

## CASE NOTES

### CONSTITUTIONAL LAW—The Fourth Amendment Does Not Prohibit Warrantless Searches and Seizures of Garbage Containers Left at the Curb of a House—*California v. Greenwood*, 486 U.S. 35 (1988).

In February 1984 a federal drug enforcement agent contacted a Laguna Beach, California police investigator (Officer Stracner) and informed her that respondent Greenwood might be a drug dealer.<sup>1</sup> This information was based on a suspect's statement that a truck filled with illegal drugs was headed for Greenwood's Laguna Beach address.<sup>2</sup> The only other piece of evidence at that time was a complaint by a neighbor that there were many late night visitors to Greenwood's house and that those visitors stayed for only a few minutes.<sup>3</sup>

The investigating officer began a surveillance of Greenwood's house.<sup>4</sup> She observed several late night visitors who stayed in the house for a short time.<sup>5</sup> She followed one of the visitors to a house that had been the site of prior narcotics investigations.<sup>6</sup>

On April 6, 1984, Officer Stracner asked the neighborhood garbage collector to pick up Greenwood's garbage and deliver it to her for the purpose of trying to uncover evidence of drug use.<sup>7</sup> The garbage had been put in opaque plastic bags and placed at the curb in front of Greenwood's house for conveyance to the city trash dump.<sup>8</sup> The officer opened the bags, searched through the garbage, and seized evidence of narcotics use.<sup>9</sup> This

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1. *California v. Greenwood*, 486 U.S. 35, 37 (1988).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* At this point in time, Officer Stracner could have taken the evidence accumulated and applied for a warrant. However, the evidence did not appear to amount to probable cause. *People v. Greenwood*, 182 Cal. App. 3d 729, 732-33, 227 Cal. Rptr. 539, 540-41 (1986).

7. *California v. Greenwood*, 486 U.S. at 37.

8. *Id.*

9. *Id.* at 37-38. The evidence consisted of straws and baggies with drug residue on them. Brief for Respondent Van Houten at 3, *California v. Greenwood*, 486 U.S. 35 (1988) (No. 86-684).

evidence was the basis for a warrant to search Greenwood's home.<sup>10</sup> The search resulted in the seizure of quantities of cocaine and hashish from the respondent's house.<sup>11</sup> Greenwood was charged with felony narcotics possession.<sup>12</sup>

After the respondent was released on bail, the Laguna Beach police received further complaints of late night visitors to Greenwood's residence.<sup>13</sup> Subsequently, another investigating officer obtained and searched Greenwood's trash and again uncovered evidence of narcotics use.<sup>14</sup> Thereafter, the officer used this evidence to obtain another search warrant of the house.<sup>15</sup> The second search also uncovered narcotics and Greenwood was again arrested and charged with drug trafficking.<sup>16</sup>

In a preliminary hearing, a magistrate determined that the warrant was valid.<sup>17</sup> However, based on the holding in *People v. Krivda*,<sup>18</sup> the Superior Court of California dismissed the charges.<sup>19</sup> *Krivda* held that warrantless searches of garbage cans violate the fourth amendment.<sup>20</sup>

The court of appeals affirmed the dismissal of charges against Greenwood in *People v. Greenwood*.<sup>21</sup> The court stated that it was required to adhere to the precedent established in *Krivda*.<sup>22</sup> The California Supreme Court denied petition for review,<sup>23</sup> but the United States Supreme Court granted certiorari.<sup>24</sup> The Supreme Court held, reversed; warrantless searches and seizures of garbage cans left at the curb of a house do not violate the fourth amendment. *California v. Greenwood*, 486 U.S. 35 (1988).

The majority<sup>25</sup> opinion written by Justice White, based on the standard set down in *United States v. Katz*,<sup>26</sup> determined that the fourth amendment

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10. *California v. Greenwood*, 486 U.S. at 37-38.

11. *Id.* at 38.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Brief for Respondent Van Houten at 4, *California v. Greenwood*, 486 U.S. 35 (1988) (No. 86-684). The purpose of the post arrest hearing is to determine if the search warrant was indeed valid.

18. *People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971). Because probable cause did not exist without the garbage evidence, the warrant was held invalid and the evidence seized was suppressed. *People v. Greenwood*, 182 Cal. App. 3d 731, 733, 227 Cal. Rptr. 539, 541 (1986).

19. *California v. Greenwood*, 486 U.S. at 38.

20. *People v. Krivda*, 5 Cal. 3d at 365, 486 P.2d at 1267-68, 96 Cal. Rptr. at 67-68 (1971).

21. *People v. Greenwood*, 182 Cal. App. 3d 729, 227 Cal. Rptr. 539 (1986).

22. *Id.* at 734, 227 Cal. Rptr. at 542.

23. *California v. Greenwood*, 486 U.S. at 39.

24. *California v. Greenwood*, 483 U.S. 1019 (1987).

25. The majority included Justices White, Rehnquist, Blackmun, Stevens, O'Connor, and Scalia.

26. *United States v. Katz*, 389 U.S. 347 (1967). See also *O'Connor v. Ortega*, 480 U.S. 709,

is violated only if the respondent had a "subjective expectation of privacy in [his] garbage that society accepts as objectively reasonable."<sup>27</sup> That is, even if the respondent had an actual expectation of privacy,<sup>28</sup> there is no violation of the fourth amendment unless that view is shared by society as a whole.<sup>29</sup>

Justice White began his analysis by concluding that exposing garbage to the public eliminated the respondent's expectation of privacy.<sup>30</sup> He noted that garbage left at the curb is easily accessible to "animals, children, scavengers, snoops, and other members of the public."<sup>31</sup> For example, he related the story of a tabloid reporter who, in 1975, took five bags of garbage from the curb in front of then Secretary of State Henry Kissinger's home and reported the contents.<sup>32</sup>

The anecdote was used to illustrate how often garbage cans are intruded upon by strangers.<sup>33</sup> Because of the many possible intrusions into exposed garbage, Justice White found that the respondent had no "reasonable expectation of privacy."<sup>34</sup>

The opinion then described two cases in which police action was upheld because individuals had exposed information to the public.<sup>35</sup> The first case<sup>36</sup> involved the police installation of a pen register<sup>37</sup> at the phone company in order to monitor telephone numbers that a suspect dialed.<sup>38</sup> The theory was that the numbers dialed are voluntarily conveyed to the phone company and therefore the dialer has lost his expectation of privacy.<sup>39</sup> The second case<sup>40</sup> involved police surveillance from a plane of a suspect's fenced backyard.<sup>41</sup> Because anyone flying over the respondent's yard could have observed what the police saw, the Court held that the respondent's expectation of privacy was unreasonable.<sup>42</sup> In both cases, the mere possibility of exposure to a third

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715 (1987); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Oliver v. United States*, 466 U.S. 170, 177 (1984).

27. *California v. Greenwood*, 486 U.S. at 39.

28. An actual expectation of privacy in this case could have come from the California law laid down in *People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).

29. *California v. Greenwood*, 486 U.S. at 39. The Court stated, "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." *Id.*

30. *Id.* at 40.

31. *Id.*

32. *Id.* n.4.

33. *Id.*

34. *Id.* at 41.

35. *Id.*

36. See *Smith v. Maryland*, 442 U.S. 735 (1979).

37. Pen registers only record numbers dialed, not the substance of the conversation.

38. *California v. Greenwood*, 486 U.S. at 41.

39. *Id.*

40. See *California v. Ciraolo*, 476 U.S. 207 (1986).

41. *California v. Greenwood*, 486 U.S. at 41.

42. *Id.*

party made the police conduct valid.<sup>43</sup>

The majority cited to a variety of federal circuit court opinions<sup>44</sup> as further examples of society's lack of expectation of privacy in its garbage.<sup>45</sup> Because of the courts' widespread rejection of the claim of privacy in trash, the majority reasoned that society should not accept respondent's claim as reasonable.<sup>46</sup>

The majority rejected Greenwood's argument that his expectation of privacy was reasonable because of the state court precedent in *Krivda*.<sup>47</sup> *Krivda* held that in California, the police cannot legally search trash cans without a warrant.<sup>48</sup> Greenwood argued that based on this holding, a privacy interest exists because California citizens do not expect the police to search their garbage.<sup>49</sup> Because the state had eliminated the exclusionary rule for violations of state law, the only means for suppressing the evidence was through the federal constitutional amendment.<sup>50</sup> Justice White reiterated that the scope of the fourth amendment is properly determined by looking at society as a whole rather than by looking to the law of the particular state where the search occurred.<sup>51</sup>

Finally, Justice White found no merit in the respondent's contention that the suppression of evidence obtained in violation of state law is a right that cannot be taken away without due process of law.<sup>52</sup> Justice White explained that a state is free to balance "the benefits of deterring police mis-

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43. *Id.* at 42.

44. See *United States v. Dela Espriella*, 781 F.2d 1432, 1437 (9th Cir. 1986) (warrantless search of trash not a fourth amendment violation because trash was abandoned); *United States v. O'Bryant*, 775 F.2d 1528, 1533-34 (11th Cir. 1985) (briefcase found in overflowing trash dumpster on a busy street); *United States v. Thornton*, 746 F.2d 39, 49 (D.C. Cir. 1984) (allowed search of trashbag inside apartment during search pursuant to warrant); *United States v. Michaels*, 726 F.2d 1307, 1312-13 (8th Cir.), *cert. denied*, 469 U.S. 820 (1984) (no reasonable expectation of privacy in trash bin of apartment complex); *United States v. Kramer*, 711 F.2d 789, 791-94 (7th Cir.), *cert. denied*, 464 U.S. 962 (1983) (garbage left at curbside does not require search warrant); *United States v. Terry*, 702 F.2d 299, 308-09 (2d Cir.), *cert. denied sub nom.*, *Williams v. United States*, 461 U.S. 931 (1983) (searching defendant's garbage for six months did not violate fourth amendment); *United States v. Reicherter*, 547 F.2d 397 (3d Cir. 1981) (no reasonable expectation of privacy in trash left in a public place); *United States v. Vahalik*, 606 F.2d 99, 100-01 (5th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980) (garbage placed at curbside); *United States v. Crowell*, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979) (garbage removed from premises before police took it); *Magda v. Benson*, 536 F.2d 111, 112-13 (6th Cir. 1976) (garbage placed at curb adjacent to apartment did not violate the fourth amendment because not within the curtilage).

45. *California v. Greenwood*, 486 U.S. at 41-43.

46. *Id.* at 42.

47. *California v. Greenwood*, 486 U.S. at 43.

48. See *supra* note 20 and accompanying text.

49. *California v. Greenwood*, 486 U.S. at 43-44.

50. *Id.* at 44.

51. *Id.*

52. *Id.*

conduct against the costs of excluding reliable evidence of criminal activity."<sup>53</sup> Thus, there is no reason why a state may not repeal its state rule of excluding illegally obtained evidence without granting all involved a due process hearing.<sup>54</sup>

The dissent<sup>55</sup> argued that a garbage bag is like any other container, and as such, cannot be searched without a warrant.<sup>56</sup> It noted that historically, sealed packages are entitled to full fourth amendment protection.<sup>57</sup> Furthermore, the dissent cited *Robbins v. California*,<sup>58</sup> which stated that as long as the contents of a container are not in plain view, they are protected from warrantless searches.<sup>59</sup> *Robbins* also held that the quality or type of container is irrelevant to a fourth amendment analysis.<sup>60</sup> Thus, the contents of an opaque garbage bag deserved as much protection as a locked suitcase or closed purse.<sup>61</sup> According to the dissent, Greenwood's use of the bag to discard, rather than to transport, should not diminish his privacy expectation.<sup>62</sup>

Justice Brennan, unlike Justice White, looked beyond the word "garbage" and considered its makeup: "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 a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene."<sup>63</sup> In support of his position, Justice Brennan noted the archaeological and sociological practice of learning about a culture by examining its garbage.<sup>64</sup>

Justice Brennan disagreed with the majority's view that society holds no expectation of privacy in its garbage.<sup>65</sup> Instead of looking at the average drug dealer's rights to privacy, the dissent stated that most people would be outraged if they discovered that people were systematically analyzing their trash.<sup>66</sup> The dissent also referred to the news reporter's search of Kissinger's garbage.<sup>67</sup> However, the dissent used it to illustrate that the Kissingers were horrified and the public almost universally condemned the reporter's methods.<sup>68</sup>

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53. *Id.*

54. *Id.* at 45.

55. The dissent included Justices Brennan and Marshall.

56. *Id.* at 46 (Brennan, J., dissenting).

57. *Id.* (Brennan, J., dissenting).

58. *Robbins v. California*, 453 U.S. 420 (1981).

59. *Id.* at 427.

60. *Id.* at 426-27.

61. *California v. Greenwood*, 486 U.S. at 47-48 (Brennan, J., dissenting).

62. *Id.* at 49 (Brennan, J., dissenting).

63. *Id.* at 50 (Brennan, J., dissenting).

64. *Id.* (Brennan, J., dissenting).

65. *Id.* at 51 (Brennan, J., dissenting).

66. *Id.* (Brennan, J., dissenting).

67. *Id.* at 52 (Brennan, J., dissenting).

68. *Id.* (Brennan, J., dissenting). *See supra* text accompanying notes 33-34.

The dissent pointed out that society's expectation of privacy in its garbage is evidenced by the fact that most cities have laws that prohibit one from going through another's trash.<sup>69</sup> If, however, one of the scavengers cited by the majority does strew someone's garbage about the street, Justice Brennan believed the police are as entitled to view it as anyone else.<sup>70</sup> It is only a police search of sealed garbage containers that Justice Brennan found objectionable.<sup>71</sup>

Justice Brennan analogized to the holding in *United States v. Jacobson*,<sup>72</sup> which held that if the post office accidentally caused a package to be opened, the police may look inside.<sup>73</sup> Until the integrity of the container is disrupted, however, the police can no more search a garbage bag than they can search a package entrusted to a mailman.<sup>74</sup> In short, Justice Brennan did not accept the majority's notion that the mere possibility of a third party invasion of privacy destroys the expectation of privacy.<sup>75</sup> If this idea is accepted, Justice Brennan argued, a home could be searched without a warrant simply because a burglar may at some point break in and view the interior.<sup>76</sup>

The problem with the majority opinion is that it does not realize the extent of the privacy invasion associated with garbage searches. As pointed out in the dissent, the majority failed to mention that the police, with no showing of probable cause, searched the respondent's trash every week for two months.<sup>77</sup> This type of indiscriminate, "hit or miss" searching was the very danger the fourth amendment was enacted to prevent. General warrants were abhorred in colonial America. If one search turned up nothing, another search could be performed at the will of the holder.

Moreover, the majority speaks of garbage as a single unit. Garbage is comprised of individual pieces, any one of which can disclose personal information. While the dissent alluded to some of the items that may be found in trash,<sup>78</sup> consider the following: the type of birth control someone uses, the amount of times birth control was used in a given week, the type of feminine hygiene used, the number of beers consumed per week, the contents of personal letters, receipts from shopping that reveal spending habits and choices, magazines and other reading material, types of medications, and school grades. Recall that one of the reasons the Supreme Court declared

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69. *Id.* (Brennan, J., dissenting).

70. *Id.* at 53 (Brennan, J., dissenting).

71. *Id.* (Brennan, J., dissenting).

72. *United States v. Jacobson*, 466 U.S. 109 (1984).

73. *California v. Greenwood*, 486 U.S. at 53 (Brennan, J., dissenting).

74. *Id.* (Brennan, J., dissenting).

75. *Id.* at 54 (Brennan, J., dissenting).

76. *Id.* (Brennan, J., dissenting).

77. See *id.* at 45 (Brennan, J., dissenting).

78. See *id.* at 50 (Brennan, J., dissenting).

anti-birth control laws unconstitutional in *Griswold v. Connecticut*<sup>79</sup> was that the thought of police entering the marital bedroom to search for birth control devices was revolting.<sup>80</sup> Now, police may search for used condoms in garbage cans.

The majority's second misconception is its view that because an item is thrown out, it is no longer private. Many items, however, are thrown in the garbage for the very purpose of maintaining privacy. When there is something lying around the house that a person does not want anyone to see, it is often safer to throw the item away.

From an evidentiary standpoint, there is a danger of criminals using the garbage to unload incriminating evidence. In this country, however, the commitment to privacy has often superceded the government's desire to uncover evidence.<sup>81</sup> The searching of garbage should not altogether be eliminated. If the police gather sufficient evidence to establish probable cause, a warrant to search the suspect's garbage may be obtained. Perhaps in light of the *Greenwood* decision, the safest thing for intravenous drug users is to reuse their old needles rather than throw them away, because the police could find them in their garbage cans and bring criminal charges.<sup>82</sup>

Another problem with the majority's approach is that it represents further erosion of fourth amendment protection in an age where privacy is becoming obsolete due to technology. The majority argued that pen registers are constitutional because anyone at the phone company has a record of what numbers are dialed.<sup>83</sup> The majority also argued that airplane surveillance is constitutional because anyone flying a plane can view someone's backyard.<sup>84</sup> In the case at bar, the Court held that garbage can searches are valid because any person or animal can break into someone's garbage.<sup>85</sup> The problem with this argument is that techniques of surveillance and information gathering are becoming more and more sophisticated. Therefore, it will become increasingly easier to justify intrusions because anyone who happens to have a spy satellite could have viewed the evidence, which would thus eliminate any privacy interest. In an era of individual rights, it will become more important for the courts to preserve the concept of privacy. Unfortunately, in *Greenwood*, privacy has been reduced to a technicality.

Gary S. Levenson

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79. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

80. *Id.* at 485-86.

81. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

82. This would circumvent the public policy of preventing the spread of AIDS because intravenous drug users are being advised to throw away used needles.

83. See *supra* notes 36-39 and accompanying text.

84. See *supra* notes 40-42 and accompanying text.

85. See *supra* note 43 and accompanying text.

