IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. ALAN JAMES KUUTTILA, Defendant-Appellant.	)))))))))	S.CT. NO. 19-0283

APPEAL FROM THE IOWA DISTRICT COURT
FOR STORY COUNTY
HONORABLE STEVEN P. VAN MAREL, JUDGE
(MOTION TO SUPPRESS & BENCH TRIAL)
HONORABLE JAMES B. MALLOY, JUDGE (SENTENCING)

APPELLANT'S BRIEF
AND
REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 20th day of December, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Alan Kuuttila, 2279 E 190th St. #22, Ames, IA 50010.

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ROUTING STATEMENT

Because this case presents an important constitutional issue of first impression for the Iowa Supreme Court, this case should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(a) & (f). Specifically, this case argues that Iowans have a constitutionally recognized right to privacy in their garbage, overruling the published court of appeals decision in State v. Henderson, 435 N.W.2d 394 (Iowa Ct. App. 1988).

STATEMENT OF THE CASE

Nature of the Case: The defendant-appellant, Alan Kuuttila, appeals from his conviction, judgment and sentences for possession of cannabidiol, possession of methamphetamine, and possession of marijuana following a bench trial in the Story County District Court.

Course of Proceedings: The State charged Alan Kuuttila with three serious misdemeanors for possessing various controlled substances in violation of Iowa Code section

124.401(5) (2017) – cannabidiol, methamphetamine, and marijuana. (Trial Information) (App. pp. 4-6).

Kuuttila filed a motion to suppress the evidence seized pursuant to the search of his apartment, arguing the information included in the affidavit did not provide probable cause for the search. Kuuttila also argued the search of his garbage and any use of any evidence obtained from the search, violated his rights under both the Iowa and federal constitutions. (Motion to Suppress; Hearing on Supp. Motion, p. 16 L. 13 – p. 18 L. 21) (App. pp. 7-8).

The motion to suppress was denied, and Kuuttila agreed to a bench trial on the minutes. (Order Denying Supp. Mot.; Waiver of Jury Trial) (App. pp. 17; 19). The district court found Kuuttila guilty of all three counts. (Verdict) (App. p. 21). The court sentenced Kuuttila to five days in jail on each count to be served consecutively. The court also ordered Kuuttila to pay a $315 fine, plus 35% surcharge, $10 DARE surcharge, $125 LEI

surcharge, court costs and attorney fees on each count. (Judgment and Sentence) (App. pp. 23-26).

Kuuttila filed a timely notice of appeal. (Notice of Appeal) (App. p. 28).

Facts: Detective Boeckman of the Story County Sheriff's Office testified that in the fall of 2017, the crime stoppers line received tips that Kuuttila was dealing methamphetamine and marijuana out of apartment #4 of 534 Fourth Street—a house in Nevada, Iowa, that had been divided into a quadplex. (Supp. Tr. p. 6 L. 4 – 23; p. 14 L. 16-22). Detective Boeckman drove by the house and saw a car registered to Kuuttila parked outside. He then conducted two separate "trash rips" by removing garbage bags from the four garbage cans on the property. He did not wait for the garbage removal provider to remove the trash, but instead pulled the bags out of the garbage bins himself and took them back to his office to search. (Supp. Tr. p. 6 L. 24 – p. 7 L. 23).

The garbage cans were placed in a row, on the grass near the edge of the yard along an alley. The cans were not marked to indicate if they were assigned to a particular apartment. Detective Boeckman estimated they were placed about 4-5 feet from the alley. The four cans were surrounded by a small fence to keep them from falling over or blowing away. (Supp. Tr. p. 8 L. 5 – p. 10 L. 23; p. 11 L. 11 – 21; p. 15 L. 10 – 24) (State's Ex. 1,2,3,4) (App. pp. 13-16).

Detective Boeckman took all the garbage bags from all four cans. In one bag, Officer Boeckman found mail addressed to Kuuttila. Inside the same bag he found a baggie with a crystal substance that field tested positive for methamphetamine. He also found another baggie with a green leafy substance that field tested positive for marijuana. (Supp. Tr. 10 L. 18 – p. 11 L. 10). Detective Boeckman used this information to obtain a search warrant for Kuuttila's apartment. (Supp. Tr. p. 11 L. 24-25).

Kuuttila was home when police executed the search warrant. According to the minutes, he admitted that the various controlled substances found within the apartment belonged to him. (Minutes, Boeckman) (Conf. App. pp. 4-5).

ARGUMENT

I. Detective Boeckman's "trash rips" violated Kuuttila's federal and state constitutional rights against unreasonable searches and seizures.

A. Error Preservation. Kuuttila filed a motion to suppress, arguing Detective Boeckman's "trash rip" of the garbage from 534 Fourth Street violated Kuuttila's right against unreasonable searches and seizures in violation of both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. (Motion to Supp.) (App. pp. 7-8). After a hearing, the district court denied Kuuttila's motion, ruling that the search of the garbage did not violate Kuuttila's rights under either constitution. (Supp. Tr. p. 22 L. 20 – p. 23 L. 4; Ruling Denying Mot. Supp.) (App. p. 17). Accordingly error was preserved. State v. Lovig, 675

N.W.2d 557, 562 (Iowa 2004) (adverse ruling on motion to suppress preserved error).

B. Standard of Review. The appellate court will review constitutional claims de novo. State v. Pals, 805 N.W.2d 767, 771 (Iowa 2011). The court will make an independent evaluation of the totality of the circumstances as shown by the entire record, including evidence introduced in the suppression hearing and the trial. State v. Breuer, 577 N.W.2d 41, 44 (Iowa 1998).

C. Discussion. The search of Kuuttila's garbage violated his constitutional rights under both the Fourth and Fourteenth Amendments of the United States Constitution and article 1, section 8 of the Iowa Constitution. Accordingly, the evidence seized in the trash rip, and all evidence seized as a result of the trash rip, should have been suppressed.

1. *Federal Constitution*. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures." U.S. Const., Amend. IV. This right is extended to the States via the due process clause of the Fourteenth Amendment. U.S. Const., Amend. XIV; Mapp v. Ohio, 367 U.S. 643, 655-57; 81 S.Ct. 1684, 1691-92 (1961).

Thirty years ago, the United States Supreme Court concluded household garbage, set out curbside for pickup and disposal, was not protected from warrantless searches by the Fourth Amendment.

> [W]e conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. 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. Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

California v. Greenwood, 486 U.S. 35, 40–41, 108 S. Ct. 1625, 1628–29, 100 L. Ed. 2d 30 (1988) (internal citations omitted). Critical to the majority's rationale was the fact that the garbage was set out for collection by a third party for disposal: "'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.' " Greenwood, 486 U.S. at 41, 108 S.Ct. at 1629 (quoting Smith v. Maryland, 442 U.S. 735, 743-44, 99 S.Ct. 2577, 2582 (1979)).

The dissent sharply criticized both the result and the reasoning of the majority. First, the dissent noted the Court had in the past explicitly rejected any distinction between "worthy" and "unworthy" containers: as long as the containers were opaque and sealed from public view, they were protected: "What one person may put into a suitcase, another may put into a paper bag. . . . And . . . no court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffelbag, or box." Greenwood, 486 U.S. at 47, 108 S. Ct. at 1632 (Brennan,

J., dissenting) (quoting Robbins v. California, 453 U.S. 420, 426-27, 101 S.Ct. 2841, 2846 (1981)). The dissent further concluded it was irrelevant that Greenwood was attempting to discard his property rather than transport it—such a fact did not make the contents any less private.

> A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like the search of a bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the intimate activity associated with the sanctity of a man's home and the privacies of life.

Greenwood, 486 U.S. at 50-51, 108 S. Ct. at 1634 (Brennan, J., dissenting) (internal quotations omitted). Given the highly private information contained in household trash, the dissent rejected the idea that by placing the garbage at the curb where it *might* be rummaged by other people or animals demonstrated a lessened privacy interest.

> The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone. "What a person ... seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected."

Greenwood, 486 U.S. at 54, 108 S. Ct. at 1636 (Brennan, J., dissenting) (quoting Katz v. United States, 389 U.S. 347, 351-52, 88 S.Ct. 507, 511 (1967)) (emphasis in original).

The dissent also criticized the majority's reliance on the third-party doctrine.

> In the first place, Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance commanded him to do so, and prohibited him from disposing of it in any other way. Unlike in other circumstances where privacy is compromised, Greenwood could not "avoid exposing personal belongings ... by simply leaving them at home." More importantly, even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection

> when placed in a mailbox or other depository with the "express purpose" of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to "sor[t] through" the personal effects entrusted to them, "or permi[t] others, such as police to do so." Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance.

California v. Greenwood, 486 U.S. 35, 54–55, 108 S. Ct. 1625, 1636–37 (Brennan, J., dissenting) (internal citations omitted).

In addition to the dissent, legal scholarship has also been critical of the decision in Greenwood both because it ignores the reality of people's expectation of privacy in their garbage and because of its reliance on the third-party doctrine to reach the result. See, e.g., Orin S. Kerr, The Case for the Third-Party Doctrine, 107 Mich. L. Rev. 561, 601, n. 5 (2009) (collecting citations: "A list of every article or book that has criticized the [third-party] doctrine would make this the world's longest law review footnote."); Edwin G. Fee, Jr., Criminal Procedure I: Narrowing the Protection of the Fourth Amendment, 1989 Ann. Surv. Am. L. 371, 381-384 (1991); Stephen E. Henderson, The Timely Demise of the Fourth Amendment Third Party Doctrine,

96 Iowa L. Rev. Bull. 39, 40 (2011) (asserting the third-party doctrine is "fundamentally misguided," unpopular as a matter of State constitutional law, and predicting its demise under federal law); Search and Seizure-Garbage Searches, 102 Harv. L. Rev. 191, 195-197 (1988); Madeline A. Herdrich, Note, California v. Greenwood: The Trashing of Privacy, 38 Am. U. L. Rev. 993, 1019–20 (1989); Kevin E. Maldonado, Comment, California v. Greenwood: A Proposed Compromise to the Exploitation of the Objective Expectation Privacy, 38 Buff. L. Rev. 647, 659-667 (1990).

Recent opinions of the U.S. Supreme Court have demonstrated a tempering of the application of the third-party doctrine and an indication that support for the doctrine is waning. In Carpenter v. United States, the Court concluded the third-party doctrine did not trump a defendant's reasonable expectation of privacy in his location even though location information was continuously disclosed to the defendant's cell phone company. Accordingly, the defendant's disclosure of the

information to third-party did not waive his Fourth Amendment rights. Carpenter v. United States, 138 S. Ct. 2206, 2216–17, 201 L. Ed. 2d 507 (2018). See also United States v. Jones, 565 U.S. 400, 417–18, 132 S.Ct. 945, 957, 181 L.Ed.2d 911 (2012) (avoiding the application of the Katz "reasonable expectation of privacy" test or consideration of the third-party doctrine by concluding installation of GPS tracking device on an automobile was a search under the Fourth Amendment because it was a physical intrusion onto personal property, notwithstanding the fact that the information revealed by the tracking device was information revealed to others by traveling on public roads). See also United States v. Jones, 565 U.S. 400, 417–18, 132 S.Ct. 945, 957, 181 L.Ed.2d 911 (2012) (Sotomayor, J, concurring) ("More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.").

The Court reasoned in Carpenter, in part, that the sheer

breadth of information revealed by cell-site records and the necessity of carrying a cell phone in our modern culture overrode the application of the third-party doctrine. "In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." Carpenter, 138 S. Ct. 2206, 2223, 201 L. Ed. 2d 507 (2018).

> Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society." Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements.

Carpenter, 138 S. Ct. at 2220 (internal citations omitted).

In these respects, household garbage is like CSLI—the creation of household trash is inevitable and the reliance on a third party for the disposal of the waste is legally and practically required. Household trash is not truly "shared" with third parties. "[A]lmost every human activity ultimately manifests itself in waste products." Greenwood, 486 U.S. at 50, 108 S.Ct. at 1634 (quoting Smith v. State, 510 P.2d 793, 798 (AK 1973)). Kuuttila was required by law to dispose of his waste as he did. See Nevada, Iowa, Code of Ordinances §§ 105.03 (sanitary disposal of solid waste required); 105.04 (unlawful to accumulate solid waste that constitute a health, sanitation or fire hazard); 105.05 (open burning restricted); 105.07 (open dumping prohibited); 105.09 (describing required waste containers); 105.10 (prohibiting scavenging solid waste); 106.06 (solid waste containers must be placed "outdoors at some easily accessible place"); 106.09 (authorizing solid waste collectors to enter property to collect garbage) (2018).

Thus, Kuuttila, and most Americans, are required not only by necessity and convenience to turn over their private information to third-parties, but are also required by law to do so. To conclude they have voluntarily relinquished their Fourth Amendment under these circumstances is unjust and unreasonable. The issue is ripe for reconsideration under the federal constitution.

2. *The Iowa Constitution*. The Iowa Constitution also protects against unreasonable searches and seizures by the State. Iowa Const. art. 1, § 8. Even where a party has not advanced a different standard for interpreting a state constitutional provision, the court may apply the standard more stringently than federal case law. State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009). When a defendant raises both federal and state constitutional claims, the court may consider either claim first or consider the claims simultaneously. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010).

When independently evaluating the Iowa Constitution's guarantee against unreasonable searches and seizures, the Iowa Supreme Court has generally examined several factors, including related decisions from other states, the rationale of the federal decisions, the scope and meaning of Iowa's search and seizure clause, and whether the federal interpretation is consistent with Iowa law. State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), overruled on other grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001); Ochoa, 792 N.W.2d at 268–91.

While article I, section 8 uses nearly identical language as the Fourth Amendment and was generally designed with the same scope, import and purpose, the Iowa Supreme Court jealously protects its authority to follow an independent approach under the Iowa Constitution. Ochoa, 792 N.W.2d at 267. This Court's approach to independently construing provisions of the Iowa Constitution that are nearly identical to

the federal counterpart is supported by Iowa's case law. See, e.g., id.; Cline, 617 N.W.2d at 285.

The Iowa Constitution has a "strong emphasis on individual rights." State v. Short, 851 N.W.2d 474, 482 (Iowa 2014). "[T]he Iowa framers placed considerable value on the sanctity of private property. Ochoa, 792 N.W.2d at 274–75. Furthermore, Iowa courts have long been concerned "'about giving police officers unbridled discretion to rummage at will among a person's private effects.'" State v. Gaskins, 866 N.W.2d 1, 10 (Iowa 2015) (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).

In 1988, just a few months after the United States Supreme Court decided Greenwood, the Iowa Court of Appeals addressed the same issue under the Iowa Constitution. State v. Henderson, 435 N.W.2d 394, 395 (Iowa Ct. App. 1988). The court followed the decision and reasoning of the United States Supreme Court. Henderson, 435 N.W.2d at 396-397. Since then, other decisions of the court of appeals have followed

Henderson. See, e.g., State v. Skola, 634 N.W.2d 687, 690-91 (Iowa Ct. App. 2001) (relying on Henderson to conclude defendant did not have legitimate expectation of privacy in garbage left near the street inside plastic garbage bin); State v. Kern, No. 03-1615, 2004 WL 1836220 at *3 (Iowa Ct. App., July 28, 2004) (finding no reasonable expectation of privacy in garbage bags set out for collection between sidewalk and street); State v. MacKenzie, No. 14-1509, 2016 WL 6651866 at *4 (Iowa Ct. App., Nov. 9, 2016) (relying on Henderson to conclude no reasonable expectation of privacy in garbage located ten feet from private roadway but outside the curtilage of the house and near a utility pole); State v. May, No. 13-0628, 2014 WL 1714460, at *3 (Iowa Ct. App. Apr. 30, 2014) (no reasonable expectation of privacy in three garbage bags removed from plastic garbage can placed by the street on pickup day); State v. Williams, No. 07-1065, 2008 WL 2746480 at *1 (Iowa Ct. App. July 16, 2008) (no legitimate privacy right in tied garbage bags thrown into jointly used dumpster outside apartment building);

State v. Allen, No. 01-1823, 2003 WL 1523879 at *2 (Iowa Ct. App. March 26, 2003) (no legitimate expectation of privacy in trash bags left at curb); Grider v. State, No. 17-1126, 2018 WL 5292087 at *3 (Iowa Ct. App. October 24, 2018) (finding counsel not ineffective for failing to challenge constitutionality of "trash rip" when record unclear whether garbage was set out for collection).

However, the Iowa Supreme Court has not addressed whether Iowans have a reasonable expectation of privacy in their garbage. Nor has the Iowa Supreme Court adopted the "third party doctrine" of United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976) and Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). Instead, the Iowa Supreme Court has indicated in its more recent decisions interpreting article I, section 8 that it will not blindly follow the U.S. Supreme Court's Fourth Amendment analysis. Accordingly, this Court should reject the U.S. Supreme Court's interpretation in Greenwood, overrule State v. Henderson, and

conclude that Iowans do have a protected privacy interest under the Iowa constitution in their household trash set out for collection and disposal.

The Iowa Supreme Court has adopted the test articulated in Katz to determine whether there has been a violation of article I, section 8 of the Iowa Constitution. State v. Brooks, 888 N.W.2d 406, 410–11 (Iowa 2016). The defendant must show that he has a "legitimate expectation of privacy" in the area searched before the court can decide if the government violated his rights. Id. To establish a "legitimate expectation of privacy," the defendant must show that he has both a subjective expectation of privacy and that this expectation was reasonable. Id. "'The determination of whether a person has a legitimate expectation of privacy with respect to a certain area is made on a case-by-case basis, considering the unique facts of each particular situation.'" Id. (quoting State v. Tyler, 867 N.W.2d 136, 168 (Iowa 2015)).

The majority of states have followed Greenwood and concluded their state constitutions permit a warrantless search of trash left out for collection based on a lack of a reasonable expectation of privacy. Litchfield v. State, 824 N.E.2d 356, 359 n. 1 (Ind. 2005) (citing cases). However, both before and after the decision in Greenwood, a significant minority of states have concluded their citizens have a reasonable and constitutionally protected privacy interest in their trash. State v. Lien, 441 P.3d 185, 202 (Ore. 2019) (warrantless search of trash collected by garbage collector and turned over to police violated defendant's rights against unreasonable searches under Oregon constitution); State v. Crane, 329 P.3d 689, 695 (N.M. 2014) (New Mexico constitution provides protection of privacy in garbage sealed from plain view and set out for collection); Beltz v. State, 221 P.3d 328, 335 (Alaska 2009) (holding person who sets out garbage for collection has some objectively reasonable expectation of privacy under Alaska constitution and a police search of the trash must be supported by reasonable suspicion);

Litchfield v. State, 824 N.E.2d 356, 363-64 (Ind. 2005) (concluding Indiana constitution requires police to have articulable individualized suspicion before they may search discarded garbage); State v. Morris, 680 A.2d 90, 118 (Vt. 1996) (holding Vermont constitution protects garbage disposed of in customary manner from warrantless police searches); State v. Boland, 800 P.2d 1112, 1116 (Wash 1990) (police warrantless removal and search of garbage put out for collection unreasonably interfered with defendant's private affairs under Washington constitution); State v. Hempele, 576 A.2d 793, 803 (N.J. 1990) (defendants had reasonable expectation of privacy in trash left out for collection); State v. Tanaka, 701 P.2d 1274, 1278 (Haw. 1985) (under Hawaii constitution, defendants had reasonable expectation of privacy in their garbage bags put out for collection); People v. Krivda, 486 P.2d 1262, 1269 (Cal. 1971), as clarified in People v. Krivda, 504 P.2d 457 (Cal. 1973) (under California constitution, defendants had reasonable expectation of privacy in their trash barrels). The reasoning

employed by these States, as well as the dissent in Greenwood, is persuasive and should be adopted by this court.

Any assessment of the reasonableness of the expectation of privacy begins with the "the premise that '[e]xpectations of privacy are established by general social norms.' " Hempele, 576 A.2d at 802 (quoting Robbins v. California, 453 U.S. 420, 428, 101 S.Ct. 2841, 2847, 69 L.Ed.2d 744, 751 (1981). "The 'ultimate question' is whether, if garbage searches are 'permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.'" Hempele, 576 A.2d at 802 (quoting Anthony G. Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn.L.Rev. 349, 384 (1974)).

It is reasonable that a person would want to keep the contents of his or her garbage private. "Clues to people's most private traits and affairs can be found in their garbage." Hempele, 576 A.2d at 802. "A search of trash, like a search of

the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. [It] can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests." Greenwood, 486 U.S. at 50–51, 108 S. Ct. at 1634 (Brennan, J., dissenting).

> We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash has lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash.

People v. Edwards, 71 Cal. 2d 1096, 1104, 458 P.2d 713, 718 (1969). "Business records, bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person's activities, associations, and beliefs. If we were to hold otherwise, police could search everyone's trash bags on their property without any reason and thereby learn of their

activities, associations, and beliefs." Tanaka, 701 P.2d at 1276–77.

Most people have an interest in keeping their discarded items private: "[F]ew publicize them voluntarily. Undoubtedly many would be upset to see a neighbor or stranger sifting through their garbage, perusing their discarded mail, reading their bank statements, looking at their empty pharmaceutical bottles, and checking receipts to see what videotapes they rent." Hempele, 576 A.2d at 803. The reasonableness of this privacy expectation is demonstrated by local ordinances that prohibit the rummaging of another's trash. Nevada, Iowa, Code of Ordinances § 105.10 (prohibiting scavenging solid waste). See also Crane, 329 P.3d at 696 ("[W]e conclude that society would consider the expectation of privacy to be reasonable, as evidenced by ordinances that prohibit rummaging through another individual's garbage.").

That privacy interest is not lost when people deposit their garbage in closed containers at curbside for collection and

disposal. "First, the placement of trash in closed, opaque bags manifests an intent that the contents of the bags not be subjected to examination by the public in general or the police in particular. . . . There is a privacy interest in opaque trash bags just as there is in any other closed container whose contents are not in plain view." Morris, 680 A.2d at 95.

Further, "the regulated collection of garbage is necessary for the proper functioning of our complex society." Morris, 680 A.2d at 95. In most communities, as in Nevada, it is either "unreasonably burdensome or unlawful to privately burn or bury unwanted refuse," and people must "necessarily rely upon governmental or commercial trash collection systems to achieve anonymous disposal of garbage." Id. "[A]llowing the State to conduct a warrantless search of refuse set out for collection when an individual is required by law to dispose of his refuse in a specific place, time, and manner is inconsistent with [constitutional] privacy protections." Crane, 329 P.3d at 696. See also Boland, 800 P.2d at 1117 (holding that while the

necessary regulation of garbage must compel a person to reasonably expect that a licensed trash collector will remove his garbage, "this expectation does not also infer an expectation of governmental intrusion").

The fact that someone is discarding rather than transporting his effects does not result in a loss of privacy interest in the items. "Although a person placing trash at curbside for collection and disposal undoubtedly relinquishes a proprietary interest in the trash, it does not necessarily follow that the person intends to renounce a privacy interest in it." Morris, 680 A.2d at 96. See also Hempele, 576 A.2d at 809 ("Courts using 'abandonment' in the property-law sense have also overlooked whether, far from losing their expectation of privacy in discarded possessions, people sometimes throw things out in order to *maintain* their privacy. A more pragmatic Emma Bovary might throw away the love letters from her Monsieur Léon to prevent her husband from discovering them in her rosewood desk."). "Thus, the question is not whether the

person abandoned the garbage itself but rather whether the person relinquished an expectation of privacy in the garbage." Morris, 680 A.2d at 96.

The possibility that one's garbage *may* be scavenged by animals, children or nosy neighbors does not eliminate the expectation of privacy or render it unreasonable. "What a person 'seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected.'" Morris, 680 A.2d at 98 (quoting Katz v. United States, 389 U.S. 347, 351–52, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) (emphasis added)). "One may accept the possibility that one's garbage is susceptible to invasion by raccoons or other scavengers, and yet at the same time reasonably expect that the government will not systematically examine one's trash bags in the hopes of finding evidence of criminal conduct." Morris, 680 A.2d at 98. See also Hempele, 576 A.2d at 805 (there is constitutionally significant difference between assuming risk that scavenger or trash collector will search trash bags for objects of interest and

assuming risk that police officer will scrutinize contents of garbage for incriminating materials).

> Thus, the mere possibility that unwelcome animals or persons might rummage through one's garbage bags does not negate the expectation of privacy in the contents of those bags any more than the possibility of a burglary or break-in negates an expectation of privacy in one's home or car, or the possibility that an operator or party-line caller will listen in on a telephone conversation negates an expectation of privacy in the contents of the conversation, or the possibility that a cleaning person or house guest will exceed the scope of a visit negates an expectation of privacy in a hotel room or home. See Greenwood, 486 U.S. at 54, 108 S.Ct. at 1636 (Brennan, J., dissenting); Nor should citizens be required to accept greater police intrusion into their private affairs because of the increased frequency of people scavenging through garbage in difficult economic times. DeFusco, 620 A.2d 746, 758 (Conn. 1993) (Katz, J., dissenting) (garbage-pickers should not "dictate how we as a society choose to live and what values we choose to protect").

Morris, 680 A.2d at 98–99.

The underpinnings of the Greenwood decision are unsound and should be rejected by this court when interpreting the Iowa Constitution. This court should conclude that a person who disposes of his household trash in the customary manner, as required by local ordinance, by placing it in garbage

bags inside an appropriately located trash receptacle, has not relinquished a reasonable and socially acceptable expectation of privacy in the discarded effects. Accordingly, police may not search the contents of the such trash containers without probable cause and a search warrant. In the alternative, should the court conclude the expectation of privacy in trash is limited, this court should adopt the approach of the Indiana and Alaska Supreme Courts and conclude a warrantless garbage search must be supported by individualized, articulable reasonable suspicion. Litchfield, 824 N.E.2d at 363–64; Beltz, 221 P.3d at 335. Under either standard, the search of Kuuttila's garbage was unconstitutional.

Kuuttila's garbage had been bagged and placed in one of four metal lidded garbage cans located on the edge of the lawn of the quad plex where he lived in Nevada, Iowa. The cans were an estimated four to five feet from an alley. The officer seized all the garbage bags from all four cans and took the bags to the police station to search them. (Supp. Tr. p. 6 L. 20 – p. 11 L.

18; p. 15 L. 10 - 25) (State's Exs. 1-4) (App. pp. 13-16). Kuuttila demonstrated a subjective expectation of privacy by discarding of his trash in a manner that shielded its contents from view by the public. He complied with local laws regarding the disposal of solid waste. The search of his trash was without a warrant.

Alternatively, the search was not supported by a individualized reasonable suspicion. Police were interested in Kuuttila because of anonymous tips received by the Central Iowa Drug Task Force indicating that Kuuttila was dealing marijuana and methamphetamine from a red house that had been divided into apartments in Nevada. Officer Boeckman testified that he drove by the house and observed a car registered to Kuuttila parked outside. (Supp. Tr. p. 6 L. 13 – p. 7 L. 5).

Anonymous tips must be sufficiently corroborated to provide reasonable suspicion. State v. Kooima, 833 N.W.2d 202, 207 (Iowa 2013). "For the tip to give rise to reasonable

suspicion, . . . the tip must have some indicia of reliability in its assertion of illegality and its tendency to identify a determinate person." Kooima, 833 N.W.2d at 207, citing Florida v. J.L., 529 U.S. 266, 268, 120 S.Ct. 1375, 1377, 146 L.Ed.2d 254 (2000). The tips in this case were only corroborated as to Kuuttila's affiliation with a red house in Nevada. However, the "assertion of illegality" was not corroborated in any way. Once Officer Boeckman identified a car registered to Kuuttila in front of the house, he "started to do basically trash pulls on the house." (Supp. Tr. p. 7 L. 4-5).

D. Conclusion. Because the search of Kuuttila's household trash violated the United States and Iowa Constitutions, the district court erred in failing to suppress the evidence obtained pursuant to the search. Because the search warrant was obtained based on information gained from the trash rips and the remaining information in the application for the search warrant does not establish probable cause to search Kuuttila's apartment, all evidence obtained pursuant to the

search of the apartment should be suppressed as fruit of the poisonous tree. See State v. Lane, 726 N.W.2d 371, 380 (Iowa 2007). Kuuttila's convictions should be vacated and his case remanded for further proceedings.

II. Even the garbage rips were constitutional, the affidavit supporting the search warrant application did not provide probable cause to search Kuuttila's apartment.

A. Error Preservation: Error was preserved by Kuuttila's motion to suppress arguing that the warrant was unsupported by probable cause and the district court's ruling on the motion. (Motion to Suppress ¶3; Reply to Response to Motion to Suppress ¶ 3; Motion to Suppress Tr. p. 17 L. 11 – p. 18 L. 21; p. 21 L. 15 – p. 23 L. 4; Supp. Order) (App. pp. 7; 9; 17). Lovig, 675 N.W.2d at 562.

B. Standard of Review. Because a challenge to the finding of probable cause by the magistrate is a constitutional issue, appellate review is de novo. State v. Davis, 679 N.W.2d 651, 655-56 (Iowa 2004). The reviewing court must determine whether the issuing court had a substantial basis for finding the existence of probable cause. State v. Green, 540 N.W.2d

649, 655 (Iowa 1995). In determining whether a substantial basis existed for finding probable cause, the court is limited to consideration of only that information, reduced to writing, which the applicant presented to the magistrate at the time of the application for the warrant. Davis, 679 N.W.2d at 656.

C. Discussion: The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect people from unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I, § 8. The Fourth Amendment guarantee against unreasonable searches is applicable to the states via the Fourteenth Amendment. See Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 76 L.Ed.2d 1081, 1090 (1961). Both constitutions guarantee that a warrant to search a person's home or property must be supported by probable cause. U.S. Const. amend. IV; Iowa Const. art. I, § 8.

The test to determine whether probable cause exists to issue a search warrant is whether a person of reasonable

prudence would believe that evidence of a crime might be located on the premises to be searched. State v. Gogg, 561 N.W.2d 360, 363 (Iowa 1997). Probable cause to search requires a determination that (1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched. State v. McNeal, 867 N.W.2d 91, 99-100 (Iowa 2015).

The task of the judge issuing the search warrant is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit presented to the judge, there is a fair probability that law enforcement authorities will find evidence of a crime at a particular place. Davis, 679 N.W.2d at 656. A finding of probable cause depends on a nexus between the criminal activity, the things to be seized and the place to be searched. Id.

The determination of whether a search warrant should have been issued is based entirely on affidavits and the magistrate's abstracts of oral testimony endorsed on the

application. State v. Thomas, 540 N.W.2d 658, 661-62 (Iowa 1995). A warrant whose affidavit and application are lacking probable cause may not be rehabilitated or fortified by later testimony. Thomas, 540 N.W.2d at 662.

An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and wholly conclusory statements fail to meet this requirement. Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). The quantum of information needed to establish probable cause is less than required for conviction. State v. Weir, 414 N.W.2d 327, 330 (Iowa 1987). However, "[m]ere suspicion, rumor or even "strong reason to suspect" a person's involvement with criminal activity is inadequate to establish probable cause." Weir, 414 N.W.2d at 330.

The application for the search warrant was not supported by probable cause. The information contained in the affidavit creates, at best, a strong suspicion that Kuuttila was involved

in drug trafficking or that evidence of this suspected criminal activity would be found in his apartment.

In this case, the affidavit supporting the application for the search warrant consisted of two reasons to suspect Kuuttilla was involved in drug dealing: tips from informants and the garbage pull uncovering evidence of controlled substances and paraphernalia. (Attach. A) (Conf. App. p. 10).

The affidavit relies on "numerous tips" received by the Central Iowa Drug Task Force that Kuuttila possessed and delivered drugs in apartment 4 at 534 5th Street in Nevada, Iowa. (Attach. A) (Conf. App. p. 10). The "tips have stated that Mr. Kuuttila frequently deals methamphetamine, marijuana, and heroine out of" his apartment. (Attach. A) (Conf. App. p. 10).

The credibility of an informant must be found within the application or sworn testimony. Iowa Code § 808.3 (2017); State v. Weir, 414 N.W.2d 327, 330 (Iowa 1987). The task of the issuing magistrate is simply to make a practical, common-

sense decision whether, given all the circumstance set forth in the affidavit before him, including the "veracity' and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). "Informants' tips doubtless come in many shapes and sizes from many different types of persons" and "may vary greatly in their value and reliability." Gates, 462 U.S. at 232, 103 S.Ct. at 2329, 76 L.Ed.2d 527.

The information about the "numerous tips" is vague and contains no indication of how the tipsters knew about drug use or drug dealing in Kuuttila's apartment. One cannot tell if they are relying on rumors or if they had first-hand knowledge of the illegal activity. The tips are alleged to have been received "over the past several months." This also is vague and doesn't indicate how recently or consistently the tips were received. Thus, the information about the tips amounts to nothing more than an unsubstantiated rumor.

To corroborate the "tips," the affidavit includes information that the affiant confirmed Kuuttila lived at 534 5th St, Apt. 4 in Nevada, Iowa, through DOT and other records. Further, the affidavit relied upon the findings of the trash pull at 534 5th Street. Critically, however, the affidavit only discloses that the trash pull was conducted at 534 4th Street—a residence consisting of four separate apartments and an unknown number of tenants. There is no indication that the trash pull targeted Kuuttila's trash rather than the trash from all of the apartments at 534 5th Street. The affidavit contains no information about the garbage regarding whether the trash was pulled from one big dumpster in which all the occupants of the apartment building would dump their trash. It doesn't indicate whether the incriminating items and the mail identifying Kuuttila were found near each other or even in the same container or bag. Given the multiple residences and multiple tenants at the address, the information from the trash pull does not sufficiently substantiate the anonymous tips and

provide probable cause to believe that the evidence of drug dealing found in the trash belonged to Kuuttila and not one of the other tenants.

D. Conclusion. Because a consideration of all the circumstances presented in the affidavit created no more than a suspicion of drug dealing occurring in Kuuttila's apartment, and the district court erred in concluding the magistrate issued the search warrant upon probable cause. The evidence seized pursuant to the search warrant should have been suppressed, and Kuuttila's convictions should be reversed and his case remanded for further proceedings.

III. The portion of the sentencing order dismissing companion charges and assessing costs to Kuuttila must be removed by way of a nunc pro tunc order, as it fails to conform to the oral pronouncement of sentence.

A. Preservation of Error: Void, illegal, or procedurally defective sentences may be corrected on appeal even absent an objection before the trial court. State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010).

B. Standard of Review: "When a party asserts that an inconsistency exists between an oral sentence and a written judgment entry" warranting correction by a nunc pro tunc order, that matter is reviewed "for correction of errors at law. State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995).

C. Discussion: At the sentencing hearing, the State moved to dismiss the companion charge in SMSM080373 and noted that the State would pay costs on that charge. (Sentencing Tr. p. 8 L. 15-18). The court clarified that the State intended to pay costs, and then ordered the charge "dismissed with costs assessed against the State." (Sentencing Tr. p. 9 L. 2-3). However, the judgment and sentencing order provides: "Any remaining counts and companion charges . . . are dismissed with costs assessed to Defendant." (Sentencing Order ¶ 11) (App. p. 25).

Where there is a discrepancy between the oral pronouncement of sentence and the written judgement, the oral pronouncement governs. State v. Hess, 533 N.W.2d 525, 527-

529 (Iowa 1995). The proper remedy is to remand for entry of a nunc pro tunc order. Id. at 529.

D. Conclusion. Because there is a discrepancy between the oral pronouncement and the written judgement, and the oral pronouncement controls. See Hess, 533 N.W.2d at 527-29. Accordingly, a nunc pro tunc should be entered removing from the orders the language assessing costs on dismissed companion charges against Kuuttila.

IV. The district court abused its discretion in assessing court costs and attorney fees without an appropriate consideration of Kuuttila's reasonable ability to pay as described in State v. Albright, 925 N.W.2d 144 (Iowa 2019).

A. Preservation of Error. Void, illegal, or procedurally defective sentences may be corrected on appeal even absent an objection before the trial court. State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010).

B. Standard of Review. Restitution orders are reviewed for corrections of error at law. State v. Albright, 925 N.W.2d 144, 158 (Iowa 2019). The appellate court will evaluate

the district court's findings for substantial evidentiary support and determine if the court has properly applied the law. Id.

C. Discussion. In this case, the district court assessed court costs and attorney fees against Kuuttila. (Sentencing Order ¶¶ 3, 6, and 9; Sentencing Tr. p. 8 L. 3-10) (App. pp. 23-25). The sentencing order provided that all amounts were due immediately. (Sentencing Order ¶¶ 3, 6, and 9) (App. pp. 23-25). The court made no finding regarding Kuuttila's ability to pay court costs, either on the record or in the sentencing order. The district court's sentencing order included language that it assessed attorney fees "pursuant to Iowa Code § 815.9(5)." (Sentencing Order ¶¶ 3, 6, and 9) (App. pp. 23-25). Section 815.9(5) provides that indigent defendants shall reimburse the State for the cost of their legal assistance "to the extent to which the person is reasonably able to pay." Iowa Code § 815.9(5) (2017). However, the court made no explicit findings on Kuuttila's reasonable ability to pay attorney fees.

The district court may only order a defendant pay restitution for court costs and attorney fees to the extent the defendant has the reasonable ability to pay. Albright, 925 N.W.2d at 159. The court may also order community service in lieu of all or part of the restitution if the defendant is not reasonably able to pay. Id. See also § 910.2(2) (2017). "It is the inclusion of the reasonable-ability-to-pay requirement makes these restitution provisions constitutional." Albright, 925 N.W.2d at 161.

A person has the reasonable ability to pay when he can do so without hardship. Id. Thus, "a court should not order payment of restitution unless the convicted person 'is or will be able to pay it without undue hardship to himself or dependents, considering the financial resources of the defendant and the nature of the burden payment will impose.' " Id. (quoting State v. Rogers, 251 N.W.2d 239, 245 (Iowa 1977) (en banc)). To make this determination, the court should not only the financial resources of the defendant, including his income and net

assets, but also his financial obligations and the amount necessary for basic human needs such as food, clothing and shelter for him and his dependents. Id. at 161-162.

In this case, the court only information the court had about Kuuttila's ability to pay was that he was employed full time at Ames Hydraulic and during the warmer seasons he expected to work in the framing and roofing business. (Sent. Tr. p. 5 L. 8-16). The court did not inquire into the rest of Kuuttila's financial situation and whether the payment of restitution would cause an undue hardship on him. Accordingly, the court did not have the information necessary to make a finding on Kuuttila's reasonable ability to pay before ordering the restitution and did not explicitly find that Kuuttila was reasonably able to pay attorney fees and court costs. That portion of the sentencing order should be vacated and the case remanded for a new restitution hearing.

D. Conclusion. Because the court did not consider Kuuttila's reasonable ability to pay before imposing court costs

and attorney fees, the portion of the sentencing order imposing those restitution amounts should be vacated and his case remanded for a new restitution hearing.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.52, and that amount has been paid in full by the Office of the Appellate Defender.

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/s/ Melinda J. Nye Dated: *12/20/19*

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