

B. *Doctrine of Accession*

[7] Alternatively, CSA claims ownership of the enhanced technology under the common law doctrine of accession. The parties agree that Maine common law controls. *Mathewson Corp. v. Allied Marine Indus., Inc.*, 827 F.2d 850, 853 n. 3 (1st Cir.1987) (appellate court will accept parties' "expressed preference" and "implicit concession" as to controlling law, where "[t]hey have briefed the question in those terms and the district court ruled on that basis."); *In re Pioneer Ford Sales, Inc.*, 729 F.2d 27, 31 (1st Cir.1984). Under Maine law, three factors govern whether an accession occurs.

[A] chattel is not merged into the realty unless (1) it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof, (2) it is adapted to and usable with that part of the realty to which it is annexed, and (3) it was so annexed with the intention, on the part of the person making the annexation, to make it a permanent accession to the realty.

*Franklin Property Trust v. Foresite, Inc.*, 489 A.2d 12, 14 (Me.1985) (citing *Hayford v. Wentworth*, 97 Me. 347, 350, 54 A. 940, 941 (1903)) (emphasis added). See *In re Lyford*, 22 B.R. 222, 224 (Bankr.D.Me.1982) (applying *Hayford* factors to determine whether cab and chassis were accessions to truck). All three elements in the *Hayford* accession test must be met, but "special prominence must be attached to the intention of the party making the annexation." *Id.* The party asserting the accession claim bears the burden of proof. *Hayford v. Wentworth*, 97 Me. 347, 350, 54 A. 940; *Franklin Property Trust*, 489 A.2d at 14.

The district court supportably found, on the basis of testimony it explicitly credited, that the time taken to remove the "J" TCM's and restore the original base technology was not out of proportion to the time required for an ordinary upgrade and therefore that the "J" TCM's were "readily removable." Thus, it was not clear error to conclude that no physical annexation of the technology occurred. See, e.g., *Peckham v. Continental Cas. Ins. Co.*, 895

F.2d 830, 840 (1st Cir.1990) (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)) (no "clear error" where district court adopts plausible view of evidence). Furthermore, no evidence was produced at trial that any party involved in the TCM installation ever anticipated, let alone that UNUM intended, that the TCM's would become accessions to the CSA-owned computer. The uncontradicted testimony was to the contrary. Accordingly, the district court determination that CSA did not acquire the "J" TCM's by accession under Maine common law must be affirmed.

*The district court judgment is affirmed.*



UNITED STATES of America, Appellant,

v.

Alan N. SCOTT, Defendant, Appellee.

No. 91-2289.

United States Court of Appeals,  
First Circuit.

Heard July 27, 1992.

Decided Sept. 22, 1992.

Defendant charged with filing false income tax returns moved to suppress evidence of shredded documents found in garbage bags in front of his house. The United States District Court for the District of Massachusetts, Joseph L. Tauro, Chief Judge, granted the motion, 776 F.Supp. 629, and United States appealed. The Court of Appeals, Torruella, Circuit Judge, held that warrantless seizure and reconstruction of shredded documents did not violate Fourth Amendment.

Reversed and remanded.

**1. Searches and Seizures** ⇐26

Fourth Amendment did not prohibit warrantless seizure and reconstruction of shredded documents found in trash bags located outside curtilage of defendant's house; mere fact that defendant shredded his garbage before he placed it outside did not create reasonable heightened expectation of privacy. U.S.C.A. Const.Amend. 4.

**2. Searches and Seizures** ⇐26

In determining legitimacy of expectation of privacy, ultimate question is whether, if police practice were to go unregulated by constitutional restraints, amount of privacy and freedom remaining to citizens would be diminished to compass inconsistent with aims of free and open society. U.S.C.A. Const.Amend. 4.

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Mark W. Pearlstein, Asst. U.S. Atty., with whom Wayne A. Budd, U.S. Atty., was on brief, for appellant.

Charles P. McGinty, Federal Defender Office, for defendant, appellee.

Before TORRUELLA and STAHL, Circuit Judges, and HORNBLY,\* District Judge.

TORRUELLA, Circuit Judge.

Constitutionally speaking, we are concerned here with trying to determine whether there is a difference between so-called private and public garbage. The sole issue presented by this appeal is whether the Fourth Amendment prohibits the warrantless seizure and reconstruction of shredded documents found in trash bags located outside the curtilage of appellee's house. Otherwise stated, we must decide whether the shredding of private documents attaches a constitutionally recognizable privacy expectancy which follows the shredded remnants, individually and collectively, even after they become public garbage. Relying on *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the district court answered in the affirmative and suppressed the evidence, 776 F.Supp. 629. We con-

clude that the trial court misinterpreted *Greenwood* and reverse its ruling.

**I**

Appellee was suspected by the Internal Revenue Service ("IRS") of involvement in a scheme to defraud the United States through the filing of false income tax returns. IRS agents systematically seized and combed through garbage bags left for collection in front of appellee's house. Their search revealed numerous shredded documents reduced to 5/32 inch strips, which when painstakingly pieced together produced incriminating evidence. The agents then used this evidence as the basis for establishing probable cause to request various search warrants. The search warrants were issued and executed, and the searches garnered additional evidence used to secure appellee's 47 count indictment for violation of 18 U.S.C. § 237. Appellee moved to suppress the reconstructed documents as well as the evidence seized pursuant to the search warrants. Appellee argued that by shredding the documents he had manifested an objectively reasonable expectation of privacy in the shredded remnants which was protected by the Fourth Amendment, a contention that convinced the district court.

Both parties to this appeal as well as the district court rely on the same case as authority for their respective positions, *California v. Greenwood*, *supra*. This seminal case decided that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home, except "if respondents [have] manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." *Id.* at 39, 108 S.Ct. at 1628.

**II**

[1] We start out with the obvious proposition that what we are dealing with here is trash. More important is the fact that at the time the challenged evidence came into the hands of the authorities, it was *public*

\* Of the District of Maine, sitting by designation.

trash. That is, irrespective of whether appellee intended to keep secret the contents of the documents in question by shredding them, there can be no doubt that appellee also intended to dispossess himself of those documents once they were shredded, and to place their fractured remnants in a public area accessible to unknown third parties. The shredded documents were deposited in a public place and in the control of third parties, without any limitation as to their use. Trash collectors and others were at liberty to dispose of the trash in any manner they saw fit. They were also free to rummage through the garbage and explore its contents, whatever that might be. Any analysis of the expectation of privacy in the contents of the garbage must take into consideration these realities. Thus, it is appropriate to call the evidence at issue "public" trash because it was trash left for collection in a public place and over which its producer had relinquished possession.

*Greenwood* recognizes that the search of trash left for collection in a public place does not offend societal values. *Id.* Therefore, appellee should have been forewarned that he did not have a legitimate expectation of privacy once his private garbage went into a public place because the contents of the garbage bags would not be exempt from public scrutiny. As the Court stated in *Greenwood*:

[H]aving deposited their garbage in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, (citation omitted), respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

*Id.* at 40–41, 108 S.Ct. at 1628–29 (emphasis supplied); see also *United States v. Dunn*, 480 U.S. 294, 304, 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326 (1987) (erection of ranch type fences in an open field does not create a constitutionally protected privacy interest); *United States v. Lamela*, 942 F.2d 100 (1st

Cir.1991); *United States v. Wilkinson*, 926 F.2d 22, 27 (1st Cir.), cert. denied, — U.S. —, 111 S.Ct. 2813, 115 L.Ed.2d 985 (1991) (placing trash bags within barrels inside defendant's lawn not entitled to elevated "expectation of privacy" respecting the trash). Other circuits agree with this view of the Fourth Amendment. See, e.g., *United States v. Comeaux*, 955 F.2d 586, 589 (8th Cir.1992) (warrantless search of garbage within the curtilage of the home permissible because the garbage was readily accessible to the public); *United States v. Hedrick*, 922 F.2d 396 (7th Cir.1991) (garbage within the curtilage of a home may be searched without a warrant when accessible to the public).

### III

In our view, a person who places trash at a curb to be disposed of or destroyed by a third person abandons it<sup>1</sup> because "[i]mplicit in the concept of abandonment is a renunciation of any reasonable expectation of privacy in the property abandoned." *United States v. Mustone*, 469 F.2d 970, 972 (1st Cir.1972). The fact that the abandoned property was partially destroyed by shredding, although constituting evidence of appellee's subjective desire or hope that the contents be unintelligible to third parties, does not change the fact that it is as a result of appellee's own actions that the shredded evidence was placed in the public domain. Had the shredded remnants been placed in a pile on the curb in front of the house, or even more doubtfully, had an errant breeze blown shredded documents from appellee's desk into the street into the open window of a passing police car, the government would certainly have been free to seize the incriminatory evidence without a warrant, and to use its contents without limitation against appellee. *United States v. Dunn*, *supra*; *Oliver v. United States*, 466 U.S. 170, 177, 104 S.Ct. 1735, 1740, 80 L.Ed.2d 214 (1984) (no expectation of privacy in open fields and thus Fourth Amend-

leads us to a different conclusion. *Greenwood*, at 40–41, 108 S.Ct. at 1628–29. To "discard" is to "abandon, relinquish, forsake." Rodale, *The Synonym Finder*, p. 299 (1978).

1. Although appellee contends that the Supreme Court rejected abandonment as a basis for deciding *Greenwood*, the above-cited language in the *Greenwood* majority opinion, which specifically refers to *discarding* inculpatory items,

ment inapplicable); *United States v. Fahey*, 769 F.2d 829, 838 (1st Cir.1985) (no expectation of privacy in open mines).

What we have here is a failed attempt at secrecy by reason of underestimation of police resourcefulness, not invasion of constitutionally protected privacy. There is no constitutional protection from police scrutiny as to information received from a failed attempt at secrecy. See *Florida v. Riley*, 488 U.S. 445, 449-51, 109 S.Ct. 693, 695-97, 102 L.Ed.2d 835 (1989) (warrantless surveillance by helicopter of partially covered greenhouse, valid); *California v. Ciraolo*, 476 U.S. 207, 212-15, 106 S.Ct. 1809, 1812-19, 90 L.Ed.2d 210 (1986) (warrantless aerial surveillance of yard enclosed by 10 foot fence, valid); *Dow Chemical Co. v. United States*, 476 U.S. 227, 239, 106 S.Ct. 1819, 1827, 90 L.Ed.2d 226 (1986) (taking aerial photographs of a factory from navigable airspace, valid).

Appellee here thought that reducing the documents to 5/32 inch pieces made them undecipherable. It turned out he was wrong. He is in no better position than the citizen who merely tears up a document by hand and discards the pieces into the sidewalk. Can there be any doubt that the police are allowed to pick up the pieces from the sidewalk for use of the contents against that person? Should the mere use of more sophisticated "higher" technology in attempting destruction of the pieces of paper grant higher constitutional protection to this failed attempt at secrecy? We think not. There is no constitutional requirement that police techniques in the detection of crime must remain stagnant while those intent on keeping their nefarious activities secret have the benefit of new knowledge. A person who prepares incriminatory documents in a secret code [or for that matter in some obscure foreign language], and thereafter blithely discards them as trash, relying on the premise or hope that they will not be deciphered [or translated] by the authorities could well be in for an unpleasant surprise if his code is "broken" by the police [or a translator is found for the abstruse language], but he cannot make a valid claim that his subjective expectation in keeping the contents

private by use of the secret code [or language] was reasonable in a constitutional sense.

In our view, shredding garbage and placing it in the public domain subjects it to the same risks regarding privacy, as engaging in a private conversation in public where it is subject to the possibility that it may be overheard by other persons. Both are failed attempts at maintaining privacy whose failure can only be attributed to the conscious acceptance by the actor of obvious risk factors. In the case of the conversation, the risk is that conversation in a public area may be overheard by a third person. In the disposal of trash, the risk is that it may be rummaged through and deciphered once it leaves the control of the trasher. In both situations the expectation of privacy has been practically eliminated by the citizen's own action. Law enforcement officials are entitled to apply human ingenuity and scientific advances to collect freely available evidence from the public domain.

The mere fact that appellant shredded his garbage before he placed it outside of his home does not create a reasonable heightened expectation of privacy under the Fourth Amendment. Appellant still discarded this garbage in an area particularly suited for public inspection and consumption. At most, appellant's actions made it likely that most third parties would decline to reconstitute the shredded remnants into a legible whole. The Fourth Amendment, however, does not protect appellant when a third party expends the effort and expense to solve the jigsaw puzzle created by shredding.

[2] The test for determining legitimacy of an expectation of privacy "is not whether the individual chooses to conceal assertedly private activity, but instead whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *California v. Ciraolo*, 476 U.S. at 212, 106 S.Ct. at 1812. The ultimate question in this respect is "whether, if the particular form of [conduct] practiced by the police is permitted to

go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." *United States v. Hendrickson*, 940 F.2d 320, 322 (8th Cir. 1991). For the reasons stated, and, we believe, following the strictures of *Greenwood*, such dangers are not found in the present case.

The decision of the district court is reversed and this case is remanded for action consistent with this opinion.

*Reversed and remanded.*



**John CHAKOUIAN, Petitioner,  
Appellant,**

v.

**John MORAN, Respondent, Appellee.**

**No. 91-2252.**

United States Court of Appeals,  
First Circuit.

Heard May 5, 1992.

Decided Sept. 23, 1992.

Following affirmance of first-degree murder conviction, 537 A.2d 409, state prisoner instituted habeas corpus proceedings. The United States District Court for the District of Rhode Island, Ronald R. Lagueux, J., dismissed petition without evidentiary hearing, and defendant appealed. The Court of Appeals, Cyr, Circuit Judge, held that: (1) defendant failed to demonstrate prima facie case of racial discrimination in prosecution's use of peremptory challenges absent any evidence as to whether other black members of venire were called and seated as jurors, and (2) defendant was not entitled to evidentiary hearing on habeas corpus petition.

Affirmed.

### 1. Jury ⇌33(5.1)

There is no requirement that prosecution provide race-neutral explanation for exercise of peremptory challenges until defendant has made prima facie showing of racial discrimination.

### 2. Jury ⇌33(5.1)

To establish prima facie showing of racial discrimination in exercise of prosecution's peremptory challenges, defendant must show he is member of cognizable racial group, and that prosecutor has exercised peremptory challenges to remove from the venire members of defendant's race; defendant may rely on the fact that peremptory challenges constitute practice that permits those to discriminate who are of mind to discriminate, and defendant must show that these facts and any other relevant circumstances raise inference that prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

### 3. Jury ⇌33(5.1)

To determine whether defendant has made prima facie showing of racial discrimination in prosecution's use of peremptory challenges, all relevant circumstances are to be considered including patterns of strikes against black jurors.

### 4. Habeas Corpus ⇌842

Mixed questions of law and fact arising under habeas corpus statute are entitled to de novo review. 28 U.S.C.A. § 2254.

### 5. Jury ⇌120

Defendant's claim that prosecution's exercise of peremptory challenges demonstrated pattern of racial discrimination impermissibly depended on pure conjecture absent any evidence as to whether other black members of the venire were called and seated as jurors.

### 6. Habeas Corpus ⇌742

Habeas corpus petitioner was not entitled to evidentiary hearing without showing he did not receive due process of law in state courts for one or more of the reasons