evidence of drug trafficking and the Residence, that nexus is so speculative and attenuated that it cannot, without more, support a finding of probable cause. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002) (noting that a hunch is insufficient to support a finding of reasonable suspicion for a *Terry* stop, and that the reasonable-suspicion standard is easier to satisfy than the probable-cause standard).

To conclude otherwise would allow officers seeking a search warrant to rely on speculation that drug activity near a residence is related to that residence, significantly lowering the burden for the government to show probable cause in areas where drugs are prevalent. Because the government cites no case that would support such a proximity test for establishing probable cause, I believe that the officers' observation of Thomas has little value on its own. But that does not end the inquiry. We must consider, as I do below, whether other evidence in the record bolsters or corroborates a connection between Thomas's alleged drug activity and the Residence, such that the magistrate could have found a fair probability that evidence of drug trafficking would be found at the Residence at the time of the search.

B. Tips from unidentified informants

The affidavit further states:

> Within the last four months, your affiant has been involved in or received information from several debriefs of subjects who have stated that Tyrone Christian is a large scale drug dealer. These subjects further stated that they have purchased large quantities of heroin and crack cocaine from Christian at 618 Grandville Avenue . . . in the last four to five months.

Officer Bush's assertion that he received information from unidentified "subjects" omits critical particulars. Among other things, the affidavit does not identify the number of individuals

who made the statements, explain what constituted a "debrief," identify the contexts in which the debriefs occurred, or even specify the date that the information was received (all of the information could have been received four months before the search).

More importantly, Officer Bush's statement gives no indication as to the veracity or reliability of the information obtained. He did not assert any belief concerning the reliability or veracity of the subjects' comments, let alone provide any factual basis by which the magistrate could assess their reliability or veracity. *See United States v. Helton*, 314 F.3d 812, 822 (6th Cir. 2003) (explaining that, under Sixth Circuit precedent, an affidavit "must contain a statement about some of the underlying circumstances indicating the informant was credible or that his information was reliable" (quoting *United States v. Smith*, 182 F.3d 473, 477 (6th Cir. 1999))).

The affidavit's complete failure to address the credibility and reliability of the information provided by the subjects is even more glaring when juxtaposed with Officer Bush's inclusion of a paragraph supporting the credibility and reliability of the confidential informant who conducted the controlled buy in January 2015. With regard to this latter informant, Officer Bush stated that "[y]our affiant was able to confirm much of the information provided by the credible and reliable informant through information maintained by the Grand Rapids Police Department, other credible and reliable informants, public information sources and other law enforcement agencies." This statement indicates that Officer Bush was well aware that hearsay statements from informants should be accompanied by an explanation of their credibility and reliability. Accordingly, his failure to do so with respect to information obtained from the unidentified subjects implies the absence of any such indicia.

An affidavit establishing probable cause based on an informant's tip must also provide facts identifying the basis of the informant's knowledge. *United States v. Frazier*, 423 F.3d 526, 532 (6th Cir. 2005). "The 'basis for knowledge' factor uses the degree of detail in a tip to infer whether the tipster 'had a reliable basis for making his statements.'" *Helton*, 314 F.3d at 822 (quoting *Smith*, 182 F.3d at 477). Although Officer Bush's affidavit states that the basis of the subjects' knowledge was that they had each purchased drugs from Christian at the Residence, the affidavit provides almost no details about the purchases beyond identifying the types of drugs involved. The unidentified subjects did not state exactly when they had purchased drugs from

Christian, the amount of the drugs purchased, or whether they entered the Residence and saw any controlled substances or other evidence of drug trafficking inside. This lack of detail further reduces the probative value of the information obtained from these sources.

"[I]n the absence of any indicia of the informants' reliability, courts insist that the affidavit contain substantial independent police corroboration." *Frazier*, 423 F.3d at 532. There is no evidence in the present case that the police corroborated any of the information obtained from the unidentified subjects. The affidavit does not indicate that the police engaged in any ongoing surveillance of the Residence, conducted subsequent controlled purchases, or otherwise tried to verify that Christian was currently using the Residence to sell drugs. And although the police established surveillance of the Residence on the very day that the affidavit was executed, the affidavit contains no observations by the police suggesting that Christian was then using the Residence as a base of operations.

Because the information from these unidentified subjects lacks any indicia of veracity or reliability and was not corroborated by subsequent police investigation, it should be accorded little weight in determining whether there was probable cause to search the Residence. *See United States v. McPhearson*, 469 F.3d 518, 524 n.3 (6th Cir. 2006) ("Thus, an allegation of drug dealing based on information from an untested confidential informant is insufficient to establish probable cause to search the alleged drug dealer's home. However, where the allegation of drug dealing is coupled with independently corroborated information from police officers, it may be sufficient to establish probable cause."); *Helton*, 314 F.3d at 822 (concluding that little weight should be given to statements from an informant whose reliability has not been determined); *see also United States v. Allen*, 211 F.3d 970, 976 (6th Cir. 2000) (en banc) (noting that an anonymous tip, even one that is "rich in particulars," will not be enough to establish probable cause if only innocent details are corroborated by the police, but holding that a magistrate may find probable cause to search a residence when "a known person, named to the magistrate, to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past").

C. The January controlled buy

Christian also contends that the evidence of the January 2015 controlled buy was stale when the affidavit was executed eight months later, and thus could not have supported a finding of probable cause to search the Residence. The government disputes this contention, arguing that because the officers sought records and indicia of continuous drug trafficking, the evidence was not stale.

"[S]tale information cannot be used in a probable cause determination." *United States v. Perry*, 864 F.3d 412, 414 (6th Cir. 2017) (quoting *United States v. Frechette*, 583 F.3d 374, 377 (6th Cir. 2009)); *see also United States v. Harris*, 255 F.3d 288, 299 (6th Cir. 2001) ("Because probable cause to search is concerned with facts relating to a presently existing condition, . . . there arises the unique problem of whether the probable cause which once existed has grown stale." (quoting *United States v. Spikes*, 158 F.3d 913, 923 (6th Cir. 1998))). Whether evidence is stale is a flexible inquiry that does not "create an arbitrary time limitation within which discovered facts must be presented to a magistrate." *United States v. Greene*, 250 F.3d 471, 480 (6th Cir. 2001) (quoting *Spikes*, 158 F.3d at 923). In considering the length of time between the events listed in the affidavit and the application for the warrant, a court should consider several factors, including:

> [1] the character of the crime (chance encounter in the night or regenerating conspiracy?), [2] the criminal (nomadic or entrenched?), [3] the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), [and 4] the place to be searched (mere criminal forum of convenience or secure operational base?) . . . .

Spikes, 158 F.3d at 923 (quoting *Andresen v. State*, 331 A.2d 78, 106 (Md. Ct. Spec. App. 1975)).

1. Second and fourth* Spikes *factors

There is little question that the second and fourth factors weigh in favor of finding that the evidence of the January controlled buy was not stale. The affidavit supports the conclusion that Christian had been occupying the Residence in Grand Rapids since at least 2009 and was thus "entrenched" in the community. *See Frechette*, 583 F.3d at 379 (finding that the defendant

was entrenched when evidence in the affidavit indicated that he had lived in the residence in question for 16 months). Moreover, courts have repeatedly held that a defendant's residence "is clearly a 'secure operational base.'" *Id.* (quoting *United States v. Paull*, 551 F.3d 516, 522 (6th Cir. 2009)); *see also United States v. Powell*, 603 F. App'x 475, 478 (6th Cir. 2015) (concluding that an individual's home "is more like a secure operational base than a mere forum of convenience").

2. First* Spikes *factor

The first and third factors, however, weigh in favor of finding that the evidence of the controlled buy was stale. With regard to the first factor, "[i]f an affidavit recites activity indicating protracted or continuous conduct, time is of less significance." *United States v. Henson*, 848 F.2d 1374, 1382 (6th Cir. 1988) (quoting *United States v. Haimowitz*, 706 F.2d 1549, 1554–55 (11th Cir. 1983)). This court has used both the terms "protracted and continuous" and "ongoing and continuous." *Compare Perry*, 864 F.3d at 415, *with United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006). Both variations appear to encompass two principles: that the conduct extended over a significant period of time and that it continued up to (or close to) the time of the search. (For clarity, I will use "protracted" for the first principle and "continuous" for the latter.) The key question, then, is whether the affidavit contains facts supporting an inference that Christian was engaged in recurrent or sustained drug-trafficking activity up to the time of the search.

As this court has pointed out:

> The crime at issue in this case—the sale of drugs out of a residence—is not inherently ongoing. Rather, it exists upon a continuum ranging from an individual who effectuates the occasional sale from his or her personal holdings of drugs to known acquaintances, to an organized group operating an established and notorious drug den. The inclusion of outdated information has been insufficient to render an entire affidavit stale when the affidavit as a whole establishes that the criminal activity in question is ongoing and continuous, or closer to the "drug den" end of the continuum.

Hython, 443 F.3d at 485. But if the affidavit, taken as a whole, suggests that the defendant is engaged in something closer to the "occasional sale from . . . personal holdings," *id.*, then "information goes stale very quickly 'because drugs are usually sold and consumed in a prompt

fashion,'" *United States v. Brooks*, 594 F.3d 488, 493 (6th Cir. 2010) (quoting *Frechette*, 583 F.3d at 378).

Here, Officer Bush explains that "a credible and reliable informant" engaged in a controlled purchase of drugs from Christian at the Residence in January 2015, eight months before Officer Bush sought the warrant at issue in this case. But the affidavit provides almost no detail regarding the controlled buy—it does not state whether the officers observed the buy, identify the type or amount of the controlled substance purchased, indicate how the purchase was initiated, or reveal if the informant had purchased drugs from Christian previously. Nor does the affidavit disclose whether the informant saw large quantities of drugs in Christian's possession or in the Residence. *See United States v. Abernathy*, 843 F.3d 243, 255 (6th Cir. 2016) (noting that a large quantity of drugs found in a trash can outside of a residence would suggest "repeated and ongoing drug activity in the residence"). Nothing about the January 2015 single controlled buy of an unknown quantity of an unknown drug by an informant with an unknown relationship to Christian suggests that Christian was engaged in protracted or continuous drug trafficking.

In sum, the affidavit reflects only a single purchase from a reliable informant eight months before the search and no other credible evidence of drug activity beyond four prior drug convictions ranging from 4 to 19 years old (the significance of these drug convictions for the probable-cause determination will be discussed in further detail below). I therefore conclude that the affidavit does not establish that Christian was engaged in protracted and continuous drug trafficking. *Cf. United States v. Sinclair*, 631 F. App'x 344, 348 (6th Cir. 2015) (evaluating the *Spikes* staleness factors and concluding that the crime at issue was "an ongoing drug trafficking conspiracy" when a confidential informant reported purchasing heroin from the defendant "for several years," and the officers observed the defendant engaging in activity consistent with drug trafficking over the most recent 12 months, with the last observation occurring just 15 days before the search warrant was executed at the defendant's residence); *United States v. Greene*, 250 F.3d 471, 481 (6th Cir. 2001) (finding protracted and continuous drug trafficking where a reliable confidential informant reported purchasing drugs from the defendant at his residence at least 12 times, the last purchase occurring 23 months before the search warrant executed,

because the informant also stated that a package was sent from the residence to a known drug dealer less than one month prior to the execution of the warrant).

3. Third Spikes *factor*

With regard to the third factor—whether the evidence to be seized is of enduring utility to the holder—the government contends that the warrant sought not just controlled substances, but also records of drug trafficking and firearms used in drug trafficking. These latter two categories of evidence, it argues, are likely to endure, even if controlled substances themselves are not. To support this argument, the government relies on *United States v. Burney*, 778 F.3d 536 (6th Cir. 2015). But *Burney* is distinguishable from the present case because there was no dispute that the 17-page affidavit in *Burney* provided ample evidence that the property had been used as a stash house for "a large-scale drug trafficking and money laundering operation— . . . a regenerating, enduring criminal enterprise that bears no resemblance to a 'chance encounter in the night.'" *Id.* at 538, 541–42. Such an extensive operation was likely to involve "scales, weapons, safes, bagging materials, and the like," evidence that was "not readily consumable" and thus unlikely to "be consumed or to disappear." *Id.* at 541.

In his affidavit in the present case, Officer Bush acknowledged the distinction between those who occasionally sell from their own supply—and thus produce little lasting evidence—and those who sell regularly for profit using extensive networks that likely involve durable evidence like records and firearms. True enough, Officer Bush stated in the affidavit that he was seeking records and firearms related to extensive drug-trafficking operations. But this statement assumes what the affidavit tried and, I believe, ultimately failed to prove by substantial evidence—that Christian was engaged in organized and extensive drug-trafficking operations likely to involve not just controlled substances, but also records and firearms.

Because the government has provided credible evidence of only a single sale of an unknown quantity of a controlled substance in January 2015, rather than "a large-scale drug trafficking and money laundering operation," *see id.*, it failed to provide a reason to believe that records of drug trafficking and firearms would be found at the Residence. Whether such records are durable is thus irrelevant. And "because drugs are usually sold and consumed in a prompt

fashion," evidence of a single drug sale became stale "very quickly," well before the search was executed eight months later. *See United States v. Abernathy*, 843 F.3d 243, 250 (6th Cir. 2016) (quoting *United States v. Brooks*, 594 F.3d 488, 493 (6th Cir. 2010)); *see also United States v. Hython*, 443 F.3d 480, 486 (6th Cir. 2006) (noting the limited evidentiary value of an undated controlled buy absent evidence of any recent drug activity at the residence). The third factor thus weighs in favor of finding the evidence of the controlled buy to be stale.

4. Conclusion on staleness

I believe that the first and third *Spikes* factors control the determination of whether evidence of the controlled buy is stale in this case. Although Christian is entrenched in the community and his residence would be a secure base of operations, the key question is whether evidence of drug activity would be found there at the time of the search. With no reliable evidence of continuous and protracted drug activity, the eight-month-old controlled buy was stale.

This court's decision in *Brooks* offers strong support for my conclusion. *Brooks* considered whether an affidavit was sufficient to establish probable cause to search the defendant's residence for evidence of drug crimes. Crucially, the affiant-officer arrested the defendant for aggravated drug trafficking at the defendant's residence and, in the process, smelled marijuana and observed marijuana seeds in plain view. The officer also found $1,000 in cash on the defendant after conducting a pat-down search. Later that day, the affiant-officer executed the affidavit in support of the search warrant. This court held that the officer's observations alone were sufficient to support probable cause. *Brooks*, 594 F.3d at 495.

But the affidavit in *Brooks* also contained several other pieces of information that, by themselves, were held to be insufficient to establish probable cause. These were: (1) four tips from confidential informants, stating that the defendant was trafficking in cocaine, with the tips ranging from one to five years old at the time that the affidavit was executed; (2) a 20-month-old tip from a confidential informant, stating that the defendant was selling cocaine from his residence; and (3) two controlled buys made by a confidential informant almost eight months before the affidavit was executed. The court noted:

> [T]here is no question but that this information is stale for purposes of establishing probable cause in its own right. All of the information is regarding drug transactions that took place, at the most recent, approximately six months prior to the date of the affidavit. Given the mobile and quickly consumable nature of narcotics, evidence of drug sales or purchases loses its freshness extremely quickly.

Id. at 493 n.4. Similarly, the single controlled buy conducted in the present case was stale when the warrant was executed eight months later. *Cf. United States v. Yates*, 501 F. App'x 505, 511 (6th Cir. 2012) (concluding that evidence of a single drug transaction occurring at a residence was not stale when the transaction occurred within ten days of the affidavit's execution); *United States v. Pinson*, 321 F.3d 558, 565 (6th Cir. 2003) (concluding that evidence of a single controlled purchase was not stale when the warrant was issued three days later).

D. Criminal history

The next matter to be considered is Christian's criminal record. Although "a person's criminal record [demonstrating multiple drug offenses] alone does not justify a search of his or her home[,]" *United States v. Payne*, 181 F.3d 781, 790–91 (6th Cir. 1999), it is relevant to the probable-cause inquiry, *United States v. Berry*, 565 F.3d 332, 339 (6th Cir. 2009). The affidavit in question here asserts that Christian, at the time that the warrant was issued, had a 19-year-old conviction for possession of less than 25 grams of cocaine and a 13-year-old conviction for an unspecified second controlled-substance offense. Christian has an additional six-year-old conviction for the delivery/manufacture of marijuana and a four-year-old conviction for the delivery/manufacture of cocaine.

The majority's contention that these convictions support a conclusion that Christian was engaged, at some point, in protracted drug activity is problematic. *See* Maj. Op. 4. Precedent instructs us to consider "[t]he relative recency of a set of actions and their relative closeness in time to each other." *United States v. Perry*, 864 F.3d 412, 415 (6th Cir. 2017). These convictions are each several years apart, and even the most recent conviction predates the January 2015 controlled buy by four years. Nothing about these old convictions and the controlled buy is inconsistent with a conclusion that Christian was simply "effectuat[ing] the

occasional sale from his or her personal holdings of drugs to known acquaintances." *See United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006).

But even assuming that these convictions, combined with the fact that two search warrants were executed at the Residence in 2009 and 2011, support a conclusion that Christian *was* engaged in protracted drug sales at the Residence at some point, there is no evidence to suggest that these sales were continuous at the time the warrant was sought and executed in September 2015. *See United States v. Helton*, 314 F.3d 812, 822 (6th Cir. 2003) (noting that even where "the likely duration of th[e] evidence is relatively long," the evidence may still be stale if enough time has passed between the tip and the execution of the warrant); *United States v. Brown*, 828 F.3d 375, 384 n.3 (6th Cir. 2016) (concluding that a 12-year-old conviction for conspiracy to distribute marijuana was insufficient to establish that an individual was a known drug dealer at the time the warrant was executed).

The key issue is whether a search-warrant affidavit establishes a fair probability that the evidence sought will be found at the place identified *at the time the warrant is executed*. *Hython*, 443 F.3d at 485. Emphasizing the temporal requirement of this test, this court found in *Hython* that "[e]ven had the affidavit stated that from time out of mind, [the residence to be searched] had been a notorious drug den, some recent information would be necessary to eliminate the possibility that a transfer in ownership or a cessation of illegal activity had not taken place." *Id.* at 486; *see also United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (concluding that the magistrate may "draw the inference that evidence of wrongdoing would be found in the defendants' homes" when the affidavit reflects "the independently corroborated fact that the defendants were known drug dealers at the time the police sought to search their homes").

Neither the majority nor the government has identified any case in which a record of past drug convictions, without *recent* credible evidence of drug activity, was sufficient to establish that a defendant was engaged in protracted and continuous drug dealing. This court has generally relied on past drug convictions in combination with a defendant's recent drug activity in applying the principle that, "[i]n the case of drug dealers, evidence is likely to be found where the dealers live." *United States v. White*, 874 F.3d 490, 501 (6th Cir. 2017) (alteration in original) (quoting *United States v. Jones*, 159 F.3d 969, 975 (6th Cir. 1998)); *see also United*

States v. Miggins, 302 F.3d 384, 393 (6th Cir. 2002) (finding probable cause to search the defendant's residence where his criminal record indicated that he had been convicted of cocaine charges and officers observed him signing for a package of cocaine delivered at a second location immediately before the issuance of the warrant).

Absent additional *recent* reliable evidence, then, old criminal convictions cannot support a finding that drug activity is continuous at the time of the search. Our legal system has long held a strong policy against using propensity evidence to suggest an inference that an individual who has once committed a crime continues to engage in criminal activity. *See* Fed. R. Evid. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."). Although the Federal Rules of Evidence do not come into play when deciding the validity of a search warrant, the aim of Rule 404 is similar to the purpose of the staleness rule: to ensure that decisionmakers—whether jurors or magistrates—do not improperly assume based on past wrongs that an individual is currently engaging in the specific criminal conduct at issue. *See Old Chief v. United States*, 519 U.S. 172, 179–82 (1997) (discussing the prejudicial nature of propensity evidence). By allowing the government to rely in part on Christian's stale prior convictions, the majority is lowering the probable-cause threshold for former convicts and stripping away their rights guaranteed by the Fourth Amendment.

I therefore conclude that Christian's prior criminal convictions, even when considered with the eight-month-old controlled buy, do not establish that he was engaged in protracted and continuous drug activity. And absent some "independently corroborated fact that the defendant[] w[as a] known drug dealer[] at the time the police sought to search [his] home," probable cause did not exist to search the Residence based on Christian's criminal record. *See McPhearson*, 469 F.3d at 524.

E. Totality of the circumstances

As discussed above, the caselaw makes clear that the probable-cause determination must be based on the "totality of the circumstances." *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008). The court should therefore evaluate the weight of the evidence when considered

as a whole. At this juncture, I note that the equivalent of only one page of the affidavit is dedicated to facts specifically related to Christian. The majority repeatedly points out that the affidavit is five pages long, *see* Maj. Op. 1, 9, but the affidavit mostly concerns generic information, including Officer Bush's qualifications and the general nature of drug investigations.

Even though the relevant portion of the affidavit is short and the information contained therein problematic, I recognize that this is not necessarily fatal. For instance, "[w]here recent information corroborates otherwise stale information, probable cause may be found." *United States v. Spikes*, 158 F.3d 913, 924 (6th Cir. 1998) (alteration in original) (quoting *United States v. Henson*, 848 F.2d 1374, 1381–82 (6th Cir. 1988)) (concluding that evidence of drug residue in a residence's trash cans and an officer's recent observations of individuals leaving the residence to sell drugs nearby "refreshed . . . otherwise stale information" contained in the affidavit). But no reliable evidence corroborates the stale evidence in the affidavit under review.

In addition, evidence from an informant whose reliability is not known can be corroborated by independent information from police officers. *McPhearson*, 469 F.3d at 524 n.3; *United States v. Hammond*, 351 F.3d 765, 772 (6th Cir. 2003) (noting the "minimal probative value" of a tip from an informant of unknown reliability, but concluding that "the tip can take on an increased level of significance for probable cause purposes, if corroborated by the police through subsequent investigation"). But there is no evidence that the officers here attempted to corroborate the information provided by the unidentified subjects. And even if the *previous* controlled buy could be considered to corroborate *subsequent* information from unidentified sources, the single buy did not corroborate allegations that protracted and continuous drug activity was occurring at the Residence.

In sum, the affidavit shows that (1) two search warrants were executed for drugs at the Residence years ago, (2) Christian has a history of years-old drug convictions, (3) he engaged in one sale of drugs at the Residence eight months prior to the execution of the search warrant, (4) unidentified subjects of unknown reliability reported that Christian was selling drugs at unspecified times in more recent months, and (5) a man with no known connection to Christian was found to be in possession of drugs after leaving "the area" of the Residence on the date of

the search-warrant affidavit. This evidence, even under the totality-of-the-circumstances approach, fails to establish a "fair probability" that drug activity was occurring at the Residence at the time the search warrant was executed. *See United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010).

The majority relies on *United States v. Hines*, 885 F.3d 919 (6th Cir. 2018), in arguing to the contrary. Maj. Op. 8 (quoting *Hines*, 885 F.3d at 921–22) ("'Not all search warrant affidavits include the same ingredients,' we said before recognizing that "'[i]t is the mix that courts review to decide whether evidence generated from the search may be used or must be suppressed.'" (alteration in original)). But the facts of *Hines* actually lend further support to my position that the warrant here did not establish probable cause to search the Residence.

The affidavit at issue in *Hines* contained the following evidence in support of a warrant to search the house in question, owned by Hines's mother: (1) a reliable confidential informant told officers five months prior to the warrant's execution that the defendant was selling large amounts of heroin from the house; (2) a statement from the same informant that he had seen heroin at the house the day before the search; (3) several months of surveillance of the house by law-enforcement officers documented the defendant's comings and goings; (4) a tip from a second reliable confidential informant the day before the warrant's execution stated that he was meeting the defendant at a nearby club to discuss an incoming heroin shipment; (5) officers' observations of the defendant driving "in a manner consistent with narcotics traffickers" to the club at the designated time; (6) statements from the second informant that he had received heroin from the defendant numerous times and was always instructed to meet him at the house to receive that heroin; (7) a tip from the second informant that he was instructed to collect heroin from the defendant at the house on the day that the warrant was executed; (8) three-year-old wiretaps identifying the defendant as a significant heroin trafficker; (9) the two-year-old seizure of $33,500 from a third individual outside the house (believed to be payment from Hines for a kilogram of cocaine); and (10) a subsequent statement from this individual that he had previously provided the defendant with heroin and cocaine. *Hines*, 885 F.3d at 922.

All of the evidence detailed above in *Hines* directly linked the residence to heroin trafficking at the time of the search through information from reliable informants and specific

observations by officers that corroborated the information provided by those informants. And after comparing this evidence with that used to support affidavits in other cases, the court in *Hines* ultimately concluded that the affidavit at least satisfied the *Leon* good-faith standard, if not probable cause. *Id.* at 924–28.

The affidavit at issue here, in contrast, fails to establish anything more than a speculative connection between drug activity and the Residence at the time of the search. This is the "hunch upon hunch" approach found unacceptable in *United States v. Valenzuela*, 365 F.3d 892, 897 (10th Cir. 2004). Unlike the affidavit in *Hines*, the affidavit here contains no recent evidence of drug activity at the Residence. The search warrant was therefore not supported by probable cause. Under these circumstances, the deference that would otherwise be due to the issuing magistrate is unjustified. *See United States v. Leon*, 468 U.S. 897, 914 (1984) ("Deference to the magistrate . . . is not boundless."); *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984) (noting that we apply a "deferential standard of review" to an issuing magistrate's probable-cause determination, but that the determination will not be upheld if the evidence, viewed as a whole, does not provide a "substantial basis" for that determination).

But the majority contends that the Supreme Court's decision in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), prevents us from "discounting each item [in the affidavit] one by one." Maj. Op. 10. Similarly, according to the majority, "*Hines* requires us to look holistically at what the affidavit does show, instead of focusing on what the affidavit does not contain, or the flaws of each individual component of the affidavit." Maj. Op. 8. The majority seems to believe that those cases prevent us from assessing the probative value of each bit of material information contained in an affidavit. That is not what the caselaw forbids, and nor should it.

To the contrary, under the totality-of-the-circumstances approach, we assess the probative value of each piece of evidence in the affidavit and then determine whether those pieces of evidence are, as a whole, sufficient to establish probable cause—in other words, we review the "mix" of unique "ingredients" in the affidavit. *See Hines*, 885 F.3d at 921–22; *see also Gardenhire v. Schubert*, 205 F.3d 303, 315 (6th Cir. 2000) (explaining that, in the context of an arrest, "[p]robable cause determinations involve an examination of all facts and circumstances

within an officer's knowledge at the time of an arrest" (quoting *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999))); *Valenzuela*, 365 F.3d at 897 ("[I]n assessing the totality of the circumstances, a reviewing court must examine the facts individually in their context to determine whether rational inferences can be drawn from them that support a probable cause determination." (citations and internal quotation marks omitted)).

The D.C. Circuit's error in *Wesby* was that it "viewed each fact 'in isolation, rather than as a factor in the totality of the circumstances.'" *Wesby*, 138 S. Ct. at 588 (quoting *Maryland v. Pringle*, 540 U.S. 366, 372 n.2 (2003)). Specifically, the Court of Appeals erred by engaging in a "divide-and-conquer analysis," *id.* (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)), whereby it dismissed facts that were "not sufficient *standing alone* to create probable cause," *id.* (emphasis in original). I have not done that here. Instead, I have considered each fact "as a factor in the totality of the circumstances," but nonetheless conclude that the affidavit was insufficient to establish probable cause. *See id.* (quoting *Pringle*, 540 U.S. at 372 n.2).

The majority's approach, on the other hand, is problematic because it contains "inferences drawn upon inferences." *See United States v. Laughton*, 409 F.3d 744, 750 (6th Cir. 2005). It infers that the officers saw Thomas leave the Residence, that the heroin found in Thomas's vehicle was connected to the Residence, that tips from unidentified informants are reliable without any indicia of credibility and without corroboration, and that a stale controlled buy and old criminal convictions establish that Christian was engaged in continuous and protracted drug activity at the time of the search. The totality-of-the-circumstances test is not a license for the majority to list problematic evidence, stacking inference upon inference, and contend in a conclusory manner that "taken together [the affidavit] point[s] clearly to one conclusion: that Christian was dealing drugs from 618 Grandville." Maj. Op. 7. Rather, the Supreme Court in *Wesby* instructed lower courts to view each fact "as a factor in the totality of the circumstances" and to "consider 'the whole picture.'" *See Wesby*, 138 S. Ct. at 588 (citations omitted). This requires us to explain how individual pieces of evidence corroborate one another, which the majority has failed to do.

II. *LEON* GOOD-FAITH EXCEPTION

This brings me to the *Leon* good-faith exception. Under the *Leon* good-faith standard, suppression should be limited to "circumstances in which the benefits of police deterrence outweigh the heavy costs of excluding 'inherently trustworthy tangible evidence' from the jury's consideration." *United States v. White*, 874 F.3d 490, 496 (6th Cir. 2017) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)). The test is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's decision." *Id.* (quoting *United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008)).

Four situations have been identified by the Supreme Court in which an officer could not reasonably believe that a search was valid, despite the issuance of a warrant. *See Laughton*, 409 F.3d at 748 (citing *Leon*, 468 U.S. at 914–23). One of those is where the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)). Such an affidavit has been characterized as "bare bones." *Id.* at 915, 926. A "bare bones affidavit is one that merely 'states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.'" *United States v. McPhearson*, 469 F.3d 518, 526 (6th Cir. 2006) (quoting *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996)). In contrast, a sufficient affidavit must contain some "particularized facts that indicate veracity, reliability, and basis of knowledge and go beyond bare conclusions and suppositions." *Id.*

This court held in *Laughton* "that a determination of good-faith reliance, like a determination of probable cause, must be bound by the four corners of the affidavit." *Laughton*, 409 F.3d at 751. Judge Thapar, concurring in the present case, now recommends that we overrule *Laughton*. But I believe that *Laughton* correctly decided that "the good faith exception to the exclusionary rule does not permit consideration of information known to a police officer, but not included in the affidavit, in determining whether an objectively reasonable officer would have relied on the warrant." *Id.* at 752.

The test for good-faith reliance is an objective one. *Leon*, 468 U.S. at 919 n.20. In *Leon*, the Supreme Court reasoned that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Id.* at 922 n.23 (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)). This court held in *Laughton* that the same reasoning applies to the issue of considering information outside of the affidavit "in determining whether an objectively reasonable officer would have relied on the warrant." *Laughton*, 409 F.3d at 752. Allowing courts to consider such extrinsic information would "lead to the very kind of subjectivity that the Supreme Court has repeatedly and explicitly rejected." *Id.* Future cases would require courts to engage in the subjective and time-consuming inquiry of "determin[ing] not only how much affiants knew, but also when and from whom they learned it." *See id.*

Judge Thapar disagrees, citing *Herring v. United States*, 555 U.S. 135 (2009), for the proposition that courts already consider "a particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, but not his subjective intent." *Id.* at 145–46 (internal citations omitted). But the Supreme Court in *Herring* was noting only that we should consider a police officer's general background knowledge and experience. In support of this proposition, the Court cited *Ornelas v. United States*, 517 U.S. 690 (1996), in which Chief Justice Rehnquist observed that "a police officer views the facts through the lens of his police experience and expertise" and that "a police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Id.* at 699–700. Considering an officer's general background knowledge and experience is an entirely different inquiry from considering what relevant facts were known to the officer at the time of the search. The latter requires us to "inquir[e] into the subjective awareness of arresting officers," *see Herring*, 555 U.S. at 145, whereas the former does not.

Furthermore, "*Leon* . . . make[s] clear that the relevant question is whether the officer reasonably believed that the warrant was properly issued, *not* whether probable cause existed in fact." *United States v. Carpenter*, 360 F.3d 591, 598 (6th Cir. 2004) (en banc) (Gilman, J., concurring) (emphasis in original). Information extrinsic to the affidavit and not presented to the

magistrate is not relevant to the inquiry of whether the officer reasonably believed that the warrant was properly issued. Accordingly, I find no basis to conclude that this court's decision in *Laughton* is inconsistent with Supreme Court precedent.

Applying the above principles, I acknowledge that whether the good-faith standard is met in this case is a close call. But I ultimately conclude that the affidavit falls short because it does not provide any particularized facts connecting the Residence to drug activity at the time that the search warrant was executed.

The majority, in concluding otherwise, argues that our decision in *United States v. Hython*, 443 F.3d 480 (6th Cir. 2006), "is almost completely inapposite here," Maj. Op. 9. I completely disagree. In *Hython*, the affidavit contained information that the officers had, at some unidentified point, conducted a controlled buy of crack cocaine at the residence to be searched. But because "the affidavit include[d] no observation of deliveries to the address, no monitoring of the frequency or volume of visitors to the house, no second controlled buy, [and] no further surveillance whatsoever," "the affidavit [wa]s patently insufficient" to allow a reasonable officer to believe that the affidavit established probable cause to search the residence. *Hython*, 443 F.3d at 486, 488–89.

Similarly, the affidavit in the present case primarily relies on a single stale controlled buy to link the Residence to drug activity at the time of the search. It does not provide any credible evidence that drug activity continued at the Residence in the eight-month interim, and the single instance of contemporary surveillance did not link the Residence to drug activity by anything more than speculation that Thomas purchased drugs at the Residence. This court's decision in *Hython* is thus very much on point with regard to the *Leon* good-faith issue.

Moreover, this court has held that the *Leon* good-faith standard was not satisfied where "the 'evidence in the affidavit connecting the crime to the residence [wa]s so vague as to be conclusory or meaningless.'" *McPhearson*, 469 F.3d at 527 (quoting *United States v. Frazier*, 423 F.3d 526, 537 (6th Cir. 2005)) (finding that the *Leon* standard was not satisfied where the affidavit reflected that officers had arrested the defendant at his residence on an assault charge and found him in possession of cocaine, but where there was no evidence connecting the

defendant or his residence to drug trafficking); s*ee also United States v. Brown*, 828 F.3d 375, 384–86 (6th Cir. 2016) (holding that, in the search of a residence, the *Leon* good-faith standard was not satisfied despite the affidavit's allegations that the defendant was arrested for attempting to deliver heroin 21 days prior to the search, a drug dog had alerted to the odor of narcotics in the defendant's car, the defendant exchanged text messages discussing drug prices, and the defendant had a 12-year-old conviction for conspiracy to distribute marijuana).

In contrast, this court has held that an affidavit was sufficient to satisfy the *Leon* good-faith standard where the affidavit provided a material link between the criminal activity alleged and the residence in question at the time of the search. *See United States v. White*, 874 F.3d 490, 494, 498 (6th Cir. 2017) (finding the *Leon* good-faith standard satisfied where the affiant stated that officers received a tip that the defendant, who had an extensive criminal history involving drugs, was selling drugs from his residence, and the officers initiated, observed, and recorded a controlled buy from the defendant in the driveway of the residence less than 72 hours before the affidavit was executed); *United States v. Higgins*, 557 F.3d 381, 391 (6th Cir. 2009) (concluding that the affidavit met the *Leon* good-faith standard where it stated that a named informant told officers that he had purchased drugs from the defendant's residence earlier that day); *Frazier*, 423 F.3d at 536 (finding the *Leon* good-faith standard satisfied when the affidavit reflected that two recorded controlled buys were conducted by an informant at the defendant's previous residence seven months before the search, that drugs were found at the defendant's previous residence two months before the search, that a named informant reported buying two pounds of marijuana from the defendant weekly, and that phone records showed that the defendant was in constant contact with known drug dealers); *Carpenter*, 360 F.3d at 593 (finding the *Leon* standard satisfied where the affidavit supporting a warrant to search the residence alleged that a police officer conducting an aerial search spotted numerous marijuana plants directly connected by a road to the residence).

Unlike the affidavit evidence considered in *White*, *Higgins*, *Frazier*, and *Carpenter*, Christian's criminal history and the January 2015 controlled buy do not establish a nexus between the Residence and drug activity at the time of the search. Such a nexus is required for the *Leon* good-faith exception to apply. *See Hython*, 443 F.3d at 488–89.

And although closer in time to the execution of the search, the information received from the unidentified subjects indicating that Christian was engaged in large-scale drug trafficking from the Residence was "so vague as to be conclusory or meaningless." *See Frazier*, 423 F.3d at 536 (quoting *Carpenter*, 360 F.3d at 596). Where statements "are heavily discounted due to their minimal trustworthiness and reliability, they add little to the probable cause determination" and, accordingly, "a reasonable officer would recognize that without more corroboration, the . . . affidavit came well short of establishing probable cause." *United States v. Helton*, 314 F.3d 812, 825 (6th Cir. 2003).

An investigation by law-enforcement officers can corroborate tips of unknown reliability. But the observation of Thomas "walk[ing] away from the area" of the Residence before he was later found with heroin in his vehicle does not provide this additional corroboration. At best, the observation allows for only speculation that Thomas purchased the drugs from the Residence. Such speculation cannot reasonably be thought to support a finding of probable cause. *See White*, 874 F.3d at 498 (noting that a bare-bones affidavit is one that contains "a mere affirmation of suspicion and belief without any statement of adequate supporting facts" (quoting *Nathanson v. United States*, 290 U.S. 41, 46 (1933))). As a result, I conclude that no reasonable officer would have believed that the affidavit established probable cause to search the Residence at the time the affidavit was executed.

I also believe that my conclusion is in line with the policy behind the *Leon* good-faith exception to the exclusionary rule. The majority argues that "this is a case in the very heartland of the *Leon* exception," and that "[t]his is a particularly egregious case to misapply the good-faith exception given the utter lack of police wrongdoing." Maj. Op. 8, 10. I respectfully disagree. This court in *United States v. McClain*, 444 F.3d 556 (6th Cir. 2005), held that the *Leon* exception applied because "[t]here was indeed nothing more that [the officer] 'could have or should have done under these circumstances to be sure his search would be legal.'" *Id.* at 566 (quoting *United States v. Thomas*, 757 F.2d 1359, 1368 (2d Cir. 1985)).

In the present case, however, the officers could have and should have done a lot more. There is no evidence in the affidavit that they engaged in ongoing or repeated surveillance, arranged subsequent controlled buys, or otherwise monitored for "hallmarks of drug dealing" at

the Residence. *See United States v. McPhearson*, 469 F.3d 518, 527 (6th Cir. 2006); *Hython*, 443 F.3d at 486, 488–89. Suppressing the evidence in this case would incentivize police officers to take such actions to corroborate unreliable information and describe such actions in their search-warrant applications. Instead, the majority allows the *Leon* good-faith exception, which was intended to be applied only in "unique cases," *see McClain*, 444 F.3d at 565, to excuse sloppy police work.

III. TELEPHONE-CALL EVIDENCE

I will now briefly discuss Christian's challenge to the district court's decision to admit the recorded telephone call between Thomas and Thomas's girlfriend, Tanisha Edwards. The majority concludes that, if the district erred in admitting this evidence, the error was harmless. Maj. Op. 10–11. But the majority's determination relies on its conclusion affirming the district court's decision to admit the evidence obtained in accordance with the search warrant. Because I disagree and conclude that the court erred in admitting the evidence obtained pursuant to the warrant, I do not consider the court's error regarding the phone-call evidence harmless.

IV. CONCULSION

In sum, considering the totality of the circumstances, I believe that the information in the affidavit fails to establish probable cause and that the *Leon* good-faith exception does not apply. I would therefore hold that the district court erred in denying Christian's motion to suppress the evidence obtained pursuant to the search warrant. Accordingly, I respectfully dissent.

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0203p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TYRONE DEXTER CHRISTIAN,

Defendant-Appellant.

No. 17-1799

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:15-cr-00172-1—Robert J. Jonker, Chief District Judge.

Decided and Filed: September 17, 2018

Before: COLE, Chief Judge; BATCHELDER, MOORE, CLAY, GIBBONS, SUTTON, COOK, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, and NALBANDIAN, Circuit Judges.

ORDER

A majority of the Judges of this Court in regular active service has voted for rehearing en banc of this case. Sixth Circuit Rule 35(b) provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is ORDERED, that the previous decision and judgment of this court are vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0122p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TYRONE DEXTER CHRISTIAN,

Defendant-Appellant.

No. 17-1799

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:15-cr-00172-1—Robert J. Jonker, Chief District Judge.

Argued: March 9, 2018

Decided and Filed: June 26, 2018

Before: GILMAN, ROGERS, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Daniel A. Bihrle, Grant E. Mitchell, UNIVERSITY OF TENNESSEE, Knoxville, Tennessee, for Appellant. Timothy VerHey, UNITED STATES ATTORNEY'S OFFICE, Grand Rapids, Michigan, for Appellee. **ON BRIEF:** Daniel A. Bihrle, Grant E. Mitchell, Lucille A. Jewel, Wesley S. Love, Jack F. Smith, UNIVERSITY OF TENNESSEE, Knoxville, Tennessee, for Appellant. Timothy VerHey, UNITED STATES ATTORNEY'S OFFICE, Grand Rapids, Michigan, for Appellee.

GILMAN, J., delivered the opinion of the court in which STRANCH, J., joined. ROGERS, J. (pp. 33–40), delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge. Tyrone Christian was convicted by a jury for (1) possessing a controlled substance with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1); (2) being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1); and (3) possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i). Before trial, Christian sought to suppress evidence obtained via a search warrant that he argued was not supported by probable cause. He also challenged the admission at trial of a recorded telephone call between two other individuals on the grounds that it was inadmissible hearsay. The district court denied the motion to suppress and admitted the recording of the call.

Christian renews both challenges on appeal. For the reasons set forth below, we **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

On September 3, 2015, a state magistrate issued a search warrant for Christian's residence located at 618 Grandville Avenue in Grand Rapids, Michigan (the Residence), based on information contained in a four-and-a-half-page affidavit prepared by Thomas Bush, a Grand Rapids police officer. But the equivalent of only one page of the affidavit is dedicated to facts specifically related to Christian. The rest concerns generic information, including Officer Bush's qualifications and the nature of drug investigations.

The search was carried out shortly after midnight on September 4, uncovering various quantities of heroin, cocaine, and marijuana, as well as two firearms and sandwich bags with cut corners. Christian was not present for the search, but was stopped and detained in his car nearby.

Before trial, Christian sought to suppress the evidence from the search of the Residence, arguing that the warrant was not based on probable cause. The district court denied the motion,

and the evidence was introduced at trial. Christian was convicted on all three counts with which he was charged. He now timely appeals his conviction, contending that the district court erred when it allowed evidence from the search to be introduced at trial.

Officer Bush's affidavit sought authorization to search the Residence for controlled substances, firearms, records relating to trafficking in controlled substances, and any quantities of cash that might be proceeds from the sale of controlled substances. In support of his request, Officer Bush outlined his qualifications and experience in investigating drug crimes and noted that he and other law-enforcement officers had become "involved in a drug investigation involving Tyrone Christian." He also provided six assertions of factual support relating to Christian:

- The Grand Rapids Police Department had previously executed two search warrants at Christian's residence in 2009 and 2011 as part of drug investigations targeting Christian. Arrests resulted from both searches (including the arrest of Christian's wife for "maintaining a drug house").
- Christian has been convicted of several drug-related crimes over a nineteen-year period: (1) possession of cocaine in 1996, (2) an unspecified second controlled-substance offense in 2002, (3) delivery/manufacture of marijuana and possession of a firearm by a felon in 2009, and (4) delivery/manufacture of cocaine in 2011.
- In December 2014, Officer Bush "had contact with a credible and reliable informant who provided information on several drug traffickers including Tyrone Christian." The affidavit states that the unnamed informant "provided names, nicknames, phone numbers, residences utilized by the drug traffickers and information regarding specific drug transactions," and that Officer Bush was "able to confirm much of the information provided."
- At the direction of Officer Bush, the informant conducted a controlled purchase of drugs from Christian at the Residence in January 2015, eight months before the warrant in question. The affidavit notes that the drugs purchased were field tested with positive results.
- "Within the last four months, [Officer Bush] has been involved in or received information from several debriefs of subjects who have stated that Tyrone Christian is a large scale drug dealer. These subjects further stated that they have purchased large quantities of heroin and crack cocaine from Christian at 618 Grandville Avenue [] in the last four to five months."
- On September 3, 2015—the date that the warrant was requested and issued—surveillance of the Residence was established. A subject later identified as Rueben Thomas was seen "walk[ing] away from the area of 618 Grandville Avenue and leav[ing] the area in a

> vehicle." Surveillance of the vehicle continued until officers conducted a traffic stop for a civil infraction. During the stop, officers seized approximately 20 grams of heroin from the vehicle. Thomas admitted to being on Grandville Avenue, but denied being at the Residence, "contrary to observations of the law enforcement officers."

In addition to contesting the validity of the search warrant, Christian argued at trial that statements made during a recorded telephone call between Rueben Thomas and Thomas's girlfriend, Tanisha Edwards, constituted inadmissible hearsay and thus should not be admitted. The call occurred while Thomas was in jail following his arrest on September 3, 2015. Edwards informed Thomas during the call that he should be grateful to Christian because Christian had removed "groceries"—allegedly referring to drugs and firearms—from Thomas's home following the arrest. This call was used to tie Christian to Thomas and to contraband later found buried in the backyard of the house belonging to Christian's mother.

II. ANALYSIS

A. The district court erred in denying Christian's motion to suppress.

1. Standard of review

"When reviewing a district court's decision on a motion to suppress, we use a mixed standard of review. . . ." *United States v. Davis*, 514 F.3d 596, 607 (6th Cir. 2008). We review findings of fact under the clear-error standard and conclusions of law de novo. *Id.* "Whether a search warrant affidavit establishes probable cause to conduct the search is a legal question that this Court reviews de novo." *United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010). "On appeal of a district court's decision on a motion to suppress, although we must view the evidence in a light most likely to support the decision of the district court, when the district court itself is a reviewing court, this court owes the district court's conclusions no particular deference." *Id.* (citations omitted and alterations incorporated). On the other hand, "[a]n issuing judge's findings of probable cause should be given great deference by the reviewing court and should not be reversed unless arbitrarily exercised." *United States v. Higgins*, 557 F.3d 381, 389 (6th Cir. 2009) (quoting *United States v. Miller*, 314 F.3d 265, 268 (6th Cir. 2002)).

2. Probable cause

The Fourth Amendment provides 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 [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *see also Payton v. New York*, 445 U.S. 573, 585 (1980) ("[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" (quoting *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972))).

"To establish probable cause adequate to justify issuance of a search warrant, the governmental entity or agent seeking the warrant must submit to the magistrate an affidavit that establishes 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Brooks*, 594 F.3d at 492 (quoting *United States v. Berry*, 565 F.3d 332, 338 (6th Cir. 2009)). This requires "a nexus between the place to be searched and the evidence sought," *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006), at the time the warrant is issued, *United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006). The probable-cause standard is practical and nontechnical. *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005). In other words, a reviewing court should consider the "totality of the circumstances" rather than "engage in line-by-line scrutiny of the warrant application's affidavit." *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008). But the court must limit its "review of the sufficiency of the evidence supporting probable cause . . . to the information presented in the four-corners of the affidavit." *Frazier*, 423 F.3d at 531.

Christian argues that the warrant issued to search the Residence was not supported by probable cause because each of the affidavit's supporting facts was either stale or failed to establish a sufficient nexus between the evidence sought and the Residence. To determine whether the affidavit supported probable cause to search the Residence, we will first assess the

significance of each piece of evidence relied upon, and then we will consider all the evidence together to determine whether the totality of the circumstances supports a finding of probable cause.

The dissent contends that our approach is inconsistent with the well-established mandate to assess probable cause by considering the totality of the circumstances. Dissent Op. 33. According to the dissent, we have engaged in a "divide-and-conquer-approach" to assess the sufficiency of the affidavit that "has no place in our law." *Id.* To the contrary, the totality-of-the-circumstances approach requires us to examine each piece of evidence in the affidavit to assess its probative value and then determine whether those pieces of evidence are as a whole sufficient to establish probable cause. *Gardenhire v. Shubert*, 205 F.3d 303, 315 (6th Cir. 2000) (noting that, in the context of an arrest, "[p]robable cause determinations involve an examination of all facts and circumstances within an officer's knowledge at the time of the arrest" (quoting *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999))); *United States v. Valenzuela*, 365 F.3d 892, 897 (10th Cir. 2004) ("[C]ourts may not engage in a 'divide-and-conquer' analysis of facts to determine whether probable cause existed. However, neither may a court arrive at probable cause simply by piling hunch upon hunch. Thus, in assessing the totality of the circumstances, a reviewing court 'must examine the facts individually in their context to determine whether rational inferences can be drawn from them' that support a probable cause determination." (citations omitted)).

i. Observations of Thomas

As noted above, officers observed Thomas "walk away from the area" of the Residence and leave in a vehicle on the day that the search warrant was issued. They followed Thomas and stopped him after an unknown period of time for a driving infraction. During the stop, the officers found approximately 20 grams of heroin in Thomas's vehicle. Crucially, the affidavit does not state that the officers saw Thomas entering or leaving the Residence, even though their surveillance was targeted specifically at that property. Nor does it say that Thomas was seen with Christian. In fact, the affidavit does not assert that there is any connection at all between Thomas and Christian.

True enough, the affidavit states that, during the traffic stop, "Rueben Thomas admitted that he had recently been at an address on Grandville Avenue in the City of Grand Rapids but denied being at 618 Grandville, contrary to observations of the law enforcement officers." But we decline to interpret this "contrary to observations" statement as an indication that officers saw Thomas actually entering or leaving the Residence itself. Officer Bush was undoubtedly aware that any evidence of Thomas being at the Residence would be highly relevant to the probable-cause determination, but chose instead to state simply that Thomas was seen "in the area"—a vague description that does not place Thomas at the Residence. Absent a direct statement that Thomas was seen entering or leaving the Residence, or even at the Residence in any sense, we are unwilling to read such a factual assertion into the affidavit.

The dissent, on the other hand, contends that the affidavit's lack of a direct statement that Thomas was at the Residence is attributable to the "haste of a criminal investigation," and that we are in effect requiring the affidavit to include "magic words," contrary to precedent from the Supreme Court. Dissent Op. 34 (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). But the affidavit's inclusion of the specific, nontechnical language "in the area" appears to us more consistent with an honest acknowledgement that the officers did not observe Thomas on the property itself. In fact, the common-sense meaning of the language "in the area" suggests that Thomas was near but not at the Residence when observed.

The dissent also notes that the affidavit "need only have alleged 'facts that create a reasonable possibility'" that "Thomas was seen leaving 618 Grandville." Dissent Op. 35. This statement reflects a subtle but crucial error. The affidavit must contain facts that establish probable cause that *evidence of drug activity would be present in the Residence at the time of the search*. Stated differently, probable cause must be established in relation to whether there is evidence of drug activity in the Residence, not in relation to whether Thomas was seen leaving the Residence. *See United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010) ("To establish probable cause adequate to justify issuance of a search warrant, the governmental entity or agent seeking the warrant must submit to the magistrate an affidavit that establishes 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" (quoting *United States v. Berry*, 565 F.3d 332, 338 (6th Cir. 2009))).

So even if the affidavit had stated that Thomas was seen on the lawn or in the driveway of the Residence, we would still have to speculate that Thomas was at one point inside the Residence and, taking the speculation one step further, that he engaged in drug activity while inside. Such an inference is made even more tenuous by the fact that there is nothing in the affidavit to suggest that the heroin later recovered during the traffic stop was on Thomas's person, rather than simply in the car, when Thomas was observed walking in the area of the Residence by the officers.

This leaves us to consider the significance of the following: A single individual with no known connection to Christian was seen walking away from the area of the Residence and then leaving that area in a car. He was followed by officers to a subsequent location where a traffic stop was conducted, during which heroin was found in the vehicle. If this provides any nexus at all between evidence of drug trafficking and the Residence, that nexus is so speculative and attenuated that it cannot, without more, support a finding of probable cause. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002) (noting that a hunch is insufficient to support a finding of reasonable suspicion for a *Terry* stop, and that the reasonable-suspicion standard is easier to satisfy than the probable-cause standard).

To conclude otherwise would allow officers seeking a warrant to rely on speculation that drug activity near a residence is related to that residence, significantly lowering the burden for the government to show probable cause in communities where drugs are prevalent. Because the government cites no case that would support such a proximity test for establishing probable cause, we find that the officers' observations of Thomas have little value on their own. But that does not end our inquiry. We must consider, as we do below, whether other evidence in the record bolsters or corroborates a connection between Thomas's alleged drug activity and the Residence, such that the magistrate could have found a fair probability that evidence of drug trafficking would be found at the Residence at the time of the search.

ii. Tips from unidentified informants

The affidavit further states:

> Within the last four months, your affiant has been involved in or received information from several debriefs of subjects who have stated that Tyrone Christian is a large scale drug dealer. These subjects further stated that they have purchased large quantities of heroin and crack cocaine from Christian at 618 Grandville Avenue in the last four to five months.

Officer Bush's assertion that he received information from several unidentified subjects omits critical particulars. Among other things, the affidavit does not tell us the number of individuals who made the statements ("several" could indicate as few as three individuals), explain what constituted a "debrief," identify the contexts in which the debriefs occurred, or specify the date that the information was received (all of the information could have been received as many as four months before the search).

More importantly, Officer Bush's statement gives no indication as to the veracity or reliability of the information obtained from the "subjects." We have no way of knowing whether Officer Bush or another officer had a relationship with any of the subjects. Nor did Officer Bush assert any belief concerning the reliability or veracity of the subjects' comments, let alone provide any factual basis by which the magistrate could assess their reliability or veracity. *See United States v. Helton*, 314 F.3d 812, 822 (6th Cir. 2003) (noting that, under Sixth Circuit precedent, an affidavit "must contain a statement about some of the underlying circumstances indicating the informant was credible or that his information was reliable" (quoting *United States v. Smith*, 182 F.3d 473, 477 (6th Cir. 1999))).

The affidavit's complete failure to address the credibility and reliability of the information provided by the subjects is even more glaring when juxtaposed with Officer Bush's inclusion of a paragraph supporting the credibility and reliability of the confidential informant who conducted the controlled buy in January 2015. With regard to this latter informant, Officer Bush stated that "[y]our affiant was able to confirm much of the information provided by the credible and reliable informant through information maintained by the Grand Rapids Police Department, other credible and reliable informants, public information sources and other law enforcement agencies." Because Officer Bush knew that hearsay statements from informants

should be accompanied by an explanation of their credibility and reliability, his failure to do so with respect to information obtained from the unidentified subjects implies the absence of any such indicia.

An affidavit establishing probable cause based on an informant's tip must also provide facts identifying the basis of the informant's knowledge. *Frazier*, 423 F.3d at 532. "The 'basis for knowledge' factor uses the degree of detail in a tip to infer whether the tipster 'had a reliable basis for making his statements.'" *Helton*, 314 F.3d at 822 (quoting *Smith*, 182 F.3d at 477). In *Helton*, the court determined that an anonymous tip was "sparse in relevant detail," causing it to "lose[] persuasive value" where the informant stated that he had been inside the residence that was searched and had seen stacks of money, but "did not describe which rooms he or she visited, where he or she saw the stacks of money, how high the stacks of money were, or how the stacks were stored." *Id.*

Although Officer Bush's affidavit suggests that the basis of the subjects' knowledge was that they had each purchased drugs from Christian at the Residence, the affidavit provides almost no details about the purchases beyond identifying the types of drugs involved. The unidentified subjects did not state exactly when they purchased drugs from Christian, the amount of the drugs purchased, or whether they entered the Residence and saw any controlled substances or other evidence of drug trafficking inside. This lack of detail further reduces the persuasive value of the information obtained from these sources.

"[I]n the absence of any indicia of the informants' reliability, courts insist that the affidavit contain substantial independent police corroboration." *Frazier*, 423 F.3d at 532. There is no evidence in the present case that the police corroborated any of the information obtained from the unidentified subjects. The affidavit does not indicate that the police engaged in any ongoing surveillance of the Residence, conducted subsequent controlled purchases, or otherwise tried to verify that Christian was currently using the Residence to sell drugs. And although the police established surveillance of the Residence on the very day that the affidavit was executed, this surveillance did not yield any observations by law enforcement suggesting that Christian was then using the Residence as a base of operations.

Because the information from these unidentified subjects lacks any indicia of veracity or reliability and was not corroborated by subsequent police investigation, it should be accorded very little weight in determining whether there was probable cause to search the Residence. *See United States v. McPhearson*, 469 F.3d 518, 524 n.3 (6th Cir. 2006) ("Thus, an allegation of drug dealing based on information from an untested confidential informant is insufficient to establish probable cause to search the alleged drug dealer's home. However, where the allegation of drug dealing is coupled with independently corroborated information from police officers, it may be sufficient to establish probable cause."); *Helton*, 314 F.3d at 822 (concluding that little weight should be given to statements from an informant whose reliability has not been determined); *see also United States v. Allen*, 211 F.3d 970, 976 (6th Cir. 2000) (noting that an anonymous tip, even one that is "rich in particulars," will not be enough to establish probable cause if only innocent details are corroborated by the police, but holding that a magistrate may find probable cause to search a residence when "a known person, named to the magistrate, to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past").

iii. The January controlled buy

Christian also contends that the evidence of the January 2015 controlled buy was stale when the affidavit was executed in September 2015 and thus could not have supported a finding of probable cause to search the Residence. The government disputes this contention, arguing that because the officers sought records and indicia of continuous drug trafficking, the evidence was not stale.

"[S]tale information cannot be used in a probable cause determination." *United States v. Perry*, 864 F.3d 412, 414 (6th Cir. 2017) (quoting *United States v. Frechette*, 583 F.3d 374, 377 (6th Cir. 2009)); *see also United States v. Harris*, 255 F.3d 288, 299 (6th Cir. 2001) ("Because probable cause to search is concerned with facts relating to a presently existing condition, . . . there arises the unique problem of whether the probable cause which once existed has grown stale." (quoting *United States v. Spikes*, 158 F.3d 913, 923 (6th Cir. 1998))). Whether evidence is stale is a flexible inquiry that does not "create an arbitrary time limitation within which discovered facts must be presented to a magistrate." *United States v. Greene*, 250 F.3d 471, 480

(6th Cir. 2001) (quoting *Spikes*, 158 F.3d at 923). "A key but by no means controlling issue is the length of time between the events listed in the affidavit and the application for the warrant." *United States v. Leaster*, 35 F. App'x 402, 406 (6th Cir. 2002). Courts should consider several factors, including:

> [1] [t]he character of the crime (chance encounter in the night or regenerating conspiracy?), [2] the criminal (nomadic or entrenched?), [3] the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), [4] the place to be searched (mere criminal forum of convenience or secure operational base?).

Greene, 250 F.3d at 480–81 (quoting *Spikes*, 158 F.3d at 923).

a. Second and fourth factors

There is little question that the second and fourth factors weigh in favor of finding that the evidence of the January controlled buy was not stale. The affidavit supports the conclusion that Christian had been occupying the Residence in Grand Rapids since at least 2009 and was thus "entrenched" in the community. *See Frechette*, 583 F.3d at 379 (finding that the defendant was entrenched when evidence in the affidavit indicated that he had lived in the residence in question for 16 months). Moreover, courts have repeatedly held that a defendant's residence "is clearly a 'secure operational base.'" *Id.* (citing *United States v. Paull*, 551 F.3d 516, 522 (6th Cir. 2009)); *see also United States v. Powell*, 603 F. App'x 475, 478 (6th Cir. 2015) (noting that an individual's home "is more like a secure operational base than a mere forum of convenience").

b. First factor

The first and third factors, however, weigh in favor of finding that the evidence of the controlled buy was stale. With regard to the first factor, "[i]f an affidavit recites activity indicating protracted or continuous conduct, time is of less significance." *United States v. Henson*, 848 F.2d 1374, 1382 (6th Cir. 1988) (quoting *United States v. Haimowitz*, 706 F.2d 1549, 1554–55 (11th Cir. 1983)). The Sixth Circuit has used both the terms "protracted and continuous" and "ongoing and continuous." *Compare Perry*, 864 F.3d at 415, *with United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006). Both variations appear to encompass two

principles: that the conduct extended over a significant period of time and that it continued up to (or close to) the time of the search. (For clarity, we will use "protracted" for the first principle and "continuous" for the latter.) The key question, then, is whether the affidavit contains facts supporting an inference that Christian was engaged in recurrent or sustained drug-trafficking activity up to the time of the search.

As this circuit has pointed out:

> The crime at issue in this case—the sale of drugs out of a residence—is not inherently ongoing. Rather, it exists upon a continuum ranging from an individual who effectuates the occasional sale from his or her personal holdings of drugs to known acquaintances, to an organized group operating an established and notorious drug den. The inclusion of outdated information has been insufficient to render an entire affidavit stale when the affidavit as a whole establishes that the criminal activity in question is ongoing and continuous, or closer to the "drug den" end of the continuum.

Hython, 443 F.3d at 485. But if the affidavit, taken as a whole, suggests that the defendant is engaged in something closer to the "occasional sale from . . . personal holdings[,]" *id.*, then "information goes stale very quickly 'because drugs are usually sold and consumed in a prompt fashion[,]'" *United States v. Brooks*, 594 F.3d 488, 493 (6th Cir. 2010) (quoting *Frechette*, 583 F.3d at 378).

Again, we must focus on what the warrant application establishes through its factual assertions, not the conclusory statements made by the affiant. *United States v. Williams*, 544 F.3d 683, 687 (6th Cir. 2008) (finding that a warrant application demonstrated continuous illegal firearm activity where it stated that the defendant possessed two firearms, had used a firearm to rob a drug trafficker one month prior, was recently arrested for carrying a concealed weapon, and was also recently arrested for possession of a stolen vehicle where a gun was found in the vehicle). Here, Officer Bush explains that "a credible and reliable informant" engaged in a controlled purchase of drugs from Christian at the Residence in January 2015, eight months before Officer Bush sought the warrant at issue in this case. But the affidavit provides almost no detail regarding the controlled buy—it does not state whether the officers observed the buy, identify the type or amount of the controlled substance purchased, indicate how the purchase was initiated, or reveal if the informant had purchased drugs from Christian previously. Nor does the

affidavit disclose whether the informant saw large quantities of drugs in Christian's possession or in the Residence. *See United States v. Abernanthy*, 843 F.3d 243, 255 (6th Cir. 2016) (noting that a large quantity of drugs found in a trash can outside of a residence would suggest "repeated and ongoing drug activity in the residence"). Nothing about the January 2015 single controlled buy of an unknown quantity of an unknown drug by an informant with an unknown relationship to Christian suggests that Christian was engaged in protracted or continuous drug trafficking.

In denying Christian's motion to suppress, the district court recognized that the credible informant engaged in only a single buy in January 2015, but emphasized that the informant provided information describing Christian's involvement in a "more extensive network of trafficking." A review of the affidavit, however, does not support the district court's observation. The affidavit states that the credible informant "provided information on several drug traffickers including Tyrone Christian." This information consisted of "names, nicknames, phone numbers, residences utilized by the drug traffickers and information regarding specific drug transactions." But the affidavit gives no explanation as to what information the informant provided relating to Christian specifically. Nor does it suggest that Christian was in cahoots with the other alleged drug traffickers so as to imply his involvement in an extensive and organized network.

This vague and conclusory reference to Christian as a drug trafficker is insufficient. "A magistrate . . . must base determination of probable cause on sufficient information for the exercise of independent judgment rather than merely ratifying the bare conclusions of others." *United States v. Hoover*, 755 F.2d 933, *2 (6th Cir. 1985) (unpublished table decision); *see also United States v. Gaston*, 16 F. App'x 375, 378–79 (6th Cir. 2001) ("It is not enough that the police officer have probable cause to believe that the things to be seized may be found in the premises to be searched, or that the police officer present to the magistrate a conclusory statement that probable cause exists; the officer must present to a neutral magistrate sufficient facts to permit the magistrate to make his own independent judgment that there is probable cause.").

Here, the four corners of the affidavit reflect only a single purchase from a reliable informant eight months before the search and no other credible evidence of drug activity beyond

four prior drug convictions ranging from 4 to 19 years old (the significance of these drug convictions for the probable-cause determination will be discussed in further detail below). We therefore conclude that the affidavit does not establish that Christian was engaged in protracted and continuous drug trafficking. *Cf. United States v. Sinclair*, 631 F. App'x 344, 348 (6th Cir. 2015) (evaluating the staleness factors and concluding that the crime at issue was "an ongoing drug trafficking conspiracy" when a confidential informant reported purchasing heroin from the defendant "for several years," and the officers observed the defendant engaging in activity consistent with drug trafficking over the most recent 12 months, with the last observation occurring just 15 days before the search warrant was executed at the defendant's residence); *United States v. Greene*, 250 F.3d 471, 481 (6th Cir. 2001) (finding protracted and continuous drug trafficking where a reliable confidential informant reported purchasing drugs from the defendant at his residence at least 12 times, the last purchase occurring 23 months before the search warrant executed, because the informant also stated that a package was sent from the residence to a known drug dealer less than one month prior to the execution of the warrant).

c. Third factor

With regard to the third *Spikes* factor—whether the evidence to be seized is of enduring utility to the holder—the government contends that the warrant sought not only controlled substances, but also records of drug trafficking and firearms used in drug trafficking. These latter two categories of evidence, it argues, are likely to endure, even if controlled substances themselves are not. To support this argument, the government relies on *United States v. Burney*, 778 F.3d 536 (6th Cir. 2015). But *Burney* is distinguishable from the present case because there was no dispute that the 17-page affidavit in *Burney* provided sufficient evidence that the property had been used as a stash house for "a large-scale drug trafficking and money laundering operation— . . . a regenerating, enduring criminal enterprise that bears no resemblance to a 'chance encounter in the night.'" *Id.* at 538, 541–42. Such an extensive operation was likely to involve "scales, weapons, safes, bagging materials, and the like," evidence that was "not readily consumable" and thus unlikely to "be consumed or to disappear." *Id.* at 541.

In his affidavit in the present case, Officer Bush acknowledged the distinction between those who occasionally sell from their own supply—and thus produce little lasting evidence—

and those who sell regularly for profit using extensive networks that likely involve durable evidence like records and firearms. Although Officer Bush stated in the affidavit that he was seeking records and firearms related to extensive drug-trafficking operations, this statement assumes what the affidavit tried and failed to prove by substantial evidence—that Christian was engaged in organized and extensive drug-trafficking operations likely to involve not only controlled substances, but also records and firearms.

Because the government has provided credible evidence of just one sale of an unknown quantity of a controlled substance in January 2015, rather than "a large-scale drug trafficking and money laundering operation," it failed to provide a reason to believe that records of drug trafficking and firearms would be found at the Residence. Whether those types of evidence are durable is thus irrelevant. And "'because drugs are usually sold and consumed in a prompt fashion[,]'" evidence of a single drug sale became stale "very quickly" and well before the search was executed eight months later. *See United States v. Abernanthy*, 843 F.3d 243, 250 (6th Cir. 2016) (quoting *Brooks*, 594 F.3d at 493); *see also Hython*, 443 F.3d at 486 (noting the limited evidentiary value of an undated controlled buy absent evidence of any recent drug activity at the residence). Consequently, we find that the third factor weighs in favor of finding the evidence of the controlled buy to be stale.

d. Conclusion on staleness

The first and third *Spikes* factors control the determination of whether evidence of the controlled buy is stale in this case. Although Christian is entrenched in the community and his residence would be a secure base of operations, the key question is whether evidence of drug activity would be found there at the time of the search. With no reliable evidence of continuous and protracted drug activity, the eight-month-old controlled buy was stale.

This court's decision in *United States v. Brooks*, 594 F.3d 488 (6th Cir. 2010), offers strong support for our conclusion. *Brooks* considered whether an affidavit was sufficient to establish probable cause to search the defendant's residence for evidence of drug crimes. Crucially, the affiant-officer arrested the defendant for aggravated drug trafficking at the defendant's residence and, in the process, smelled marijuana and observed marijuana seeds in

plain view, as well as found $1,000 in cash on the defendant after conducting a pat-down search. Later that day, the affiant-officer executed the affidavit in support of the search warrant. On review, this court held that the officer's observations alone were sufficient to support probable cause. *Id.* at 495.

But the affidavit in *Brooks* also contained several other pieces of information that by themselves would not, according to the court, have established probable cause. These were: (1) four tips from confidential informants, stating that the defendant was trafficking in cocaine, with the tips ranging from one to five years old at the time that the affidavit was executed; (2) a six-month-old tip from a confidential informant, stating that the defendant was selling cocaine from his residence; and (3) two controlled buys made by a confidential informant six months before the affidavit was executed. The court noted that

> there is no question but that this information is stale for purposes of establishing probable cause in its own right. All of the information is regarding drug transactions that took place, at the most recent, approximately six months prior to the date of the affidavit. Given the mobile and quickly consumable nature of narcotics, evidence of drug sales or purchases loses its freshness extremely quickly.

Id. at 493 n.4. Similarly, the single controlled buy conducted in the present case was undoubtedly stale when the warrant was executed eight months later. *Cf. United States v. Yates*, 501 F. App'x 505, 511 (6th Cir. 2012) (concluding that evidence of a single drug transaction occurring at a residence was not stale when the transaction occurred within ten days of the affidavit's execution); *United States v. Pinson*, 321 F.3d 558, 565 (6th Cir. 2003) (noting that evidence of a single controlled purchase was not stale when the warrant was issued three days later).

iv. Criminal history

Although "a person's criminal record [demonstrating multiple drug offenses] alone does not justify a search of his or her home[,]" *United States v. Payne*, 181 F.3d 781, 790–91 (6th Cir. 1999), it is relevant to the probable-cause inquiry, *United States v. Berry*, 565 F.3d 332, 339 (6th Cir. 2009). Here, the affidavit asserts that Christian, at the time that the warrant was issued, had a 19-year-old conviction for possession of less than 25 grams of cocaine and a 13-year-old

conviction for an unspecified second controlled-substance offense. Christian has an additional six-year-old conviction for delivery/manufacture of marijuana and a four-year-old conviction for delivery/manufacture of cocaine.

Whether these convictions can support a conclusion that Christian was engaged, at some point, in protracted drug activity is problematic. Precedent instructs us to consider "[t]he relative recency of a set of actions and their relative closeness in time to each other." *United States v. Perry*, 864 F.3d 412, 415 (6th Cir. 2017). These convictions are each several years apart and even the most recent conviction predates the controlled buy by four years. Nothing about these old convictions and the controlled buy in January 2015 is inconsistent with a conclusion that Christian was simply "effectuat[ing] the occasional sale from his or her personal holdings of drugs to known acquaintances." *See United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006).

But even assuming that these convictions, combined with the fact that two search warrants were executed at the Residence in 2009 and 2011, support a conclusion that Christian *was* engaged in protracted drug sales at the Residence at some point, there is no evidence to suggest that these sales were continuous at the time the warrant was sought and executed in September 2015. *See United States v. Helton*, 314 F.3d 812, 822 (6th Cir. 2003) (noting that even where "the likely duration of th[e] evidence is long," evidence may still be stale if enough time has passed between the tip and execution of the warrant, and expressing concern about the staleness of a two-month-old tip that stacks of money were being stored in a residence); *United States v. Brown*, 828 F.3d 375, 384 n.3 (6th Cir. 2016) (concluding that a 12-year-old conviction for conspiracy to distribute marijuana was insufficient to establish that an individual was a known drug dealer at the time the warrant was executed).

The key issue is whether a search-warrant affidavit establishes a fair probability that the evidence sought will be found at the place identified *at the time* the warrant is executed. *Hython*, 443 F.3d at 485. Emphasizing the temporal requirement of this test, this court found in *Hython* that "[e]ven had the affidavit stated that from time out of mind, [the residence to be searched] had been a notorious drug den, some recent information would be necessary to eliminate the possibility that a transfer in ownership or a cessation of illegal activity had not taken place." *Id.* at 486; *see also United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (concluding that

the magistrate may "draw the inference that evidence of wrongdoing would be found in the defendants' homes" when the affidavit reflects "the independently corroborated fact that the defendants were known drug dealers at the time the police sought to search their homes").

The government has identified no case where a record of past drug convictions, without *recent* credible evidence of drug activity, was sufficient to establish that a defendant was engaged in protracted and continuous drug activity. Rather, this court has generally relied on past drug convictions in combination with a defendant's recent drug activity in applying the principle that, "[i]n the case of drug dealers, evidence is likely to be found where the dealers live." *United States v. White*, 874 F.3d 490, 501 (6th Cir. 2017) (quoting *United States v. Jones*, 159 F.3d 969, 975 (6th Cir. 1998)); *see also United States v. Newton*, 389 F.3d 631, 636 (6th Cir. 2004) (noting that, "with continuing criminal operations . . . [,] the lack of a direct known link between the criminal activity and the residence" is inconsequential), *vacated on other grounds*, 546 U.S. 803 (2005); *see also White*, 874 F.3d at 494, 498 (finding that the defendant's "'numerous' drug convictions[] len[t] further credence" to an informant's recent tip that the defendant was selling narcotics from his residence, and concluding that a controlled buy conducted in a car in the driveway of the residence within the last 72 hours "was not an aberration"); *United States v. Miggins*, 302 F.3d 384, 393 (6th Cir. 2002) (finding probable cause to search the defendant's residence where his criminal record indicated that he had been convicted of cocaine charges and officers observed him signing for a package of cocaine delivered at a second location immediately before the issuance of the warrant).

Absent additional *recent* reliable evidence, then, old criminal convictions cannot support a finding that drug activity is continuous at the time of the search. Our legal system has long developed a strong policy against using propensity evidence to suggest an inference that an individual who has once committed a crime continues to engage in criminal activity. *See* Fed. R. Evid. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."). Although the Federal Rules of Evidence do not come into play when deciding the validity of a search warrant, the aim of Rule 404 is similar to the purpose of the staleness rule: to ensure that decisionmakers—whether jurors or magistrates—do not improperly assume based on

past wrongs that an individual engaged in the specific criminal conduct at issue. *See Old Chief v. United States*, 519 U.S. 172, 179–82 (1997) (discussing the prejudicial nature of propensity evidence).

We thus conclude that Christian's prior criminal convictions, even considered with the eight-month-old controlled buy, do not establish that he was engaged in protracted and continuous drug activity. And absent some "independently corroborated fact that the defendant[] w[as a] known drug dealer[] at the time the police sought to search [his] home," probable cause did not exist to search the Residence based on Christian's criminal record. *See McPhearson*, 469 F.3d at 524.

v. Totality of the circumstances

As discussed above, the caselaw makes clear that the probable-cause determination must be based on the "totality of the circumstances." *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008). We thus evaluate the weight of the evidence when considered as a whole.

First, "[w]here recent information corroborates otherwise stale information, probable cause may be found." *United States v. Spikes*, 158 F.3d 913, 924 (6th Cir. 1998) (quoting *United States v. Henson*, 848 F.2d 1374, 1381–82 (6th Cir. 1988)), and concluding that evidence of drug residue in a residence's trash cans and an officer's recent observations of individuals leaving the residence to sell drugs nearby "refreshed . . . otherwise stale information" contained in the affidavit). But for the reasons discussed above, no reliable evidence corroborates the stale evidence in the affidavit under review.

Alternatively, evidence from an informant whose reliability is not known can be corroborated by independent information from police officers. *McPhearson*, 469 F.3d at 524 n.3; *United States v. Hammond*, 351 F.3d 765, 772 (6th Cir. 2003) (noting the "minimal probative value" of a tip from an informant of unknown reliability, but concluding that "the tip can take on an increased level of significance for probable cause purposes, if corroborated by the police through subsequent investigation"). But, as discussed above, there is no evidence that the officers here attempted to corroborate the information provided by the unidentified subjects. And even if the *previous* controlled buy could be considered to corroborate *subsequent*

information from unidentified sources, the single buy did not corroborate allegations that protracted and continuous drug activity was occurring at the Residence.

In sum, the affidavit shows that (1) search warrants were executed for drugs at the Residence in the past, (2) Christian has a history of years' old drug convictions, (3) he engaged in one sale of drugs at the Residence eight months prior to the execution of the search warrant, (4) unidentified subjects of unknown reliability reported that Christian was selling drugs in the more recent past, and (5) a man with no known connection to Christian was found to be in possession of drugs after leaving "the area" of the Residence on the date of the search-warrant affidavit. This evidence, even when considered cumulatively, fails to establish "fair probability" that drug activity was occurring at the Residence at the time the search warrant was executed. *See United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010).

The dissent's conclusory statement to the contrary fails to explain how the individual pieces of evidence corroborate one another. Moreover, the dissent fails to analogize the facts of this case to those of any of our prior cases that have found a warrant supported by probable cause. It instead argues that *United States v. Hines*, 885 F.3d 919 (6th Cir. 2018), "compel[s]" us to conclude that probable cause existed to search Christian's home because *Hines* makes clear that courts must consider the unique mix of evidence in each affidavit to determine if it established probable cause. Dissent Op. 37. *See Hines* 885 F.3d at 921–22 ("Not all search warrant affidavits include the same ingredients. It is the mix that courts review to decide whether evidence generated from the search may be used or must be suppressed."). But the facts of *Hines* actually lend further support for our position that the warrant here did not establish probable cause to search the Residence.

The affidavit at issue in *Hines* contained the following evidence in support of a warrant to search a home: (1) a reliable confidential informant told officers five months prior to the warrant's execution that the defendant was selling large amounts of heroin from the home; (2) a statement from the same informant that he had seen heroin at the home the day before the search; (3) several months of surveillance of the home by law-enforcement officers showing the defendant's comings and goings; (4) a tip from a second reliable confidential informant the day before the warrant's execution stating that he was meeting the defendant at a nearby club to

discuss an incoming heroin shipment; (5) officers' observations of the defendant driving "in a manner consistent with narcotics traffickers" to the club at the designated time; (6) statements from the second informant that he had received heroin from the defendant numerous times and was always instructed to meet him at the home to receive that heroin; (7) a tip from the second informant that he was instructed to collect heroin from the defendant at the home on the day that the warrant was executed; (8) three-year-old wiretaps identifying the defendant as a significant heroin trafficker; and (9) the two-year-old seizure of $33,500 from a third individual outside the home (believed to be payment from Hines for a kilogram of cocaine) and a subsequent statement from this individual that he had previously provided the defendant with heroin and cocaine. *Id.* at 922.

The evidence detailed above in *Hines* directly linked the residence to heroin trafficking at the time of the search through information from reliable informants and specific observations by officers that corroborated the information provided by those informants. And after comparing this evidence with that used to support affidavits in other cases, the court in *Hines* ultimately concluded that the affidavit at least satisfied the *Leon* good-faith standard, if not probable cause. *Id.* at 924–28.

For the reasons already discussed, the affidavit at issue here fails to establish more than a speculative connection between drug activity and the Residence at the time of the search. Unlike the affidavit in *Hines*, it contains no recent reliable evidence of drug activity at the Residence. The search warrant, accordingly, was not supported by probable cause. Under these circumstances, the deference that would otherwise be due the issuing magistrate is unjustified. *See United States v. Leon*, 468 U.S. 897, 914 (1984) ("Deference to the magistrate . . . is not boundless."); *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984) (noting that we apply a "deferential standard of review" to an issuing magistrate's probable-cause determination, but that the determination will not be upheld if the evidence, viewed as a whole, does not provide a "substantial basis" for that determination).

3. Leon *good-faith exception*

"Though evidence obtained in violation of the Fourth Amendment is generally excluded, the Supreme Court has held that the exclusionary rule 'should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective.'" *United States v. Frazier*, 423 F.3d 526, 533 (6th Cir. 2005) (quoting *Leon*, 468 U.S. at 905). Under the *Leon* good-faith standard, suppression should be limited to "circumstances in which the benefits of police deterrence outweigh the heavy costs of excluding 'inherently trustworthy tangible evidence' from the jury's consideration." *United States v. White*, 874 F.3d 490, 496 (6th Cir. 2017) (quoting *Leon*, 468 U.S. at 907). The test is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's decision." *Id.* (quoting *United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008)).

Four situations have been identified by the Supreme Court in which an officer could not reasonably believe that a search was valid, despite the issuance of a warrant. *See United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005) (citing *Leon*, 468 U.S. at 914–23). Christian argues that the third situation is present in this case—that the affidavit was "so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable." *Id.* Such a "bare bones affidavit is one that merely 'states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.'" *McPhearson*, 469 F.3d at 526.

Determining whether an affidavit is more than "bare bones" is a "less demanding inquiry" than the inquiry into whether the magistrate had a substantial basis for concluding that an affidavit reflected probable cause. *Id.* The good-faith exception requires only "a minimally sufficient nexus between the illegal activity and the place to be searched" at the time of the warrant's execution. *United States v. Brown*, 828 F.3d 375, 385 (6th Cir. 2016) (quoting *United States v. Carpenter*, 360 F.3d 591, 596 (6th Cir. 2004) (en banc)). But the affidavit must contain some "particularized facts that indicate veracity, reliability, and basis of knowledge and go beyond bare conclusions and suppositions." *McPhearson*, 469 F.3d at 526. Although the *Leon* good-faith exception does not assume that the reasonable officer has "extraordinary legal

training," *United States v. Van Shutters*, 163 F.3d 331, 337 (6th Cir. 1998), it does "require[] officers to have a reasonable knowledge of what the law prohibits," *Leon*, 468 U.S. at 919. Whether the good-faith standard is met is a close call in this case, but ultimately we conclude that the affidavit falls short because it does not provide any "particularized facts" connecting the Residence to drug activity at the time that the search warrant was executed.

This court's analysis in *United States v. Hython*, 443 F.3d 480 (6th Cir. 2006), is particularly persuasive on this issue. In that case, the affidavit contained information that the officers had, at some unidentified point, conducted a controlled buy of crack cocaine at the residence to be searched. The court found that evidence of a single controlled buy at the residence was consistent with the situation "where an individual occasionally sells drugs to acquaintances out of his or her personal holdings." *Id.* At 486. And because "the affidavit include[d] no observation of deliveries to the address, no monitoring of the frequency or volume of visitors to the house, no second controlled buy, [and] no further surveillance whatsoever," "the affidavit [wa]s patently insufficient" so that no reasonable officer could have believed that the affidavit established probable cause to search the residence. *Id.* At 486, 488–89.

Similarly, the affidavit in this case primarily relies on a single stale controlled buy to link the Residence to drug activity at the time of the search. It does not provide any credible evidence that drug activity continued at the Residence in the interim, and the single instance of contemporary surveillance did not link the Residence to drug activity by anything more than speculation that Thomas purchased drugs at the Residence on September 3, 2015.

This court has also held that the *Leon* good-faith standard was not satisfied where "the 'evidence in the affidavit connecting the crime to the residence [wa]s so vague as to be conclusory or meaningless.'" *McPhearson*, 469 F.3d at 527 (quoting *United States v. Frazier*, 423 F.3d 526, 537 (6th Cir. 2005)) (finding that the *Leon* standard was not satisfied where the affidavit reflected that officers had arrested the defendant at his residence on an assault charge and found him in possession of cocaine, but where there was no evidence connecting the defendant or his residence to drug trafficking). It has further concluded that an affidavit did not meet the *Leon* standard where the facts it contained were so inconclusive that they did not "draw some plausible connection" between alleged drug activity and the residence to be searched.

See, e.g., *Brown*, 828 F.3d at 384, 385–86 (holding that the *Leon* good-faith standard was not satisfied where the affidavit indicated that the defendant was arrested for attempting to deliver heroin 21 days prior to the search, a drug dog had alerted to the odor of narcotics in the defendant's car, the defendant exchanged text messages discussing drug prices, and the defendant had a 12-year-old conviction for conspiracy to distribute marijuana).

In contrast, this court has held an affidavit insufficient to show probable cause to search a residence but sufficient to satisfy the *Leon* good-faith standard where the affidavit provided *some* link between the criminal activity alleged and the residence to be searched *at the time* of the search. *See United States v. White*, 874 F.3d 490, 494, 498 (6th Cir. 2017) (finding the *Leon* good-faith standard satisfied where the affiant stated that officers received a tip that the defendant, who had an extensive criminal history involving drugs, was selling drugs from his residence, and the officers initiated, observed, and recorded a controlled buy from the defendant in the driveway of the residence less than 72 hours before the affidavit was executed); *United States v. Higgins*, 557 F.3d 381, 391 (6th Cir. 2009) (concluding that the affidavit met the *Leon* good-faith standard where it stated that a named informant told officers that he had purchased drugs from the defendant's residence earlier that day, even though there were questions about the informant's reliability); *Frazier*, 423 F.3d at 536 (finding the *Leon* good-faith standard satisfied when the affidavit reflected that two recorded controlled buys were conducted by an informant at the defendant's previous residence seven months before the search, that drugs were found at the defendant's previous residence two months before the search, that a named informant reported buying two pounds of marijuana from the defendant weekly, and that phone records showed that the defendant was in constant contact with known drug dealers); *Carpenter*, 360 F.3d at 593 (finding the *Leon* standard satisfied where the affidavit supporting a warrant to search the residence alleged that a police officer conducting an aerial search spotted numerous marijuana plants connected by a road directly to the residence).

Contrary to the affidavit evidence considered in *White*, *Higgins*, *Frazier*, and *Carpenter*, Christian's criminal history and the January 2015 controlled buy do not establish a nexus between the Residence and drug activity *at the time of the search*. This nexus is required for the *Leon* good-faith exception to apply. *See Hython*, 443 F.3d at 488–89.

And although closer in time to the execution of the search, the information received from the unidentified subjects indicating that Christian was engaged in large-scale drug trafficking from the Residence was "so vague as to be conclusory or meaningless." *See Frazier*, 423 F.3d at 536 (quoting *Carpenter*, 360 F.3d at 596). Where statements "are heavily discounted due to their minimal trustworthiness and reliability, they add little to the probable cause determination" and, accordingly, "a reasonable officer would recognize that without more corroboration, the . . . affidavit came well short of establishing probable cause." *United States v. Helton*, 314 F.3d 812, 825 (6th Cir. 2003).

An investigation by law enforcement can corroborate tips of unknown reliability. But the observation of Thomas "walk[ing] away from the area" of the Residence before he was later found with heroin in his vehicle does not provide this additional corroboration. At best, it allows for only speculation that Thomas purchased the drugs from the Residence. Such speculation cannot reasonably be thought to support a finding of probable cause. *See White*, 874 F.3d at 498 (noting that a barebones affidavit is one that contains "a mere affirmation of suspicion and belief without any statement of adequate supporting facts" (quoting *Nathanson v. United States*, 290 U.S. 41, 46 (1933))). As a result, we conclude that no reasonable officer would have believed that the affidavit established probable cause to search the Residence at the time the affidavit was executed.

We believe that our conclusion is in line with the policy behind the *Leon* good-faith exception to the exclusionary rule. A reasonable officer understands that allegations of protracted and continuous drug activity must be supported by information from informants whose reliability, veracity, and basis of knowledge have been shown. If no such credible information exists, the allegations must be corroborated by independent investigation by law-enforcement officers. Here, the police failed to provide the necessary corroboration. There is no evidence in the affidavit that they engaged in ongoing or repeated surveillance, arranged subsequent controlled buys, or otherwise monitored for "hallmarks of drug dealing" at the Residence. *See United States v. McPhearson*, 469 F.3d 518, 527 (6th Cir. 2006); *Hython*, 443 F.3d at 486, 488–89. By suppressing the evidence in this case, we will incentivize the police to take such corroborative action in the future.

B. The district court erred in admitting the recorded telephone call because it constituted inadmissible hearsay.

Christian also challenges the district court's decision to admit a recorded telephone call between Thomas and Thomas's girlfriend, Tanisha Edwards, arguing that the conversation was inadmissible hearsay. The government contends that the district court properly admitted the conversation under Rule 801(d)(2)(E) of the Federal Rules of Evidence as the statement of a coconspirator.

1. Standard of review

Rule 801(d)(2)(E) excludes from the definition of hearsay a statement offered against an opposing party when it is "made by the party's coconspirator during and in furtherance of the conspiracy." In order for an out-of-court statement offered for the truth of the matter asserted to be admitted under this section, the government must show by a preponderance of the evidence that (1) a conspiracy existed, (2) the defendant against whom the statement is admitted was a member of the conspiracy, and (3) that the statement was made in the course and in furtherance of the conspiracy. *United States v. Martinez*, 430 F.3d 317, 325 (6th Cir. 2005). "These findings, often called *Enright* findings, must be made by the district court." *Id.* (citing *United States v. Enright*, 579 F.2d 980, 986–87 (6th Cir. 1978)).

Determining whether each of the three requirements was satisfied is a question of fact that we review under the clear-error standard. *United States v. Warman*, 578 F.3d 320, 335 (6th Cir. 2009). But the ultimate decision to admit evidence under Rule 801(d)(2)(E) is reviewed to determine whether the district court abused its discretion. *Martinez*, 430 F.3d at 326. "A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *Id.* (quoting *United States v. Pugh*, 405 F.3d 390, 397 (6th Cir. 2005)). This court has repeatedly emphasized its "preference for specific *Enright* findings," *id.* at 328, but it has not "mandated a particular degree of specificity," *United States v. Kone*, 307 F.3d 430, 441 (6th Cir. 2002).

So although a complete failure to make *Enright* findings is undoubtedly an abuse of discretion, *United States v. Mahar*, 801 F.2d 1477, 1495 (6th Cir. 2007), we may conclude that a

district court's finding relating to an individual *Enright* requirement was implicit, *Martinez*, 430 F.3d at 327–28. "[C]onclusory [*Enright*] findings[, moreover,] have been upheld when the court could conclude with confidence that the government had met its burden." *Id.* at 328; *cf. Kone*, 307 F.3d at 441 (noting that "'a mere conclusory statement will not always suffice' when the government has not met its burden of proof" (quoting *United States v. Curro*, 847 F.2d 325, 329 (6th Cir. 1988))).

If the appellate court concludes that the district court abused its discretion, it must then determine whether that error was harmless. *Kone*, 307 F.3d at 436–37. "[W]e do not reverse a conviction if the error is harmless, meaning that 'it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *United States v. Kelsor*, 665 F.3d 684, 696 (6th Cir. 2011) (quoting *United States v. Lopez-Medina*, 461 F.3d 724, 741 (6th Cir. 2006)).

2. **Enright *findings***

The telephone call at issue occurred while Thomas was in jail, after he had been arrested by the police for possession of heroin. At trial, the government noted that Edwards called Thomas in jail, and it summarized the call as follows:

> Rueben Thomas is told by Tanisha Edwards that he ought to be more grateful to Mr. Christian . . . for helping him because Christian came and got the "groceries" out of the house. Edwards is going to say that when she said "groceries" she meant the gun and what she assumed to be drugs that she took out of there.

The government conceded that it did not "have any evidence that Tanisha Edwards was involved in drug trafficking herself." It instead contended that Christian and Edwards were participating in an uncharged "obstruction-of-justice conspiracy." According to this theory, Christian and Edwards conspired to remove evidence of drug trafficking from Thomas's home.

Although the government contends that the district court properly applied the *Enright* test when admitting the recorded call, it appears to concede that the court did not make specific findings regarding the final factor: whether Edwards's statement was made in the course of and in furtherance of the conspiracy. A review of the trial transcript shows that the court's *Enright* analysis was focused solely on the first two factors—the existence of a conspiracy and the

membership of Christian and Edwards in that conspiracy. The court's failure to address the final *Enright* factor, however, does not constitute an abuse of discretion if the record is otherwise clear that the government met its burden with respect to that factor. We conclude that the government has not done so.

"A statement is considered to be in furtherance of the conspiracy 'if it is intended to promote the objectives of the conspiracy.'" *United States v. Darwich*, 337 F.3d 645, 657 (6th Cir. 2003) (quoting *United States v. Monus*, 128 F.3d 376, 392 (6th Cir.1997)). "Whether a statement was in furtherance of a conspiracy turns on the context in which it was made and the intent of the declarant in making it." *United States v. Warman*, 578 F.3d 320, 338 (6th Cir. 2009). "[M]ere idle chatter or casual conversation about past events is not considered a statement in furtherance of the conspiracy." *United States v. Conrad*, 507 F.3d 424, 430 (6th Cir. 2007) (quoting *Darwich*, 337 F.3d at 657).

If, as the government contended at trial, the conspiracy was one "to remove incriminating evidence from Thomas's home so that Thomas could avoid further legal problems," then the aim of the conspiracy had already been accomplished at the time of the call. "A conspiracy is completed when the intended purpose of the conspiracy is accomplished." *United States v. Mayes*, 512 F.2d 637, 642 (6th Cir. 1975). Edwards's statement was not made, therefore, in the course of and in furtherance of the conspiracy. *See Conrad*, 507 F.3d at 430 ("[O]ut-of-court statements made *after* the conclusion of the conspiracy are not made 'in furtherance of the conspiracy,' and are thus not admissible under the co-conspirator exception." (emphasis in original)). Rather, the statement appeared to be commentary about past events, intended only to inform Thomas of what had happened but not to induce his participation in the alleged conspiracy.

The government now attempts to argue that, despite its own characterization of the conspiracy as one "to remove incriminating evidence," the conspiracy was actually broader in scope: "It was not simply to hide evidence. It was to keep Thomas quiet and continue the drug trafficking scheme." But the government did not argue for such a broad definition of the conspiracy at the trial level. Nor has it identified any evidence indicating that Edwards intended to "keep Thomas quiet" or linking Edwards to an agreement to engage in drug trafficking. The

district court, moreover, never explicitly identified the scope or aim of the conspiracy in which Christian and Edwards were allegedly involved, implying that it agreed with the narrower scope of the conspiracy as identified by the government at trial.

Christian also raises a question of whether the alleged conspiracy—a conspiracy to remove incriminating evidence from Thomas's home and thus to obstruct justice—is a conspiracy that qualifies a statement for admission pursuant to Rule 801(d)(2)(E). As the Supreme Court has explained:

> [A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. As was there stated, allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely. Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.

Grunewald v. United States, 353 U.S. 391, 401–02 (1957); *see also Krulewitch v. United States*, 336 U.S. 440, 444 (1949).

This court has recognized that *Grunewald* establishes that "an agreement to conceal a completed crime does not extend the life of the conspiracy," and that the Supreme Court rejected "the notion that after the central objectives of a criminal conspiracy have succeeded or failed, a subsidiary phase of the conspiracy, which has the conspiracy's concealment as its sole objective, always survives." *United States v. Howard*, 770 F.2d 57, 60 (6th Cir. 1985). But "[i]n conspiracies where a main objective has not been attained or abandoned and concealment is essential to success of that objective, attempts to conceal the conspiracy are made in furtherance of the conspiracy." *United States v. Gardiner*, 463 F.3d 445, 463 (6th Cir. 2006) (quoting

Howard, 770 F.2d at 61); *cf. United States v. Etheridge*, 424 F.2d 951, 964 (6th Cir. 1970) ("If the central object of the conspiracy has been accomplished, evidence of subsequent events designed to conceal that accomplishment cannot be presented under the theory that there was an implied conspiracy to conceal the completed crime.").

Because the government concedes that Edwards was not a party to any drug-trafficking conspiracy, any question of whether the concealment was intended to further Christian's alleged drug trafficking is irrelevant. Nor need we address whether an alleged conspiracy to conceal evidence is the type of conspiracy that can qualify a statement for admission pursuant to Rule 801(d)(2)(E) because, as discussed above, there is no evidence in the record that Edwards's statement was made in the course of and in furtherance of the alleged conspiracy to remove evidence from Thomas's home. We thus have no basis to "conclude with confidence" that the government satisfied its burden as to the third *Enright* finding. *See United States v. Martinez*, 430 F.3d 317, 328 (6th Cir. 2005). In sum, the district court abused its discretion in admitting the telephone conversation as evidence. Whether this error was harmless is moot because the illegal search of the Residence already requires a new trial in this case.

III. CONCLUSION

The question of whether a reasonable officer could have believed that the search warrant was supported by probable cause is a close call in this case. But this court's relevant precedents, including *United States v. Hython*, 443 F.3d 480 (6th Cir. 2006), convince us that the supporting affidavit was simply inadequate to establish a good-faith belief in a fair probability that drugs would be found at the Residence on the date of the search.

True enough, the affidavit permits speculation of such drug activity. But the probable-cause standard requires more. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002). These cases of legalized home invasions are not ones where the ends justify the means. The Fourth Amendment's goal of protecting individuals from unreasonable searches of their homes outweighs the occasional loss of incriminating evidence obtained by overzealous law-enforcement officers.

For all of the reasons set forth above, we **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

DISSENT

ROGERS, Circuit Judge, dissenting. Based on a five-page-long search-warrant affidavit—which included evidence from a confidential informant and other sources, a controlled buy, and direct police-officer surveillance—a neutral and detached magistrate determined that there was probable cause to search 618 Grandville Avenue, Tyrone Christian's home, for evidence of drug trafficking. That search uncovered a large amount of heroin, some cocaine, and two loaded guns. Christian argues on appeal that the search was not supported by probable cause because each piece of evidence assertedly could not have independently authorized the search. However, reading each piece of evidence in that way—alone and in the most uncharitable light possible—distorts the narrow scope of our review prescribed by *Illinois v. Gates*, 462 U.S. 213 (1983). Such a hyper-technical, line-by-line scrutiny of each factual allegation patently violates the common-sense, totality-of-the-circumstances approach to probable cause that multiple precedents compel us to apply. Earlier this year the Supreme Court cautioned that "this kind of divide-and-conquer approach" has no place in our law. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). To suppress the evidence seized in reliance on the robust warrant here is to ignore that clear admonition.

The search-warrant affidavit at issue here provided an ample basis for probable cause, and the question is really not even close. The affidavit first outlined Christian's extensive history with drugs, which included four felony drug convictions from 1996, 2002, 2009, and 2011, at least two of which were for drug trafficking. In 2009 and 2011, search warrants executed at Christian's home, 618 Grandville, the same place searched here, uncovered evidence of drug trafficking that each time resulted in Christian's arrest.

The affidavit next detailed the reasons why officers believed that Christian had gone back into business. In December 2014, a "credible and reliable informant" advised Officer Bush, the affiant, that Christian was again dealing drugs. The informant also provided information about other traffickers, including "names, nicknames, phone numbers, residences utilized by the drug traffickers and information regarding specific drug transactions." Officer Bush independently

corroborated "much of the information provided" by this informant. In January 2015, under the direction of Officer Bush, the informant executed a controlled purchase of drugs from Christian. In addition, "[w]ithin the last four months" from the date of the search, meaning from May to September of 2015, several other informants stated that "Tyrone Christian is a large scale drug dealer" and that "they [had] purchased large quantities of heroin and crack cocaine from Christian at [his residence] in the last four to five months."

That brings us to September 3, 2015, the day of the search, when, according to the affidavit, officers established surveillance "at 618 Grandville Avenue." The officers observed Reuben Thomas "walk away from the area of 618 Grandville Avenue and leave the area in a vehicle." After stopping him for a traffic violation, officers found "approximately 20 grams of heroin" in the form of "'chunk[s]' that appeared to have been removed from a larger portion of heroin." Thomas denied having been at 618 Grandville but admitted having been at another address on that street. Crucially, the affidavit recounted that Thomas's denial was "contrary to the observations of the law enforcement officers."

Viewing the "totality of the circumstances," *Florida v. Harris*, 568 U.S. 237, 244 (2013), through the "lens of common sense," as the Supreme Court has instructed, *id.* at 248, the conclusion is inescapable: there was probable cause to believe that a search of 618 Grandville would uncover evidence of drug trafficking. Most readers of the affidavit would have been surprised if it did not.

Indeed, one element of the affidavit was independently sufficient for probable cause: the surveillance of Reuben Thomas. Christian argues that there was no "nexus" between Thomas and 618 Grandville because the affidavit states merely that officers saw Thomas "walk away from the area of 618 Grandville Avenue," rather than entering or leaving that residence. But that selective, out-of-context reading is contradicted even by other parts of the affidavit, which later states that "Reuben Thomas . . . denied being at [the Residence], *contrary to the observations of the law enforcement officers*." (Emphasis added.) While this is not a direct statement that Thomas was seen entering or leaving 618 Grandville, the law does not require such a direct statement. Indeed, our precedents require us to eschew such a formal requirement. "Affidavits are not required to use magic words." *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000)

(en banc). Because our job is not to reweigh the assertions in an affidavit but to ask whether the magistrate had a substantial basis for his conclusion, *United States v. Perry*, 864 F.3d 412, 415 (6th Cir. 2017), the latter phrase in the affidavit cannot be read out of existence. Rather, the deferential nature of our review means that we should take that latter statement—i.e., that Thomas's denying that he was at 618 Grandville was "contrary to the observations of the law enforcement officers"—to reconcile any doubt about where the officers saw Thomas walk away from.

Under that proper view of the affidavit, and paying the appropriate "great deference" to the magistrate's probable-cause determination, *Gates*, 462 U.S. at 236, the surveillance evidence provided a substantial basis for concluding that probable cause existed. Argument to the contrary is unavailing. Any possible contradiction between "from the area of" and "contrary to the observations of the officers" is more readily attributable to the "haste of a criminal investigation" under which officers often draft an affidavit supporting a search warrant. *See id.* at 235. Such haste was certainly present here: Officer Bush applied for and received the warrant on the same day as the purportedly infirm surveillance and search. To boot, police officers are mostly non-lawyers who must draft search-warrant affidavits "on the basis of nontechnical, common-sense judgments." *Id.* at 235–36. With the benefit of hindsight, perhaps the affiant could have been more precise. But our precedents do not require such an exacting degree of specificity. For example, in our recent published opinion in *United States v. Tagg*, 886 F.3d 579 (6th Cir. 2018), we held that probable cause existed to search the defendant's home for child pornography despite the supporting documents' failure to state that the defendant had actually clicked on or viewed an online file containing child pornography. *Id.* at 585–90. In doing so, we explained that probable cause is not the same thing as proof. *See id.* at 589–90. Likewise, the affidavit here need not have definitively stated that Thomas was seen leaving 618 Grandville. Rather, it need only have "alleged facts that create a reasonable probability" that he did. *See id.* From there, the remaining inferences needed to connect 618 Grandville to Christian's drug trafficking are quite straightforward, given Christian's history of dealing drugs from that address and the officers' finding heroin on Thomas. Under a common-sense reading of the affidavit, then, its description of the 618 Grandville surveillance easily exceeds the "degree of suspicion," *id.* at 586, needed to establish probable cause.

Moreover, the officers who saw Thomas were assigned to "establish[] [surveillance] at 618 Grandville Avenue," not the entire area around it. Assuming those officers were doing their jobs, the fact that they saw Thomas at all probably means that he was very near 618 Grandville. At the very least, that would be far from an arbitrary inference for a magistrate to draw. In addition, the heroin found on Thomas appeared to "have been removed from a larger portion of heroin." These facts further supported the magistrate's determination that there was probable cause to believe that evidence of drug dealing would be found at 618 Grandville.

The affidavit hardly relies alone on the Thomas surveillance, however. There is also Christian's lengthy history of dealing drugs from 618 Grandville, the controlled purchase from 618 Grandville, and the numerous tips that Christian was dealing large quantities of drugs from 618 Grandville, all of which provide further evidence still that probable cause existed. When it comes to probable cause, "the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation." *Wesby*, 138 S. Ct. at 588 (citing *United States v. Arvizu*, 534 U.S. 266, 277–278 (2002)). Even if each of these additional items would not suffice to establish probable cause on its own, each factual allegation is still a relevant data point in the "totality of the circumstances" constellation, rather than an independent thing to be lined up and shot down one by one. As in *Wesby*, where the Supreme Court firmly repudiated the Court of Appeals' attempt to isolate and explain away each piece of evidence, here too "the totality of the circumstances gave the officers plenty of reasons," 138 S. Ct. at 589, to believe that there was evidence of drug trafficking in Christian's home.

Probable cause therefore existed, and it is not a close call. The opposite conclusion can be reached only by engaging in the kind of "hypertechnical[,] . . . line-by-line scrutiny," *United States v. Woosley*, 361 F.3d 924, 926 (6th Cir. 2004), of the affidavit explicitly forbidden by the Supreme Court, *see Gates*, 462 U.S. at 236, 246 n.14. In *Wesby*, the Court explained that "this kind of divide-and-conquer approach is improper," because "[a] factor viewed in isolation is often more 'readily susceptible to an innocent explanation' than one viewed as part of a totality." 138 S. Ct. at 589 (quoting *Arvizu*, 534 U.S. at 274). That is the case here too, where alone some parts of the affidavit might be criticized but taken together they point clearly to one conclusion: that Christian was dealing drugs from 618 Grandville.

We are accordingly compelled to hold that there was probable cause in this case, especially given the undemanding character of the probable-cause standard and the deferential nature of our review. Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Tagg*, 886 F.3d at 585 (quoting *Wesby*, 138 S. Ct. at 586). Time and again the Supreme Court has emphasized that "[p]robable cause 'is not a high bar'" to clear. *Wesby*, 138 S. Ct. at 586 (quoting *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014)). Where, as here, a magistrate has issued a search warrant based on probable cause, we "do[] not write on a blank slate." *Tagg*, 886 F.3d at 586. Rather, the magistrate's probable-cause determination "should be paid great deference," *Gates*, 462 U.S. at 236 (internal quotation marks omitted) (citing *Spinelli v. United States*, 393 U.S. 410, 419 (1969)), and we overturn that decision only "if the magistrate arbitrarily exercised his or her authority," *United States v. Brown*, 732 F.3d 569, 573 (6th Cir. 2013) (citing *United States v. Greene*, 250 F.3d 471, 478 (6th Cir. 2001)). We are "not permitted to attempt a de novo review of probable cause." *Tagg*, 886 F.3d at 586 (citing *Gates*, 462 U.S. 238–39; *United States v. King*, 227 F.3d 732, 739 (6th Cir. 2000)).

The conclusion that probable cause existed to search Christian's home is compelled, moreover, by our recent published decision in *United States v. Hines*, 885 F.3d 919 (6th Cir. 2018), in which we emphasized the importance of the totality-of-the-circumstances approach: "Not all search warrant affidavits include the same ingredients," we said before recognizing that "[i]t is the mix that courts review to decide whether evidence generated from the search may be used or must be suppressed." *Id.* at 921–22. The affidavit at issue in *Hines*, like the one here, was substantial. Both included, among other things, recent evidence of drug-related activity: there, a confidential informant's statement that one day earlier he had seen drugs at the subsequently searched home; here, the officers' finding heroin on Thomas after having observed his leaving 618 Grandville. But the takeaway from *Hines* most salient here is methodological, not analogical: *Hines* requires us to look holistically at what the affidavit does show, instead of focusing on what the affidavit does not contain or the flaws of each individual component of the affidavit. Doing the former establishes probable cause here. Rejecting probable cause on the affidavit in this case therefore flies in the face of *Hines*, a well-reasoned precedential decision.

Because the affidavit contained more than enough to establish probable cause, it follows as a matter of logic that, at the very least, Christian's suppression motion was properly denied because of the good-faith exception of *United States v. Leon*, 468 U.S. 897 (1984). Under *Leon*, the exclusionary rule does not bar from admission "evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." *Id.* at 905. If somehow the affidavit at issue here could be deemed insufficient to establish probable cause, then this is a case in the very heartland of the *Leon* exception. Contrary to Christian's argument, the affidavit was not "bare bones." We reserve that label for an affidavit that "merely states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." *United States v. Washington*, 380 F.3d 236, 241 n.4 (6th Cir. 2004) (internal quotation omitted). To further describe the bare-bones standard is to show why it does not apply here. We have said that, to be considered bare bones, an affidavit must be "so lacking in indicia of probable cause" as to make an officer's "belief in its existence . . . objectively unreasonable." *United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005). In *United States v. Williams*, 224 F.3d 530 (6th Cir. 2000), we described how woefully deficient an affidavit must be before it meets this standard:

> An example of a "bare bones" affidavit is found in *Gates*, 462 U.S. at 239, where the Court, pointing to one from *Nathanson v. United States*, 290 U.S. 41 (1933), said, "A sworn statement of an affiant that 'he has cause to suspect and does believe that' liquor illegally brought into the United States is located on certain premises will not do." Another illustration was taken from *Aguilar v. Texas*, 378 U.S. 108 (1964), that "[a]n officer's statement that 'affiants have received reliable information from a credible person and believe' that heroin is stored in a home, is likewise inadequate." *Gates*, 462 U.S. at 239. Thus, a "bare bones" affidavit is similar to, if not the same as, a conclusory affidavit. It is "one which states 'only the affiant's belief that probable cause existed.'" *United States v. Finch*, 998 F.2d 349, 353 (6th Cir. 1993) (quoting *United States v. Ciammitti*, 720 F.2d 927, 932 (6th Cir. 1983)).

Williams, 224 F.3d at 533.

Although one can split hairs about the affidavit in this case, it is impossible to deny that it contains factual allegations, not just beliefs or conclusions. Each factual allegation, regardless of any infirmities, at least purports to link Christian to drug trafficking at 618 Grandville. An affidavit need only present "some connection, regardless of how remote it may have been,"

United States v. White, 874 F.3d 490, 497 (6th Cir. 2017), or, in other words, establish a "minimally sufficient nexus between the illegal activity and the place to be searched," *nited States v. Brown*, 828 F.3d 375, 385 (6th Cir. 2016), to avoid the bare-bones designation and thus be one upon which an officer can rely in good faith. Because the affidavit here established probable cause, it also necessarily satisfies this lower requirement. To hold otherwise is to equate the five-page, extensively sourced affidavit here with the short, conclusory, and self-serving ones for which the bare-bones designation has been, and ought to be, reserved.

Our decision in *United States v. Hython*, 443 F.3d 480 (6th Cir. 2006), is almost completely inapposite here. We held there that the affidavit—which recounted only a single, undated controlled purchase—did not satisfy the good-faith exception. *Id.* at 486, 488–89. Although the affidavit linking 618 Grandville to drug dealing did include information about an arguably stale controlled purchase, the similarities between this case and *Hython* end there. Indeed, this case is like *Hython* only if, engaging in the methodological error forbidden by the Supreme Court in *Wesby*, one completely ignores most of the affidavit by discounting each item one by one. Indeed, *Hython* by negative inference supports the existence of good-faith reliance here by showing just how unsubstantiated an affidavit must be to fail to qualify under *Leon*'s good-faith exception.

This is a particularly egregious case to misapply the good-faith exception given the utter lack of police wrongdoing. The "exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916. As the Supreme Court explained in *Leon*, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922. This balance supports the principle that, as we said in *United States v. Carpenter*, 360 F.3d 591 (6th Cir. 2004) (en banc), the good-faith exception requires "a less demanding showing than the 'substantial basis' threshold required to prove the existence of probable cause in the first place." *Id.* at 595–96 (quoting *United States v. Bynum*, 293 F.3d 192, 195 (4th Cir. 2002) (citation omitted)). Refusing to adhere to those decisions in a case like Christian's unduly exalts the Fourth Amendment interest marginally served by deterring nonculpable conduct over the public interest in

combatting crime—and amounts to effective disregard of Supreme Court precedent as well as our own.

Finally, it is questionable to conclude that the district court erred by admitting the challenged telephone-call evidence. In any event, any such error was harmless, given that, as explained above, the evidence obtained in accordance with the search warrant was properly admitted. Because suppression was correctly denied, the jury properly heard, for example, evidence that officers found 70 grams of heroin next to two loaded guns in Christian's basement and cocaine in another part of the house, that the DNA found on one of the guns matched Christian's, and that Christian's cell phone contained text messages about drug trafficking. Considering that evidence, the phone call added relatively little: it connected Thomas and Christian, which provided a basis for the jury to conclude that Christian had sold drugs to Thomas, and it linked Christian to a third gun. But even had that evidence not been admitted, no jury could have acquitted Christian on these charges. The evidence against him was too damning. Admitting the phone-call statements was therefore harmless.

The judgment of the district court should be affirmed.

APPENDIX D

A P P E A R A N C E S:

FOR THE GOVERNMENT:

MR. HEATH M. LYNCH
UNITED STATES ATTORNEY'S OFFICE
330 Ionia Avenue, N.W.
P.O. Box 208
Grand Rapids, Michigan 49501-0208
Phone: (616) 456-2404
Email: Heath.lynch@usdoj.gov

FOR THE DEFENDANT:

MR. LAWRENCE J. PHELAN
HAEHNEL & PHELAN
200 North Division Avenue
Grand Rapids, Michigan 49503
Phone: (616) 454-3834
Email: lphelan.hp@gmail.com

* * * * *

Grand Rapids, Michigan

April 25, 2016

10:04 a.m.

P R O C E E D I N G S

THE COURT: All right. We're here on the case of the United States against Tyrone Christian, case number 1:15-cr-172.

10:04:08 Let's start with appearances, please.

MR. LYNCH: Good morning, Your Honor, Heath Lynch on behalf of plaintiff United States. Seated to my left is Grand Rapids Police Department Detective Tom Bush and my colleague Cindy Vine.

10:04:18 ***THE COURT:*** All right.

Thank you, Your Honor.

THE COURT: All right. Anything else on the Fourth Amendment issues?

MR. LYNCH: No, thank you.

THE COURT: All right. Well, let me go ahead and give you a ruling on the Fourth Amendment because I have read the cases and I've thought about this and focused on the affidavit since I knew this would be a four-corners issue. And in my view, there isn't a basis to suppress under the Fourth Amendment. The boilerplate from a court's point of view is pretty straightforward for Fourth Amendment. We know we have to use -- as I think both sides indicate, but Mr. Phelan today -- Illinois against Gates, and I have to look at whether there is a, quote, fair probability given the totality of the circumstances that contraband or evidence of a crime will be found in a particular place. And to me the totality of the circumstances is what is key. We have to look at everything. We don't look at a line-by-line hypertechnical security. That's certainly not in keeping with what I'm instructed to do under Illinois and others. Make a practical common-sense evaluation of the circumstances and see whether from those four corners we satisfy where we need to go. And I think we do here.

The first thing that is evident to me -- and I certainly haven't read as many affidavits as Mr. Phelan has --

but this one is a little different than many that I see. This one really is much more linguistically focused on the trafficking and documentation issues than many I see. It seems to me the fair gravamen of what the affiant here is trying to say is that based on what's detailed in the search warrant, the agent believes there's probable cause to conclude that Mr. Christian is operating an ongoing drug-trafficking business out of his residence on Grandville. And then what's laid out there is the litany of information. And I think when I evaluate staleness, when I evaluate the other potential problems with what's in here, that needs to be a part of the mix as well.

We have here a situation with law enforcement looking very concretely, very directly for evidence of trafficking, and in that sense what Mr. Phelan describes as boilerplate from Officer Bush is -- even if it is boilerplate -- informative boilerplate. It demonstrates why this officer believes that based on the information that's described, which we'll talk about in more detail in a minute, that there is probable cause to believe in an evidentiary finding at the house of trafficking and again focusing on things like documentation. The whole litany of what the officers are looking for starts with those kinds of things, doesn't get around to guns and drugs themselves until later in the description. And later in the boilerplate of the affidavit the officer describes why

that's the case. Looking for the paper trail, which may be more persistent than the drugs themselves.

When I look at that as the focus point, then I have to ask whether the nexus of that target of the search is established, and in that context the fact that you have a confidential informant that's validated by the police in December of 2014 who then conducts a controlled buy that results in positive contraband from the house in January of 2015 isn't really stale. It might be stale if they were trying simply to get somebody for a single sale or use. I'm not sure. That's a much more difficult line to draw. But here the fact that we're within nine months or eight months is a factor to consider along with all the other information, and that's pretty hard evidence of some trafficking at the house.

In that context another piece of the puzzle is the information, albeit not necessarily from validated CIs but from other sources that carry forward in that four-month period, which is somewhere between May and August of 2015, other information that's consistent, that's corroborating what the confidential informant has said. And by the way, you know, the confidential informant wasn't simply used for a single buy at the house. That was corroborating for sure, but it's the information from the CI that describes a more extensive network of trafficking and operation.

When you move forward beyond the May-to-August

period, we have what Mr. Phelan focuses on, "On today's date," and I think the suggestion from Mr. Phelan is, look, that paragraph was written consciously and intentionally to mislead the issuing judicial officer to believing that law enforcement actually saw a drug buy at 618 Grandville, the target of this search, and that that was false, they never saw that, and that was calculated in the probable cause calculus. And I just don't see it that way.

It is certainly clear, I think, that law enforcement believes that's what happened. I think that's probably honest. I think law enforcement believes there was a sale of heroin out of 618 Grandville. But what I think law enforcement carefully does is describe what they actually did. They saw this person leaving "the area." Yes, maybe that's next-door, maybe that's a hundred feet, I don't know. On the video we saw it took only about 20 seconds to go from where that -- maybe 30 seconds -- to go from where the police stopped Mr. Christian to his home, you know, in the early morning hours. But the fact is the officers are describing what they saw. They are setting up surveillance of that home. Yes, visually they can see the area, but within what's naturally constrained by law enforcement looking at the area when their focus is 618 Grandville, I don't think there's anything misleading, intentionally or otherwise, in that paragraph. It simply describes another piece of what leads law enforcement to

believe there's probable cause to believe there's trafficking at the house. It's not a hundred percent. It's certainly not beyond a reasonable doubt. May not even be preponderance. But it is, I think, with everything else, a part of probable cause.

So that, I think, in addition to the other things that I'm not specifically calling out but are described in detail in the affidavit would in my mind create a basis for probable cause that I think supports the warrant and requires a denial of the motion.

If there is some flaw in the probable cause description, I certainly don't see anything that rises to the level of overcoming Leon good faith. It seems to me that I've already addressed the main point from the defense on that issue. I don't think it's a barebones affidavit or something else that you'd read and say no reasonable officer would rely on that or that the court had somehow gotten rid of its judicial function in the process. Nothing that in my mind would take Leon good faith out of the equation. So I think all of those circumstances together mean that on the Fourth Amendment argument the defense motion fails, and I'll deny the motion to that extent.

The Fifth Amendment issue is one that I'll give the parties a chance to brief in light of the record we have. And although, of course, either side can brief whatever issue they want, the thing that is the most troubling to me, the thing

APPENDIX E

STATE OF MICHIGAN)
COUNTY OF) SS
KENT)

SEARCH WARRANT

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

On this day, affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exist;

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that you search the following described place:

The entire residence, located at 6[redacted] G[redacted] Avenue [redacted], in the City Of Grand Rapids, County of Kent, State of Michigan, and further described as a tan and white colored two story dwelling, with the numbers "6[redacted]" attached on the west side of the structure, including all rooms, closets, fixtures, containers, clothing, basement, attic and all places of concealment therein, all attached and unattached buildings and garages, all vehicles registered to the residents in the above described address or parked on the property, along with person(s) found at the above location specifically the suspect: Tyrone Dexter Christian, Race: Black, Sex: Male and DOB: [redacted].

and to seize, secure, tabulate and make return according to law the following property and things:

Any and all records at the above location which would indicate the trafficking of controlled substances such as, but not limited to, telephone records of the long distance calls, financial transactions involving the accumulation of or transferring of cash money, photographs, videos, video recordings, cellular telephones, computers, hard drives and computer disks, magnetic storage devices. The contents of the devices including but not limited to pictures, videos, text messages, incoming and outgoing calls, internet activity and anything else accessible on said devices. Any and all papers identifying or tending to identify the occupant(s) or possessor(s) of the above described premise, and/or co-conspirators in controlled substances trafficking. Receipts of storage facilities, rental agreements, property interest in real or personal property. Receipts for other rental property, both real and personal, keys and/or receipts to a strong box. Paperwork indicating amounts of money owed or payable, names of customers and/or suppliers and their telephone numbers. Paperwork indicating weights that controlled substances are commonly sold in, tax records indicating the lack of income inconsistent with a possessor of the amounts of controlled substances, etc. Any and all quantities of controlled substances, together with any paraphernalia suitable for the use possession, or delivery of controlled substances. Any and all articles tending to identify the possessor(s) of controlled substances, being evidence of a crime. Any quantities of money tending to establish the illicit act of sales of controlled substances. Any firearms used for the protection of controlled substances and/or the proceeds made from the sales of controlled substances, firearms for the protection of the business or the sale of controlled substances.

The following facts having been sworn to by affiant in support of the issuance of this Warrant:

ISSUED UNDER MY HAND THIS 3rd DAY OF September, 2015.

JUDGE OF 61st DISTRICT COURT
Original Search Warrant

STATE OF MICHIGAN)

COUNTY OF) SS

KENT)

AFFIDAVIT FOR SEARCH WARRANT

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

Thomas Bush affiant now appears before the undersigned Magistrate authorized to issue warrants in criminal cases, and makes this affidavit in support of the issuance of a Search Warrant, to search the following described place:

The entire residence, located at 6[redacted] G[redacted] Avenue [redacted], in the City Of Grand Rapids, County of Kent, State of Michigan, and further described as a tan and white colored two story dwelling, with the numbers "6[redacted]" attached on the west side of the structure, including all rooms, closets, fixtures, containers, clothing, basement, attic and all places of concealment therein, all attached and unattached buildings and garages, all vehicles registered to the residents in the above described address or parked on the property, along with person(s) found at the above location specifically the suspect: Tyrone Dexter Christian, Race: Black, Sex: Male and DOB: [redacted].

and to there seize, secure, tabulate and make return thereof according to law the following property or things which have been used in the commission of, or which constitute evidence of criminal conduct:
Any and all records at the above location which would indicate the trafficking of controlled substances such as, but not limited to, telephone records of the long distance calls, financial transactions involving the accumulation of or transferring of cash money, photographs, videos, video recordings, cellular telephones, computers, hard drives and computer disks, magnetic storage devices. The contents of the devices including but not limited to pictures, videos, text messages, incoming and outgoing calls, internet activity and anything else accessible on said devices. Any and all papers identifying or tending to identify the occupant(s) or possessor(s) of the above described premise, and/or co-conspirators in controlled substances trafficking. Receipts of storage facilities, rental agreements, property interest in real or personal property. Receipts for other rental property, both real and personal, keys and/or receipts to a strong box. Paperwork indicating amounts of money owed or payable, names of customers and/or suppliers and their telephone numbers. Paperwork indicating weights that controlled substances are commonly sold in, tax records indicating the lack of income inconsistent with a possessor of the amounts of controlled substances, etc. Any and all quantities of controlled substances, together with any paraphernalia suitable for the use possession, or delivery of controlled substances. Any and all articles tending to identify the possessor(s) of controlled substances, being evidence of a crime. Any quantities of money tending to establish the illicit act of sales of controlled substances. Any firearms used for the protection of controlled substances and/or the proceeds made from the sales of controlled substances, firearms for the protection of the business or the sale of controlled substances.

Affiant says that he has probable cause to believe that the above-listed things to be seized are now located upon said described premises, based upon the following facts:

Your affiant is a member of the Grand Rapids Police Department (GRPD) currently assigned to the Vice Unit. Your affiant has been a police officer for the last 21 years and has over seven years of experience as a vice-officer. Your affiant currently investigates all levels of violations of the Michigan Controlled Substance Act in the West Michigan area and Federal Controlled Substances laws. Your affiant has had in house and on the job training from the Grand Rapids Police Department and Vice Unit. Your affiant has also completed several structured trainings provided by the Drug Enforcement Administration. Your affiant has also gained experience in cooperating with other local and federal law enforcement agencies specializing in narcotics trafficking, including other law enforcement officers with the Michigan State Police, Drug Enforcement Administration; attorney's with the Kent County Prosecutor's Office and the United States Attorney's Office; and area District and Circuit judges; regarding the various ways and means by which controlled substances, and the methods by which drug traffickers obtain and secrete proceeds from drug sales.

Your affiant has been involved in the execution of undercover narcotics cases and search warrants over the last eight years in the Vice Unit and six years in the Special Response Team; including investigations wherein your affiant posed as a buyer of controlled substances, and/or assisted other officers in undercover investigations, and/or participated in the drafting of search warrants for controlled substances. Your affiant has interviewed and/or debriefed individuals involved in drug trafficking. Your affiant also has worked with and/or was the control officer of several civilian police agents who have since agreed to cooperate with police agencies, thereby learning first hand the intricacies of drug trafficking, including but not limited to a working knowledge of how drug houses operate in the obtaining, processing, packaging and distribution of drug proceeds; a working knowledge of the market value of various amounts of drugs; and the often subtle distinctions between a user of drugs as compared to a trafficker of drugs. Your affiant has testified several times in District, Circuit and Federal Courts.

In this regard, your affiant along with other members of the Grand Rapids Police Department (GRPD) and other law enforcement agencies became involved in a drug investigation involving Tyrone Christian, suspected of trafficking narcotics in the Grand Rapids, Michigan area.

Your affiant is aware that Tyrone Christian has been the target of other drug investigations at 6[redacted] G[redacted] Avenue. For instance on April 1, 2009, members of the Grand Rapids Police Department executed a search warrant at 6[redacted] Avenue with Tyrone Christian being the listed suspect. Based upon that investigation, Tyrone Christian was arrested for possession with intent to deliver marijuana and felon in possession of a firearm. On February 25, 2011, members of the Grand Rapids Police Department conducted a search warrant at 6[redacted] Avenue [redacted] with Tyrone Christian being one of the listed suspects. During that investigation, Tawanna Christian, wife of Tyrone Christian, was arrested for possession with intent to deliver marijuana, possession with intent to deliver cocaine and maintaining a drug house. On that same date, Tyrone Christian was arrested for delivery of cocaine.

Your affiant has determined that Tyrone Christian has the following felony convictions on his criminal record: August 21, 1996, possession of cocaine less than 25 grams; August 27, 2002, controlled substance-2nd offense; August 31, 2009, delivery/manufacture marijuana and possession of a firearm by a felon;

July 7, 2011, controlled substance deliver/manufacture cocaine less than 50 grams.

In December of 2014, your affiant had contact with a credible and reliable informant who provided information on several drug traffickers including Tyrone Christian. The credible and reliable informant provided names, nicknames, phone numbers, residences utilized by the drug traffickers and information regarding specific drug transactions. Your affiant was able to confirm much of the information provided by the credible and reliable informant through information maintained by the Grand Rapids Police Department, other credible and reliable informants, public information sources and other law enforcement agencies.

In January of 2015, at the direction of your affiant, the above described informant conducted a controlled purchase of drugs from Tyrone Christian at 6[redacted] G[redacted] Avenue [redacted]. The drugs that were purchased were field tested with positive results.

Within the last four months, your affiant has been involved in or received information from several debriefs of subjects who have stated that Tyrone Christian is a large scale drug dealer. These subjects further stated that they have purchased large quantities of heroin and crack cocaine from Christian at 6[redacted] G[redacted] Avenue [redacted] in the last four to five months.

Your affiant has seen Tyrone Christian and vehicles associated with him on several occasions within the last several weeks. On todays date, your affiant determined that Tyrone Christian's listed address with the Michigan Secretary of State is 6[redacted] G[redacted] Avenue [redacted].

On todays date, surveillance was established at 6[redacted] G[redacted] Avenue [redacted]. Surveillance observed a subject, later determined to be Rueben Thomas walk away from the area of 6[redacted] G[redacted] Avenue and leave the area in a vehicle. Surveillance was continued on the vehicle being driven by Rueben Thomas and a traffic stop was conducted for a civil infraction. During the traffic stop of Rueben Thomas, approximately 20 grams of heroin was seized from the vehicle and Rueben Thomas was the only occupant of the vehicle. In a post Miranda statement, Rueben Thomas admitted that he had recently been at an address on G[redacted] Avenue in the City of Grand Rapids but denied being at 6[redacted] G[redacted] contrary to observations of the law enforcement officers. The suspected heroin was field tested with positive results. Your affiant was advised that the heroin seized was "chunk's" that appeared to have been removed from a larger portion of heroin.

Based upon the above information and experience and training of your affiant, a pattern of criminal behavior has become apparent to your affiant. Traffickers of controlled substance can be classified both by the amount of controlled substance they are to deal in and the purpose for trafficking.

The "user" type of trafficker is an individual who deals in controlled substances to support his need to obtain the controlled substance can be differentiated from the individual who traffics a controlled substance for "profit". The "user" normally deals in smaller quantities for example 1 gram of cocaine or one ounce of marijuana deliveries or less. Normally this individual traffics enough controlled substances to supply his or her personal needs. They normally do not have an organized system for his/her trafficking.

However, the "profit" type of traffickers is usually capable of multiple grams and ounce sales of heroin and cocaine or multiple ounces and pounds of marijuana. These individuals normally have a relatively stable network of

suppliers and customers. These individuals may or may not be gainfully employed while engaging in their trafficking. Because of the ongoing nature of these traffickers, it is necessary for these "profit" traffickers to maintain a base of operations where they can be contacted both by their suppliers and customers. This business type atmosphere generates the expected paper trails of phone calls, messages, use of communications devices, pagers, etc. These dealers also need the equipment to process the controlled substances such as scales for weighing and repacking and/or cutting materials to "step" on their controlled substances. Based on your affiant's experience it is customary for dealers at this level to "front" out their product or take partial payments for their deliveries which necessitates the need for these individuals to keep records of their ongoing transactions. As is the logical conclusion for "profit" traffickers, the primary residue of all of their trafficking is money - which again produces a "paper trail" in transfer to financial institutions or to other people who store and safeguard and/or launder their profits.

Your affiant through training and experience has determined that many drug traffickers will purchase drugs in bulk and then repackage the drugs for distribution. Your affiant is aware that the use of plastic sandwich bags, along with other materials, are a common way for drug traffickers to package drugs. More specifically, many drug traffickers will place drugs into a sandwich bag, force the drugs to a corner of the bag and then remove/tie the corner of the bag to package drugs in smaller amounts for distribution.

Your affiant through his training and experience has also learned about keeping and maintaining of records at search scenes. This information was gained by prior searches of his unit of residences and the debriefing of the suspects after their arrest. These debriefings frequently include cooperation of the suspects which further adds to your affiant's and his law enforcement units knowledge of internal workings of controlled substances traffickers.

Based upon the above training and experience your affiant is aware that sought trafficking records range in complexity from slips to paper to computer maintained records. It has been learned by your affiant and his law enforcement unit that records are kept depending upon their complexity in areas ranging from secret locations within the homes to slips of paper stored in automobiles and to persons located at the residence. It is further learned that records are frequently found in control of seemingly innocent persons located at the residence at the search location. This is consistent with other information about traffickers using safe houses to traffic and store their controlled substances.

Your affiant knows from both training and experience that valuable information can be learned from the examination of suspects/witnesses cellular telephones, computers, tablets or any other establishing a timeline of events, identifying the telephone numbers that the suspects(s) made before, during or after an incident. Any text messages, instant messages, emails, social media communications received or sent made before, during or after the incident. This information can then be used to identify other possible suspects or witnesses in the case, thus opening up other avenues of investigation.

Pictures and videos are also taken with cellular telephones, tablets, cameras, and/or video recording devices which can and are uploaded and/or accessible on other devices. Oftentimes subjects will take and keep incriminating photos of themselves or others on said devices. These pictures and videos can also easily be transferred from one device to another. These items may also be of

use to investigators.

WHEREFORE, your affiant for the foregoing reasons does verily believe that evidence of further narcotics trafficking, proceeds of narcotics trafficking, and/or records/documents or other indicia of narcotics trafficking will be discovered within this residence.

Thomas Bush

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 3rd DAY OF September, 2015.

Issuance of a Search Warrant
as prayed for in the foregoing
Affidavit for Search Warrant
is hereby authorized.

JUDGE OF THE 61st DISTRICT COURT
Magistrate

PROSECUTING ATTORNEY,

Original Affidavit