

That Probable Cause Is Garbage!

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It is settled law that the police may rummage through a person's trash once it is put out to the curb for collection. "Trash pulls" are a routine part of drug investigations, where sufficient evidence of drug activity found in the garbage may support a search warrant for the associated residence. But how much evidence is enough? For example, if a person's garbage contains the remains of a single marijuana cigarette, does that provide probable cause to believe that further evidence of drug activity will be present inside the house?

Background. The seminal Supreme Court case in this area is *California v. Greenwood*, 486 U.S. 35 (1988). In that case, an officer asked the "regular trash collector" to pick up and deliver to the officer several garbage bags that the defendant had left at the curb for collection. The officer searched the bags and found items "indicative of narcotics use," though the Court's opinion does not say exactly what the items were. Based on the results of the trash pull, the officer sought and obtained a search warrant for the residence. Upon execution of the warrant, the officer found cocaine and hashish. A second trash pull about a month later revealed more indicia of drug activity, and a second search warrant turned up more drugs. The defendant argued that the warrantless trash pulls violated the Fourth Amendment, but the Court disagreed, finding no reasonable expectation of privacy in the trash bags: "It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. . . . Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so."

Unanswered questions. *Greenwood* doesn't answer every possible question about law enforcement access to trash. What if the garbage is in a can, not merely a bag? What if it is outside the house but not yet set out to the curb? What if a suspect shreds his or her documents before putting them in the garbage? What if the trash receptacle is used by more than one household, like a dumpster behind a quad-plex? Some of these questions have been resolved by subsequent case law, while others remain controversial. For purposes of this post, though, the unanswered question is not about law enforcement *access* to trash. It is about whether what law enforcement *finds* in the trash provides probable cause to search the house. That question apparently was not before the Court in *Greenwood* so the Court simply noted that "evidence of narcotics use" was in the trash and that a search warrant issued thereafter. In some cases, the question is easy to answer. Where there's evidence of manufacturing, processing, or dealing drugs, probable cause is likely present as those are normally ongoing business activities. But what if an officer does a trash pull and finds a single [marijuana roach](#)? Is there still probable cause to search the house for drugs, or is the most likely inference that whatever marijuana was present has been smoked?

Conflicting case law. Courts have disagreed on this issue. A recent case on point is *United States v. Abernathy*, 843 F.3d 243 (6th Cir. 2016), where an officer acting on an anonymous tip did a trash pull at the defendant's residence and found "[s]everal [m]arijuana roaches with [m]arijuana residue inside" and "[s]everal plastic vacuumed packed heat sealed bags consistent [with] those used to package marijuana for resale containing marijuana residue." The Sixth Circuit ruled that this evidence did not provide probable cause to search the home: "Although the trash pull evidence certainly suggested that someone in the residence had smoked marijuana recently, that fact alone does not create an inference that the residence contained additional drugs. Drugs by their very nature are usually sold and consumed in a prompt fashion, and so the more probable inference upon finding drug refuse is that whatever drugs were previously in

the residence had been consumed and discarded. Further, it is impossible to tell when the marijuana roaches and plastic bags were put into the garbage.” See also *Raulerson v. State*, 714 So. 2d 536 (Fla. Dist. Ct. App. 1998) (finding no probable cause to search a residence where officers found “two cannabis cigarette butts, stems, seeds, and pieces of suspected cannabis” in the trash following anonymous tips, as the evidence did “not suggest a pattern of continuous drug activity”).

By contrast, other courts have concluded that the discovery of small amounts of drugs and paraphernalia in the trash does provide probable cause to search the associated home. See, e.g., *United States v. Thurmond*, 782 F.3d 1042 (8th Cir. 2015) (finding that discovery of two marijuana roaches and related items in defendant’s garbage provided probable cause to search his home); *United States v. Colonna*, 360 F.3d 1169 (10th Cir. 2004) (finding probable cause based on the discovery of “two burnt roach ends of suspected marijuana cigarettes, a ‘twist’ torn from the corner of a plastic baggie, a plastic baggie with a corner torn from it, and an empty container of Zig Zag cigarette papers”).

The law in North Carolina. I don’t think this question has been completely resolved in North Carolina. The cases that we have may lean towards the view that finding any residue or paraphernalia provides probable cause. See, e.g., *State v. Lowe*, 369 N.C. 360 (2016) (holding that there was probable cause for a search of the defendant’s home where officers found a “small amount of marijuana residue in a fast food bag” in the defendant’s trash, the defendant had prior drug convictions, and officers had received an anonymous tip that the defendant was selling drugs from and using drugs in the residence). Cf. *State v. Sinapi*, 359 N.C. 394 (2005) (finding probable cause for a search of the defendant’s home where officers found eight “wilted” marijuana plants in a garbage bag outside the residence, the defendant had prior drug convictions, and police believed that the defendant was connected to a recent heroin sale and overdose); *State v. Teague*, ___ N.C. App. ___, 817 S.E.2d 239 (2018) (finding probable cause for a search of the defendant’s home based on a stale anonymous tip and the fact that officers found in the defendant’s trash “a red Solo cup containing a green leafy substance; five cut-open food saver bags; and a Ziplock bag containing trace residue” as well as a butane gas container). However, the cases don’t directly address the type of argument that the *Abernathy* court found persuasive. I think it’s a reasonable issue to raise and to preserve, and it might be a winning argument on the right facts.