IN THE
SUPREME COURT OF THE UNITED STATES

No._____

JAY THARPS,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth Circuit erred in determining that probable cause existed when instead of describing any reliable and corroborated facts about drug *trafficking*, the warrant cited to isolated and relatively minor instances where Mr. Tharps simply possessed marijuana and the untested statements of an anonymous informant that Mr. Tharps was possibly distributing marijuana but not at the target address, before jumping to the conclusion that he must be trafficking? The standard used to determine if there is probable cause is the "totality of the circumstances." However, this less formal test does not mean that probable cause has been accomplished where each separate incident is deemed sufficient for that purpose in relation to other insufficient incidents. A basket full of partially rotten fruit doesn't produce a piece of edible fruit, in the end, that basket is just full of partially rotten fruit.

Whether the Fourth Circuit erred in determining that the *Leon* exception applied?

LIST OF PARTIES

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OPINIONS BELOW

The United States District Court for the District of Maryland entered judgment on November 22, 2017. The United States Court of Appeals for the Fourth Circuit entered judgment on August 3, 2018 and its opinion appears in Appendix A at page 1. The denial of the petition for rehearing appears on Appendix A at page X.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit rendered its decision on August 3, 2018. A timely petition for rehearing was denied on September 11, 2018. This Court enlarged the time for filing a petition for a writ of certiorari to February 7, 2019. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

Appellant Jay Maurice Tharps was charged, by (superseding) indictment, in the District Court of Maryland with three counts:

- Count One: having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess in and affecting commerce the following firearms and ammunition:
    1) a Glock, Model 26, 9 millimeter semi-automatic pistol
    2) a Springfield Armory, Model XD357, .357 caliber semi-automatic pistol, bearing serial number US33826;
    3) a Colt, Model Trooper, .357 caliber semi-automatic pistol, bearing serial number 84065;
    4) Ruger Model Ranch Rifle, .223 caliber semi-automatic rifle, bearing serial number 187-93344;
    5) 94 F.C. 9 millimeter caliber cartridges
    6) 20 Federal .357 Magnum caliber cartrides
    7) 38 Hornady, .357 caliber cartridges;
    8) 16 G.F.L., .223 caliber cartridges;
    9) Four I.M.G., .223 caliber cartridges;
    10) Four Winchester, .223 caliber cartridges;
    11) Six HP .357 caliber cartridges; and
    12) 50 Blazer .357 caliber cartridges

  In violation of 18 U.S.C. § 922 (g)(1)
- Count Two: knowingly, willfully and unlawfully possess with intent to distribute a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance, and a quantity of a mixture or substance containing a detectable amount of marijuana, a Schedule I controlled substance, in violation of 21 U.S.C. § 841.
- Count Three: did knowingly possess firearms, as identified in Count One, in furtherance of a drug trafficking crime..., that is, possession with intent to distribute controlled substances, in violation of 18 U.S.C. § 924 (c)(1)(A)(i).

Appellant filed motions to suppress evidence seized from a trash pull on April 1, 2013 and the search of his house on April 11, 2013; he also requested a *Franks*

hearing on the motion to suppress. JA:20,24,69,250. These motions were denied by the court. JA:87,256. Appellant pled guilty to all three counts, reserving his right to appeal denial of the motion to suppress evidence from the Doppler Street residence. JA:312,323. Appellant received a sentence of 192 months: 120 months as to Count 1s, to run concurrent to 132 months as to Count 2s, and 60 months as to Count 3s, to run consecutive to both Counts 1s and s2. JA:371. Appellant timely appealed. JA:377. The 4th Circuit Court of Appeals affirmed.

B. Statement of Facts

On April 11, 2013, law enforcement executed a no knock search warrant at 5020 Doppler Street in Capitol Heights, Maryland, which led to the recovery of controlled substances, firearms and ammunition from the defendant's bedroom and basement. This warrant was based in part on a trash pull on April 1, 2013. On that same day, PO Thompson of the Prince George's County Police Department, Patrol Division presented a search warrant affidavit to The Honorable Michael D. Whalen of the Circuit Court for Prince Georges County. JA:30-36. Officer Thompson provided an affidavit narrating several law enforcement contacts with Appellant. *Id.* Additionally, Officer Thompson provided both his training and experience and his own assertions about what he refers to as "drug trafficking" behaviors. *Id.* Officer Thompson listed three different sources of information about Mr. Tharps. The first was from a traffic stop, where Jay Tharps was detained as a passenger; the second was also a traffic stop, however, in this instance an unnamed passenger gave police information about Jay Tharps; and the third provided information obtained from a "computer database" check. JA:31-32.

The first traffic stop that involved appellant occurred on January 23, 2013. On that date, a gold Lincoln Town Car was stopped for having its tabs improperly placed on the license plate. JA:31. In testimony, the arresting officer, Officer Farley, elaborated as to how, precisely, the tabs were situated: "The month and the year sticker should be in the top right. This tag is displaying two separate month's tabs, one in the top left and one in the top right, and it's displaying the year tab in the bottom left, which is incorrect." JA:96. The government proffered a demonstrative photograph at the hearing. JA:249-50. Officer Farley further explained to the court that he was "about ten feet," from the moving vehicle when he made this observation. JA:96. Upon exiting the vehicle, Officer Farley told the court that he smelled "unburned or fresh marijuana, a very strong smell emanating from the vehicle." JA:106. Officer Farley observed the passenger, later identified as Jay Tharps, throw a baggie from the passenger window. JA:97. That baggie was later recovered and determined to contain a substance that field tested positive for marijuana, consisting of 28 grams, in individually packaged baggies. JA:43. In the affidavit, Officer Farley, based on his training and experience, explains that the marijuana was indicative of possession with intent to distribute. JA:31. Appellant was the passenger in this vehicle and after he tossed this baggie, he exited the car and began to walk away from the traffic stop; Officer Farley proceeded to detain Mr. Tharps and, ultimately, he was placed in custody. *Id.*

The second traffic stop described in the affidavit occurred on March 19th, 2013. In that instance, a vehicle was stopped for failing to keep right of center. *Id*. There was the "strong odor of marijuana emanating" from the vehicle. *Id*. In fact,

approximately 44 grams of suspected marijuana was retrieved from the vehicle. *Id.* The passenger in that vehicle was arrested and advised of his Miranda rights; this arrestee quickly became an informant and told the officers that he had bought marijuana for about a year from "Jay Tharps" who the unverified informant went on to say was an African-American male who is slim, about 6'1 and has been observed driving a Camaro bearing Maryland tags "SEWFLY." JA:31-2. Finally, this individual, who remained under arrest during this entire discussion, explained that he has seen "Jay Tharps" exiting 1906 Village Green Drive, Landover, Prince Georges County, MD with marijuana prior to their drug sale. JA:32. Notably, this informant is not identified by name or any other identifying information in the affidavit. JA:31-32.

In the affidavit requesting the search warrant, Officer Thompson provides that he checked Mr. Tharps "through the computer database." JA:32. Based on the search of this "computer database," Officer Thompson explained that he was able to link Jay Tharps to 5020 Doppler Street, as Mr. Tharps had given this address during an arrest, and as a vehicle associated with him was registered to that address. JA:32. Thompson also includes that Jay Tharps has several prior arrests for CDS related offenses and an armed robbery. JA:32.

Officer Thompson then indicated that he conducted a "trash rip," or a search of a trash can that he says was located near 5020 Doppler Street. In sum, on April 1, 2013, officers noticed a trash can outside in an area near 5020 Doppler Street. Officers removed trash from that location. Upon searching the trash, officers found a small cigarette containing two grams of suspected marijuana and a restaurant

receipt with the name "Jay" written on the bottom. JA:32.

Officer Thompson concludes the "fact," portion of the affidavit with general statements about the behaviors of "drug traffickers," for example: "persons involved in drug trafficking conceal in their residences and businesses caches of drugs, currency, financial instructions…" JA:33-34. None of the "facts" provided in this portion of the affidavit are specific to Jay Tharps or 5020 Doppler Street. Officer Thompson does not describe any drug trafficking behaviors observed at or near that location. He also does not describe any observations of Jay Tharps entering or leaving that location.

Based solely on information summarized above, Judge Whalen signed the warrant, authorizing the search. JA:37-39.

REASONS FOR GRANTING THE WRIT

This Court should grant review and reverse the Fourth Circuit decision to affirm the trial court's denial of Mr. Tharps' motion to suppress evidence. The flaw in the search warrant is that the magistrate, and subsequently the district court, erred in ruling that these facts were *enough* to justify an invasion into Mr. Tharps' home. Instead of describing any reliable and corroborated facts about drug *trafficking*, the warrant cited to isolated and relatively minor instances where Appellant possessed marijuana and the untested statements of an anonymous informant's information that Mr. Tharps was possibly distributing marijuana, but not at the search warrant's target address. Based on those instances, law enforcement made, and the reviewing court authorized, a leap to the unwarranted conclusion that, Mr. Tharps was a "drug trafficker" and that evidence would be

found at the target address. This conclusion was made in error.

The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. *Payton v. New York*, 445 U.S. 573, 601 (1980). This important expectation of privacy has been a key entitlement since the advent of our Constitution. The Supreme Court of the United States described the majestic and sweeping nature of the 4th Amendment, by stating that its principles:

> apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property

Boyd v. United States, 116 U.S. 616, 630 (1886).

Without question, the sanctity of the home remains, even in modern times, central to the courts' role in guarding against unreasonable government intrusion. Principled respect for the sanctity of the home has long graced Fourth Amendment jurisprudence. *Illinois v. McArthur*, 531 U.S. 326, n.3 (2001). *See*, *e.g., Wilson v. Layne,* 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home"); *Payton v. New York,* 445 U.S. 573, 601, (emphasizing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"); *Mincey v. Arizona,* 437 U.S. 385, 393 (1978) ("[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."). Vigorous protection of this central right is not accomplished simply by the issuance of a search warrant when that warrant is justified based

more on imagination than observation, as is the one before this Court.

The law of probable cause is quite clear. The probable cause standard is not defined by bright lines and rigid boundaries. Rather, a judicial officer is tasked with reviewing the facts and circumstances as a whole and makes a common sense determination. *United States v. Grossman*, 400 F.3d 212, 217 (4th Cir. 2005). Accordingly, there is not a checklist of items that must be included on every warrant affidavit. When considering the merits of a judicial officer's probable cause determination, courts must review a search warrant application in its entirety to determine whether the application provided sufficient information to support the issuance of the warrant. *United States v. Wellman*, 663 F.3d 224, 228 (4th Cir. 2011).

Mr. Tharps simply contends that the *only* requirement for probable cause is that law enforcement corroboration of the sort that substantiates probable cause. Further such corroboration is not the brainchild of Mr. Tharps. Rather corroboration is a well-tread area of 4th Amendment law.

Here, that requirement has just not been met. There was an unnamed informant who claims that Mr. Tharps sells marijuana. Notably, that same unnamed and unidentified informant was carrying substantially more weight than Mr. Tharps is accused of possessing in the entirety of the narrative. Indeed, that unnamed, unidentified and detained informant does provide *some* identifying information about Jay Tharps. However, our significantly compromised informant also maintains that his seller, who he says is the Mr. Tharps, deals out of a specific, yet different, address in a separate town from the location that was searched.

Instead of investigating the portion of the tip about actual criminal activity, law enforcement chose to search its own records to recover Mr. Tharps' residential address. Then, instead of determining that Mr. Tharps was, in fact, residing at that address with any sort of frequency or regularity, law enforcement took a couple of small items from a trash can. Those items also fail to sufficiently corroborate the allegation that Mr. Tharps is a drug trafficker: a mostly smoked blunt alongside a Friday's receipt says more about personal, rather than entrepreneurial, endeavors.[1] In each and every case where this Court has found a nexus between criminal behavior and the location to be searched, there was specific, reliable corroboration obtained through *even the most minimal* law enforcement investigation. That basic, but mandatory, effort is lacking here.

The standard used to determine if there is probable cause is the "totality of the circumstances." However, this less formal test does not mean that probable cause has been accomplished where each separate incident is deemed sufficient for that purpose in relation to other insufficient incidents. A basket full of partially rotten fruit doesn't produce a piece of edible fruit, in the end, that basket is just full of partially rotten fruit.

The affidavit requesting a search warrant, authored by Officer Thompson, did not provide probable cause to search the location of 5020 Doppler Street, and therefore all evidence obtained as a result of that search should have been suppressed. Only an anonymous informant, whose statements are not accompanied

[1] In fact, just a few short years later, the amount of marijuana recovered from the trash can would, if adequately associated with a person, result in a citation, rather

by any of the required indicia of reliability, provided any information that Mr. Tharps was possibly distributing marijuana. And even then, this anonymous informant stated that Mr. Tharps sold said marijuana out of an address that was never linked to him and the informant provided no information on the address that was the subject of the search warrant. A traffic stop, completed on January 23, 2013, was conducted in the absence of reasonable suspicion, and as such, the detention of Mr. Tharps and subsequent evidence should have been suppressed. Finally, the small amount of marijuana and a receipt with "Jay" scratched onto it, obtained after a "trash rip," of a garbage can located within a protected are of 5020 Doppler Street should have been suppressed.

After evaluating the information in the search warrant, Judge Grimm drew two conclusions of law, each of which are now challenged. The first conclusion was that, based on information presented in the warrant, there was probable cause to believe that Appellant was involved in drug distribution. JA:211. The second conclusion was that there was probable cause to believe that there would be evidence of controlled dangerous substances at 5020 Doppler Street. JA:213. As the court did not hear from Officer Thompson, the author of the search warrant, there is no question of fact. JA:180. However, the district court *did* hear from two Prince Georges County law enforcement officials who contributed to the investigation. The facts developed, and the conclusions drawn from that testimony are challenged below. To the extent that those erroneous findings impact the reliability of the overall search warrant, we ask that this Court incorporate those challenges into its

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than a criminal charge. *See* Md. Code § 5-601.

review of this issue. A district court's conclusion that there was reasonable suspicion or probable cause is reviewed *de novo. Ornelas v. United States*, 517 U.S. 690, 699 (1996). Because this is a defendant's appeal from a motion to suppress, this Court is to construe the facts in the light most favorable to the government. *United States v. Seidman,* 156 F.3d 542, 547 (4th Cir.1998). At the motion hearing, there were two suppression motions with live testimony, each of which required the judge to evaluate facts and apply the law: the traffic stop on January 23, 2013 and the law enforcement search of the trash can alleged to be associated with 5020 Doppler Street.

The probable cause standard is not defined by bright lines and rigid boundaries. Rather, a judicial officer is tasked with reviewing the facts and circumstances as a whole and makes a common-sense determination. *United States v. Grossman*, 400 F.3d 212, 217 (4th Cir. 2005). Accordingly, there is not a checklist of items that must be included on every warrant affidavit. To establish probable cause for the issuance of a search warrant, the:

> issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis for knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983). The district court's obligation, in reviewing a search warrant, is to determine if a substantial basis exists for the finding of probable cause and "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." *Id.* at 239. The warrant affidavit

must contain enough facts and circumstances for the magistrate to also conclude that there is probable cause that contraband will be present in the identified location. *Id.*

Taken separately, the events described by Officer Thompson in his affidavit to the court lack reliability. Cumulatively, the affidavit also fails to articulate probable cause. The affidavit is composed primarily of broad conclusions that do not fit the bare facts. Each piece of the narrative is discussed separately below, and Appellant's contentions are based exclusively on the facts contained within the four corners of the affidavit.

A. The affidavit submitted for the search warrant failed to articulate a sufficient basis to support the probable cause conclusion that Mr. Tharps was a drug trafficker

The affiant, Officer Thompson, did not provide actual facts to support a fair probability that contraband or evidence of a crime would be found in a particular place. Instead, Officer Thompson provides unsupported conclusions about "drug traffickers," without actually establishing that Mr. Tharps is probably a drug trafficker.

Like many legal terms of art, "drug trafficking," has more than one meaning, depending on the specific legal focus. Under federal drug prohibition laws, "drug trafficking" means: "any felony punishable under the Controlled Substances Act". 21 U.S.C.§§ 801, 952. While *sale* of marijuana is a federal felony that would be considered "drug trafficking," *possession* of marijuana is a misdemeanor and would not be a "drug trafficking" offense. 21 U.S.C. § 811. In the State of Maryland, a "drug trafficking" crime is: "a felony or conspiracy to commit a felony involving the

possession, distribution, manufacture or importation of a controlled dangerous substance under §§ 5-602 through 5-609 and 5-614 of this subtitle." Md. Code § 5-621 (a)(2). While possessing marijuana with intent to distribute is a felony, under Maryland law, mere possession was a misdemeanor at the time; it is now a civil infraction. Rather than exhibit familiarity with these simple definitions, Officer Thompson substitutes his own, rather generic, judgment, in place of fact. Law enforcement judgement in these matters, while crucial for in- the-moment decisions, must still be based in fact. The several law enforcement contacts described in the affidavit do not support a conclusion that Mr. Tharps is a drug trafficker. One contact involves Mr. Tharps himself, the second contact features an unnamed informant who refers to Mr. Tharps, and the third contact involves a trash can associated with 5020 Doppler Street. The next nugget of information consists of a search through a "computer database." JA:32. While arguably each contact, separately, may confirm suspicion that Mr. Tharps has, currently, or in the past, had involvement with marijuana, the goal of the search warrant application and affidavit was to gain entry into 5020 Doppler Street, a location believed to be his residence. In order to get permission to enter, search and seize property from 5020 Doppler Street, the affiant must provide facts to support probable cause that there is criminal activity *at* that location. However, the majority of the contacts described in the affidavit occur independent of 5020 Doppler Street, and the single incident that is alleged to be directly associated with the residence involves a personal use quantity of marijuana and not drug trafficking. The affidavit fails, on its face, to articulate a nexus between the crime suspected (drug trafficking) and

the premises described (Doppler Street address)

In order to create the required nexus, Officer Thompson includes in his affidavit a boilerplate summary of behaviors and habits believed to be associated with drug traffickers. JA:33-34. The list of general drug trafficking behaviors is based on training and experience. For example, "…persons involved in drug trafficking conceal in their residences and businesses caches of drugs, currency, financial institutions, precious metals, jewelry…" etc. *Id*. The training and experience described by Officer Thompson is rather lean. He has been a patrol officer for two years. He has had a mere 40 hours of controlled dangerous substance training at the academy. Presumably, more than academic experience is required to identify the habits and manners of drug traffickers, yet Officer Thompson has very little practical experience. While he describes how many warrants he has successfully obtained, he fails to mention how many drug trafficking operations he has observed. Officer training and experience is relevant to an understanding of probable cause, but it is not a talisman. The training and experience must actually exist, in fact, to be relied on, in practice.

Officer Thompson provided a narrative of distinct, unrelated and unconnected, pieces of information that neither independently nor cumulatively support probable cause that Mr. Tharps was a drug trafficker. Officer Thompson does not articulate any direct observations of this drug trafficking behavior, either by Mr. Tharps or at 5020 Doppler Street. Therefore, it cannot be fairly speculated that he engages in any of the generic drug trafficking behaviors that are listed in the affidavit. Hence, this Court should, as the District Court and Magistrate should

have, ignore the generic drug trafficker indicators listed in the search warrant affidavit, as they lack probative value. JA:33-34.

Courts has consistently upheld warrants to search suspects' residences or temporary abodes on the basis of: "(1) evidence of the suspects' involvement in drug trafficking combined with 2) the reasonable suspicion (whether explicitly argued by the applying officer or implicitly arrived at by the magistrate judge) that drug traffickers store drug-related evidence in their homes. *United States v. Williams*, 548 F.3d 311 (4th Cir. 2008). *See United States v. Grossman*, 400 F.3d 212, 217-18 (4th Cir. 2005); *United States v. Servance*, 394 F.3d 222, 230 (4th Cir. 2005); *United States v. Suarez*, 906 F.2d, 984-85 (4th Cir. 1990). A review of the facts of those cases, favors a different result in this case. In *Williams*, for example, the affidavit included: information from a confidential informant who both identified the suspect as a mid-level narcotics dealer and completed controlled buys; court-approved interception of pertinent and relevant calls; surveillance of the suspect meeting with suspected drug suppliers, after learning that the suspect had made arrangements to meet with them. 548 F.3d at 313. In contrast, here, law enforcement did not supplement their information with further investigation or direct observations.

The rule that has come out of those cases is a "totality of the circumstances," review. *United States v. Grossman*, 400 F.3d 212, 217 (4th Cir. 2005). In such a review, a court is tasked with determining whether there is a "fair probability," that evidence of a crime will be found at a particular place. *Id.* In weighing whether a nexus has been sufficiently established, we look to the "nature of the item and the

normal inferences of where one would likely keep such evidence." *Id* (*quoting United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988)).

In cases such as *Anderson,* courts have discussed nexus and what may be inferred about the location of contraband or evidence. The decision in *Anderson*, however, was supported by a warrant with much more detail, as are subsequent cases that relied on this Court's ruling. In *Anderson*, the warrant contained no facts that the contraband (a firearm) would be contained in the suspect's residence. However, law enforcement had ample, credible, reliable information that the suspect whose residence was searched had possession of the specific contraband. That information included: the suspect had offered to sell a pistol and silencer to *three* informers; the suspect had told the informers that the weapon for sale had been used to kill someone; and at least one informer actually named the murder victim. *Id* at 728. By comparison, the warrant in this case only provides for one informant, who is not demonstrably reliable, nor is his information corroborated and in fact, it is contradicted.

Grossman and *Williams* are 4th Circuit cases with drug trafficking suspects. In *Grossman*, a reliable informant (who the detective had received accurate information from in the past), identified the suspect as a drug dealer (with specific information about large quantities of cocaine and multiple locations where the drugs were being stashed) and the affiant-detective made his own observations of the suspect engaging in suspicious behavior at the residence to be searched. 400 F.3d 212, 217 (4th Cir. 2005). In *United States v. Williams*, 974 F.2d 480, 480-81 (4th Cir. 1992), the suspect was arrested for an outstanding warrant. Investigating

officers took several steps to gather information, prior to requesting a warrant. That information included a receipt from the motor lodge where the suspect was staying, but also included: recovery of a concealed weapon and drugs in his vehicle; information that the suspect was wanted for possession of 28 ounces of liquid phencyclidine, 10 pounds of marijuana and handguns; and observations by Federal DEA agents that the suspect had been seen running from an apartment that was used as a PCP processing plant. *Id*. In those cases, the affiant-officers supplemented nominal facts and observations with knowledge, training and experience in order to articulate probable cause to search a location. In those cases, this Court found that substitution reasonable. However, that reasonability was anchored by more substantial individualized facts and observations. In each of those cases, the evidence of "drug trafficking" was strong either because of corroboration or demonstrably reliable informants. In each of those cases, the appellants were not challenging whether they were properly construed as *drug traffickers,* as is the contention here. Rather those cases turned on whether there was a sufficient nexus between the suspect and the location such that there was probable cause that there would be evidence of *drug trafficking* in the place to be searched.

Unlike in this case, the affirmations in *Anderson, Grossman, Williams,* and *Lalor*[2] were based on substantial, credible evidence that each suspect was engaged

[2]Whose warrant affidavit had significantly less information about the suspect and drug trafficking, but still included TWO informants, who separately provided (innocuous) specific information about the suspect, each of which was confirmed by

in an abundance of unlawful behavior, whether that was drug distribution or manufacture, or violence. The heft of that information is far weightier than here, where the quantity of marijuana was low and consistent with personal use, where the informant lacked reliability and where there was no law enforcement investigation or observation to develop a nexus between drug trafficking and 5020 Doppler St. The only nexus is the Mr. Tharps, who was never observed at that residence and, in fact, was said to be distributing marijuana in a different location, in a different town.

B. The traffic stop of Mr. Tharps a few months prior to execution of the search warrant was insufficient to establish that Appellant was drug trafficking.

The first event narrated by Officer Thompson describes a traffic stop of a Gold Lincoln Town Car[3], stopped for improper rear tabs. JA:32. Officer Farley approached the vehicle and smelled the strong odor of marijuana emanating from the vehicle. JA:32. Mr. Tharps attempted to leave the scene, but was ultimately detained by Officer Farley and identified as Jay Tharps. Recovered from that traffic stop was a baggie containing small glassine baggies filled with a green leafy substance, later tested positive as marijuana. *Id*. The recovered marijuana weighed out to approximately 28 grams. *Id.*

In this same paragraph, Officer Thompson explains that Officer Farley discovered the marijuana to be packaged in individually packaged baggies, which

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the other*, in addition* to law enforcement confirmation and database review. *United States v. Lalor*, 996 F.2d 1578, 1581 (4th Cir. 1993).

[3] A car never alleged or determined to be associated with Mr. Tharps, during testimony or in other places in the warrant affidavit.

through training and experience indicates "possession with intent to distribute" JA:32. The amount of marijuana recovered, coupled with the presence of another person, undermines Officer Farley's conclusion. Nevertheless, even if the Court accepts Officer Farley's conclusion that Mr. Tharps intended the marijuana to be distributed, it was recovered from a vehicle that does not belong to Mr. Tharps and in a location not associated with Mr. Tharps. While the marijuana recovered from this stop was an appropriate basis for his arrest at that time and supports a subsequent charge, it does not support the conclusion that he is a drug trafficker, and that his trafficking home field is on Doppler.

C. The information obtained from a suspect during a custodial traffic stop was not reliable.

In addition to evidence gathered on January 23, 2013 through Officer Farley, Officer Thompson also provided information from a suspect detained, as a vehicle passenger, for possession of 44 grams of marijuana. This informant told officers that he purchased marijuana from Jay Tharps, he provided a non-corroborated physical description for Jay Tharps, along with details about a vehicle belonging to Jay Tharps. JA:32. The informant was not demonstrably reliable, either through proven prior law enforcement contact or corroboration of the information he provided. Instead, he provided incriminating information about Appellant while under the stress of his own arrest. Therefore this information lacks sufficient indicia of reliability and should be stricken from consideration.

On March 19, 2013, Officer Robinson stopped and approached a vehicle. JA:31-32. During that stop, Officer Robinson spoke with an individual, unnamed

(redacted) in the affidavit. (This individual is repeatedly referred to as the "Defendant," in this affidavit). That individual claimed ownership of approximately 44 grams of marijuana that was recovered during the stop. JA:31. Officer Thompson (the affiant) arrived at the scene and spoke with the defendant, who shared that he has bought marijuana from "Jay Tharps," for about a year, that Jay Tharps was a 6'1, slim, African-American male who drives an orange Chevy Camaro with the Maryland tags "SEWFLY." The defendant explained that the aforementioned drug sales *always* occurred at 1906 Village Green Drive. JA:32.

Notably, although this unnamed defendant possessed nearly twice the amount of marijuana recovered in the January stop where Mr. Tharps was a passenger, Officer Thompson did not appear to suspect him of possession with intent to distribute. Also of note is that the affidavit is ambiguous as to the context of the conversation between the defendant and the officers: was he asked where he got his supply? Did he volunteer that it was for personal use? Was the unnamed defendant arrested and/or charged or was he released upon giving the above uncorroborated information?

On its face, the information in the affidavit that came from the informant lacked sufficient reliability. This subject is a well-tread area of 4th Amendment search and seizure law. The basic inquiry is a "totality-of-the-circumstances" test, which analyzes the reliability or veracity of the informant as well as the informant's basis of knowledge. *Illinois v. Gates*, 462 U.S. 213; 233 (1983). A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the *information* is reliable. An informant may establish

reliability by establishing a track record of providing accurate information. *Id*. For the traffic stop described in the search warrant application at bar, there was no information (not even a name) that the informant had a track record with Prince George's law enforcement. In the absence of tested reliability, where a previously unknown informant proffers information, there must be independent verification to establish the reliability of the information. *Id*. In this Circuit, whether an informant's tip establishes probable cause depends on the degree to which the report is independently corroborated. *United States v. Wilhelm,* 80 F.3d 116, 119 (4th Cir. 1996). Independent verification occurs when material information is corroborated by independent observations of the police officers. *Gates*, 462 U.S. at 241-5.

The informant told police that he bought marijuana from Jay Tharps, a slim, 6'1, African-American male. He advised that he always observes him in an orange Chevy Camaro bearing the Maryland tags "SEWFLY."(ECF 71-1; JA___). In the course of his investigation, Officer Thompson searched the Motor Vehicle administration and determined that Jay Maurice Tharps was the sole owner of a 2010 Chevy bearing the registration "SEWFLY."

However, the most important detail proffered by this informant was that he always met Mr. Tharps at 1906 Village Green Drive, Landover, MD. Further, he said that *all* drug transactions occurred at that same location. JA:32. While Officer Thompson managed to search "computer databases," and to rifle through trash, neither he nor anyone in the Prince George's County Police Department, prior to executing a no-knock warrant by breaking down the door of 5020 Doppler Street,

sought to briefly stake out either 5020 Doppler Street OR 1906 Village Green Drive. There were no controlled buys or surveillance to independently verify either that Jay Tharps did, in fact, sell marijuana or that he sold marijuana at the location to be searched.

In *Alabama v. White*, this court suggested how an anonymous tip might be sufficiently corroborated when crediting a tip that included "a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." 496 U.S. 325, 332 (1990). Circuits evaluating this issue have distinguished between police corroboration of "innocuous details," rather than independent police confirmation of information indicative of drug trafficking. *United States v. Wilhelm*, 80 F.3d 116 (4th Cir. 1996), *relying on United States v. Gibson*, 928 F.2d 250 (8th Cir. 1991); *United States v. Mendonsa*, 989 F.2d 366 (9th Cir. 1993) ("mere confirmation of innocent static details is insufficient to support an anonymous tip. The fact that a suspect lives at a particular location or drives a particular car does not provide any indication of criminal activity.)[4]

In *Wilhelm*, of particular concern to the court was that to uphold that warrant would "ratify police use of unknown, unproven informant – with little or no corroboration - to justify searching someone's home." *Id*. at 120. Noting that the right to privacy in one's home is a "most important interest protected by the Fourth

[4] *But see also United States v. Lalor*, 996 F.2d 1578 (4th Cir. 1993): corroboration of apparently innocent details of an informant's report tends to indicate that other aspects of the report are also correct. *Lalor*, a 4th Circuit case, preceded *Wilhelm* by

Amendment," the court condemned a warrant that lacked corroboration in a similar matter to the warrant on review in this instance. *Id*. In *Wilhelm*, the affiant made conclusory assertions about the informant's credibility and there was only corroboration of basic, static details (the location of the home).

Here, the only confirmed information from the informant that was that Jay Tharps drove a specific car. The physical description of him remained unconfirmed as did the location-specific drug transactions. Mere corroboration of the make, model and registration of a car, no matter how unique, is insufficient to establish informant reliability, particularly where that information is corroborated by a search of motor vehicle records, rather than direct observation.

Aside from the lack of material corroboration, the informant in this case was detained by police when he provided his information. And despite the litigation before the district court, the circumstances of that detention and interrogation remain outstanding, and it is reasonable to assume that any number or stressors or inducements may have led the detainee-informant to provide inaccurate information incriminating someone other than himself.

The circumstances of the informant's interrogation coupled with the complete lack of material corroboration obliterates the value of this information, further compromising prior determinations of probable cause.

D. Law enforcement search of a trash bin associated with 5020 Doppler Street did not provide a sufficient nexus between drug trafficking and the location to be searched.

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3 years. *United States v. Wilhelm*, 80 F.3d 116 (4th Cir. 1996) cites the 8th and 9th Circuit decisions quoted *supra*.

The affidavit is essentially divided into two sections- the first being relative to Mr. Tharps and the second pertaining to the residence to be searched. JA: 31-33. As discussed above, the information about Mr. Tharps, consisting of two traffic stops and a database search, lacked probable cause that he was a drug trafficker. The next section consists of a brief investigation into a trash bin associated with 5020 Doppler Road and a list of common drug trafficking behaviors, discussed above. As such, the trash bin retrieval provides the only individualized nexus between the property to be searched and contraband. However, that search produced no information probative of drug trafficking at the residence. Rather, the search produced the tail end of a smoked marijuana cigarette and a receipt.

On April 1st, 2013, officers noticed and searched a dark colored trash can on the curbside in front of the house located at 5020 Doppler St. JA:32. In that trash can, argued by the government as belonging to Jay Tharps at 5020 Doppler St, officers recovered two items of evidentiary value. The first was a small cigarette containing two grams of suspected marijuana. *Id.* In the hearing, Officer Hall testified that the recovered marijuana was contained in a blunt, as if someone had smoked a joint and it had burned down close to the fingers, and what was recovered was what remained in that joint. JA:122. The second item was a receipt from Fridays with the name "Jay" scrawled on it. JA:123.

Setting aside any argument that law enforcement retrieved the contested trash inside protected curtilage, even an entirely constitutional search of the garbage failed to produce any indicia of drug trafficking at 5020 Doppler Street. Instead, the "evidence" retrieved is indicative of a personal smoker who ordered

Friday's, actions that fall far below those associated with drug traffickers.

Each piece of the affidavit for probable cause has significant weaknesses. The affidavit failed to establish even a fair probability that contraband or evidence of a crime would be found at 5020 Doppler Street. The list of drug trafficking behavior, while detailed and lengthy, was generic and lacked applicability in this instance. Officer Thompson neither had the experience necessary nor the information required to establish that Mr. Tharps was a drug trafficker who would likely engage in the behaviors described. None of the additional information led to a conclusion that contraband or evidence of a crime would be found in the location to be searched. Mr. Tharps' residence was therefore violently invaded without a sufficient basis and the evidence recovered should have been suppressed. The district court erred in denying the motion to suppress.

E. The District Court further erred in applying the good faith exception to the execution of this deficient warrant

The warrant authored and executed by the Prince George's Police Department was not effected in "good faith" and therefore, the exception cannot save the fruits of the search from suppression. Instead, the exclusionary rule should apply where the warrant was so lacking in probable cause as to render official belief in it entirely unreasonable. Even if an appellate court agrees that the district court erred in upholding the magistrate's probable cause finding, the court must still evaluate whether the evidence was obtained by "officers reasonably relying on a warrant issued by a detached and neutral magistrate." *United States v. Leon*, 486 U.S. 897, 913 (1984). In *Leon*, this court emphasized that "officers," should be read

"broadly to include those who obtain the warrant as well as those who conduct the search." *Id*. These officers must act on "objectively reasonable" reliance, and, in some cases "the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id*. *See also United States v. Wilhelm*, 80 F.3d 116, 121 (4th Cir. 1996). In a footnote, this court notes that the opinion should *not* be read to suggest that "an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search." *Leon*, 468 U.S. at 923 n. 24.

Generally, evidence seized in violation of the Fourth Amendment is subject to suppression under the exclusionary rule. *United States v. Andrews*, 577 F.3d 231, 235 (4th Cir. 2009); *Leon, supra*. The overarching purpose of the exclusionary rule is to "deter future unlawful police conduct." *Id.* This objective, however, is not achieved through suppression of evidence obtained by "an officer acting with objective good faith within the scope of a search warrant issued by a magistrate." *Id.* The core of the *Leon* good faith exception is to uphold searches and seizures, permitting introduction of evidence even if obtained via less than probable cause, unless a "reasonably trained officer would have known that the search was illegal despite the magistrate's authorization." *Andrews*, 577 F.3d at 236 (*quoting Leon*, at 922 n. 23).

There are four situations in which the good faith exception does not apply: 1) when the warrant is based on an affidavit containing knowing or reckless falsity; 2) when the magistrate has simply acted as a rubber stamp for the police; 3) when the affidavit does not provide the magistrate with a substantial basis for determining

the existence of probable cause; and 4) when the warrant is so facially deficient that an officer could not reasonably rely on it. *Leon* at 923.

In this case, Officer Thompson, along with other officers from Prince George's County police department, executed the warrant. The information in the warrant was, aside from being thin at best, also did not describe or allude to a large or dangerous drug operation and lacked material evidence of weapons or violence. The degree of law enforcement response relative to the quality and quantity of information in the warrant was unwarranted and any reasonable officer would know this.

Officer Thompson, in his pursuit of a search warrant, told the Magistrate that he had over two years of experience and that he had successfully obtained several warrants. JA:30. Taking that as true, Officer Thompson no doubt understands the importance of anonymous informant corroboration. However, he presented an affidavit for signature that lacked even the most basic corroboration.

In the 4th Circuit, the seminal good faith case is *United States v. Wilhelm*. In that case, this Court found that the affidavit did not adequately support the magistrate's finding of probable cause, as "it depended on information from an unnamed informant and provided no indication of that informant's truthfulness or reliability." 80 F.3d 116, 120 (4th Cir. 1996). This Court, in *Wilhelm*, emphasized that "the right to privacy in one's home is a most important interest protected by the Fourth Amendment and a continuing theme in constitutional jurisprudence." *Id.* This Court found that the good faith exception did *not* apply in *Wilhelm*: "due to

the 'bare bones' nature of the affidavit" and "because the magistrate could not have acted as other than a 'rubber stamp' in approving such an affidavit." *Id* at 121.

The "good faith" exceptions should not apply in this case, either, given the "bare bones" nature of the affidavit. Here, the absence of corroboration rings particularly egregious, as the informant told Officer Thompson that the center of Mr. Tharps' distribution activities was on Village Green Drive. However, the warrant was not to search *that* location, it was to search 5020 Doppler Street, a wholly separate location, in a wholly separate town.

Instead of completing reasonable police work by reconciling the difference between what the informant provided and what a computer search turned up, Officer Thompson recklessly moved forward with an obviously facially invalid warrant. In fact, Officer Thompson did not even scope out the 5020 Doppler Street home to confirm that Jay Tharps was there.

This type of low, minimum effort policing is not law enforcement that courts should encourage. Here, the investigation, completed in order to search Appellant's home, lacked basic, simple and straightforward police work. At a bare minimum, we should be able to demand that law enforcement make efforts to reconcile discrepancies between what an informant relays versus what a computer search provides. This is particularly important here, where the information was divulged by an informant who does not have any of the basic indicators for reliability. In fact, given the custodial nature of the statement, that informant has negative reliability. This Court should not find that the officers executed the warrant in good faith. The affidavit for this search warrant lacked probable cause. This affidavit was so bare

bones, lacking even the most basic displays of reliability, that no officer could reasonably rely on it.

CONCLUSION

Because the decision below legally conflicts with binding legal precedent, the Court should grant certiorari to review this issue. The Court should reverse the Fourth Circuit's determination and reverse the decision to deny Mr. Tharps' motion to suppress evidence.

Respectfully submitted,

JAY THARPS, BY AND THROUGH

/s/

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Appointed by the Court for Jay Tharps
Under the Criminal Justice Act

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by electronic mail, to:

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on this 7th day of February, 2019.

/s/

JENIFER WICKS

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4726

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAY MAURICE THARPS,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paul W. Grimm, District Judge. (8:14-cr-00161-PWG-1)

Submitted: July 30, 2018 Decided: August 3, 2018

Before GREGORY, Chief Judge, and AGEE and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Jenifer Wicks, THE LAW OFFICES OF JENIFER WICKS, Takoma Park, Maryland, for Appellant. Robert K. Hur, United States Attorney, Baltimore, Maryland, Jennifer R. Sykes, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A federal grand jury charged Jay Maurice Tharps with possession of firearms and ammunition by a convicted felon, possession with intent to distribute cocaine and marijuana, and possession of firearms in furtherance of a drug trafficking crime. He moved to suppress evidence seized from his residence on Doppler Street in Capitol Heights, Maryland, pursuant to a search warrant, claiming that the affidavit offered in support of the warrant was insufficient to establish probable cause and that the good faith exception to the exclusionary rule did not apply. The district court denied the motion, concluding that the affidavit established probable cause, and, even if it did not, the evidence was admissible under the good faith exception. Tharps subsequently entered a conditional guilty plea to all charges, reserving the right to challenge on appeal the denial of a motion to suppress evidence seized pursuant to the search warrant.[*] He appeals, arguing that the district court erred when it denied the motion to suppress. We affirm.

The Fourth Amendment, which protects individuals from "unreasonable searches," provides that "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. To deter police misconduct, evidence seized in violation of the Fourth Amendment generally is inadmissible at trial. *United States v. Andrews*, 577 F.3d 231, 235 (4th Cir. 2009). This is the exclusionary rule.

[*] Tharps filed in the district court several unsuccessful motions to suppress, but only preserved for appeal the denial of his Motion to Suppress Search.

However, in *United States v. Leon*, 468 U.S. 897 (1984), "the Supreme Court modified the exclusionary rule to allow the use of evidence 'obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral [judicial officer] but ultimately found to be unsupported by probable cause.'" *Andrews*, 577 F.3d at 235-36 (quoting *Leon*, 468 U.S. at 900).

We review factual findings concerning a motion to suppress for clear error and legal conclusions de novo. *United States v. Kehoe*, 893 F.3d 232, 237 (4th Cir. 2018). When a district court denies the motion, we view the evidence in the light most favorable to the Government. *United States v. Shrader*, 675 F.3d 300, 306 (4th Cir. 2012). In cases where a defendant challenges both the existence of probable cause and the applicability of the good faith exception, we may proceed directly to the good faith analysis without first deciding whether the warrant was supported by probable cause. *United States v. Legg*, 18 F.3d 240, 243 (4th Cir. 1994).

Ordinarily, "searches conducted pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a [judicial officer] . . . suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *United States v. Perez*, 393 F.3d 457, 461 (4th Cir. 2004) (internal quotation marks omitted). There are, however, four circumstances in which the good faith exception will not apply:

> (1) when the affiant based his application on knowing or reckless falsity; (2) when the judicial officer wholly abandoned his role as a neutral and detached decision maker and served merely as a "rubber stamp" for the police; (3) when the affidavit supporting the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely

> unreasonable; and (4) when the warrant was so facially deficient that the executing officers could not reasonably have presumed that the warrant was valid.

United States v. Wellman, 663 F.3d 224, 228-29 (4th Cir. 2011). If any of these circumstances are present, evidence gathered pursuant to that warrant must be excluded. *See Andrews*, 577 F.3d at 236. In assessing whether the exception applies, our analysis is "confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal" in light of "all of the circumstances." *Leon*, 468 U.S. at 922 n.23.

Even if the affidavit supporting the warrant was insufficient, we agree with the district court that the good faith exception to the exclusionary rule applied. During a traffic stop of a vehicle in which Tharps was a passenger, a police officer observed Tharps throw out of the car a bag containing 28 grams of marijuana stored in seven individual baggies, packaging that the officer seeking the warrant knew—through his training and experience—indicated possession with intent to distribute. Additionally, an unidentified informant told law enforcement that he had been purchasing marijuana from Tharps for a year at a specific address. A subsequent computer check confirmed that the informant accurately described the make and vanity plate of the vehicle Tharps drove. The vehicle was registered to Tharps at his Doppler Street address. Although this was not the location where the informant stated that he and Tharps conducted their drug transactions, a subsequent trash pull at the Doppler Street address yielded a marijuana cigarette and a restaurant receipt on which the name "JAY" was written. All of this information was included in the warrant application affidavit.

We conclude that this evidence of Tharps' involvement in drug trafficking, combined with the reasonable suspicion that drug traffickers store drug-related evidence in their homes, was sufficient to uphold the search of the Doppler Street residence under the good faith exception. *See United States v. Williams*, 548 F.3d 311, 319 (4th Cir. 2008). Because the good faith exception applied, the district court properly denied Tharps' motion to suppress the evidence seized pursuant to the search warrant. We accordingly affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: September 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4726
(8:14-cr-00161-PWG-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAY MAURICE THARPS

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Agee, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk