SEARCH AND SEIZURE—ARE PRIVACY RIGHTS THROWN OUT WITH THE TRASH? THE SOUTH DAKOTA SUPREME COURT DENIES EXTENDING A PRIVACY INTEREST TO TRASH. *State v. Schwartz*, 689 N.W.2d 430 (S.D. 2004).

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I. INTRODUCTION

In *State v. Schwartz*,[1] the Supreme Court of South Dakota considered whether the search and seizure clause of article VI, section 11 of the South Dakota Constitution,[2] is more expansive than the Search and Seizure Clause of the Fourth Amendment to the United States Constitution.[3] The *Schwartz* plurality held that the trial court correctly denied the defendants' motions to suppress evidence obtained in a warrantless search of their trash because one

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1. 689 N.W.2d 430 (S.D. 2004).

2. Article VI, section 11 of the South Dakota Constitution states:

> 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 warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized.

S.D. CONST. art. VI, § 11.

3. The Fourth Amendment to the United States Constitution states:

> 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.

U.S. CONST. amend. IV.

does not maintain a reasonable expectation of privacy in one's trash once it is exposed to the public.[4] This Comment argues that the *Schwartz* court correctly applied the same analysis to its state search and seizure provision as the United States Supreme Court did for the parallel Federal Search and Seizure Clause. The court did so despite the recognition that it has the authority to interpret the South Dakota Constitution more broadly than the United States Constitution.[5] Moreover, the vast majority of state supreme courts have come to the same conclusion,[6] thus demonstrating that society, as a whole, is not ready to recognize a privacy interest in trash that is exposed to the public.

II. STATEMENT OF THE CASE

In January 2003, South Dakota law enforcement authorities were provided information about alleged distribution and use of illegal drugs in Brookings, South Dakota.[7] Subsequently, a meeting was set up between Agent Jason Even and the informant to gather more information.[8] At the meeting, the informant told Agent Even that the informant's ex-wife told him that she was abusing methamphetamine and had obtained the drugs from Rick and Connie Schwartz.[9] At the conclusion of the meeting, Agent Even was shown where the Schwartzes resided.[10]

On February 4, 2003, based on the information gathered, Agent Even removed a "City of Brookings" trash can, which had been placed on the curb for collection from the front of the Schwartzes' residence.[11] In it he found approximately twenty-two pieces of tin foil with black burn marks, a yellow pen tube with white powder residue inside, and a small amount of a green leafy substance.[12] The following week, on February 11, Agent Even conducted a second search of the Schwartzes' trash which yielded

4. 689 N.W.2d at 434-37.
5. *Id.* at 435; *see also infra* note 45 and accompanying text.
6. *See infra* notes 34-36 and accompanying text.
7. *Schwartz*, 689 N.W.2d at 432.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 432-33. Agent Even testified that, in his experience, individuals engaged in methamphetamine use will very often use tin foil as a means of smoking the drug, while pen tubes are used as a means to snort illegal drugs or to inhale fumes after methamphetamine is burned off of tin foil. *Id.* at 433. In addition, a field test was conducted and identified the green, leafy substance as marijuana. *Id.*

approximately twenty-eight pieces of tin foil with black burn marks.[13] The following day Agent Even obtained a search warrant for the Schwartzes' residence and for their persons.[14] The next day, Agent Even, along with other officers, served the warrant on the Schwartzes, conducted a search of their residence, and found drugs and drug paraphernalia.[15]

On February 28, the Schwartzes were indicted for possession of methamphetamine and marijuana.[16] Before their trial, they filed motions to suppress the State's evidence, claiming that the evidence found in their trash was obtained illegally without a search warrant, and that consequently, all evidence later found in their home was obtained through an invalid search warrant based on less than probable cause.[17] The court denied these motions[18] and subsequently, at trial, convicted the Schwartzes of a felony for unauthorized possession of methamphetamine in violation of a South Dakota statute.[19] They were both sentenced to two years imprisonment.[20] Upon direct appeal to the South Dakota Supreme Court,[21] the court, in a plurality opinion, affirmed the decision of the trial court, finding that both warrantless searches of defendants' trash were not unreasonable and did not violate article VI, section 11 of the South Dakota Constitution.[22] They further found that, based on the evidence obtained from both trash searches, there was

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13. *Id.*

14. *Id.* The basis of the search warrant was the information Agent Even learned in his meetings with the informant as well as what was found during both searches of the Schwartzes' garbage. *Id.*

15. *Id.* The officers found a white powder substance along with a razor blade on top of the Schwartzes' dresser. *Id.* After conducting a search of Connie's purse, they found a snort tube and additional amounts of a white powder substance. *Id.* The officers then obtained urine samples from both Rick and Connie Schwartz, which tested positive for methamphetamine. *Id.* In addition, subsequent drug tests identified the white powder as methamphetamine. *Id.* When being interviewed the following day, both Rick and Connie admitted to the possession of the methamphetamine that was found in their residence. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* Chapter 22-42, paragraph five of the South Dakota Criminal Code states in pertinent part: "No person may knowingly possess a controlled drug or substance unless the substance was obtained directly or pursuant to a valid prescription . . . or except as otherwise authorized by chapter 34-20B. A violation of this section is a Class 4 felony." S.D. CODIFIED LAWS § 22-42-5 (2004).

20. *Schwartz*, 689 N.W.2d at 433. Connie's sentence, however, was suspended. *Id.*

21. South Dakota has no intermediate appellate court. Therefore, the appeal of the trial court decision went directly to the Supreme Court of South Dakota.

22. *See supra* note 2.

sufficient evidence to establish probable cause in granting a search warrant for the defendants personally and for their residence.[23]

III. HISTORY OF THE AREA

The Fourth Amendment to the United States Constitution[24] is designed to protect an individual's privacy interests from unwanted government intrusion.[25] However, for the Fourth Amendment to apply, a person must have a reasonable expectation of privacy.[26] The United States Supreme Court, in *Katz v. United States*,[27] held that the Fourth Amendment does not protect an individual's privacy interest in what they knowingly expose to the public.[28] However, the court concluded, an individual would have Fourth Amendment protection in something he seeks to keep private even in a location that is accessible to the public.[29] In 1988, the United States Supreme Court addressed, for the first time, whether Fourth Amendment protection extended to trash, thereby granting an individual a privacy interest in trash that they voluntarily expose to the public. The Court, in *California v.*

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23. *Schwartz*, 689 N.W.2d at 433.

24. *See supra* note 3. For a comprehensive and enlightening analysis of the Fourth Amendment see generally Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

25. *See* Katz v. United States, 389 U.S. 347, 350 (1967).

26. As Justice Harlan noted in *Katz*, the touchstone of the Fourth Amendment is whether "a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring); *see also* Terry v. Ohio, 392 U.S. 1, 9 (1968) ("'No right is held more sacred . . . than the right of every individual to the possession and control of his own person.'") (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)); *infra* note 29.

27. 389 U.S. 347 (1967).

28. *Id.* at 351.

29. *Id.* The defendant in *Katz* challenged the admissibility of his telephone conversations, which were recorded by the FBI while he was talking on a public phone. *Id.* at 348-49. The Court held that the defendant's conversation was constitutionally protected even though the government never actually entered the phone booth. *Id.* at 353. The Court reasoned that when the defendant entered the phone booth and shut the door he was trying to exclude "the uninvited ear," and his words were clearly entitled to constitutional protection regardless of the fact that the listening device did not penetrate the wall of the phone booth. *Id.* at 352-53; *cf.* Oliver v. Maine, 466 U.S. 170, 178 (1984) (reaffirming that an individual has no reasonable expectation of privacy for activities which are conducted in open fields); Hester v. United States, 265 U.S. 57, 58 (1924) (finding the protection under the Fourth Amendment does not extend to open fields). *But see* Lewis v. United States, 385 U.S. 206, 211 (1966) (holding that the Fourth Amendment does not protect a person's home when it is turned into a commercial area and outsiders are invited in to conduct illegal business).

Greenwood,[30] held that a search of an individual's possessions would only implicate the Fourth Amendment when an individual "manifest[s] a subjective expectation of privacy in their garbage that society accepts as objectively reasonable."[31] The Court concluded that an expectation of privacy in one's trash is not reasonable and that society is not prepared to grant such protection.[32]

State courts have taken conflicting views on whether to follow the lead of the United States Supreme Court and adopt the *Greenwood* rationale in interpreting parallel search and seizure constitutional provisions.[33] The vast majority of state supreme courts have adopted the *Greenwood* analysis in concluding that when an individual places his trash where it is accessible to the public, it is considered abandoned, and there remains no reasonable expectation of privacy.[34] Some state appellate courts have reached the same

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30. 486 U.S. 35 (1988).

31. *Id.* at 39. In *Greenwood*, the State appealed the superior court's decision to suppress evidence of drugs obtained from a search of the defendant's trash after authorities received information that the defendant was involved in drug trafficking. *Id.* at 38-39. The Court held that the Fourth Amendment does not prohibit a warrantless search of garbage that an individual leaves outside his home for collection. *Id.* at 37. The Court gave three reasons for this conclusion. First, when one places their trash in a public area where anyone has access to it, he will lose any reasonable expectation of privacy. *Id.* at 40. Second, when trash is left for the trash collectors to collect nothing prevents the collectors themselves from going through it. *Id.* at 40-41. Finally, the police are not required to avert their eyes from evidence which was exposed to third parties. *Id.* at 41. The Court noted that even if an individual can show that he had an expectation of privacy, society must be prepared to honor that expectation in order to have Fourth Amendment protection. *Id.* at 39-40. Moreover, the Court noted that their conclusion that society does not recognize an expectation of privacy in trash left to be collected in a public area is reinforced by the federal appellate courts' unanimous rejection of similar claims. *Id.* at 41-42.

32. *Id.* at 37.

33. *See* 2 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 11-4(c) (3d ed. 2000).

34. State supreme courts that adopt the *Greenwood* analysis include: Arkansas, Colorado, Connecticut, Idaho, Indiana, Kansas, Massachusetts, Montana, Nebraska, North Dakota, and Wisconsin. *See* Rikard v. State, 123 S.W.3d 114, 119-20 (Ark. 2003) (holding that the Arkansas Constitution does not supply greater protection than the Search and Seizure Clause of the Fourth Amendment); People v. Hillman, 834 P.2d 1271, 1277 (Colo. 1992) (holding no expectation of privacy exists in trash placed in a public area); State v. DeFusco, 620 A.2d 746, 751-53 (Conn. 1993) (finding no reasonable expectation of privacy in garbage placed at the curb for collection); State v. McCall, 26 P.3d 1222, 1224 (Idaho 2001) (finding a person has no reasonable expectation of privacy in garbage left out for collection); State v. Donato, 20 P.3d 5, 10 (Idaho 2001) (holding that Idaho's Constitution does not recognize an individual's reasonable expectation of privacy in garbage deposited in a public area); Moran v. State, 644 N.E.2d 536, 542 (Ind. 1994) (finding a warrantless search of garbage did not offend the Indiana Constitution); State v. Kimberlin, 984 P.2d 141, 146 (Kan. 1999) (holding

conclusion.[35] Other state courts reached the same conclusion even prior to the *Greenwood* decision.[36] Conversely, five state supreme courts have rejected *Greenwood* and have given broader privacy protection to citizens as it relates to their trash under the states' respective constitutions.[37] Those

individuals have no reasonable expectation of privacy in their garbage); Commonwealth v. Pratt, 555 N.E.2d 559, 567-68 (Mass. 1990) (holding that under the Massachusetts Constitution, there is no expectation of privacy in trash placed in a public area); State v. 1993 Chevrolet Pickup, 116 P.3d 800, 805 (Mont. 2005) (holding that when an individual abandons their garbage they do not maintain any reasonable expectation of privacy in it); State v. Texel, 433 N.W.2d 541, 543 (Neb. 1989) ("[N]o reasonable expectation of privacy exists in garbage which has been made accessible to the public."); State v. Trahan, 428 N.W.2d 619, 623 (Neb. 1988) (holding garbage left for collection in a public area not constitutionally protected); State v. Carriere, 545 N.W.2d 773, 776 (N.D. 1996) (reinforcing that one does not retain a privacy interest in their discarded trash); State v. Rydberg, 519 N.W.2d 306, 310 (N.D. 1994) (finding a warrantless search of garbage does not violate North Dakota's Constitution); State v. Stevens, 367 N.W.2d 788, 797 (Wis. 1985) (finding that individuals have no expectation of privacy in garbage placed in the public arena for disposal). Post-*Greenwood*, both the California and Florida state legislatures amended their search and seizure provisions to prohibit a broader interpretation than that of the Fourth Amendment. *See* 2 FRIESEN, *supra* note 33, at § 11-2(c).

35. State appellate courts that have adopted the *Greenwood* analysis include: Illinois, Iowa, North Carolina, Ohio, and Utah. *See* People v. Stage, 785 N.E.2d 550, 552 (Ill. App. Ct. 2003) (holding an individual has no reasonable expectation of privacy in their garbage); State v. Skola, 634 N.W.2d 687, 691 (Iowa Ct. App. 2001) (holding a warrantless search of garbage does not violate state constitution); State v. Washington, 518 S.E.2d 14, 17 (N.C. Ct. App. 1999) (holding a warrantless search of garbage dumpster does not violate North Carolina's Constitution); State v. Payne, 662 N.E.2d 60, 62 (Ohio Ct. App. 1995) (adopting the *Greenwood* analysis in finding there was no reasonable expectation of privacy in garbage made accessible to the public); State v. Jackson, 937 P.2d 545, 550 (Utah Ct. App. 1997) (declining to interpret article I, section 14 of the Utah Constitution more broadly than the Fourth Amendment).

36. Those states are: Alaska, Arizona, Florida, Michigan, Minnesota, Oregon, and Wyoming. *See* Smith v. State, 510 P.2d 793, 797 (Alaska 1973) (finding that society is unable to recognize a privacy interest in garbage); State v. Fassler, 503 P.2d 807, 813-14 (Ariz. 1972) (holding garbage located in an alleyway is not subject to a reasonable expectation of privacy); State v. Schultz, 388 So. 2d 1326, 1329 (Fla. Dist. Ct. App. 1980) (holding any expectation of privacy in trash unreasonable); People v. Whotte, 317 N.W.2d 266, 268-69 (Mich. Ct. App. 1982) (finding no reasonable expectation of privacy in garbage placed in trash cans shared by two families); State v. Oquist, 327 N.W.2d 587, 591 (Minn. 1982) (finding no expectation of privacy in garbage bags placed where they are accessible to the public); State v. Purvis, 438 P.2d 1002, 1005 (Or. 1968) (holding wastebaskets removed from a hotel room and placed in a hallway are not entitled to a reasonable expectation of privacy); Croker v. State, 477 P.2d 122, 125 (Wyo. 1970) (finding that garbage collectors giving authorities garbage for inspection after removal did not violate the defendant's privacy rights).

37. State courts that have rejected *Greenwood* include: Hawaii, New Hampshire, New Jersey, Vermont, and Washington. *See* State v. Tanaka, 701 P.2d 1274, 1277 (Haw. 1985) (holding police need a search warrant in order to search one's garbage); State v. Goss, 834

states have held that police needed a warrant to search through trash, even if the trash was placed in a public area.[38]

In interpreting their state constitution, the South Dakota Supreme Court has, at times, elected to give greater protection to its citizens than that provided under the United States Constitution.[39] The court has done so even when interpreting its search and seizure clause. In *State v. Opperman*,[40] the court granted greater protection under article VI, section 11 of the South Dakota Constitution than what is required under the Fourth Amendment.[41]

A.2d 316, 319-20 (N.H. 2003) (finding that, under the state constitution, one has a reasonable expectation of privacy in their garbage); State v. Hempele, 576 A.2d 793, 813 (N.J. 1990) (holding there is an expectation of privacy in garbage and the police must secure a warrant in order to search the trash); State v. Morris, 680 A.2d 90, 101 (Vt. 1996) (finding that a warrantless search of garbage cans was protected under the state constitution); State v. Boland, 800 P.2d 1112, 1116 (Wash. 1990) (holding that the Washington Constitution protects individuals from warrantless searches of their trash). It is interesting to note that *Tanaka* was decided prior to *Greenwood*. However, subsequent to the *Greenwood* decision, the Hawaii Supreme Court reaffirmed the *Tanaka* holding. *See* State v. Lopez, 896 P.2d 889, 901-03 (Haw. 1995).

38. *See supra* note 37.

39. *See, e.g.*, Sweeney v. Leapley, 487 N.W.2d 617, 620 (S.D. 1992) (granting greater due process rights for post-conviction relief than what is mandated under the United States Constitution); State v. Opperman (*Opperman II*), 247 N.W.2d 673, 675 (S.D. 1976) (finding an inventory search of a car that was towed for parking violations was barred under the state constitution even though permitted under the Fourth Amendment to the United States Constitution); Parham v. Municipal Court, 199 N.W.2d 501, 505 (S.D. 1972) (holding state constitution entitles individual to jury trial in civil cases).

40. *Opperman II*, 247 N.W.2d 673 (S.D. 1976).

41. In *State v. Opperman* (*Opperman I*), the South Dakota Supreme Court held that the Fourth Amendment protects against unreasonable searches of an individual's car. 228 N.W.2d 152, 159 (S.D. 1975). After defendant's car was issued a second parking ticket, the police had his car towed and impounded in the city parking lot. *Id.* at 153. The police then ordered the tow truck operator to break into the car. *Id.* After seizing the items that were in plain view, the police searched the glove compartment and found marijuana. *Id.* Subsequently, the defendant was convicted. *Id.* The court overturned his conviction on the grounds that the officers conducted an unreasonable search of the car in violation of the Fourth Amendment to the United States Constitution. *Id.* at 153-59. The Supreme Court of the United States granted certiorari and overturned the South Dakota Supreme Court's interpretation of the Fourth Amendment. *See* South Dakota v. Opperman, 428 U.S. 364, 367 (1976). In doing so, the Court held that the search of defendant's car was not an unreasonable search in violation of the Fourth Amendment because once the police were permitted to seize those items, which were in plain view, it was not unreasonable for them to then search the unlocked glove compartment. *Id.* at 375-76. Upon remand, the South Dakota Supreme Court overturned the conviction. *Opperman II*, 247 N.W.2d at 675. The court concluded that article VI, section 11 of the South Dakota Constitution grants greater protection than the Fourth Amendment to the United States Constitution. *Id.*

The South Dakota Supreme Court, as well, has previously held that an individual has no reasonable expectation of privacy when he abandons his property.[42] In a later case, the court went further in holding that even when property is not actually abandoned, if it is exposed to the public, any expectation of privacy is nullified.[43] It is against this backdrop that *State v. Schwartz* came before the court.

IV. THE COURT'S REASONING

A. Plurality Opinion

In addressing this issue, the South Dakota Supreme Court in *Schwartz* chose to follow the *Greenwood* decision, and the majority of states, and did not grant greater constitutional privacy protection to trash.[44] The court did so despite the recognition that it has the authority to interpret the South Dakota Constitution more broadly than the United States Constitution.[45] The court

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42. *See, e.g.*, State v. Anderson, 548 N.W.2d 40, 44 (S.D. 1996) (vehicle); State v. Disbrow, 266 N.W.2d 246, 250 (S.D. 1978) (apartment). The United States Supreme Court has held likewise. *See* Abel v. United States, 362 U.S. 217, 241 (1960) (finding there is no reasonable expectation of privacy in an abandoned item). Although the Supreme Court did not set forth a clear test for determining when an item is abandoned, a federal appellate court, in *United States v. Colbert*, held that "[a]bandonment is primarily a question of intent, [which] may be inferred from words spoken, acts done, and other objective facts." 474 F.2d 174, 176 (5th Cir. 1973). Every federal circuit court of appeals considering the issue has agreed with this test for abandonment. *See, e.g.*, United States v. Stevenson, 396 F.3d 538, 546-47 (4th Cir. 2005), *cert. denied*, 544 U.S. 1067 (2005); United States v. Fulani, 368 F.3d 351, 354-55 (3d Cir. 2004), *cert. denied*, 543 U.S. 1091 (2005); United States v. Dillard, 78 Fed. App'x 505, 510-11 (6th Cir. 2003), *cert. denied*, 541 U.S. 975 (2004); United States v. Leshuk, 65 F.3d 1105, 1111 (4th Cir. 1995); United States v. Hoey, 983 F.2d 890, 892-93 (8th Cir. 1993); United States v. Scott, 975 F.2d 927, 929 (1st Cir. 1992); United States v. Lee, 916 F.2d 814, 818 (2d Cir. 1990); United States v. Thomas, 864 F.2d 843, 845-46 (D.C. Cir. 1989); United States v. Binder, 794 F.2d 1195, 1198-99 (7th Cir. 1986); United States v. Jones, 707 F.2d 1169, 1172-73 (10th Cir. 1983); United States v. Pirolli, 673 F.2d 1200, 1204 (11th Cir. 1982); United States v. Veatch, 674 F.2d 1217, 1220-21 & n.5 (9th Cir. 1981). The Supreme Court's continued denial of certiorari leads one to conclude it agrees with this test.

43. *See* State v. Ramirez, 535 N.W.2d 847, 850 (S.D. 1995) (holding there is no expectation of privacy in a conversation one has in the backseat of a patrol car).

44. State v. Schwartz, 689 N.W.2d 430, 435 (S.D. 2004); *see also supra* note 31.

45. *Schwartz*, 689 N.W.2d at 435; *see also* State v. Neville, 346 N.W.2d 425, 427 (S.D. 1984) ("We alone determine the extent of protection afforded under our state constitution."); *Opperman II*, 247 N.W.2d at 674 (holding that state constitutional provisions can provide greater protection for individuals than their federal counterparts). The court noted that it can do so even if the state constitutional provisions are worded the same as parallel federal provisions. *Schwartz*, 689 N.W.2d at 435. Moreover, the United States Supreme Court has

began its analysis by laying out the framework and limitations of the Fourth Amendment, after which it addressed whether the South Dakota Constitution should be interpreted more broadly than the United States Constitution.[46] The court adopted a two-part test to determine when one's trash would be entitled to constitutional protection.[47] First, did the defendants manifest a subjective expectation of privacy, and, second, is society willing to honor this expectation as being reasonable?[48] Analyzing the facts in the *Schwartz* case, the Court determined that the defendants did not meet either part of the test.[49] The defendants made no showing of any subjective expectation of privacy.[50] In addition, they discarded the trash in a City of Brookings trash receptacle, on a public street.[51] In view of those facts, the court concluded that it was not believable that society would grant an expectation of privacy.[52]

After establishing that no expectation of privacy existed in the trash, the court examined whether the information gleaned from the trash established probable cause, justifying a warrant.[53] The court, following previous jurisprudence, held that as long as there is a *fair probability* that evidence will be found, a warrant is proper.[54] In the *Schwartz* case, based on the

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acknowledged that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." California v. Greenwood, 486 U.S. 35, 43 (1988); *see also* State v. Hempele, 576 A.2d 793, 800 (N.J. 1990) (stating that the United States Constitution establishes only the floor of constitutional protections for individual rights).

46. *Schwartz*, 689 N.W.2d at 435-36.

47. *Id.* (citing Cordell v. Weber, 673 N.W.2d 49, 53 (S.D. 2003)). This two-prong test has its origins in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

48. *Schwartz*, 689 N.W.2d at 435-36.

49. *Id.* at 436.

50. *Id.* Neither defendant testified at the suppression hearing nor pointed to anything in the record establishing an expectation of privacy. *Id.*

51. *Id.*

52. *Id.* The Court rejected the argument that not extending constitutional protection to trash would create an invitation for third parties to go through garbage as a means of gathering information to commit identity theft. They reasoned that the South Dakota Legislature's passage of a law making it a misdemeanor or possibly even a class four felony to commit crimes of identity theft would prevent individuals from snooping through garbage. *Id.* at 436 n.3.

53. *Id.* at 436.

54. *Id.* at 436-37 (finding a warrant proper "if the issuing judge's decision was based upon a 'common sense' determination that there was a 'fair probability' the evidence would be found . . . at the place searched" (internal quotation marks omitted) (quoting State v. Jackson, 616 N.W.2d 412, 416 (S.D. 2000))); *see also supra* text accompanying note 23.

evidence found in the trash, the court determined that there was a fair likelihood of finding drugs at the defendants' residence.[55]

B. Concurring Opinion

In his concurring opinion, Justice Konenkamp agreed with the majority that in the present case, South Dakota's Constitution should not be interpreted more broadly than the Fourth Amendment.[56] However, he stressed that in the right scenario "[t]his Court has the obligation to decide whether the South Dakota Constitution requires stricter standards on searches and seizures than those required under the United States Constitution."[57] He then cited three reasons not to require stricter standards in this case. First, the court should not just borrow how other states interpret the provisions of their constitutions, but rather "must adopt an interpretive methodology based on the unique text of [its] Constitution and its historical underpinnings."[58] Second, a state's constitution should not automatically be interpreted more broadly to give greater rights than a parallel provision of the United States Constitution.[59] And finally, the legal arguments were not fully developed at trial in order to make a sound decision whether the search and seizure clause of the South Dakota Constitution should be interpreted more broadly based on the facts in this case.[60]

The concurrence went on to explain that when the language of the state constitution and the Federal Constitution are similar, deference should be given to how the United States Supreme Court interpreted the federal provisions since many of the state provisions were patterned after their federal counterpart.[61] Only after a thorough examination, if the court

55. *Schwartz*, 689 N.W.2d at 437. The court found that the agent's affidavit described the defendants as people identified as potential drug dealers, detailed evidence of drug use found through the two searches, and, most importantly, reported the discovery of the marijuana. *Id.*

56. *See id.* at 437-45 (Konenkamp, J., concurring). Justice Zinter filed a one paragraph concurrence, joining the court's opinion and agreeing with Justice Konenkamp's call for an interpretive methodology in deciding when to interpret identical language of the state constitution differently than language in its federal counterpart. *Id.* at 437 (Zinter, J., concurring).

57. *Id.* at 438 (Konenkamp, J., concurring); *see also* Cooper v. California, 386 U.S. 58, 62 (1967) (finding that states have the power to create higher standards of protection for their citizens with the search and seizure clauses of their state constitutions).

58. *Schwartz*, 689 N.W.2d at 438 (Konenkamp, J., concurring).

59. *Id.*

60. *Id.* at 439.

61. *Id.*

determines that a genuine reason to diverge exists, should the court consider doing so.[62]

The concurrence then suggested a non-exclusive four-part test, depending on the nature of the particular case, to determine when the state constitution should receive a broader interpretation.[63] One should look at "(1) the text of the provision at issue; (2) the territorial, legal, and constitutional history surrounding the provision; (3) the structural differences in the State and Federal Constitutions; and (4) the matters of unique state tradition or concern that bear on the meaning of the provision."[64] The concurrence concluded that applying these factors to the present case would not create a valid reason to interpret article VI, section 11 more broadly than the Fourth Amendment of the United States Constitution.[65]

C. Dissenting Opinion

In his dissent,[66] Justice Sabers argued that the plurality should have interpreted the South Dakota Constitution more broadly than the Federal

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62. *Id.* at 440. Other state courts have established different criteria for determining when to interpret their constitutions more broadly than the Federal Constitution. *See, e.g.*, State v. Hunt, 450 A.2d 952, 962-67 (N.J. 1982) (Handler, J., concurring) (seven criteria); State v. Gunwall, 720 P.2d 808, 812-13 (Wash. 1986) (six criteria). *But see* Dennis J. Braithwaite, *An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1, 32-36, 46-47 (2001) (arguing there is no need for criteria in interpreting state constitutional issues differently than the Federal Constitution because the state constitution is separate and distinct from its federal counterpart).

63. *Schwartz*, 689 N.W.2d at 440-45 (Konenkamp, J., concurring).

64. *Id.* at 440-41.

65. *See id.* at 441-45. For a more thorough analysis on various methods of interpreting state constitutions see generally James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (arguing that state courts have failed to develop clear guidelines in interpreting their constitutions); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985) (defining the core distinctions between federal and state constitutional analysis); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005) (discussing the failure of state courts to create a coherent discourse in defining state constitutional jurisprudence); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997) (discussing under what circumstances state courts should interpret their constitutions more broadly than their federal counterpart).

66. *Schwartz*, 689 N.W.2d at 445-49 (Sabers, J., dissenting). Justice Meierhenry joined the dissent. *Id.* at 449.

Constitution, because one does have an expectation of privacy in their trash.[67] Justice Sabers contended that the *Greenwood* analysis that the court relied on is incorrect.[68] Whether or not one's trash is exposed to the public, allowing the public access to it[69] does not negate that the Fourth Amendment's primary concern is whether the *government* can engage in a warrantless search of a person's items.[70] The fact that non-government entities may go through one's trash has no bearing on whether the government can do so as well.[71]

Justice Sabers also questioned the plurality's assertion that because the defendants voluntarily placed their trash in a public area to be collected by a trash collector they lost any reasonable expectation of privacy.[72] When an individual places his trash in an opaque bag, his assumption is that it will be thrown onto the garbage truck, mixed with everyone else's trash and "dumped into a landfill where it loses its identity as belonging to the citizen."[73] Information contained in the average person's trash is so personal that he would expect it to remain private.[74] One can learn almost anything about a person by going through his trash.[75] Justice Sabers then pointed out that similar to an individual retaining a privacy interest in their mail after it is placed in a mailbox, even though it is exposed to the public, the same should apply to one's trash.[76] Ultimately, the dissent concluded, people have an

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67. *Id.* at 446. Denying such protection "defies reason and undercuts the protections of the warrant requirement of Art. VI, § 11 of the South Dakota Constitution." *Id.*

68. *Id.*

69. "The mere possibility that unwelcome meddlers might open and rummage through containers does not negate the expectation of privacy in its contents any more than the possibility of a burglary negates an expectation of privacy in the home . . . ." *Id.* at 446-47 (quoting California v. Greenwood, 486 U.S. 35, 54 (1988) (Brennan, J., dissenting)).

70. *Id.* at 446; *see also* Katz v. United States, 389 U.S. 347, 350 (1967) (stating that the Fourth Amendment is designed to protect an individual from government intrusion on his privacy).

71. *Schwartz*, 689 N.W.2d at 446 (Sabers, J., dissenting).

72. *Id.* at 447.

73. *Id.* at 447-48. Justice Sabers noted that, whether or not an individual hires a garbage collection service or relies on whom the city sends, the trash collector is an agent of the garbage owner, and just like the police, would have no legal right to seize the garbage of the homeowner as he or she took the garbage to the dump. *Id.* at 448. That same expectation should apply to the agent of that person, and he or she would maintain a reasonable expectation of privacy in his or her garbage until it is placed in the landfill. *Id.*

74. *Id.* at 445.

75. *Id.*

76. *Id.* at 447.

expectation of privacy in their trash that rises to the level of deserving constitutional protection.[77]

V. AUTHOR'S ANALYSIS

In deciding *State v. Schwartz*, the South Dakota Supreme Court correctly chose to follow the path of the United States Supreme Court in *Greenwood*, as well as the vast majority of state supreme courts in not finding that an individual maintains a privacy interest in trash that was exposed to the public. The court was correct because the average person does not have a reasonable expectation of privacy in his trash. Additionally, even if one could advance the argument that one does have an expectation of privacy, such a privacy interest should not rise to the level of receiving constitutional protection.

The South Dakota Supreme Court has the authority to interpret the South Dakota Constitution more expansively than the United States Constitution when "logic" and "sound regard for the purposes" of the South Dakota Constitution dictate.[78] In fact, the court has done so in the past when interpreting article VI, section 11 of the South Dakota Constitution by finding that the state's search and seizure provision affords South Dakota citizens greater protection than the Fourth Amendment.[79]

The plurality correctly concluded that there is no reasonable expectation of privacy in one's trash. Although no one wants people going through his trash, that by no means creates a constitutionally protected privacy right in that trash. "The law does not determine what privacy is, but only what situations of privacy will be afforded legal protection, or will be made private by virtue of legal protection."[80] Any expectation of privacy is not based on an interest in property or on the invasion of such an interest, but rather, as the Court in *Greenwood* determined, whether someone has a reasonable expectation in a privacy interest that society is prepared to respect.[81]

Appellants raised the argument that placing trash in a public area does not demonstrate that an individual removed his privacy interest from what is in the trash, because in order to have a functioning society there must be

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77. *Id.*

78. *Opperman II*, 247 N.W.2d 673, 674-75 (S.D. 1976).

79. *See supra* note 41 and accompanying text.

80. Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 36 (1967).

81. *See supra* note 31; *see also* Robbins v. California, 453 U.S. 420, 428 (1981) ("Expectations of privacy are established by general social norms . . . .").

regulated trash collection.[82] Advancing such an argument, however, is somewhat flawed. When a person initially has control of the item being discarded, he controls who can and cannot have access to that item. If he chooses to expose that item to the public in a way that he loses control over who has access to it, he cannot then turn around and claim a privacy interest in that very item. Moreover, even if appellants are correct that by showing a subjective interest in retaining privacy in their trash one will maintain that privacy interest in the trash, such a privacy interest should not rise to the level of granting constitutional protection within article VI, section 11 of the South Dakota Constitution.[83]

It is true that to have trash collected an individual is forced to leave it in an area exposed to the public. However, this is only if he desires to make use of the public trash collection service. The service exists for society's convenience. Nowhere are we forced to take advantage of this "big brother" service, and if one desires, he can dispose of his trash on his own.[84]

Indeed, many times when the average person wants to throw something away that he wishes to keep private, he destroys or attempts to destroy it prior to placing it in the trash. Such action is recognition that people could look through his trash. If he really contemplated no possibility of people going through his trash, he would feel no need to destroy it.[85] Therefore, it is difficult to argue that trash should be granted constitutional protection.

One must be cognizant that attempting to destroy an item, alone, would not create a privacy interest in that item. If one would then place that "destroyed" item where it is accessible to the public he runs the risk of not maintaining a privacy interest in it anymore.[86] If a stranger would then

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82. Brief of Petitioners-Appellants at 11, State v. Schwartz, 689 N.W.2d 430 (S.D. 2004) (No. 22932).

83. *See infra* notes 90-94 and accompanying text.

84. No one can argue that we have a right for state sponsored garbage pick up; if we desire we may take it to the garbage dump ourselves, destroy it, or do whatever we feel necessary in order to maintain a privacy interest in it.

85. Most people know that it is an inevitable aspect of public garbage collection that, over the course of a year, some animal will get a hold of their garbage, laying bare what is inside. Consequently, expecting garbage to remain private after placing it in the public is an unrealistic expectation.

86. In *United States v. Scott*, the defendant was suspected of tax fraud. 975 F.2d 927, 928 (1st Cir. 1992). The IRS seized his garbage and found countless shredded documents, after which they painstakingly pieced them together, which produced incriminating evidence. *Id.* The court held that even when an individual has shredded their documents, if afterwards they are discarded in an area accessible to the general public, they will lose Fourth Amendment protection. *Id.* at 928-31. The court reasoned that although the defendant, by shredding his documents, showed a subjective intention in keeping them private, that

attempt to reconstruct the "destroyed" item and is successful in doing so, the one who threw it out cannot then turn around and claim he is entitled to a privacy interest in the item.[87] By throwing it out he bears that risk.[88] A person always has the option of not discarding that object at all or relying on burning or destroying it in a way which precludes someone else's ability to reconstruct it.[89]

The dissent misses the point in arguing that because there are personal items in the trash an individual expects them to remain private.[90] Granted, an individual may continue to desire privacy in his items, even after placing them in the trash; however, no one should reasonably expect that trash, exposed to the public, will always remain private.[91] One who consciously

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subjective intention was contradicted by placing those very shredded documents in a public area and in control of third parties. *Id.* By doing so, he relinquished any reasonable expectation of privacy. *Id.* at 930. The court further stated that "'[i]mplicit in the concept of abandonment is a renunciation of any reasonable expectation of privacy in the property abandoned.'" *Id.* at 929 (alteration in original) (quoting United States v. Mustone, 469 F.2d 970, 972 (1st Cir. 1972)). The Court concluded that any privacy interest one had will be lost when there is a failed attempt in maintaining that privacy. *Id.* at 930.

87. Placing private items in the trash can be compared to privileged communication. Society respects the fact that certain communications need privacy. However, it is the individual's to lose, and once a person exposes that private communication to the public, that privacy interest is lost forever. Moreover, one could not seriously advance the position that if they placed an item in the public arena accessible to everyone and announced that they intended to retain an exclusive privacy interest in it that they would, in fact, retain that privacy right.

88. *Scott*, 975 F.2d at 930. The court noted that "[l]aw enforcement officials are entitled to apply human ingenuity and scientific advances to collect freely available evidence from the public domain. . . . The Fourth Amendment . . . does not protect [an individual] when a third party expends the effort and expense to solve the jigsaw puzzle created by shredding." *Id.*

89. United States v. Kramer, 711 F.2d 789, 792 (7th Cir. 1983). The court added that there is nothing unfair in requiring people who want to retain a privacy interest in an item to either completely destroy it prior to throwing it out or not discard it at all. *Id.*

90. *See supra* notes 72-75 and accompanying text; *see also* Amsterdam, *supra* note 24, at 405-06.

91. As the Sixth Circuit Court of Appeals explained when referring to the open-field doctrine:

> The Fourth Amendment and other laws protecting privacy create the conditions and the context for many relationships based on intimacy, friendship and trust. These laws establish an environment in which individual emotional and mental processes can develop freely without surveillance or interference. The legal principles that protect privacy, therefore, do not protect the desert island, the mountain top or the open field—even one the owner has posted with a "no trespass" sign. The human relations that create the need for privacy do not ordinarily take place in these settings.

United States v. Oliver, 686 F.2d 356, 360 (6th Cir. 1982).

elects to retain privacy in what was placed in the trash will not compromise his desire for privacy by placing that trash in a place where he routinely fails to maintain any control over it and where anyone has access to it.[92] The very act of placing one's trash in an area accessible to the public negates any reasonable claim or expectation of privacy and precludes any requests for such protection.[93]

A distinction must be drawn between the government entering into one's home and compromising one's privacy and the government going through one's trash after its owner voluntarily placed it in the public arena. The privacy interest one has in one's home is a fundamental hallmark of our society.[94] One who places an item in his home trying to shield it from the public has affirmatively tried to protect its privacy, and such privacy is deserving of constitutional protection. However, trash is different. No one keeps his personal items in the trash. Consequently, it is unrealistic for society to grant to an individual such a privacy interest. This being the case, to equate the two in attempting to grant a privacy interest in one's trash only weakens the constitutional protection one should expect, and is entitled to, in the home under the Fourth Amendment to the United States Constitution.

Ultimately, extending a privacy interest to trash is a farfetched proposal. We as a society should not be prepared to expend effort and engage resources to defend the right of privacy in trash when the individuals themselves control the contents of their trash. The extension of such a right

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92. The dissent misses the point in arguing that by placing trash in opaque garbage bags, one shows an expectation of privacy. *See supra* text accompanying note 73. The majority of trash bags sold are opaque, and people generally purchase them because that is what is available for purchase, not because they specifically want opaque garbage bags.

93. As the Court in *Greenwood* stated, "[i]t 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." California v. Greenwood, 486 U.S. 35, 40 (1988) (citations omitted); *cf.* Cardwell v. Lewis, 417 U.S. 583, 590 (1974) ("'The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.' . . . One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny." (citation omitted) (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring))). Trash placed in the public arena, it can be argued, is no different. For example, if an individual were to place, outside of their property, a used table or chair for garbage collection and another person were to come along and take it for themselves, the original owner would have no ability to reclaim the item since their action shows relinquishment of possession.

94. "[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v. New York, 445 U.S. 573, 601 (1980).

would create an unhealthy mindset within society. Reasonable expectations of privacy begin with responsible actions. Individuals themselves should be the first line of defense to ensure they retain their privacy rights, and therefore must bear the consequences of exposing their property to the general public when they dispose of their trash.[95]

The dissent's comparison between trash and mail is fundamentally flawed.[96] Congress enacted a federal statute making it a federal crime to tamper with someone else's mail.[97] This is indicative of society's desire to maintain a basic privacy interest in mail. Additionally, by sealing an envelope, one makes clear that he expects the contents to remain private. In contrast, trash is not where an individual places items he desires to keep private,[98] and sealing a trash bag is generally done to ensure the trash is not strewn all over the street—not to keep prying eyes away from it. If the legislature feels the need to grant a privacy interest in trash, Congress can enact a "right of privacy" law for trash that would ensure such a right. However, pending such legislation, the Fourth Amendment to the Unites States Constitution and article VI, section 11 of the South Dakota Constitution must be read to deny a privacy interest in trash.[99]

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95. Similar to an ambiguous contract that will always be construed against the drafter, so too here; you are in control of the item and it is very easy to retain a privacy interest in it—do not throw it out.

96. *See supra* note 76 and accompanying text. The dissent is further incorrect in comparing a person bringing their garbage to the garbage dump themselves and placing it in the public domain. *See supra* note 73. As long as the person retains control of their garbage we should not have to analyze one's right to privacy under the rubric of whether or not you have a reasonable expectation of such privacy.

97. Title 18, section 1702 of the United States Code states:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1702 (2000).

98. It can be further argued that, generally, people who place items in the trash to keep them private are likely those who are involved in some sort of criminal activity and are trying to hide that activity from the authorities. No upstanding society should create in such activity a constitutionally protected privacy right.

99. Moreover, no one would advance the argument that an individual has a greater interest in retaining a privacy interest in garbage than mail. Consequently, if mail needed a federal enactment to ensure its privacy, all the more so, garbage would have to wait for a federal or state enactment to ensure its complete privacy.

A. Recommendation

If society as a whole becomes concerned with maintaining a privacy interest in trash, the legislature has the option of creating laws to protect such a privacy interest. Indeed, the South Dakota Legislature, recognizing the potential for misuse of another's trash, passed a law making it a misdemeanor to commit the crime of identity theft.[100] However, no matter how strongly anyone may feel about retaining a privacy interest in his trash, we as a society cannot allow personal feelings to distort constitutional interpretation in requesting such protection.[101]

VI. CONCLUSION

In *State v. Schwartz*, the South Dakota Supreme Court held that article VI, section 11 of the South Dakota Constitution does not create a privacy interest in trash exposed to the public. The plurality correctly recognized that once an item is placed in an area accessible to the public, there is no reasonable expectation of privacy since the owner ceases to retain any control over it. This denial of privacy is acceptable to society since the individual chose to place his or her item in the trash. Once an individual manifests a desire to discard an item in the trash in a location where it is accessible to the public where anyone could access it, it is difficult to then argue that he or she has a reasonable expectation of privacy. The very act of placing trash out for collection constitutes an abandonment of such an expectation. As every apartment dweller and homeowner knows, when placing trash where it is accessible to the public, some of their trash sometimes "disappears" before it is collected by the trash collection service. An individual who wishes to keep his items private has the choice of either destroying them or not disposing of them in the trash. However, to give an individual constitutional protection in trash that was private and became

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100. *See* State v. Schwartz, 689 N.W.2d 430, 436 n.3 (S.D. 2004).

101. As Justice Frankfurter so aptly explained:

> As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting).

exposed to the public through his own volition is something that the vast majority of society, at present, is not prepared to do.