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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

KELVIN JONES,

APPELLANT

APPELLATE CASE NO. 2016-001835

Appeal from Aiken County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 28074

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Kelvin Jones petitions the Court for rehearing. Counsel submits that this Court correctly found that the pre-trial denial of the motion to suppress drugs seized as a violation of the Fourth Amendment was a final ruling and the issue was preserved for appellate review. Counsel respectfully submits, however, that this Court overlooked the fact, with regard to the merits of the motion to suppress, that the anonymous complaints of "short-term traffic" at a house in the present case are one step removed from anonymous complaints that drugs are being sold or stored at a house, as in State v. Kinloch, 410 S.C. 612, 767 S.E.2d 153 (2014) and State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct.App. 2007). The anonymous complaints of

"short-term traffic" in the present case lacked reliability as unverified **and** required an assumption that "short-term traffic" was indicative of drug transactions rather than innocent behavior. Additionally, counsel respectfully submits that this Court overlooked the fact that the burnt remains of a cigar containing marijuana, the torn baggies, empty cigar tube wrappers and torn open cigars found during the single trash pull are consistent with personal use rather than resale. The anonymous, undated, non-specific, and unverified complaints of "short-term traffic" in the present case together with the items found during the trash pull are not sufficient to provide probable cause to believe that drugs would be found inside the house.

Counsel respectfully submits that the complaints of "short-term traffic" and items found from the trash pull in the present case are *less* supportive of probable cause than the complaints and the observations this Court found provided the magistrate with a substantial basis for the probable cause determination in Kinloch, 410 S.C. 612, 767 S.E.2d 153 (2014). Law enforcement officers in Kinloch received numerous complaints about heroin and cocaine transactions at a house. Law enforcement observed the house and saw activity consistent with drug sales including hand to hand transactions, money counting, and an exchange that resulted in law enforcement following one of the men involved in the exchange as he left the house. When approached by law enforcement, the man dropped a bag of heroin.

Importantly, the complaints in Kinloch specifically referenced drug transactions at the house and the complaints were verified by the observations made by law enforcement. The complaints of "short term traffic" in the present case were unverified and did not specifically reference drug transactions. The assumption that "short-term traffic" is indicative of drug transactions is *less* supportive of probable cause than the specific complaints of drug transactions at the house in Kinloch. The verifying observations by law enforcement in Kinloch are far more supportive of probable cause

than the items found in the trash pull in the present case. The observations in Kinloch corroborated the complaints of heroin and cocaine transactions at the house. The items found in the trash pull in the present case do not corroborate complaints of "short-term traffic" or provide probable cause that drug transactions were taking place at the house. The items found in the trash pull are consistent with personal marijuana use rather than marijuana sales. The items only indicate that marijuana had been smoked and disposed of at some point in time. The items do not indicate that marijuana would still be in the house. The anonymous, unverified, undated complaints of "short-term traffic" along with the items from the trash pull did not provide the magistrate with probable cause to issue the search warrant for the house.

Additionally, counsel respectfully submits that in State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct.App. 2007), the specific anonymous tip that Rutledge was selling marijuana from a house and knowledge by law enforcement that Rutledge had two prior convictions for simple possession of marijuana was *more* supportive of probable cause than the general anonymous complaints of "short-term traffic" in the present case. Importantly, the complaint in Rutledge specifically referenced drug transactions at the house and specifically referenced Rutledge by name. In the present case there was no reference to drug transactions at all, and no names were given. The assumption that "short term traffic" was indicative of drug transactions in the present case is *less* supportive of probable cause than the specific information that Rutledge was selling marijuana from the house in Rutledge.

The specific tip in Rutledge was followed by a trash pull. The affidavit in support of the search warrant included the specific tip that Rutledge was selling marijuana and stated that "officers recovered marijuana, marijuana seeds and marijuana stalks." The affidavit was supplemented by oral testimony about the trash pull. The marijuana, the marijuana seeds and the

marijuana stalks found in the trash pull in Rutledge gave credibility to the specific anonymous tip that Rutledge was selling marijuana. In the present case the items found in the trash pull do not corroborate complaints of "short-term traffic" or provide probable cause that drug transactions were taking place at the house. The items are just as consistent with personal marijuana use and do not provide the magistrate with information to believe that marijuana was being sold at the house or that any marijuana would still be in the house. The items from the trash pull only provided the magistrate with information that marijuana had been smoked and disposed of at some time in the past. Without a reference to specific drug transactions at the house, the tip of "short-term traffic" and the items found during the trash pull are not sufficient to provide probable cause.

The marijuana found in the trash pull in Rutledge substantiated the specific anonymous tip that Rutledge was selling marijuana. In Rutledge, 373 S.C. 312, 318, 644 S.E.2d 789, 791–92 (Ct. App. 2007), the South Carolina Court of Appeals wrote, "The marijuana the officers found in the trash can in front of the residence, and Rutledge's prior convictions for marijuana serve as additional evidence of a crime, while along with the electric bill registered in Rutledge's name, also substantiating the credibility of the informant and the veracity of his statements." The search warrant in Rutledge was based on a specific anonymous tip that Rutledge was selling marijuana, the fact that Rutledge had prior convictions for possession of marijuana and the marijuana, the marijuana seeds and the marijuana stalks found in the trash pull. In the present case the anonymous, undated, non-specific, and unverified complaints of "short-term traffic" and the items found in the trash pull, consistent with personal use, are *less* supportive of probable cause than the information provided to the magistrate in Rutledge. Counsel most respectfully submits that Kinloch and Rutledge are distinguishable on their facts as providing *more* probable cause than the facts in the present case.

This Court's deferential standard of review does not bar a review of the record to determine whether the trial judge's decision was supported by the evidence. See State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 2015 (2010). The trial judge's finding that probable cause existed for the magistrate to issue the warrant is not supported by the record. The search warrant in the present case lacked probable cause to believe that drugs would be found inside the house. Counsel respectfully seeks rehearing.

The court erred in refusing to suppress drugs seized as the result of a search warrant lacking probable cause.

During the pre-trial hearing on August 11, 2014, Petitioner moved to suppress the drugs found as a result of the execution of the search warrant. Petitioner argued that the affidavit in support of the search warrant lacked probable cause. First, the affidavit failed to establish the reliability of the complaints received by Captain Sawyer. (R. p. 3-5). The affidavit failed to indicate the basis for any conclusion that the complaints of short-term traffic were consistent with narcotics sales. (R. p. 5). The affidavit failed to provide a time frame in regard to the short-term traffic. (R. p. 5). Second, the items recovered from the single trash pull did not provide probable cause to believe that narcotics would be found inside the house. (R. p. 5-8). Additionally, Petitioner argued that the good faith exception to the requirement of a warrant based on probable cause did not apply. (R. p. 8-9).

The judge denied the motion to suppress writing, "Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge, 644 S.E.2d 789 (Ct.App. 2007)(Finding probable cause for search warrant where a trash pull corroborated a tip). Therefore, probable cause existed for the magistrate to issue the warrant." (R. p. 10-12). There was, however,

no tip to corroborate. The affidavit in support of the search warrant indicates "complaints of short-term traffic at ** Morgan St. NW that is consistent with the sale of narcotics." (R. p. 11). There was not a tip that drugs were inside the house or that drugs were being sold from the house. There was not a tip that anybody ever saw drugs inside the house. The only reference to narcotics with regard to the anonymous complaints is the detective's mere conclusory statement that the short-term traffic is consistent with narcotics sales. The officers did not conduct surveillance to try and verify the complaints of short-term traffic. The magistrate was only presented with anonymous complaints of short-term traffic without a time frame and some baggies and remnants of marijuana cigars collected from the trash pull. The State failed to present the magistrate with a substantial basis for reaching his probable cause determination. The affidavit in support of the search warrant lacked probable cause. Judge Dickson erred in denying the motion to suppress.

Both the Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution protect citizens from unreasonable searches and seizures. Both constitutions provide that search warrants may not be issued except upon "probable cause, supported by oath or affirmation," and particularly describing the place to be searched and the persons or things to be seized. State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004); see also State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A search warrant may issue only upon a finding of probable cause.").

In State v. Kinloch, 410 S.C. 612, 616–17, 767 S.E.2d 153, 155 (2014)(fn #4 omitted), this Court wrote:

> The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A search or seizure does not violate the Fourth Amendment if it is authorized by a warrant that is supported by probable cause. Id.; see State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006), cert. denied, 555 U.S. 1074, 129 S.Ct. 733, 172 L.Ed.2d 735 (2008). A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair

probability that contraband or evidence of a crime will be found in a particular place. Baccus, 367 S.C. at 50, 625 S.E.2d at 221 (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

"When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. See State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999)(citing Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause. See State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999)." State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000)(fn #1 omitted).

"In reviewing a magistrate's probable cause determination, circuit court judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. Baccus, 367 S.C. at 50, 625 S.E.2d at 221; see also State v. Bellamy, 336 S.C. 140, 143–45, 519 S.E.2d 347, 348–49 (1999) (applying the fair probability standard and stating the duty of a reviewing court is to ensure the magistrate had a substantial basis for its probable cause determination)." Kinloch, 410 S.C. at 617, 767 S.E.2d at 155.

"An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. "[H]is action cannot be a mere ratification of the bare conclusions of others." Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 527, 549 (1983)." State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990).

As noted by the Court of Appeals in State v. Gentile, 373 S.C. 506, 514, 646 S.E.2d 171, 174 (Ct. App. 2007), "Although we are cognizant that our decision should be based on the totality of the circumstances, for analytical purposes we find it necessary to separately address each piece

of evidence presented to the magistrate." Addressing the evidence presented to the magistrate in the present case, the affidavit provided that the detective received complaints of short-term traffic that "is consistent with the sale of narcotics." The affidavit failed to establish the veracity or reliability of the complaints of short-term traffic. The complaints were not verified by law enforcement. The affidavit failed to establish a basis of knowledge of short-term traffic. The affidavit failed to provide a time frame in regard to alleged short-term traffic. See State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (In order for an affidavit in support of a search warrant to show probable cause, it must state "facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." 68 Am.Jur.2d 724 Searches and Seizures s 70. An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient. Anno., "Search Warrant: Sufficiency of showing as to time of occurrence of facts relied on," 100 A.L.R.2d 527, s 3 (1965). The reason for this rule is that probable cause, with time, dissipates.). Additionally, the affidavit failed to establish how short-term traffic was consistent with narcotics sales. Instead, the affidavit provided that Detective Sawyer received complaints of short-term traffic that is consistent with the sale of narcotics, a conclusory statement that gave the magistrate no basis to make a judgment regarding probable cause.

In Gentile the South Carolina Court of Appeals found that the search warrant was not supported by probable cause. Addressing whether citizen complaints about a high volume of traffic at the defendant's house, without more, was sufficient to establish that narcotics activity was taking place inside the house, the Court of Appeals wrote:

> The narcotics officers' decision to investigate Gentile was precipitated primarily by the receipt of citizen complaints regarding a high volume of traffic at Gentile's residence. Even though the officers verified the pattern of traffic at Gentile's

> residence, this, without additional investigation into the residence, was not sufficient to establish that narcotics activity was taking place. See State v. Hunt, 150 N.C.App. 101, 562 S.E.2d 597, 601-02 (2002) (reversing trial court's decision denying defendant's motion to suppress drug evidence and stating "[a]ll that the affidavit offers are complaints from citizens suspicious of drug activity in a nearby house. There is no mention of anyone ever seeing drugs on the premises. The citizens only reported heavy vehicular traffic to the house. The officer verified the traffic. His verification, as the trial court found, was not a conclusion."); Bailey v. Superior Court for County of Ventura (People), 11 Cal.App.4th 1107, 15 Cal.Rptr.2d 17, 19-20 (1992) (finding information from an anonymous informer and an unidentified citizen regarding heavy foot traffic at defendant's residence, without investigation, was insufficient to establish probable cause for the issuance of a search warrant; stating " 'heavy foot traffic' does not necessarily engender criminal behavior. True, under certain circumstances, such activity might raise suspicions, or be one indicator of possible narcotics transactions.").

Gentile, 373 S.C. at 514, 646 S.E.2d at 175.

The affidavit in Gentile did not include information about citizen complaints but was supplemented with oral testimony that the officer told the magistrate that "[T]he Charleston Police Department received citizen complaints regarding suspected narcotics traffic at Gentile's residence. Bradley testified the citizens claimed to have witnessed heavy foot traffic 'in and out of the residence, later in the afternoon up until the wee morning hours.'" In contrast to the **verified** heavy foot traffic in Gentile, the complaints in the present case were not verified. The anonymous, undated and, **unverified** complaints of "short-term traffic" in the present are not sufficient to establish probable cause for the issuance of the search warrant.

The remaining evidence presented to the magistrate in the affidavit involved items discovered during the single trash pull on April 18, 2011. The items found were listed in the affidavit as follows:

> 1 – the burnt remains of a cigar that contained a green leafy material believed to be marijuana;
> 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3 – empty cigar tube wrappers;
> 4 – cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;)

5 – mail addressed to 462 Morgan St. NW Aiken SC.

Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence.

(R. p. 588)

The evidence found in the single trash pull failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional contraband would be found in the house. State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct.App. 2007), the case relied upon by the judge in his written order denying the motion to suppress, is distinguished from the present case. In Rutledge the affidavit provided the following information:

> The affiant has received information that William Rutledge and two other subjects only known as Steve and Richie are selling marijuana from 162 Bailey Ave., Rock Hill, South Carolina. Within the past 72 hours officers of the YCMDEU conducted a narcotics investigation focused on 162 Bailey Ave., Rock Hill, SC. As a result of this investigation, officers recovered marijuana, marijuana seeds and marijuana stalks from 162 Bailey Ave. A Criminal Records check of William Rutledge found that Rutledge has prior convictions for marijuana. Officers of the YCMDEU confirmed through Rock Hill Utilities that William Rutledge is drawing power at 162 Bailey Ave.

Rutledge, 373 S.C. at 315, 644 S.E.2d at 790. The confidential informant in Rutledge provided specific information about the crime being committed and the names of the people involved in the crime. The complaints in the present case did not provide information about a crime at all, simply short-term traffic. Additionally, the complaints in the present case did not provide the names of the people involved. The affidavit in Rutledge also included information linking the defendant to the residence and providing the defendant's prior criminal record involving marijuana. No such information was provided in the affidavit in the present case.

In Gentile the Court of Appeals found, under the totality of the circumstances, that the verified high volume of traffic at Gentile's house, the single unverified citizen complaint of smelling marijuana in the vicinity of Gentile's house and the arrest and possession of marijuana by a visitor shortly after leaving Gentile's house did not support a finding of probable cause to search the house. In State v. Kinloch, 410 S.C. 612, 618, 767 S.E.2d 153, 156 (2014), this Court found the magistrate had a substantial basis for reaching his probable cause determination and wrote, "We reach this conclusion after acknowledging that independently each fact set forth in the search warrant affidavit is merely suspicious, but the totality of the circumstances—namely, the numerous tips indicating drug activity was probably present at 609 A and the subsequent surveillance of 609 A during which seemingly drug-related behavior was observed—distinguishes this case from Gentile."

Considering the totality of the circumstances in the present case, the affidavit lacked a substantial basis upon which to conclude that probable cause existed to believe that narcotics would be found in the house. The magistrate in the present case had even less basis for a probable cause determination than the magistrate did in Gentile where the Court of Appeals found the search warrant lacked in probable cause. The present case can be distinguished from Kinloch where there were numerous complaints specifically about heroine and cocaine transactions and the police conducted surveillance and observed drug transaction behavior. In the present case there were no specific complaints about drug transactions, just "short-term traffic." There was also no surveillance done in the present case to verify "short-term traffic" and no observation of drug transaction behavior.

The present case is distinguished from State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), where a confidential informant notified SLED that Petitioner

was storing illegal video gambling machines at two specific addresses. In response to the tip, undercover agents posed as potential buyers of a pool table and went to both addresses where they observed the illegal machines. This Court wrote, "Here, the magistrate had a substantial basis for concluding a search would uncover illegal gambling machines. The information provided by the confidential informant was independently corroborated by undercover SLED agents. This verification established probable cause under the totality of the circumstances." Id. 338 S.C. at 192, 525 S.E.2d at 881. In the present case there was no independent corroboration to establish that narcotics would be found inside the house. Neither the complaints of "short-term traffic" nor the items found during the trash pull provide a substantial basis upon which to conclude that narcotics would be found inside the house.

The present case is also distinguished from State v. Bellamy, 336 S.C. 140, 145, 519 S.E.2d 347, 349 (1999), where this Court wrote, "Although the affidavit is weak on the element of reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and partial corroboration." As in Bellamy, in the present case the judge noted that "the reliability of the tipsters was never established." (R. p.p. 10-12). In contrast to Bellamy, the complaints in the present case were anonymous, there was no strong showing of specificity, no first-hand knowledge and no corroboration. The case is also distinguished from United States v. Gary, 528 F.3d 324 (4th Cir. 2008), where the anonymous tip prior to the trash pull specifically stated that "Melvin" (Gary's first name) was selling illegal narcotics from his residence. The only complaint in the present case was about "short-term traffic" with no mention of illegal narcotic sales and no mention of Petitioner's name.

In United States v. Lyles, 910 F.3d 787, 792 (4th Cir. 2018), the Fourth Circuit Court of Appeals found that a trash pull revealing three empty packs of rolling papers, a piece of mail

addressed to the home, and three marijuana stems were insufficient to provide the probable cause needed for issuance of a search warrant for the house. The Court wrote:

> The government invites the court to infer from the trash pull evidence that additional drugs probably would have been found in Lyles's home. Well perhaps, but not probably. The government's argument has several shortcomings. This was a single trash pull, and thus one less likely to reveal evidence of recurrent or ongoing activity. And from that one trash pull, as defendant argues, "[t]he tiny quantity of discarded residue gives no indication of how long ago marijuana may have been consumed in the home." Appellee Br. at 21. This case is almost singular in the sparseness of evidence pulled in one instance from the trash itself and the absence of other evidence to corroborate even that. The affidavit thus did not provide a substantial basis for the magistrate to find probable cause to search the home for evidence of marijuana possession.

Lyles, 910 F.3d at 794.

As in Lyles, the trash pull in the present case was a single trash pull less likely to reveal evidence of ongoing activity. This is especially true given there was no time frame given for the complaints of short-term traffic. These complaints do not rise to the level of the tip that proceeded the trash pull in Gary and are more analogous to the complete lack of a tip proceeding the trash pull in Lyles. The baggies and marijuana cigar remnants are only slightly more incriminating than the three packs of rolling papers and three marijuana stems found in the trash pull in Lyles. The results of the trash pull do not provide a substantial basis upon which to conclude that narcotics would be found inside the home. As in Lyles, the affidavit in the present case was insufficient to provide the probable cause needed for the issuance of a search warrant for the house. The trial judge erred in refusing to suppress the drugs found pursuant to the search warrant lacking probable cause.

The present case is also analogous to United States v. Abernathy, 843 F.3d 243 (6th Cir. 2016), where the Sixth Circuit Court of Appeals found that a trash pull revealing several marijuana roaches with marijuana residue inside, several plastic vacuumed packed heat sealed bags consistent

to those used to package marijuana for resale containing marijuana residue with T2 markings (T2 is a known strain of marijuana), a USPS certified mail receipts addressed to Jimmy Jail Abernathy [the Defendant] 5809 Tru Long Ct. Antioch TN [sic], a USPS certified mail receipts addressed to [Defendant's girlfriend], and one additional piece of mail addressed to 'current resident' at 5809 Tru Long Ct. Antioch, TN 37013 Davidson County were insufficient, standing alone, to create probable cause to search the Defendant's residence. The Sixth Circuit noted that without additional evidence of drug activity, there was no reliable nexus between the residue and paraphernalia found during the trash pull and the house. Additionally, the Sixth Circuit noted that the small amount of residue and paraphernalia found during the trash pull was insufficient to establish a fair probability that more drugs were inside the house. In the present case there was no additional evidence of drug activity to establish a nexus between the results of the trash pull and the house. The small amount of items found during the trash pull is insufficient to establish a fair probability that more drugs were inside the house. The trial judge erred in refusing to suppress the drugs found pursuant to the search warrant lacking probable cause.

The present case is factually distinguished from United States v. Briscoe, 317 F.3d 906 (8th Cir. 2003), where the Eighth Circuit Court of Appeals found that a trash pull revealing forty marijuana seeds and twenty-five marijuana stems that tested positive for tetrahydrocannabinol, the active component of marijuana were independently adequate to establish probable cause for a search warrant for the house. In Abernathy, cited above, the Sixth Circuit distinguished Briscoe writing:

> Briscoe and the cases the government cites in urging that probable cause was present here are inapposite. In Briscoe, the police found "forty marijuana seeds and twenty-five marijuana stems" in the defendant's garbage. 317 F.3d at 907. A large quantity of drug refuse in a residence's garbage suggests repeated and ongoing drug activity in the residence, and therefore creates a fair probability that more drugs remain in the home. See Elliott, 576 F.Supp. at 1581 ("[A] large quantity of

> discarded contraband ... might indicate its continued presence in the house."). Here, however, Detective Particelli only specified that "several" marijuana roaches and plastic bags were found in Defendant's garbage. The word "several" means "more than one or two but not a lot," indicating that the quantity of roaches and bags found in the trash pull was not large enough to suggest repeated or ongoing marijuana consumption in the residence. Black's Law Dictionary, 1583 (10th ed. 2014).

Abernathy, 843 F.3d at 255. Unlike the large quantity of drug refuse in Briscoe, the small amount in the present case, like the small amount found in Abernathy, does not suggest repeated and ongoing drug activity inside the house.

The present case is also factually distinguished from United States v. Leonard, 884 F.3d 730, 734-35 (7th Cir. 2018), where the Seventh Circuit Court of Appeals found that, "two trash pulls taken a week apart, both testing positive for cannabis, are sufficient standing alone to establish probable cause for a search warrant." The Seventh Circuit, citing Briscoe and Abernathy wrote:

> Both Briscoe and Abernathy support the assertion of probable cause in this case. While one search turning up marijuana in the trash might be a fluke, two indicate a trend. Whether it be a particularly large quantity of drugs, as in Briscoe, or multiple positive tests of different trash pulls within a fairly short time, both tend to "suggest[ ] repeated and ongoing drug activity in the residence," Abernathy, 843 F.3d at 255, and "create[ ] a fair probability that more drugs remain in the home[,]" id. So long as the drugs were contained in trash bags bearing sufficient indicia of residency, this is all that is necessary to establish probable cause and obtain a search warrant.

Leonard, 884 F.3d at 734. The present case involved a single trash pull revealing a small amount of drug refuse. Neither the single trash pull nor the small amount found in the present case suggest repeated and ongoing drug activity inside the house. The search warrant lacked probable cause to search the house.

As additional persuasive authority, in Raulerson v. State, 714 So. 2d 536, 537 (Fla. Dist. Ct. App. 1998), the police, after receiving an anonymous tip that residents at Raulerson's address were involved in drug activity, pulled six bags of trash from the curb in front of the home. Inside

the bags the police found two cannabis cigarette butts, stems, seeds, and pieces of suspected cannabis. A field test of the pieces tested positive for cannabis. The police obtained a search warrant based on the trash pull and anonymous tip. The Florida Court of Appeals reversed and wrote, "Although the affidavit contained relevant information that the substance found in the one-time trash pull tested positive for cannabis, we believe the affidavit lacked other sufficient material facts to indicate a fair probability that cannabis would be found in Raulerson's home." Raulerson , 714 So. 2d at 537. See also Cruz v. State, 788 So.2d 375 (Fla. Dist. Ct. App. 2001); Serrano v. State, 123 S.W.3d 53 (Tex. App. 2003).

In Gesell v. State, 751 So. 2d 104, 105 (Fla. Dist. Ct. App. 1999), the court found that a single trash pull, revealing the presence of a residual amount of marijuana in a plastic bag, coupled with an anonymous tip of suspected drug activity that is uncorroborated by the officers' observations, was insufficient to constitute probable cause for issuance of a search warrant.

In United States v. Elliott, 576 F. Supp. 1579, 1581 (S.D. Ohio 1984), the court granted the motion to suppress writing:

> We conclude that the discovery of the discarded contraband, standing alone, is insufficient to support a determination of probable cause. Despite the prompt action of the agent in seeking the warrant the day after the garbage was examined, the evidence in the garbage did not render the continued presence of marijuana probable. The affidavit does not indicate a large quantity of discarded contraband which might indicate its continued presence in the house. Instead, all we can ascertain is that at least two partially smoked marijuana cigarettes and several stems had left the home at some point in time.

Like Elliott, all that can be ascertained in the present case is that a small amount of marijuana cigar remnants and baggies were placed in the garbage at some point in time.

The affidavit in the present case did not provide the magistrate with a substantial basis for determining the existence of probable cause to believe that contraband would be found inside the house. The small amount of contraband in the trash did not indicate the continued presence of

contraband in the house. Instead, it indicated that marijuana was smoked and discarded. The anonymous, unconfirmed, and undated complaints of short-term traffic and the baggies and marijuana cigar remnants found during the single trash pull do not suggest repeated and ongoing drug activity inside the house. The search warrant lacked probable cause.

In finding that the magistrate's issuance of the search warrant was supported by probable cause this Court wrote:

> In State v. Kinloch, this Court held that short-term traffic and subsequent surveillance constituted probable cause for the issuance of a warrant. See 410 S.C. 612, 618, 767 S.E.2d 153, 156 (2014). Similarly, in State v. Rutledge, the court of appeals affirmed the magistrate's probable cause finding after reviewing a tip of drug sales combined with a trash pull that yielded marijuana. See 373 S.C. 312, 315, 644 S.E.2d 789, 791 (Ct. App. 2007). Even if distinguishable, the facts of Jones's case are *more* supportive of a probable cause finding, not less. Not only did the trash pull 75 at Jones's home yield marijuana residue, but also baggies indicative of narcotics resale, which was consistent with and corroborated by the tips of short-term traffic. Thus, the magistrate's issuance of the search warrant was supported by probable cause.

Counsel most respectfully submits that Kinloch and Rutledge are distinguishable on their facts as providing *more* probable cause than the facts in the present case. The anonymous complaints of "short-term traffic" at a house in the present case are one step removed from anonymous complaints that drugs are being sold or stored at a house, as in Kinloch and Rutledge. The anonymous complaints of "short-term traffic" in the present case lacked reliability as unverified **and** required an assumption that "short-term traffic' was indicative of drug transactions rather than innocent behavior.

In Kinloch law enforcement received numerous complaints about heroin and cocaine **transactions** at a house, not anonymous complaints of simply "short-term traffic". In Kinloch law enforcement observed the house and saw activity consistent with drug activity including hand to hand transactions, money counting, and an exchange that resulted in law enforcement following one of the men involved in the exchange as he left the house. When approached by law enforcement, the man

dropped a bag of heroin. Law enforcement in the present case did not make observations of activity consistent with drug activity prior to obtaining the search warrant. The complaints of "short term traffic" in the present case are less supportive of probable cause than the specific complaints of drug transactions at the house in Kinloch. The observations by law enforcement in Kinloch are far more supportive of probable cause than the items found in the trash pull in the present case. The observations in Kinloch corroborated drug transactions at the house. The complaints of "short term traffic" and items found in the trash pull in the present case do not support probable cause that drug transactions were taking place at the house. The burnt remains of a cigar containing marijuana, the torn baggies, empty cigar tube wrappers and torn open cigars found during the single trash pull are consistent with personal use rather than narcotics resale and did not provide the magistrate with probable cause to issue the search warrant.

In Rutledge law enforcement received a specific anonymous tip that Rutledge was selling marijuana from a house and learned that Rutledge had two prior convictions for simple possession of marijuana. This specific tip was followed by a trash pull where law enforcement found marijuana, marijuana seeds and marijuana stalks giving credibility to the anonymous tip that Rutledge was selling marijuana. The scant evidence of marijuana found in the present case does not give credibility to the general complaints of "short-term traffic" when the evidence is consistent with personal use rather than narcotics resale. The specific tip that Rutledge was selling marijuana, the prior convictions and the marijuana, the seeds and the stalks found during the trash pull in Rutledge are *more* supportive of probable cause than the general complaints of "short-term traffic" without a name and the minimal evidence of marijuana remnants and baggies, consistent with personal use, in the present case.

The scant evidence of marijuana from the trash pull coupled with the anonymous, undated, non-specific, and unverified complaints of "short-term traffic" with no mention of drug transactions at the house or that a specific person was involved in drug sales fails to provide the magistrate with probable cause to believe drugs would be found inside the house. While the complaints of "short term traffic" are one factor to be considered in making a probable cause determination, these complaints coupled with the items found in the trash pull, consistent with personal use, do not provide probable cause to believe that drugs would be found inside the house. A probable cause determination based on a single trash pull is suspect.

In State v. Martin, 175 N.E.3d 1004, 1013, (Ct. App. Ohio, 2021), the Ohio Court of Appeals wrote:

> Ohio courts and the Sixth Circuit have repeatedly held that evidence of personal drug use recovered from a trash pull is insufficient, standing alone, to establish probable cause. See, *e.g.*, Goble, 2014-Ohio-3967, 20 N.E.3d 280, at ¶ 10, 16 (finding evidence of "several" marijuana stems and marijuana "roaches" in trash pull insufficient to establish probable cause); State v. Kelly, 8th Dist. Cuyahoga No. 91137, 2009-Ohio-957, 2009 WL 545996, ¶ 20 (finding clear plastic bag with "suspected marijuana residue" insufficient to support probable cause); Abernathy, 843 F.3d at 251 (holding that affidavit did not support probable cause where "the only proper evidence the [a]ffidavit contained * * * was the 'several' marijuana roaches and T2–laced plastic bags the police recovered from the trash pull"). "The waste products of marijuana use do not, of themselves, indicate any continuing presence of contraband in the home." United States v. Elliott, 576 F.Supp. 1579, 1581 (S.D. Ohio 1984).

In Martin the Court of Appeals agreed with the trial court's determination that the affidavit in support of the search warrant lacked probable cause but found the good faith exception did not apply.

As the Fourth Circuit Court of Appeals wrote in United States v. Lyles, 910 F.3d 787, 792 (4th Cir. 2018):

> Precisely because curbside trash is so readily accessible, trash pulls can be subject to abuse. Trash cans provide an easy way for anyone so moved to plant evidence. Guests leave their own residue which often ends up in the trash. None of this means that items pulled from trash lack evidentiary value. It is only to suggest that the open and sundry nature of trash requires that it be viewed with at least modest circumspection. Moreover, it is anything but clear that a scintilla of marijuana residue or hint of marijuana use in a trash can should support a sweeping search of a residence. The Supreme Court recognized similar dangers in searches incident to traffic stops, where allowing comprehensive searches following minor infractions would create "a serious and recurring threat to the privacy of countless individuals." Arizona v. Gant, 556 U.S. 332, 345, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). That threat, like the threat posed by indiscriminate trash pulls, "implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." Id.

In United States v. Morales, 987 F.3d 966, 972 (11th Cir.), cert. denied, 142 S. Ct. 500 (2021), the Eleventh Circuit Court of Appeals wrote:

> On the other hand, some courts have concluded that trash pull evidence can on its own support probable cause when a single pull yields a great volume of evidence that clearly indicates illegal drug activity or when police find a smaller quantity of (perhaps less inculpatory) evidence over the course of two successive trash pulls, thereby establishing a trend. See United States v. Briscoe, 317 F.3d 906, 907–09 (8th Cir. 2003) (single trash pull found "forty marijuana seeds and twenty-five marijuana stems"); United States v. Leonard, 884 F.3d 730, 734–35 (7th Cir. 2018) ("two trash pulls taken a week apart, both testing positive for cannabis, [were] sufficient standing alone to establish probable cause" where the trash contained "sufficient indicia of residency").

In Morales the Eleventh Circuit Court of Appeals did not decide whether the affidavit in support of the search warrant based on law enforcement finding a small amount of marijuana in two separate trash pulls lacked probable cause and instead found that, ". . . suppression of the fruits of the search would be inappropriate under the good faith exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)." Morales, 987 F.3d at 969. In the present case the trash pull revealed a small amount of marijuana as opposed to the amount found in Briscoe. Unlike in Leonard and Morales, this was a single trash

pull. The warrant in the present case lacked probable cause. Unlike Morales, the good faith exception does not apply.

The good faith exception to the warrant requirement, found in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.ed.2d 677 (1984), does not apply under the facts of this case. In Leon the Court noted great deference to the magistrate issuing the search warrant but wrote:

> Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).[12] Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." Aguilar v. Texas, supra, 378 U.S., at 111, 84 S.Ct., at 1512. See Illinois v. Gates, supra, 462 U.S., at 239, 103 S.Ct., at 2332. A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. Lo–Ji Sales, Inc. v. New York, 442 U.S. 319, 326–327, 99 S.Ct. 2319, 2324–2325, 60 L.Ed.2d 920 (1979).
>
> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." Illinois v. Gates, 462 U.S., at 239, 103 S.Ct., at 2332. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Ibid.

468 U.S. at 914–15, 104 S. Ct. at 3416. While the affidavit in the present case does not appear to include false information, the magistrate failed to perform his neutral and detached function and served merely as a rubber stamp for the police when he signed the search warrant that failed to provide a substantial basis for determining the existence of probable cause.

In State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990), this Court wrote:

> In Leon, the Supreme Court held that "the Fourth Amendment exclusionary rule does not bar the admission of evidence obtained by officers acting in reasonable reliance on a search warrant which was issued by a detached and neutral magistrate but ultimately found to be invalid." The dispositive issue here is whether sufficient information was given to the magistrate to perform his "neutral and detached"

> function rather than serve as a "rubber stamp for the police." Leon specifically precludes the application of the good faith exception in this situation. [R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.' 'Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.'

In Johnson the affidavit in support of the search warrant failed to include any information about the reliability of the informant who provided the information and the information was not corroborated. This Court remanded the case in Johnson to determine if the affidavit was supplemented by sworn oral testimony regarding the reliability of the informant. The affidavit in the present case was not supplemented by sworn oral testimony. In denying the motion to suppress the judge in the present case wrote, "Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge, 644 S.E.2d 789 (Ct.App. 2007)(Finding probable cause for search warrant where a trash pull corroborated a tip). Therefore, probable cause existed for the magistrate to issue the warrant." (R. p. 10-12). Pursuant to Johnson, the anonymous, unconfirmed, and undated complaints of short-term traffic with no information in regard to reliability, alone, would not have provided a substantial basis for determining the existence of probable cause. Unlike Johnson, the magistrate in the present was also presented with the evidence from the trash pull. The baggies and marijuana cigar remnants from the single trash pull, however, combined with the complaints, still do not provide a substantial basis to determine probable cause to justify the search of the house. The good faith exception does not apply.

In State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997), this Court found that the affidavit in support of the search warrant did not provide a substantial basis to find probable cause. Finding

that the good faith exception did not apply, this Court wrote, "Suppression is appropriate in only a few situations, including when an 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, 104 S.Ct. at 3421, 82 L.Ed.2d at 699. We find the affidavit in this case lacked any indicia of probable cause. Therefore the good-faith exception would not apply." Weston, 329 S.C. at 293, 494 S.E.2d at 804.

In Weston this Court found that the affidavit failed to set forth any facts as to why police believed that Weston committed the crime. In State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990), this Court found that the affidavit "set forth no facts as to *why* police believed Smith robbed the Master Host Inn." 301 S.C. at 373, 392 S.E.2d at 183. The Smith case, like the Johnson case was remanded to determine if the affidavit was supplemented by sworn oral testimony. Again, the affidavit in the present case was not supplemented by oral sworn testimony. The affidavit in the present case failed to set forth facts to believe that drugs would be found inside the house. Like Weston, the good faith exception does not apply in the present case.

In United States v. Lyles, 910 F.3d 787, 796–97 (4th Cir. 2018), discussed above, the Court found that the good faith exception did not apply writing:

> We decline, however, to apply the good faith exception in the present case. We do not at all impugn the subjective good faith of the officer who ran the warrant application through review, including by his superior and a state prosecutor, before submitting it to the magistrate. The prosecutor's and supervisor's review of an application is often helpful in determining good faith. But those reviewers, unlike a neutral magistrate, share the officer's incentives "in the often competitive enterprise of ferreting out crime." Riley[1], 134 S.Ct. at 2482 (internal quotation marks omitted). The prosecutor's and supervisor's review, while unquestionably useful, "cannot be regarded as dispositive" of the good faith inquiry. Messerschmidt v. Millender, 565 U.S. 535, 554, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012). If it were, police departments might be tempted to immunize warrants through perfunctory superior review, thereby displacing the need for "a neutral and detached magistrate"

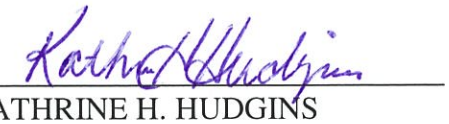
[1] Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

to make an independent assessment of an affidavit's probable cause, Riley, 134 S.Ct. at 2482 (internal quotation marks omitted).

The affidavit in the present case is lacking any indicia of probable to cause to believe that contraband would be found inside the house. As discussed above, the affidavit failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional contraband would be found in the house. The Leon good faith exception does not apply in this case.

The anonymous unconfirmed complaints of short-term traffic, without a time frame combined with the nature of a trash pull, as discussed in Lyles, and the scant evidence of marijuana found in the trash pull did not provide probable cause to search the residence. The trial judge erred in refusing to suppress the drugs found as a result of a search warrant lacking probable cause. Counsel respectfully submits that this Court should find that the search warrant lacked probable cause and reverse the convictions. Counsel respectfully seeks rehearing.

Respectfully Submitted,



KATHRINE H. HUDGINS
Appellate Defender

This 22nd day of December, 2021.