No. 98-243

In the Supreme Court of the United States

OCTOBER TERM, 1998

JOSEPH R. REDMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in finding that petitioner had no reasonable expectation of privacy in the trash he placed in his driveway for collection.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. I, at 1-60) is reported at 138 F.3d 1109. The panel opinion is reported at 117 F.3d 1036.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 10, 1998. The petition for a writ of certiorari was filed on June 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of a pretrial motion to suppress evidence and entry of a conditional plea of guilty in the United States District Court for the Central District of Illinois, petitioner was convicted of possession of

cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 188 months' imprisonment, to be followed by six years' supervised release. The court of appeals, sitting en banc, affirmed.

1. In 1993, a drug enforcement task force in Urbana, Illinois, traced a shipment of approximately one pound of cocaine from California to Urbana. After learning from an informant that a man named Shaw was expecting such a package, an undercover agent delivered the package to Shaw, who accepted it. When Shaw was questioned by law enforcement authorities, however, he claimed that he had received the package on behalf of someone who used the alias "Blackbelt." "Blackbelt" was later identified as petitioner Joseph Redmon. Pet. App. I, at 2.

As a result, police began surveillance of petitioner's residence at 1319 Harding Drive in Urbana. Pet. App. I, at 3. Petitioner's Harding Drive residence is the easternmost unit in a row of eight adjoining townhouses, and sits at the intersection of Vawter Street and Harding Drive. *Id.* at 2; Gov't C.A. Br. 5. The entrance to petitioner's townhouse faces east on Vawter Street, and the attached one-car garage faces north on Harding Drive. Petitioner's garage is connected to his neighbor's garage, and the two neighbors share a common driveway that extends 24 feet north from the garages to a four-foot-wide public sidewalk, and then approximately an additional ten feet to Harding Drive. The common driveway is approximately 25 feet wide. Pet. App. I, at 2-3; see *id.* at 15-16 (diagram and picture). Petitioner's and his neighbor's townhouses can be entered only by proceeding up the common drive-

way toward the front of the connected garages. *Id.* at 3, 15.[1]

During surveillance of petitioner's townhouse, the police saw petitioner put his garbage out for collection. Because a city ordinance prohibited petitioner from leaving his garbage for pick-up at the curb, Pet. App. I, at 3-4, petitioner did not leave his garbage cans at the end of the driveway. Instead, he put them out for collection by placing them in the driveway between his garage door and his neighbor's garage door. *Id.* at 3, 17. After the garbage had been collected from the cans, petitioner returned the empty cans to his garage. *Id.* at 3.

On three separate occasions in January and March of 1996, after petitioner put his garbage cans on the shared driveway for collection, the police removed and inspected the garbage contained in the cans. Pet. App. I, at 4. The police found clear plastic bags commonly used for shipping cocaine, a glass vial test tube, and rubber and tape packages. All of those items tested positive for cocaine. *Ibid.*

The police used that evidence to obtain a search warrant for petitioner's residence. Pet. App. I, at 4. While executing that warrant, the police found more than 400 grams of cocaine outside of petitioner's master bedroom.

2. After his indictment on federal drug charges, petitioner moved to suppress the evidence obtained from

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[1] Those seeking to enter petitioner's townhouse must walk up the common driveway and then follow a sidewalk on the left side of the garages around to his front door on Vawter Street. Pet. App. I, at 3; see also *id.* at 15-16. Those seeking to enter petitioner's neighbor's townhouse also must proceed up the common driveway toward the garages, but must follow a sidewalk around the right-hand side of the garages. *Id.* at 3.

the search of his house. He contended that the search of his garbage cans was unlawful and that the warrant was obtained with evidence from the unlawful search. Pet. App. I, at 5. The district court denied the motion. It held that petitioner's "garbage was knowingly exposed to the public," and "there was no objectively reasonable expectation of privacy in the garbage cans." Pet. App. II, at 3-4. Petitioner then entered a conditional guilty plea, preserving his right to appeal the denial of his motion to suppress. Pet. App. I, at 1-2.

3. A divided panel of the court of appeals affirmed the denial of the motion to suppress. 117 F.3d 1036. The full court of appeals then reheard the case en banc and affirmed.

Recognizing the "fact-based" nature of the Fourth Amendment issue presented in this case, the court of appeals declined to "fashion some convenient rule to fit all situations." Pet. App. I, at 5. Instead, the court looked to "all the factual circumstances of this case" in order to determine whether petitioner had an "objectively reasonable expectation of privacy in the garbage cans placed" in the common driveway near his garage. *Id.* at 6-7. Relying on this Court's decision in *California* v. *Greenwood*, 486 U.S. 35 (1988), the court of appeals concluded that petitioner did not have such an expectation of privacy in his trash. Pet. App. I, at 10.

The court explained that, like the defendant in *Greenwood*, petitioner had left his garbage in an area that was "very publicly exposed and accessible," and had manifested his intent to abandon it by putting it out for collection by strangers. Pet. App. I, at 11-12. While the defendant in *Greenwood* had left his garbage cans at the curbside, the court held that the area outside of petitioner's garage was the functional equivalent of the curbside area in *Greenwood*. *Id.* at 10; see also *id.* at 8-

9. The court also rejected petitioner's contention that the police needed a warrant to inspect his garbage because the trash cans, as they sat awaiting pick-up by trash collectors, were within the curtilage of petitioner's home. The pertinent factors for determining whether an area is curtilage, the court of appeals noted, are "the proximity of the area to the home itself, the nature of the uses to which the [area] is put, whether the area is within an enclosure surrounding the home, and the steps the resident has taken to protect the area from observation by passersby." *Id.* at 12 (internal quotation marks and citation omitted). "We believe our decision," the court concluded, "passes all the tests." *Ibid.*

Judge Coffey joined the majority opinion, but also wrote a separate concurrence to emphasize that, because petitioner had abandoned the property in a publicly visible location, the police were correct to conclude that it was "theirs for the taking." Pet. App. I, at 20. Judge Flaum, joined by Judge Easterbrook, also concurred. Addressing petitioner's contention that the garbage cans were on the curtilage, Judge Flaum explained that the curtilage inquiry often is a short-hand way of asking what is the ultimate question—whether the individual has a reasonable expectation of privacy in the location at issue. *Id.* at 30. In this case, he emphasized, the garbage cans were "readily accessible" to the public—having been placed on a shared driveway for collection by total strangers—and petitioner had taken no steps to protect them from public view or inspection. *Id.* at 27-28. As a result, they were not within the curtilage, and petitioner did not have a legitimate expectation of privacy in their contents. *Id.* at 30. Judge Evans also concurred, agreeing that the trash cans were outside the curtilage. *Id.* at 38.

Five judges dissented, in opinions written by Chief Judge Posner and Judge Rovner. Pet. App. I, at 39-60. In their view, the police crossed into the curtilage of the home when they walked up the driveway, and that entry required a warrant. *Id.* at 45-46, 50-51.

ARGUMENT

Petitioner asserts that the warrantless inspection of the contents of his garbage cans, which had been placed outside his home in his driveway for collection by trash collectors, violated his Fourth Amendment rights. Because the court of appeals' decision is correct and consistent with the decisions of other courts of appeals, further review is not warranted.

1. In *California* v. *Greenwood*, 486 U.S. 35 (1988), this Court held that the Fourth Amendment permits the warrantless search and seizure of garbage left outside the curtilage of the home, at the curb, for collection. "The warrantless search and seizure of the garbage bags left at the curb," the Court explained, "would violate the Fourth Amendment only if [defendants] manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." *Id.* at 39. Finding that garbage bags left on or at the side of the street are "readily accessible" to the public and could be invaded by scavenging animals or curious passersby, and noting that the defendants had placed their garbage at the curb to convey it to a third party, the Court concluded that the defendants "could have had no reasonable expectation of privacy" in the garbage. *Id.* at 40-41.

Applying the same factors here, the Seventh Circuit properly concluded that petitioner had no legitimate expectation of privacy in the garbage he put out for collection. Petitioner did not place his garbage in a

private location, outside of public view. Rather, petitioner left his garbage out for collection in an open and shared driveway close to the street—an area that was "readily accessible" and "knowingly exposed" to the public. Pet. App. II, at 2-3 (district court order); Pet. App. I, at 11-12 (court of appeals opinion). Petitioner, moreover, manifested no desire to retain control over the contents of his garbage cans. Instead, he manifested his intention to abandon the garbage by leaving it outside his garage for regular collection. *Id.* at 11.

In light of the layout of petitioner's home and the way petitioner used the area in front of his garage, the area in which the garbage cans awaited collection was the functional equivalent of the "curbside" area where the garbage cans sat in *Greenwood*. See Pet. App. I, at 10 ("[Petitioner]'s 'curb' * * * was necessarily not at curbside, but on his joint walk-driveway."); *id.* at 8-9 ("[Petitioner], in effect, chose the front of the joint garage on the shared driveway-sidewalk to be his curb for garbage pickup purposes."); *id.* at 27 ("[O]nce [petitioner] left the trash for collection in his driveway, it occupied a space that—for purposes of his expectation of privacy in the garbage * * * —was not much different than the curbside collection point chosen in other cases.") (Flaum, J., concurring). And like the curbside area at issue in *Greenwood*, the area where petitioner placed the garbage was "without any obstruction" and was "open to use by friends and guests of himself and his neighbors, as well as solicitors, strangers, postal people, and a myriad of others including animals, and even snoops mentioned by the Supreme Court in *Greenwood*." *Id.* at 10; see also *id.* at 27 (shared use of driveway with others "severely limited [petitioner]'s reasonable expectation of privacy in his trash"). Under those particular circumstances, the court reasonably deter-

mined that petitioner had no legitimate expectation of privacy in his garbage.

2. Seeking to distinguish *Greenwood*, petitioner argues that his garbage cans were not "readily accessible to the public," Pet. 13, and in fact were within the "curtilage" of the home, see Pet. 10-11. See also Pet. ii (asserting that the garbage cans were "within the curtilage"). Neither contention warrants review.

a. The district court and the court of appeals concluded that petitioner's garbage cans were both "readily accessible" and "knowingly exposed" to the public. See Pet. App. II, at 3 (district court order) ("[I]t is objectively clear that [petitioner]'s garbage was knowingly exposed to the public."); Pet. App. I, at 11-12 (court of appeals opinion) ("It takes little more than a look at the plat * * * showing [petitioner's home's location] at the intersection of two city streets and the short common driveway-sidewalk arrangement with his neighbor to see how very publicly exposed and accessible [petitioner] left his garbage."). Those essentially factual, and, in any event, fact-bound determinations do not warrant further review. See *id.* at 5 (inquiry must be fact-specific); *id.* at 21 (Flaum, J., concurring) ("The determination of ready accessibility is highly fact-bound.").

b. Petitioner's claim that his trash cans were within the curtilage of his home also lacks merit. Petitioner concedes that the court of appeals properly identified the four factors relevant to the curtilage determination —the area's "proximity" to the home itself, the "nature of the uses" to which the area is put, whether the area is protected by a fence or similar enclosure, and the steps that were taken to protect the area from observation. See *United States* v. *Dunn*, 480 U.S. 294, 301 (1987); Pet. App. I, at 12 (same factors); Pet. 10-11

(same factors). Petitioner argues, however, that the court of appeals erred in its application of those settled criteria to the particular facts of this case. While such a case-specific contention would not in any event warrant this Court's review, the court of appeals' conclusion that the search "passe[d] all the [curtilage] tests," Pet. App. I, at 12, is correct.

Although the garbage cans were close to petitioner's garage, that garage faces a different street than does petitioner's home, and the area in front of the garage does not offer visitors the ability to see into the home itself. Proximity alone therefore gives no support for the suggestion that the garbage cans were located in an area designed for intimate family life. Moreover, the three other factors—the existence of enclosures, efforts to obstruct the view, and the "centrally relevant" or "primary" factor, "the nature of the uses" to which the area is put, see *Dunn*, 480 U.S. at 301 & n.4—demonstrate that the wide, shared driveway was not "curtilage." Petitioner concedes that the area was not protected by a fence. See Pet. 11. It is undisputed that petitioner had done nothing to obstruct the public's view. And the area was not used for private affairs. To the contrary, any member of the public seeking to approach the home of petitioner's neighbor had to walk through the area, and petitioner himself used the area for a distinctly non-private purpose—as a drop-off point at which total strangers would collect his garbage. As Judge Evans summarized, "[w]hen [petitioner] moved his garbage cans outside of his garage on collection days to his shared driveway, which was less than a first down's distance from the public sidewalk, he moved them beyond his curtilage. As the cans sat there waiting to be picked up by the garbage collectors, [petitioner] had no reasonable expectation that their con-

tents would remain undisclosed." Pet. App. I, at 38 (Evans, J., concurring).

For that reason, petitioner's assertion that the Seventh Circuit's decision eliminates any "right to privacy outside of the four walls of" the home, Pet. 14, is incorrect. As the majority and the concurring opinions make clear, the result in this case turned on the specific facts before the court—that the garbage clearly had been abandoned and set out for pick-up by strangers, that the garbage cans were placed in a shared driveway area that was exposed and readily accessible to the public, and that neither the contents of petitioner's home nor any other private area could be viewed from the location where the garbage cans sat. See Pet. App. I, at 5 (court does not "imply that * * * anybody's garbage cans placed on the driveway adjacent to his or her garage, regardless of the other facts and circumstances, can henceforth be searched without a warrant"); *id.* at 10 (layout of neighborhood made area near garage akin to the "curb" in *Greenwood*); *id.* at 10-12 (considering abandonment, accessibility to public, and degree of public exposure); see also *id.* at 28 n.3 (Flaum, J., concurring) (examination of garbage permissible only where garbage is "readily" accessible; whether garbage is "readily" accessible depends on proximity to home, distance from public thoroughfares, ease with which public can reach area without disturbing the intimate activities of home life, and any unique societal message of abandonment sent by the defendant).

c. To the extent petitioner argues that the court of appeals concluded that the garbage was within the curtilage, but permitted it to be searched nonetheless, petitioner errs. The court of appeals specifically passed on the four factors relevant to the curtilage question, and found that its decision offended none of them. See

Pet. App. I, at 12. Moreover, the conclusion that petitioner had no legitimate expectation of privacy in his garbage cans itself comprehends a finding that they were not within the curtilage. See *id.* at 29-31 (Flaum, J., concurring) (curtilage inquiry is another way of determining whether expectation of privacy is reasonable). Curtilage is the area surrounding the home "to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" and is "considered part of the home itself for Fourth Amendment purposes." *Oliver* v. *United States*, 466 U.S. 170, 176, 180 & n.12 (1984) (quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)). Petitioner offers no reason to believe that intimate activity associated with the home was conducted in the area where his garbage cans stood; nor does he offer any other reason why the shared and publicly exposed driveway on which the garbage cans sat should be "considered part of [his] home * * * for Fourth Amendment purposes."

3. The court of appeals' decision is consistent with the decisions of other courts of appeals. The courts of appeals have held that the police may inspect garbage left out for collection so long as the garbage is in a sufficiently public location, even where the garbage is not left at the curb. See, *e.g.*, *United States* v. *Hall*, 47 F.3d 1091, 1095-1097 (11th Cir.) (search of dumpster on private property, forty yards from public property, did not violate Fourth Amendment where dumpster was in public view and there was no effort to exclude others from it), cert. denied, 516 U.S. 816 (1995); *United States* v. *Comeaux*, 955 F.2d 586, 588-589 (8th Cir.) (where trash bag was accessible from alley, even though placed "on top of a garbage can located next to the garage," Fourth Amendment did not bar police from examining it), cert. denied, 506 U.S. 845 (1992); *United States* v.

Wilkinson, 926 F.2d 22, 27 (1st Cir.) (warrantless search of garbage left for collection on lawn next to curb permissible because of ready accessibility of garbage to public), cert. denied, 501 U.S. 1211 (1991). Petitioner cites no case with similar facts that reaches the opposite result. See Pet. App. I, at 6 (noting the absence of "duplicate" cases from other courts of appeals or this Court).

Nor do we believe that the result in this case will be affected by this Court's decision in *Minnesota* v. *Carter*, No. 97-1147. One of the issues in *Carter* is whether a police officer's observation of the interior of an apartment through partially closed venetian blinds, while the officer was standing in a grassy, publicly used common area immediately outside the apartment, constitutes a "search" within the meaning of the Fourth Amendment. In its amicus curiae brief in *Carter*, the United States has argued, *inter alia*, that the defendants had no reasonable expectation of privacy, because the officer's vantage point was "one that a neighbor or another member of the public might well have assumed." 97-1147 U.S. Amicus Br. at 22-28. Because this case concerns the reasonableness of a defendant's expectation of privacy in garbage left for collection by strangers in a publicly accessible place, and *Carter* concerns a defendant's expectation of privacy in the home of another when viewed through the window blinds by an officer standing in an open and public location, there is little chance that this Court's decision in *Carter* will affect the proper resolution of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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