UNITED STATES SUPREME COURT

JOSHUA CARRIER,
Petitioner,

No. 19-8227

-V-

STATE OF COLORADO,
Respondent

MOTTION FOR LEAVE TO FILE OUT-OF-TIME PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed petition for rehearing on the order of this Court denying the petition for writ of certiorari in this case. No timely petition for rehearing was filed in this case as of this time.

A petition for writ of certiorari is being filed in the *Carrier v. State* case. As several cases that the petitioner has addressed in the rehearing brief conflicts with the decision that was made by the Colorado Appeals Court. The petitioner's brief has fully explained the conflicts with the Appeals Court's decision, and as such should be reviewed. Due to the COVID-19 pandemic, the correctional institution where the petitioner is located is in lockdown. The petitioner has only had limited time to review case laws and has only had limited time to file this rehearing brief. The petitioner has only had approximately 1 hour a week in the legal library to conduct the research after the petitioner had received the denial letter. To compound this issue, the legal library computers, which is the only way to access legal materials, was off line for two weeks. The legal library had also ran out of supplies (Tan paper) necessary for the petitioner to file his legal brief according this Court's Rules (see attachment to this motion).

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 44.1, the grounds upon which it is based arose after such time. This

Court clearly has power, in its discretion and in the interests of justice to entertain the petition in these circumstances. See *United States v. Ohio Power Co.*, 353 U.S. 98 (1957); *Gondeck v. Pan American World Airways*, 382 U.S. 25 (1965).

Respectfully Submitted,

Joshua Carrier, Pro Se
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Attachment A

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION
INFORMAL COMPLAINT FORM

Inmate Name: Joshua Carrier Commitment #: T93493 Incident Date: 8/16/2020
Institution: OCCC Housing Unit: A3

CHECK OFF AREA OF CONCERN (one issue per form allowed).

☐ HOUSING ASSIGNMENT / STATUS	☐ LAUNDRY	☐ PROGRAMS	☐ MAIL	☐ FOOD
☐ CLOTHING / LINEN EXCHANGE	☐ RELIGION	☐ PROPERTY	☐ VISITS	
☐ LEGAL EXCHANGE	☒ LIBRARY	☐ PHONE	☐ OTHER:	

State completely, but briefly, the single issue of concern and your requested resolution
-See Attached-

List any previous steps you have taken to resolve your concern
-Librarian Request Form, Letter to Superintendent's Office, Talked with Printshop manager Ken Newby.

(Use other side of page if more space is needed).

Inmate Signature _____ Date 8/18/2020

Note: If you follow instructions in preparing your request, it can be addressed more readily. Your complaint will be reviewed and replied to within ten (10) business days from the date of receipt.

DO NOT WRITE BELOW THIS LINE (Reserved for Staff Response)

Received By _____ Date Received 8/25/2020

DECISION

Resolution: Granted ✓ Partially Granted ___ Denied ___ Alternate Resolution Offered ___ N/A ___

Comments Tan paper will be available in library

Decision by: _____ Date: 8/27/20

* Denied informal complaints may be appealed to the Institution Grievance Coordinator within ten (10) business days.

** An inmate shall not be required to submit a step 1 informal form prior to filing an emergency grievance, allegations of staff misconduct, or for allegations of sexual assault / abuse.

Grievance about "Tan" Paper 8/18/2020

I am writting this grievnace about the lack of access to the courts. I am currently tring to file a brief to the United States Supreme Court. According to Supreme Court Rule 33(g)(xiii), the cover for this brief must have a tan cover. I asked the law libray about this and was informed that tan paper is currently out of stock and they would have to reorder this color of paper. The ETA for this paper is 1½ months. This is not acceptable, since this lockdown and the denial of access to the legal library has caused me to be late on filing this brief. This additional month and a half can not be allowed to occur. This brief is ready to go out, but can't due to me not having tan paper.

I have talked with print shop manager Ken Newby, and he informed me that he has tan paper in the print shop, he just needs a deputy superintendent or above to give him approval to give the paper to the library. The superintendent's office was also contacted and I was informed that I had to send a letter to the superintendent's office with this request. Although a letter was sent to the office, I am still awaiting a letter that was sent to the superintendent's office over 1½ months ago. I have no choice then to file this grievance for documentation so that I can submit the obstruction that I have been having to the Court.

Remedy:
I would like to get this tan paper into the library so that I can complete the required brief .

No. 19-8227

UNITED STATES SUPREME COURT

JOSHUA CARRIER
PETITIONER

-V-

STATE OF COLORADO
RESPONDANTS

PETIITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR REHEARING

Joshua Carrier
OCCC
1 Administration Rd
Bridgewater, MA 02324

PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, Petitioner Joshua Carrier, *pro se*, petition for a rehearing of the Court's order denying certiorari in this case. The petitioner requests that the Court takes in mind the arguments stated below for the reason for the rehearing on the singular issue of the Search Warrant. The Petitioner request that the Court grants the petition, vacate the judgment and remand it back to the Colorado Appeals Court so that that court may take appropriate action in light of the arguments below.

GROUNDS FOR REHEARING

I. THE COURT SHOULD HOLD THE PETITION AND GRANT THE REHEARING BECAUSE THE SEARCH WARRANT FOR MR. CARRIER'S HOME AND COMPUTERS RELYING ON A SINGLE TRANSACTION FROM FOUR YEARS EARLIER WAS BASED UPON STALE INFORMATION AND LACKED PROBABLE CAUSE IN VIOLATION TO MR. CARRIER'S 4TH AMENDMENT RIGHTS.

A. Argument

The Colorado and United States Constitutions require that, in order to support the issuance of a search warrant, the issuing magistrate must be apprised of sufficient underlying facts and circumstances to support a finding

of probable cause. *Illinois v. Gates*, 462 U.S. 213 (1983); U.S. CONST. amends. IV, XIV; COLO. CONST. art. II, §7. In determining whether the affidavit is sufficient, the magistrate must look only within the four corners of the affidavit.

Probable cause to search requires an affidavit that demonstrates a "sufficient nexus between criminal activity, the things to be seized, and the place to be searched." *People v. Kazmierski*, 25 P.3d 1207, 1211 (Colo.2001); *People v. Randolph*, 4 P.3d 477 (Colo.2000.

Additionally, information upon which a search warrant affidavit is based must not be stale. *People v. Miller*, 75 P.3d 1108, 1112-3 (Colo.2003. That is, "the warrant must establish probable cause to believe that contraband or evidence of criminal activity is located at the place to be searched *at the time of the warrant application, not merely at some time in the past.*" *Id.*, p.1112 (emphasis added). Thus, probable cause can become stale as a result of the passage of time. *Id.*, p.96, fn.2; *see also People v. Mapps*, 231 P.3d 5, 8 (Colo.App.2009).

The search warrant and affidavit in this case failed to establish probable cause to search Mr. Carrier's home in 2011. The search warrant was predicated on alleged acts occurring in 2007. The search warrant failed to establish probable cause of criminal activity in the first instance; however, even if it did establish probable cause in 2007, it failed to establish a sufficient nexus in time or place to believe that evidence of the alleged activity would be uncovered four years later on Mr. Carrier's computer and/or at his home. The search warrant also makes several leaps as to the identity of Mr. Carrier. Nowhere in Det. Romine's affidavit does it showed that Mr. Carrier owned the computer that was used to download the website. Nowhere in the affidavit does it show that Mr. Carrier even visited or purchased information from the site in question. The only information that connects Mr. Carrier to this website is the name "Joshua Carrier" and that the IP address that purchased the alleged illegal website was located in Colorado Springs. It should be known that the City of Colorado Springs has a population of well over 480,000 people. It should also be known that Mr. Carrier in 2007 never lived in the City of Colorado Springs; he lived in El Paso County, outside of the city limits in which the population is over 680,000 people.

The search warrant references only two alleged transactions: one in January of 2007 and the other in February of 2007. The affidavit fails to

establish probable cause to believe that the first transaction involved child pornography (and the Colorado Court of Appeals did not rely on this transaction in its analysis). The affidavit cannot state what was actually purchased or what, if any, website was accessed.

The second transaction also fails to establish probable cause that child pornography was purchased, accessed, or downloaded. It reflects a payment related to a website that apparently has some, but not all, child pornographic content. However, there is no evidence regarding what content, if any, was actually accessed, viewed, or downloaded. The affidavit fails to establish probable cause that any criminal activity actually occurred. There was at no time any information on this Probable Cause Affidavit that showed Mr. Carrier access or downloaded any contact from the website. It is plausible that the site was purchased and then it was discovered that the site contained child pornography, and Mr. Carrier (assuming *in arguendo*) deleted the site and never visited the site after the initial time the purchase occurred. Moreover, even if the second transaction established probable cause in 2007, that probable cause did not extend more than four years later to May of 2011. By that time, the probable cause was stale. *See e.g. Miller, supra.*

There was no evidence in the affidavit of Mr. Carrier allegedly purchasing or viewing child pornography in the intervening four years. There was no evidence of ongoing or continuous activity. The search warrant affiant attempted to "freshen" any probable cause that allegedly existed initially by sending a flyer. The sending of the flyer did not serve to revive or freshen the initial information in this affidavit, since there was no information in the affidavit that Mr. Carrier personally received, viewed, or opened the flyer. The Colorado Court of Appeals did not rely on the flyer in its probable cause analysis.

In *United States v. Prideaux-Wentz*, 543 F.3d 954 (7th Cir. 2008), an FBI investigation determined that defendant's user account had been utilized to upload images of child pornography. However, there were no exact dates for when the images had actually been uploaded, and it could have been as many as four years earlier. The FBI obtained a search warrant and recovered child pornography. The Seventh Circuit held that the information in the warrant was too stale to support a finding of probable cause. The court noted that "[w]e have suggested that the staleness argument takes on a different meaning in the context of child pornography because of the fact that collectors and distributors rarely, if ever, dispose of their collections. ... Nevertheless, there must be some limitation on this principle." *Prideaux-*

Wentz, 543 F.3d at 958 (citation omitted); *see also United States v. Greathouse*, 297 F.Supp.2d 1264, 1271 (D. Or.2003 (quoting *United States v. Lacy*, 119 F.3d 742 (9th Cir.1997) :"[W]e are unwilling to assume that collectors of child pornography will keep their materials indefinitely.").

Although the court "decline[d] to find that evidence that is two to four years old is stale as a matter of law," the court held that four-year-old evidence was stale in Mr. Prideaux-Wentz's case because "there was no new evidence to 'freshen' the stale evidence." *Prideaux-Wentz*, 543 F.3d at 958-959. The court thus held that: "The four year gap, without more recent evidence, undermines the finding that there was probable cause that the images would be found during the search. Therefore, we find that the evidence relied on to obtain the warrant here was stale, and the warrant lacked probable cause." *Id.*, p.959. The court further held, however, that the substantial amount of other information in the affidavit supporting the warrant justified a good faith reliance on the warrant, and therefore declined to suppress the evidence. *Id.*, pp.959-962.

Here, as in *Prideaux-Wentz*, the information was in excess of four years old and there was no new evidence to "freshen" it. *See also Greathouse*,

supra at 1271. Consequently, as in *Prideaux-Wentz*, the evidence was stale and could not support probable cause for the search. *See also United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990) (Finding a lack of probable cause where: "In addition to the one order solicited by the government, the only other piece of evidence arguably suggesting that Weber may have had child pornography in his house on the day of the search was the fact that a customs agent, almost two years previously, had identified advertising material addressed to Weber as 'apparently' child pornography. But to conclude from that slim evidence that on the day of the search there would be child pornography at his house (other than that delivered)," too many unsupported inferences would need to be drawn, even if each inference was independently reasonable. *Id.* Further, the affidavit detailing tendencies of "pedophiles" and "child pornography collectors" was foundationless boilerplate and "was not drafted with the facts of this case or this particular defendant in mind." (*Id.*,p.1345.) Mr. Carrier falls into none of the definitions according to relevant case laws that he can be called a collector or a pedophile. In fact in *Weber* the appeals court had ruled "...there was not a whit of evidence in the affidavit indicating that Weber was a 'child molester'. And the affidavit does not say how many magazines or pictures one must buy in order to be defined as a 'collector. It goes without saying that the government could not search Weber's house for evidence to proved Weber was a collector merely by alleging he was a collector." *Weber* p. 1345 . There is even less evidence in

Mr. Carrier's case. There was only one purchase that was made and there can not be any dispute that the state can say that Mr. Carrier downloaded or even looked at child pornography. In *Weber*, Weber purchased some illegal items that were confiscated by U.S. Customs and answered a government-generated advertisement for child pornography, and still the Court found that there was not enough to overcome the staleness of the warrant by saying that he was a collector. In Mr. Carrier's Search Warrant there is a bunch of boilerplate information that does not even involve Mr. Carrier. There is also no information that brings Mr. Carrier to the realm that he is a pedophile or a collector. It should also be noted that Mr. Carrier prior to this case had never been convicted of a crime or diagnosed as a pedophile.

The warrant in Mr. Carrier's case is supported by even less. There is a single identifiable transaction at a website containing child pornography, more than four years prior to the search, but the object of the transaction is not specifically identifiable. Nothing else supports a probable cause determination.

The Colorado Court of Appeals found that, because Mr. Carrier allegedly made a one-time purchase for a "membership" to a website

containing child pornography and because electronic child pornography can be indefinitely stored on a computer, probable cause existed to search his computer more than four years later. In fact, the Colorado Court of Appeals does not put any outer time limit on the existence of probable cause in such circumstances. Based upon its rationale in Mr. Carrier's case, there would be no outer limit – since electronic media can theoretically be stored indefinitely. In effect, the court of appeals eliminated the staleness inquiry in cases where a purchase of electronic child pornography has been alleged. "On these facts, to find probable cause for the materials listed in paragraph 2 of the warrant would be to justify any search of the home of a person who has once placed an order for child pornography – even if he never receives the materials ordered." *Weber* p. 1334. "The four year gap, without more recent evidence, undermines the finding that there was probable cause that the images would be found during the search." *Prideaux-Wentz* p. 959

No other court in the country, has gone so far as the court of appeals in this case. The Colorado Court of Appeals' unwarranted departure from critical Fourth Amendment principles is unsupported, and supports a review by this Court of the differing of opinions between the other districts and other states.

First, the Colorado Court of Appeals seems to be assuming that a "membership" was purchased, based upon the affidavit's reference to the websites as "member-restricted." However, the affidavit does not specify whether member access was obtained through payment, or merely through registration and a password, which would then enable access to make purchases from the site. Moreover, even assuming some type of membership was involved, there is no information regarding the nature or length of that membership.

Second, assuming *arguendo* that a "membership" was purchased, the cases the Colorado Court of Appeals relies on do not support the court's conclusion that evidence of such a purchase, standing alone, serves to defeat a staleness challenge (apparently without limits). The cases cited by the Colorado Court of Appeals do not support such a generalized and sweeping departure from existing Fourth Amendment jurisprudence.

United States v. Raymonda, 780 F.3d 105 (2d Cir. 2015) actually found that a nine-month delay between the defendant's access to Internet child pornography and the issuance of the warrant rendered the warrant stale,

absent specific evidence that the defendant was a "collector." *United States v. Freschette*, 583 F.3d 374 (6th Cir. 2009) involved a payment for a subscription to a child pornography site *and* Mr. Freschette was a registered sex offender at the time, and the majority of the court found the sixteen-month delay between the purchase and the warrant did not render it stale. Notably, that delay was approximately one-third the length of the delay here, and was also based in part upon the fact that the defendant was a known sex offender in addition to the purchase. And the result in *Freschette* was itself questioned. As the dissent pointed out: "The affidavit supporting the warrant in the instant case established a single fact particular to Frechette: Frechette bought a one-month membership to one website displaying child pornography. This is the sole basis upon which the majority rests its finding of probable cause, and the majority insists that this result is dictated by our case law and that of other circuits. Such an assertion, however, ignores the fact that the instant appeal is materially distinguishable from these prior cases." *Frechette*, 583 F.3d at 381 (Moore, C.J., dissenting). *United States v. Gourde*, 440 F.3d 1065 (9th Cir. 2006) appeared to focus on whether there was a sufficient showing that the defendant actually received or downloaded child pornography, rather than a specific staleness challenge – although the court did comment on staleness in passing. *Gourde, supra* at 1071. Significantly, though, the delay in *Gourde* was only four months - not four

years as here. And, as with *Freschette*, the result was disputed by two dissenting judges.

Consequently, those cases do not support the broad legal conclusion reached by the Colorado Court of Appeals in this case.

Similarly, the cases the Colorado Court of Appeals relied on factually to find that the warrant in this case was not stale are also easily distinguishable. The court first relies on *United States v. Irving*, 452 F.3d 110 (2d Cir. 2006, which it characterizes as holding the warrant to search defendant's home was not stale when it was obtained "five years after he was detained briefly at an airport on suspicion of traveling internationally to engage in sexual acts with minors." However, the Colorado Court of Appeals fails to mention the numerous other facts which, in combination with the single fact above, established probable cause to search in *Irving*: (1) Mr. Irving was a previously convicted pedophile; (2) beyond the trip mentioned above, there were statements from a witness identifying Irving as having engaged in sex with minors while abroad; (3) Irving maintained contact with the person who arranged such acts for years after the trip; and (4) Irving had written various more recent letters detailing exploitation of children that had

occurred in the past and that he hoped would occur in the future. Likewise, the court's reliance on *United States v. Riccardi*, 405 F.3d 852 (10th Cir. 2005) for the proposition that a "warrant based primarily on five-year-old receipt was not invalid due to staleness" is misplaced. Riccardi was calling teenage boys and asking them to do sexual things, and police specifically linked him to the calls. Additional investigation uncovered prior similar conduct by Riccardi. A search warrant was obtained for Riccardi's home. During the search, police recovered Polaroid photographs of nude young males posed in a sexually explicit manner, and several other potentially incriminating items. One of those items was a five-year old Kinko's receipt for copying photographs to computer disks. Based upon the discovery of the photographs currently existing in the home and the Kinko's receipt, the police obtained a warrant to search the computer. The court rejected Riccardi's staleness attack because, when combined with all of the other information available to the police – including the very recent search and discovery of pornographic photographs in the home at the time of the search, the receipt was simply one consideration in a host of factors to establish probable cause.

Unlike in *Irving* and *Riccardi*, Mr. Carrier's case does not involve additional and/or recent information to supplement or refresh the stale information in the warrant. In fact Detective Romine observed that the

warrant was stale and tried to refresh the warrant. In Detective Romine's statement to the court about sending the flyer, he stated, "I wanted it sent for a couple of reasons. First, the information that I had received from the Air Force was a couple of years old, so, you know, I wanted to *try and refresh the information that way.*" It is without dispute that the flyer that he sent was not responded to or even received by Mr. Carrier. It was clear that Det. Romine's effort to attempt to freshen the warrant and, when he failed freshen the material he made the conscience effort to proceed with getting the search warrant anyway, knowing that the information was in fact stale.

The Colorado Court of Appeals' conclusion that a payment for electronic child pornography (assuming that occurred here) will establish one as a "collector" and overcome a staleness challenge when a warrant issues four years later is unsupportable. Indeed, the court's rationale would allow probable cause to exist in perpetuity once person makes a payment to a website containing child pornography. As stated above, several Circuit Courts have said that there needs to be an outer limit on the time frame for searching a home. Just because there has been one purchase for child pornography does not give the government the right to search a home when ever they feel like it. There has got to be an outer limit on the time frame to

search a home. The Colorado Appeals Court has made a ruling to exclude any outer limit of a time to search without freshening the information.

Finally, here – as in *Weber, supra* – the affidavit was a "bare bones" affidavit and could not be relied upon for the good faith exception. Although the affidavit is lengthy, the relevant facts are few and facially inadequate. "The foundationless expert testimony may have added fat to the affidavit, but certainly no muscle. Stripped of the fat, it was the kind of 'bare bones' affidavit that is deficient under *[United States v.] Leon,* [468 U.S. 897, 926 (1984)]." *Weber, supra* at 1346. In essence, the "expert" opinion is attempting to simply allege that "once a possessor, always a possessor." *See e.g. State v. Smith*, 805 P.2d 256, 262 (Wash.App.1991) (identifying such reasoning as a "faulty syllogism"). The limited information in the affidavit did not establish that Mr. Carrier was a "collector" of child pornography, or a pedophile. *See e.g. Weber, supra; Prideaux-Wentz, supra.* "A reasonably well-trained police officer is held to know that an affidavit without any relatively current information of illegal activity or the presence of contraband at a residence does not create probable cause to search the residence." *Miller,* 75 P.3d at 1116. "The affidavit in this case is a 'bare bones' affidavit regarding the existence of the crucial link between the place to be searched *and current information of criminal activity or contraband* there." *Id.* (emphasis added).

The evidence obtained from the home and computers should have been suppressed, and the warrant should not be saved for any type of good faith, since Det. Romine knew that the information in the warrant was stale, by the fact of him trying to freshen the information contained in the warrant. The evidence was critical in both trials and reversal of all of the convictions is warranted.

CONCLUSION

For the reasons presented above and in the petition for certiorari, this Court should grant this petition for rehearing.

Respectfully Submitted,

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