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BIG BROTHER ISN'T WATCHING: HOW STATE V. JONES TRANSFORMED WHAT ONE CAN SEE WITH A NAKED EYE INTO A FOURTH AMENDMENT SEARCH

ALAYNA HOLMSTROM†

In the 2017 decision of State v. Jones, the South Dakota Supreme Court considered whether installing a pole camera on a public street light to record a defendant's activities outside of his home constituted a warrantless search in violation of the Fourth Amendment. By reversing the circuit court's ruling, the majority concluded that the pole camera constituted a search, and as such the detectives were required to obtain a warrant. The majority reasoned that the use of a pole camera on a public street light violated an expectation of privacy that society recognizes as reasonable, therefore equating to a search under the Fourth Amendment. The majority's rationale, however, was misplaced. As addressed by Chief Justice Gilbertson, who concurred in the result but dissented from the majority's analysis, this faulty reasoning deviated from the well-known understanding that mere visual observation of public areas is not in and of itself a search. This note argues that the majority erroneously misconstrued the United States Supreme Court decision in United States v. Jones, disregarding an overwhelming national understanding that areas viewed by the naked eye need no warrant. By ignoring established case law, the majority altered the basic understanding of what constitutes a Fourth Amendment search, creating an aggregate element that takes into consideration the quality—and—quantity of the electronic surveillance. This rationale is improper.

I. INTRODUCTION

“...” The advancement of technology has, in the opinion of some, brought an Orwellian tone to the ability of the government to conduct surveillance

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of its citizens. Indeed, as was recognized by the South Dakota Supreme Court, "unfettered use of surveillance technology could fundamentally alter the relationship between our government and its citizens." Courts have examined whether such long-term video surveillance constitutes a search, and overwhelmingly, cases conclude that what one exposes to the public is not protected. Yet, in 2017, the South Dakota Supreme Court diverged from the precedent of the United States Supreme Court and other jurisdictions' interpretation of video surveillance. In State v. Jones, the South Dakota Supreme Court concluded that the warrantless use of a pole camera outside of a residence constituted a search under the Fourth Amendment, requiring a warrant. The majority incorrectly held that the use of a public pole camera was a violation of the Fourth Amendment because "controlling precedent is clear: mere visual observation does not constitute a [Fourth Amendment] search." Instead, the Supreme Court of South Dakota deviated from the standard that the visual observation of a house that is in plain public view is "no 'search' at all." This note argues that the warrantless use of a public pole camera in Jones was not a violation of the Fourth Amendment. First, this note discusses the facts and procedure of State v. Jones. Next, it provides background information on the Fourth Amendment, examining the adaptation of the Amendment's protections as technology fundamentally alters society, as well as the interpretation of the Fourth Amendment by the South Dakota Supreme Court and other jurisdictions. Then, this note focuses on the South Dakota Supreme Court's deviation from United State Supreme Court precedent in United States v. Jones and other controlling precedent by adding a "quality-and-quantity" consideration when

2. See State v. Jones, 2017 SD 59, ¶ 37, 903 N.W.2d 101, 112 (suggesting the use of pole cameras by law enforcement "it raises the specter of an Orwellian state and unlocks the gate to a true surveillance society."). See also Daniel J. Solove, Privacy and Power: Computer Databases and Metaphors for Information Privacy, 53 STAN L. REV. 1393, 1397-98 (2001) (noting the "Big Brother" metaphor as the longstanding paradigm for conceptualizing privacy problems).


4. See Jones, 2017 SD 59, ¶¶ 20-21, 903 N.W.2d at 108-09 (referencing United States v. Houston, 813 F.3d 282, 287-88 (6th Cir. 2016)).

5. Compare Jones, 2017 SD 59, ¶ 43, 903 N.W.2d at 113-14 (holding that the use of a public pole camera was a violation of the Fourth Amendment, requiring a warrant), with United States v. Jones, 565 U.S. 400, 412 (2012) (holding long-term surveillance through the use of a camera is constitutionally permissible), and Houston, 813 F.3d at 287-88 (holding that where agents obtained video footage of defendant, suppression was not warranted under the Fourth Amendment for defendant had no reasonable expectation of privacy from a camera that was located on top of a public utility pole which captured the same view enjoyed by those passing by on public roads).

6. Jones, 2017 SD 59, ¶ 43, 903 N.W.2d at 113-14. Although the court found there was a Fourth Amendment violation, the majority ultimately concluded Jones's motion to suppress was properly denied based on the good faith exception to the exclusionary rule. Id. ¶ 43, 903 N.W.2d at 115.

7. Id. ¶ 63, 903 N.W.2d at 120-21 (Gilbertson, C.J., concurring in result).


9. Jones, 2017 SD 59, ¶ 43, 903 N.W.2d at 113-14. See also infra Part IV (comparing the controlling precedent of United States v. Jones to State v. Jones as well as the use of pole cameras in other jurisdictions).

10. See infra Part II (outlining the facts and procedures of State v. Jones).

11. See infra Part III (detailing background information on the Fourth Amendment and its adaption to increased amplified technology developments in recent centuries).
analyzing Fourth Amendment violations. In doing so, this note will illustrate that the South Dakota Supreme Court majority in Jones erroneously found a Fourth Amendment violation by inserting this consideration into their analysis. Ultimately, this note will demonstrate that the majority should have affirmed Jones’s conviction on the ground that no warrant was required for the use of a public pole camera by the State of South Dakota.

II. FACTS AND PROCEDURE

On January 23, 2015, Brookings Police Detective Dana Rogers received an informant tip regarding the sale of large quantities of marijuana by the Defendant, Joseph A. Jones. The informant detailed an operation involving the transportation of large quantities of marijuana from Jones’s home in Brookings, South Dakota to Huron, South Dakota where Brady Schutt would sell it. The informant noted that Schutt drove a red GMC truck when he would travel to Jones’s trailer. Because the informant did not give any other information, Detective Rogers confirmed the make and model of Schutt’s vehicle and verified Jones’s address. After meeting with various DCI agents following the informant’s tip, it was decided that a pole camera, owned by DCI, would be installed across from Jones’s residence for immediate monitoring. Detective Rogers subsequently arranged for the installation of the camera by a city employee. Because he believed that law enforcement often used cameras without a warrant in public areas, and had done so in previous investigations, Detective Rogers did not obtain a warrant to install the camera.

Jones’s residence was a trailer within the Lamplighter Village Trailer Park, close to the park’s entrance, in Brookings. The DCI pole camera was mounted to the top of a public utility pole across the street from Jones’s mobile home on the corner of 4th Street and 3rd Avenue. The camera was wired to the power of the public utility pole and was inside a box. The camera was approximately two

13. See infra Part IV.B (detailing how the use of a quality-and-quantity analysis is inappropriate).
14. See infra Part IV.C-D (analyzing how, based on either U.S. v. Jones, the application of the two-prong analysis of Katz, or decisions from other jurisdictions, the use of a pole camera does not constitute a Fourth Amendment search).
17. Id.
18. Id.
21. Appellee’s Brief, supra note 15, at 5 (testifying that he knew police officers used pole cameras at Hot Harley nights in Sioux Falls).
22. Jones, 2017 SD 59, ¶ 2, 903 N.W.2d at 104.
24. Id. at 5.
to four feet below the top of the light.\footnote{Jones, 2017 SD 59, ¶ 3, 903 N.W.2d at 104.} The box, but not the camera, was readily observable to the public eye.\footnote{Appellee’s Brief, supra note 15, at 5.} The camera was aimed at Jones’s mobile home, located nearest to the street as one enters into Lamplighter Village Trailer Park.\footnote{Appellant’s Brief, supra note 19, at 3.} The vantage point of the camera included the street, Jones’s front yard, the front door of the trailer, as well as the parking area for the trailer.\footnote{Id.} Jones did not have a fence or gate enclosure, or any other obstruction blocking the view of the front of his mobile home.\footnote{Appellee’s Brief, supra note 15, at 5.} The pole camera’s view was essentially the same as what one could view from a public sidewalk.\footnote{Id. at 4.

The camera allowed detectives to scan up and down, side to side, or zoom in and out.\footnote{Appellant’s Brief, supra note 19, at 3.} Detective Rogers testified that although the camera had a zoom feature, when used the image would subsequently become blurry and distorted.\footnote{Id.} Although the camera did not have night vision, it recorded continuously throughout the night.\footnote{Id. at 4.} The location of Jones’s mobile home was near two lights, one of the lights being the light on which the pole camera was installed, which sometimes illuminated the mobile home at night.\footnote{State v. Jones, 2017 SD 59, ¶ 3, 903 N.W.2d 101, 104.} Due to the light, recordings could often capture vehicles or display shadows of individuals walking up to the mobile home in the evening.\footnote{Id.} The camera, however, only recorded public areas, and did not record activity within Jones’s home.\footnote{Id.}

The pole camera ran continuously from January 23, 2015 to March 19, 2015.\footnote{Appellee’s Brief, supra note 15 at 5.} Footage could be viewed live by the detectives or at later times by viewing previously recorded footage.\footnote{Appellant’s Brief, supra note 19, at 3.} Officers could determine when Jones’s car was parked outside the mobile home, when he would leave and return, when visitors would arrive, where visitors would park in the trailer park, when Jones would leave the park with his trash, pedestrians walking by or to Jones’s trailer, as well as other things noticeable to the public eye.\footnote{Id. at 4.} Through the use of the long-term surveillance, Detective Rogers observed vehicles associated with known drug offenders, including Schutt’s red truck, arrive at varying times to Jones’s mobile home.\footnote{Jones, 2017 SD 59, ¶ 5, 903 N.W.2d 104.} Specifically, on March 6, 2015, Detective Rogers observed Jones place trash bags into his vehicle and return shortly after.\footnote{Appellee’s Brief, supra note 15 at 6.} Assuming the trash bags were thrown away at the local trailer park dumpster, Rogers drove to the west
side of the trailer park to the dumpster site and retrieved Jones's open trash bag, identified by a package addressed to Joseph Jones. After bringing the trash back to the police station, detectives searched the bags and subsequently discovered drugs and paraphernalia. Several days later, on March 11, the detectives again, through the pole camera, saw Jones load something in his car and return a short time later. The detectives again went to the trailer dumpster, identified objects linking the trash bags to Jones, and found marijuana and drug paraphernalia after searching the bags.

Based on the information seen on the pole camera, Detective Rogers requested a warrant to install a GPS tracking device on Jones's vehicle, as well as a warrant to search Jones's residence. These warrants were executed on March 19, and Jones was subsequently arrested. Jones was charged with various drug offenses. Later, he was indicted for three felonies: distribution or possession with intent to distribute marijuana, violation of a drug-free zone, and possession of a controlled substance.

On July 6, 2015, Jones filed a motion to suppress evidence, arguing that the State's use of the pole camera violated the Fourth Amendment. Two weeks later, on July 25, the circuit court issued findings, conclusions, and an order denying Jones's motion to suppress. The court held "[t]hat there was no physical invasion of [Jones's] residence or privacy, and the use of physical observation in this case, via a pole camera, was conducted on public property, and without trespassing onto [Jones's] property, and thus, no Fourth Amendment violation has occurred." The circuit court further concluded that society would not recognize an "unfettered expectation of privacy" outside one's home. On December 15th, a court trial on stipulated facts was held in which the trial court found Jones guilty on all three indictment counts. On January 19, 2016, the circuit court sentenced Jones. Nine days later, Jones appealed to the South Dakota Supreme Court on

42. Jones, 2017 SD 59, ¶ 6, 903 N.W.2d at 105.
43. Id.
44. Appellee's Brief, supra note 15, at 7.
45. Id.
46. Id.
47. Id.
48. Jones, 2017 SD 59, ¶ 8, 903 N.W.2d at 105.
49. Appellant's Brief, supra note 19, at 2. A habitual offender Information was also filed against Jones, including other misdemeanor charges that were dismissed. Id.
50. Appellee's Brief, supra note 15, at 3.
51. Jones, 2017 SD 59, ¶ 11, 903 N.W.2d at 105-06; Appellant's Brief, supra note 19, at 3.
52. Jones, 2017 SD 59, ¶ 11, 903 N.W.2d at 105-06.
53. Id. ¶ 10, 903 N.W.2d at 105.
54. Appellant's Brief, supra note 19, at 3.
55. Appellee's Brief, supra note 15, at 3. Defendant was sentenced on Count 1-Distribution or Possession with Intent to Distribute Marijuana to twelve years with five years suspended; Count 2-Drug Free Zone Created, to ten years with three years suspended; Count 3-Felony Unauthorized Possession of a Controlled Substance to six years with five years suspended. All Jones' sentences were to run consecutively. Id.
a variety of issues, including a violation of his Fourth Amendment rights based on
the use of the pole camera. On appeal, a divided South Dakota Supreme Court reversed the circuit
court's decision, holding that the use of the pole camera violated the Fourth
Amendment, but ultimately affirmed the application of the good-faith exception
to the exclusionary rule. Writing for the majority, Justice Wilbur held that the
circuit court erred in denying Jones's motion to suppress. The court held that
the warrantless use of the camera constituted a Fourth Amendment search,
determining that Detective Rogers was required to first obtain a warrant.

To reach this conclusion, the majority distinguished the facts of this case from other United States Supreme Court decisions, founded in part on the lack of
an actual physical trespass. Justice Wilbur reasoned that because the case before
the court did not involve a physical trespass into a protected area, the analysis
hinged on application of the two-part Katz test: whether Jones exhibited a
subjective expectation of privacy that was objectively reasonable. In doing so,
the majority concluded that a recent United States Supreme Court decision, United
States v. Jones, had not answered the "vexing problems" that the case at hand
required them to grapple with.

First, the majority reasoned that the recent 2012 United States Supreme Court
decision of United States v. Jones was not controlling precedent. Although the
majority noted that United States v. Jones was relevant to the present case because
both the majority and concurring decisions brought into question the legality of
warrantless video surveillance, the majority reasoned that the holding in the case
was not dispositive. The majority suggested that the Jones court declined to
address the question of whether visual observation is constitutionally permissible
if it is the result of targeted, long-term surveillance. In the majority's opinion,
because there is no controlling law from the United States Supreme Court

56. Id. Jones also argued that the Good Faith Exception to the Fourth Amendment did not allow for admission of the challenged evidence. Appellant's Brief, supra note 19, at 9-15.
58. Jones, 2017 SD 59, ¶ 1, 43, 903 N.W.2d at 104.
59. Id. ¶ 43, 903 N.W.2d at 113-14.
60. Id. ¶¶ 14-16, 903 N.W.2d at 106-07.
61. Id. ¶ 25, 903 N.W.2d at 109-10; see Katz v. United States, 389 U.S. 347, 351 (1967) (noting that cases have deviated from the property-based approach).
62. Id. ¶ 26, 903 N.W.2d at 110. See also Kyllo v. United States, 533 U.S. 27 (2001) (holding that thermal imaging technology of a home violated a reasonable expectation of privacy).
63. Jones, 2017 SD 59, ¶ 26, 903 N.W.2d at 110.
64. Id. ¶¶ 17-18, 903 N.W.2d at 107-08.
65. Id. ¶ 18, 903 N.W.2d at 107 (quoting that the Jones opinion only said, "our cases suggest that such visual observation is constitutionally permissible, it may be that achieving the same result [(targeted, long-term surveillance)] through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy . . ."). United States v. Jones, 565 U.S. 400, 412 (2012) (emphasis added)).
concerning this long-term, remote surveillance, they were required to apply the two-part *Katz* test.66

In applying the *Katz* test, the majority reasoned that the “advancement in technology” has changed privacy expectations.67 In the court’s opinion, existing Fourth Amendment doctrine and precedent must account for whether the increase and innovations in technology, such as amplified surveillance techniques, would change whether an individual’s “reasonable expectations of privacy were violated by the long-term monitoring . . . .”68 Based on this notion, the majority relied on Justice Alito’s concurrence in *United States v. Jones* to grapple with the concept of whether long-term surveillance changes an individual’s objective and subjective expectation of privacy.69 Dispositive for the majority was the argument that courts faced with facts involving video surveillance of activities outside of a defendant’s home should consider the aggregate nature of such surveillance.70 In the court’s opinion, the fact that “the public does not get exposed to the aggregate of another’s comings and goings” was a factor that ought be considered and weighed.71

Thus, the majority examined both Jones’s subjective and objective expectations of privacy under the two prongs of *Katz*.72 The majority reasoned that Jones had a subjective expectation of privacy based on “the amassed nature of Detective Rogers’s surveillance of Jones’s activity.”73 In accordance with Justice Alito’s concurrence from *Jones*, Justice Wilbur opined that the essence of one’s expectation of privacy changes when you look at the quality—and—quantity of the surveillance.74 The majority also found that Jones’s subjective expectation of privacy was reasonable.75 Operating on the premise that *United States v. Jones* left open the question of whether long-term surveillance can trigger a reasonable expectation of privacy, the majority reasoned that based on the facts at hand, Jones had a reasonable expectation of privacy “in the whole of” his movements which were being exposed to the public.76

Finally, the majority noted that a group of cases have concluded that what one exposes to the public is not protected under the Fourth Amendment and that as such, law enforcement can “augment their sensory faculties” through the use of technology, such as pole cameras.77 The majority suggested that these decisions

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66. *Id.* ¶26, 903 N.W.2d at 110.
67. *Id.* ¶18, 903 N.W.2d at 107.
68. *Id.* ¶18, 903 N.W.2d at 107-08 (quoting *Jones*, 565 U.S. at 430-31 (Alito, J., concurring)).
69. *Id.* ¶26, 903 N.W.2d at 110 (citing *Jones*, 565 U.S. at 430-31 (Alito, J., concurring)).
70. *Id.* ¶20, 903 N.W.2d at 108.
71. *Id.*
72. *Id.* ¶20-43, 903 N.W.2d at 110-114.
73. *Id.* ¶31, 903 N.W.2d at 111.
74. *Id.* The majority also took into consideration, based on a quality—and—quantity analysis, that pole camera surveillance “does not grow weary, or blink, or have family, friends, or other duties to draw its attention.” *Id.* ¶36, 903 N.W.2d at 112.
75. *Jones*, 2017 SD 59, ¶34, 903 N.W.2d at 111-12.
76. *Id.*
77. See *id.* ¶20, 903 N.W.2d at 108 (citing United States v. Houston, 813 F.3d 282, 288 (6th Cir. 2016)) (holding there was no reasonable expectation of privacy from a public utility pole camera for it
rely on the reasoning found in *Katz, Knotts,* and *Ciraolo.* The court dismissed these jurisdictions, however, suggesting that these decisions "by federal courts of appeal and other lower courts do not bind this Court's examination of the question of whether Jones had a reasonable expectation of privacy that society would recognize as reasonable." Thus, the majority disposed of both the United States Supreme Court cases and other federal courts of appeal. Through this analysis, the court concluded that the warrantless use of the pole camera violated the Fourth Amendment.

Although the court found that there was a Fourth Amendment violation, the majority ultimately concluded that Jones's motion to suppress was properly denied based on the good faith exception to the exclusionary rule. Noting that the Fourth Amendment does not mandate complete exclusion of evidence "when officers conduct an illegal search," the court reasoned that Detective Rogers did not act in bad faith or that suppression of the evidence in this case would deter law enforcement wrongdoing. Further, based on the fact that the lower court had captured the same view enjoyed by those passing by on public roads); United States v. Anderson-Bagshaw, 509 F. App'x 396, 405-06 (6th Cir. 2012) (holding that the camera in question only revealed only Bagshaw's activities outside in her yard—a fixed space which was open to public view and as such did not present a reasonable expectation of privacy); United States v. Brooks, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012) (holding that law enforcement observing a defendant's actions as recorded through the use of a pole camera in the same way had they stationed themselves outside of his or her residence does not infringe upon the Fourth Amendment); United States v. Campuzano-Chavez, No. CR-15-00154-HE, 2016 WL 879326, at *4 (W.D. Okla. Mar. 7, 2016) (holding that the defendant's Fourth Amendment rights were not violated by video surveillance observing no more than what any passersby would be able to observe and where there is no reasonable expectation of privacy); United States v. Gilliam, Nos. 02:12-CR-93, 02:13-CR-235, 2015 WL 5178197, at *9 (W.D. Penn. Sept. 4, 2015) (holding that the defendant could not establish an objectively reasonable expectation of privacy when the images captured by the pole camera were visible to any person located on the public street); Martinez-Turcio v. United States, No. 6:10-CR-00054-GRA-1, 2013 WL 12106924, at *9-10 (D.S.C. Oct. 18, 2013) (holding that the officer's use of a public camera was not surveillance which intruded into the privacy of the residence and instead was clearly visible from a public vantage point); United States v. Baltes, No. 8:11-CR-282 (MAD), 2013 WL 11319002, at *7 (N.D.N.Y. Apr. 22, 2013) (holding that the use of a pole camera in a public place that captured video of the exterior of the defendant's residence did not require a warrant); United States v. Nowka, No. 5:11-CR-474-VEH-HGD, 2012 WL 6610879, at *5 (N.D. Ala. Dec. 17, 2012) (holding that a pole camera which monitored defendant’s movements in plain view was not a violation of the Fourth Amendment); United States v. Clarke, No. CRIM. 3:04 CR 10839002, 2005 WL 2645003, at *2 (D. Conn. July 19, 2005) (holding that because "[a]ll of the activity in question could have been seen with only the naked eye, the use of telephoto capabilities does not change the nature of the protection afforded under the Fourth Amendment").

78. *Jones,* 2017 SD 59, ¶ 20, 903 N.W.2d at 110 (citing *Katz* v. United States, 389 U.S. 347, 348-51 (1967) (creating a standard which analyzes an individual's subjective and objective reasonable expectation of privacy); United States v. Knotts, 460 U.S. 276, 285 (1983) (holding that there was no Fourth Amendment search by using a beeper to a car as it could have also been tracked by visual surveillance); California v. Ciraolo, 476 U.S. 207, 213 (1986) (holding that "the mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible").


80. See id. (noting "we do not find dispositive that the United States Supreme Court has held years ago—in regard to observation via other sense-enhancing means—that a search did not occur").

81. Id. ¶ 43, 903 N.W.2d at 113-14.

82. Id. ¶ 48, 903 N.W.2d at 115.

found "Detective Rogers was not aware of any prior use of pole cameras by law enforcement where a search warrant was required prior to its installation," the majority reasoned that Detective Rogers had acted reasonably.84 Thus, although the court held that the pole camera constituted a Fourth Amendment search, it affirmed the denial of Jones's motion to suppress based on the good faith exception to the exclusionary rule.85

Chief Justice Gilbertson, joined by Justice Zinter, concurred in the result but dissented from the majority's analysis, arguing that the majority's conclusion ignored the "overwhelmingly—if not unanimously—acknowledged" opinion of the United States Supreme Court and courts throughout the nation that "mere visual observation does not constitute a search."86 Chief Justice Gilbertson reasoned that the facts before the court were not facts of first impression, and based on the explicit statements from the United States Supreme Court in Jones, as well as other courts across the country which serve as persuasive authority, there was no Fourth Amendment violation in this case.87 Had the court employed the binding opinions of Kyllo, Katz, and Jones, Chief Justice Gilbertson argued that the majority would have properly addressed the issues at hand: (i) that the camera was "in general public use" and (ii) that the camera did not explore "details of the home that would previously have been unknowable without physical intrusion[]."88

Apart from his differing opinion regarding the majority "stretching the Fourth Amendment in contravention of controlling precedent" such as United States v. Jones, Chief Justice Gilbertson further pointed out the flawed premise by which the court grounded its finding of a reasonable expectation of privacy.89 By relying on Justice Alito's concurrence from Jones, Chief Justice Gilbertson argued that the majority adopted an incorrect approach for "the Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained."90 In his opinion, the question of whether a Fourth Amendment search occurred depends on the "method of surveillance, not the product of the surveillance."91 By incorporating a new element into the reasonable expectation of privacy analysis—evaluating the aggregate nature of the long-term surveillance through a "quality—and—quantity" examination—Chief Justice Gilbertson maintained that the majority strayed away from the United States Supreme Court, which has "explicitly and implicitly rejected the quality—and—quantity of information approach."92 Therefore, Chief Justice Gilbertson concurred with the majority's decision to affirm the circuit court's denial of

84. Id. ¶ 48, 903 N.W.2d at 115.
85. See id. ¶ 49, 903 N.W.2d at 115 (reversing in part and affirming in part).
86. Id. ¶ 52, 903 N.W.2d at 115 (Gilbertson, C.J., concurring in result) (quoting United States v. Jones, 565 U.S. 400, 412 (2012)).
87. Jones, 2017 SD 59, ¶ 52, 903 N.W.2d at 115.
88. Id. ¶¶ 59-60, 903 N.W.2d at 118 (quoting Kyllo v. United States, 533 U.S. 27, 40 (2001)).
89. Jones, 2017 SD 59, ¶ 62, 903 N.W.2d at 120.
90. Id. ¶ 59, 903 N.W.2d at 118 (quoting Kyllo, 533 U.S. at 37).
91. Id. (emphasis added).
92. Id. ¶ 63, 903 N.W.2d at 121.
Jones’s motion to suppress, but on the grounds that the pole camera was not a Fourth Amendment search.93

III. BACKGROUND

Both the United States and the State of South Dakota grant citizens the right to be free from unreasonable searches or seizures, endowed in the Fourth Amendment of the United States Constitution, as well as Article VI of the South Dakota Constitution.94 This means the State may not unreasonably search or seize an individual.95 It is well established that the Fourth Amendment provides these basic protections in that “the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure[].”96

A. HISTORY OF THE FOURTH AMENDMENT AND U.S. SUPREME COURT CASES

Traditionally, Fourth Amendment constitutional protections were tied to the common law understanding of trespass, such that a search occurred when the government physically intruded upon a person’s property.97 Grounded on a property-based test, the Supreme Court has consistently held that, unless an exception applies, a Fourth Amendment search occurs if the search is accomplished by a physical trespass into an area protected by the Fourth Amendment.98 For example, in Olmstead v. United States, the Supreme Court held that evidence obtained through the sense of hearing through the use of

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93. See id. ¶ 51, 903 N.W.2d at 115 (concurring in result).
94. U.S. CONST. amend. IV; S.D. CONST. art. VI, § 11.
The Fourth Amendment to the United States Constitution provides:
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. Similarly, Article VI, § 11, of the South Dakota Constitution provides:
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.
95. U.S. CONST. amend. IV; S.D. CONST. art. VI, § 11.
stressing the precedent and importance of Terry v. Ohio’s understanding of judicial approval); United
States v. Chadwick, 433 U.S. 1, 9 (1977) (repeating that police should obtain judicial authorization if
practicable); Chimel v. California, 395 U.S. 752, 762 (1969) (reiterating the need for judicial approval if
practicable); Carroll v. United States, 267 U.S. 132, 153 (1925) (suggesting that police should attempt to
obtain judicial approval through a warrant when possible); Johnson v. United States, 333 U.S. 10, 14-15
(1948) (recognizing the need for advance judicial approval); Carroll v. United States, 267 U.S. 132, 153
(1925) (suggesting that police should attempt to obtain judicial approval through a warrant when possible);
United States v. Johnson, 637 F.2d 532, 534 (8th Cir. 1980) (quoting this same language from Terry v.
Ohio).
97. See Olmstead v. United States, 277 U.S. 438, 464-66 (1928) (holding that obtaining evidence
through the sense of hearing does not constitute a search).
wiretapping did not constitute a search as there was no physical invasion on an individual’s property to gather evidence.99 The Olmstead opinion restricted what encompassed a Fourth Amendment violation to when “there has been an official search and seizure of a person, or such a seizure of his papers or tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.”100 Thus, initially, the Fourth Amendment was understood to embody concern regarding the government’s actual, physical trespass upon specific areas the constitution enumerates, such as “persons, houses, papers, and effects.”101 As technology developed, however, the United States Supreme Court was forced to expound upon the bounds of what constitutes a “search,” such that an actual physical trespass need not occur for the Fourth Amendment protections to potentially be invoked.102

Katz v. United States harkened the beginning of the Supreme Court’s move from a physical trespass analysis, founded in Olmstead, to a focus that emphasized the protection of privacy.103 In Katz, police installed an electronic surveillance device to listen to various conversations without physically penetrating the phone booth itself.104 While acknowledging that “the absence” of physical penetration was at one time enough to foreclose Fourth Amendment inquiry, the Supreme Court shifted the analysis to whether the government had violated a person’s reasonable expectation of privacy “for the Fourth Amendment protects people, not places.”105 Thus, the Katz majority articulated the principle: “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”106 In his concurrence, Justice Harlan formulated a two-prong test that examined whether “a person . . . exhibited an actual (subjective) expectation of privacy and, second, whether that expectation [was] one that society is prepared to recognize as ‘reasonable.’”107

Thus, under the first Katz prong, the defendant must establish that he or she subjectively believed his activities in front of his home were concealed from public view.108 This subjective expectation of privacy has been held to not extend

100. Id. at 466.
101. Id. at 465.
102. See, e.g., Renée McDonald Hutchins, Tied Up in Knotts? GPS Technologies and the Fourth Amendment, 55 UCLA L. REV. 409, 423-25 (2007) (suggesting that “with Olmstead, the Court recognized a new constitutional threshold for Fourth Amendment protection—tangible physical intrusion by the government” but that the analysis central focus on the “physical” nature of a search must change with technology).
103. See People v. Scott, 593 N.E.2d 1328, 1332-33 (N.Y. 1992) (suggesting that in Katz v. United States, [the United States Supreme Court] abandoned the Olmstead property-oriented physical trespass approach to its current Fourth Amendment jurisprudence which focused on the Fourth Amendment’s protection of people and not simply physical areas).
104. Katz v. United States, 389 U.S. 347, 348 (1967) (noting that the FBI placed an electronic device on the exterior of the phone booth which enabled them to listen to the defendant’s phone conversations).
105. See id. at 351-53 (abandoning the “trespass doctrine” and shifting the focus to expectations of privacy).
106. Id. at 351.
107. Id. at 361 (Harlan, J., concurring).
108. Id.
to items or places that an individual exposes to the public. For example, in United States v. Bucci, a subjective expectation of privacy is lessened when "[t]here are no fences, gates or shrubbery located in front of [the defendant's residence] that obstruct the view of the driveway or the garage from the street." Thus, even when a trespass does not physically occur, the United States Supreme Court has held that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." Often, as discussed below, the South Dakota Supreme Court has applied the two-part Katz test to determine whether a defendant has a reasonable expectation of privacy. At times, the Katz test of whether an individual has an expectation of privacy that society is prepared to recognize as reasonable has met criticism as being circular and unpredictable. Other scholars have criticized the two-prongs as a test that allows for judicial activism, suggesting that the test allows a judge to subjectively define an "objective expectation of privacy" according to his or her own preconceptions.

More recently, in United States v. Knotts, the United States Supreme Court considered whether the use of a tracking device beeper on a public road to monitor the movements of the defendant was a Fourth Amendment search. The Court

109. See Katz, 389 U.S. at 351 (stating that "[t]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"). See also Kyllo v. United States, 533 U.S. 27, 31-33 (2001) (noting lawfulness of unenhanced visual surveillance of a home); California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (using the legal principle that one does not have an expectation of privacy in the public as dispositive here); Kyllo v. United States, 533 U.S. 27, 31-33 (2001) (noting lawfulness of unenhanced visual surveillance of a home).

110. United States v. Bucci, 582 F.3d 108, 116-17 (1st Cir. 2009) (drawing reference from Katz, 389 U.S. at 351 and the notion that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection").

111. Kyllo, 533 U.S. at 33.

112. See, e.g., State v. Zahn, 2012 SD 19, ¶ 20, 812 N.W.2d 490, 496 (quoting State v. Thunder, 2010 SD 3, ¶ 16, 777 N.W.2d 373, 378) (holding "[f]irst we consider whether [an individual] exhibited an actual subjective expectation of privacy in the area searched. Second, we consider whether society is prepared to recognize that expectation of privacy as reasonable").

113. See 1 W. LAFAVE, SEARCH AND SEIZURE § 2.1(d) (3d ed. 1996) (noting "the criteria for reasonable expectations must be abstracted from the flow of life, and it is the judge's task to find and articulate those societal standards"). See also Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188 (noting "it is circular to say that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy; whether he will or not have such an expectation will depend on what the legal rule is"); Sparing v. Vill. of Olympia Fields, 266 F.3d 684, 689 (7th Cir. 2001) (referring to the "unmistakable circularity" of such an approach).

114. See, e.g., Christian M. Halliburton, How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm, 42 AKRON L. REV. 803, 826-27 (2009) (suggesting that if the Constitution's drafters intended the Fourth Amendment to protect privacy, the language "persons, houses, papers and effects" may not have been the most effective language to achieve that goal). See also United States v. Johnson, 561 F.2d 832, 851 (D.C. Cir. 1977) (MacKinnon, J., concurring) ("Katz . . . incorporates a fair amount of circularity. One will have a reasonable expectation of privacy over those areas that courts tell him he may reasonably expect to be private."); Jim Harper, Reforming Fourth Amendment Privacy Doctrine, 57 AM. U. L. REV. 1381, 1387-88 (2008) (stating that "[un]workable as a true legal test, the second part of the formulation Justice Harlan proposed in Katz is simply an invitation for judges to import their personal views and alter the actual rule set down in the case").

held that there was no reasonable expectation of privacy for the defendant on the public road, for "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Further, the Court noted that because the vehicle could have been tracked by visual surveillance and monitoring by officers, "scientific enhancement of this sort raises no constitutional issues that visual surveillance would not also raise." Thus, the Court reasoned that police efficiency in use of the beeper did not equate with an unconstitutional search.

A year later, the Supreme Court distinguished the use of beepers on public roads and inside homes, ruling in United States v. Karo that the government’s use of an electronic beeper to determine what was inside a house was a search within the purview of the Fourth Amendment. The Court differentiated the facts of Karo from Knotts in that the monitoring of the property was property that had been withdrawn from public view, placed in the home, and as such constituted a reasonable expectation of privacy.

A few years later, in California v. Ciraolo, the Court analyzed the issue of whether a warrantless aerial observation of a fenced-in backyard within the curtilage of a home was permissible under the Fourth Amendment. In that case, officers utilized an airplane to observe a fenced-in backyard within the curtilage of the defendant’s home. Unlike Kyllo, however, the officers did not use sensory enhancing technology, but instead used their own vision. The Supreme Court held that this type of naked-eye aerial observation did not violate the Fourth Amendment. As to the second part of the analysis under Katz, the Court concluded that defendant’s expectation that his marijuana garden was protected from aerial observations was not recognized by society as a reasonable expectation of privacy. Specifically, the Court emphasized that the Fourth Amendment does not require police to obtain a warrant “in order to observe what is visible to the naked eye.” Electronic beepers, aerial surveillance, and the use of cameras, however, were not the only technological advancement that would come before the United States Supreme Court.

116. Id. at 276.
117. Id. at 285.
118. Id. at 284-85.
120. Id. at 715-16.
122. Id.
123. Id.
124. Id. at 213-15.
125. Id.
126. Id. at 215.
B. TECHNOLOGICAL SURVEILLANCE POST-\textit{KATZ}: DEVELOPMENTS IN THE U.S. SUPREME COURT

Further advancements in technological innovation, including the augmentation of senses by technology, has led the United States Supreme Court to reconsider the bounds of Fourth Amendment protection in the twenty-first century.\textsuperscript{127} For example, in the 2001 case of \textit{Kyllo v. United States}, law enforcement used a thermal-imaging device from a public street outside of a defendant’s home to investigate the suspected growing of drugs in the residence.\textsuperscript{128} The Supreme Court held that the use of this sense-enhancing device violated the Fourth Amendment because the information obtained by the police could not have been acquired without physically entering into the home.\textsuperscript{129} The Court reasoned that “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search” especially where the technology in question is not in general public use.\textsuperscript{130} The Court stated, “[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”\textsuperscript{131} Notable is the \textit{Kyllo} Court’s distinction between mere visual observation and law enforcement’s use of “sense-enhancing technology” in order to reach their conclusion.\textsuperscript{132} Thus, dispositive for Fourth Amendment cases for the United States Supreme Court post-\textit{Kyllo} is an analysis of (i) “the Government [using] a device that is not in general public use,” and that the use of said device was (ii) “to explore details of the home that would previously have been unknowable without physical intrusion[.]”\textsuperscript{133}

Most recently, in \textit{United States v. Jones}, Justice Scalia, writing for a five-Justice majority, noted that a person’s “Fourth Amendment rights do not rise or fall with the \textit{Katz} formulation” and further that “the \textit{Katz} reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test.”\textsuperscript{134} Justice Scalia further distinguished \textit{Kyllo}’s use of thermal-imaging devices from \textit{Knotts}, noting that \textit{Knotts} only involved information about

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\textsuperscript{127} Compare United States v. Knotts, 460 U.S. 276, 285 (1983) (holding that monitoring of a beeper does not violate the Fourth Amendment when it reveals no information that could not have been obtained through visual surveillance), with United States v. Karo, 468 U.S. 705, 714-15 (1984) (holding that monitoring of a beeper violates the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance, and a warrant is required), and United States v. Jones, 565 U.S. 400, 403-04 (2012) (holding that GPA tracking constituted a Fourth Amendment search). See also Russell L. Weaver et al., Principles of Criminal Procedure 95 (4th ed. 2012) (discussing the enhancement of senses by police officers using a variety of techniques).


\textsuperscript{129} \textit{Id.} at 40.

\textsuperscript{130} \textit{Id.} at 34.

\textsuperscript{131} \textit{Id.} at 40.

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.}

activity in public. In a concurrence, Justice Alito argued the use of the GPS amounted to a search based on the prolonged period of surveillance. In his opinion, the quality—and—quantity of the monitoring involved a degree of intrusion that a reasonable person would not anticipate.

C. DEVELOPMENTS IN THE SOUTH DAKOTA SUPREME COURT

Similar to the evolution of Fourth Amendment analysis at a federal level, the South Dakota Supreme Court long employed a physical trespass analysis to review if a Fourth Amendment search had occurred. However, just as the United States Supreme Court changed its focus, the South Dakota Supreme Court also began to shift its analysis to the two-part Katz test to determine whether an individual has a reasonable expectation of privacy in an area. The South Dakota Supreme Court first considers whether an individual exhibited an actual subjective expectation of privacy in the area searched. Then, the court considers whether society is prepared to recognize that expectation of privacy as reasonable. The court applies a case-by-case approach to each Fourth Amendment violation issue, noting that “whether [an individual] has a legitimate expectation of privacy in [an area] is determined on a ‘case-by-case basis, considering the facts of each particular situation.”

Advancements in technological innovation, including the augmentation of senses by technology, has compelled the South Dakota Supreme Court to reconsider its analysis of Fourth Amendment searches and seizures. In State v. Sweedland, the South Dakota Supreme Court recognized this change, noting the importance of police being allowed to use developing technology, especially in the “often competitive enterprise of ferreting out crime.” A recent example of the South Dakota Supreme Court grappling with changes in technology is State v.

137. Id. at 430.
139. State v. Thunder, 2010 SD 3, ¶ 16, 777 N.W.2d 373, 378-79 (citing Cordell v. Weber, 2003 SD 143, ¶ 12, 673 N.W.2d 49, 53). See also State v. Lowther, 434 N.W.2d 747, 754 (S.D.1989) (noting the Katz two-part test); State v. Christensen, 2003 SD 64, ¶ 11, 663 N.W.2d 691, 694 (discussing the requirement that an individual have a reasonable expectation of privacy in the place searched).
140. Cordell, 2003 SD 143, ¶ 12, 673 N.W.2d 49, 53.
141. Thunder, 2010 SD 3, ¶ 16, 777 N.W.2d at 378-79.
142. Id. (quoting State v. Hess, 2004 SD 60, ¶ 17, 680 N.W.2d 314, 322).
143. See State v. Sweedland, 2006 SD 77, ¶ 22, 721 N.W.2d 409, 415 (discussing importance of allowing police technology); State v. Zahn, 2012 SD 19, ¶ 31, 812 N.W.2d 490, 496 (examining the use of a GPS tracking device); State v. Jones, 2017 SD 59, ¶ 37, 903 N.W.2d 101, 112 (analyzing the use of a pole camera on a public utility pole).
Zahn, where the court held that the warrantless use of a GPS tracking device attached to the defendant’s vehicle was unconstitutional. In Zahn, the majority applied the United States v. Jones physical-trespass analysis to determine whether a Fourth Amendment search occurred. After reasoning that a physical trespass had occurred, the court also reasoned that the actions constituted a search under the Katz “reasonable expectation of privacy” test. By applying Katz, the South Dakota Supreme Court distinguished between various types of electronic surveillance, noting that the GPS unit at issue in Zahn tracked “the whole of Zahn’s movements for nearly a month.” The court noted that although “personal desire for privacy alone, no matter how earnestly held, does not trigger the protections of the Fourth Amendment,” the facts specific to Zahn triggered Fourth Amendment protections under Katz.

D. DEVELOPMENTS IN OTHER JURISDICTIONS’ INTERPRETATION OF SUPREME COURT PRECEDENT

Various courts of appeals in other jurisdictions have grappled with facts similar to those found in State v. Jones, finding that the Fourth Amendment “cannot sensibly be read to mean that police [should] be no more efficient in the twenty-first century than they were in the eighteenth [century].” For example, in 2016, the Sixth Circuit Court of Appeals in United States v. Houston considered the installation of a public utility pole camera by the Bureau of Alcohol, Tobacco, Firearms and Explosives near the property of the defendant. The camera sent footage through an IP address to agents who could view it on remote computers. The monitoring from the pole camera occurred for over ten weeks. The Houston Court held that the use of the pole camera did not constitute a Fourth Amendment search as the defendant had “no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole.” Dispositive for the court was that the public utility pole captured the same views “enjoyed by passersby on public roads,” the defendant could not claim an expectation of privacy.

146. Id. ¶ 19, 812 N.W.2d at 496.
147. Id. ¶ 20, 812 N.W.2d at 496.
148. Id. ¶ 21-22, 812 N.W.2d at 497.
149. Id. ¶ 23, 812 N.W.2d at 497.
150. United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007).
151. United States v. Houston, 813 F.3d 282, 285 (6th Cir. 2016). See also United States v. Anderson-Bagshaw, 509 Fed. Appx. 396, 405-06 (6th Cir. 2012) (holding that the camera in question only revealed Bagshaw’s activities outside in the yard which was open to the public, therefore it did not present a reasonable expectation of privacy).
152. Houston, 813 F.3d at 285-86.
153. Id. at 286.
154. Id. at 287-88.
155. Id.
Years prior, in 2009, the First Circuit held in *United States v. Bucci* that an eight-month surveillance did not constitute a Fourth Amendment search.  

Dispositive for the First Circuit was that the surveillance could see what the eyes of public passersby could, noting that "[t]here was no fences, gates, or shrubbery located in front of Bucci’s residence that obstruct[ed] the view of the driveway or the garage from the street...[b]oth are plainly visible." Similarly, in 2008, the Eighth Circuit held in *Sherbrook v. City of Pelican Rapid* that use of a pole camera did not constitute a search, reasoning that what a person knowingly exposes to the public does not qualify for Fourth Amendment protection.

District courts throughout the United States have also held that electronic surveillance of public areas outside the home does not infringe upon the Fourth Amendment, regardless of the length of surveillance. For example, in *United States v. Brooks*, the District of Arizona held that a pole camera installed outside of an apartment complex to survey the parking lot of the defendant did not violate the Fourth Amendment, meaning police officers did not need a warrant before using the camera. Based on this reasoning, the court upheld a five-month-long surveillance because it “was ‘a prudent and efficient use of modern technology’ to enhance their sense of sight and allowed for law enforcement to see ‘what may be seen’ from a public vantage point where they had a right to be.” Further, the Northern District Court of Alabama in *United States v. Nowka* found that a camera mounted on a utility pole monitoring defendant’s movements in plain view for over eight months was not a violation of the Fourth Amendment. The Eastern District Court of Michigan in *United States v. Pratt* held that a fourteen-month video surveillance did not constitute a Fourth Amendment search. The court reasoned that the length of the surveillance did not render it unreasonable, for the recordings were of a view available to the public, and as such regardless the length there was “no reasonable expectation of privacy in the video footage captured by the camera.”

For many jurisdictions, the analysis turns on whether the recorded footage was within private areas in which the public eye could not see, such as inside a defendant’s fenced backyard, a hotel room, or an office, or whether the surveillance is outside of a private area, such as surveillance of the outside of a

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157. *Id.*
158. *Sherbooke v. City of Pelican Rapid*, 513 F.3d 809, 815 (8th Cir. 2008).
161. *Id.*
164. *Id.*
defendant’s home. For example, in United States v. Gilliam, the Western District Court of Pennsylvania reasoned that the defendant could not establish an objectively reasonable expectation of privacy when the images captured by a pole camera were areas that were visible to any person located on the public street. Dispositive for the majority was that a pole camera was different than a GPS device, so the use of a camera to record activity visible to the naked eye did not violate the Fourth Amendment. The District Court of South Carolina held in United States v. Martinez-Turcio that an officer’s use of a public camera was not surveillance that intruded into the privacy of the residence for the camera was instead clearly visible from a public vantage point. Therefore, the court held that the officer’s observations from a public vantage point where the officer has a right to be and by which is an area clearly visible to a passerby does not make the surveillance unlawful. In United States v. Aguilera, the Eastern District Court of Wisconsin held that a pole camera surveilling the defendant’s home to monitor traffic coming and going from the home was not a violation of the defendant’s Fourth Amendment rights. The court reasoned that police “could have stood on the street outside [the] defendant’s house and observed the exact same comings and goings from his driveway” in the same manner, and as such, there was no Fourth Amendment violation.

Furthermore, in United States v. Campuzano-Chavez, the Western District Court in Oklahoma held that the defendant’s Fourth Amendment rights were not violated by video surveillance, for the surveillance observed no more than what any passerby would be able to observe. As such, the court held that there was

165. Compare United States v. Gilliam, Nos. 02:12-CR-93, 02:13-CR-235, 2015 WL 5178197, at *9 (W.D. Penn. Sept. 4, 2015) (holding that the defendant could not establish an objectively reasonable expectation of privacy when the images captured by the pole camera were visible to any person located on the public street), with Martinez-Turcio v. United States, No. 6:10-CR-00054-GRA-1, 2013 WL 12106924, at *9-10 (D.S.C. Oct. 18, 2013) (holding that the officer’s use of a public camera was not surveillance which intruded into the privacy of the residence and instead was clearly visible from a public vantage point), and United States v. Baltes, No. 8:11-CR-282 (MAD), 2013 WL 11319002, at *7 (N.D.N.Y. Apr. 22, 2013) (holding that the use of a pole camera in a public place that captured video of the exterior of the defendant’s residence did not require a warrant), and United States v. Nowka, No. 5:11-CR-474-VEH-HGD, 2012 WL 6610879, at *5 (N.D. Ala. Dec. 17, 2012) (holding that a pole camera which monitored defendant’s movements in plain view was not a violation of the Fourth Amendment), and United States v. Clarke, No. CRIM. 3:04 CR SRU, 2005 WL 2645003, at *2 (D. Conn. July 19, 2005) (holding that because “[a]ll of the activity in question could have been seen with only the naked eye, the use of telephoto capabilities does not change the nature of the protection afforded under the Fourth Amendment). But see United States v. Koyomejan, 970 F.2d 536, 541 (5th Cir. 1992) (holding that surveillance inside an office constituted a Fourth Amendment search as it was not viewable from the public); United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987) (reasoning that surveillance of a backyard enclosed with a fence was not an area open to the public eye); United States v. Nerber, 222 F.3d 597, 606 (9th Cir. 2000) (finding a Fourth Amendment search of surveillance which videotaped inside a hotel room).

167. Id.
169. Id.
171. Id.
no reasonable expectation of privacy in the area outside of the defendant’s home.173 In United States v. Baltes, the Northern District Court of New York held that the use of a pole camera in a public place that captured video of the exterior of the defendant’s residence did not require a warrant as the government agents were constitutionally permitted to view whatever portions of the defendant’s home were visible.174 Finally, in United States v. Clarke the District Court in Connecticut reasoned that because “[a]ll of the activity in question could have been seen with only the naked eye, and the use of telephoto capabilities (capabilities that would be available to any neighbor who wished to purchase similar equipment) to clarify that viewing does not change the nature of the protection afforded” under the Fourth Amendment.175 Thus, the court held that because the view of the defendant’s home was not a “search” within the Fourth Amendment as it was an area within the public eye, the “how and why the activities were viewed was not relevant.”176

IV. ANALYSIS

In State v. Jones, the majority analyzed the use of a public pole camera by the police through a quality-and-quantity approach.177 Under similar facts, the United States Supreme Court has held that such visual surveillance does not constitute a Fourth Amendment search.178 Further, other jurisdictions find that identical circumstances do not require a warrant.179 The ruling in Jones, therefore, strays from both binding and persuasive opinions, and in doing so, creates a new standard specifically for the State of South Dakota.180 The facts of the case should have been analyzed under United States Supreme Court precedent, which would have required the South Dakota Supreme Court to analyze if (i) the device used by the State was in “general public use,” and whether (ii) the State used said device “to explore details of the home that would previously have been unknowable without physical intrusion[,]”181 Furthermore, even if the court were to analyze the facts under the two-pronged test from Katz, the South Dakota Supreme Court

173. Id.
176. Id. (emphasis added).
178. See infra Part IV.A (comparing the holding of State v. Jones to similar facts of controlling United States precedent cases).
179. See infra Part IV.D (analyzing the holding of State v. Jones compared to other jurisdictions).
180. See Jones, 2017 SD 59, ¶ 61, 903 N.W.2d at 119 (Gilbertson, C.J., concurring in the result) (arguing that “because of the Court’s decision today, this overwhelming body of authority may be followed by a solitary dissenting opinion”).
181. See id. ¶ 60, 903 N.W.2d at 118 (Gilbertson, C.J., concurring in the result) (suggesting that the facts of this case fall “squarely” into the considerations of Kyllo and Katz). See also infra Part IV.A-B (analyzing that under United States v. Jones and Kyllo v. United States, the court analyzed the wrong factors, employing instead a quality-and-quantity test).
should have found Jones did not have a subjective or reasonable expectation of privacy.  

Finally, the South Dakota Supreme Court reached its conclusion by ignoring jurisdictions throughout the nation who have recognized that no rule is more established than the understanding that public visual observations do not constitute a search. Thus, the Jones majority went against controlling and persuasive national precedent, regardless of the test employed.

**A. THE IRONY DOES NOT ESCAPE US: THE MAJORITY DEVIATED FROM UNITED STATES V. JONES AND OTHER UNITED STATES SUPREME COURT PRECEDENT**

The United States Supreme Court "has to date not deviated from the understanding that mere visual observation does not constitute a search."  

Ironically, just five years ago, the United States Supreme Court grappled with facts similar to those in *State v. Jones* with a defendant of the same last name. As was noted explicitly by the United States Supreme Court in *United States v. Jones*, even assuming "that '[t]raditional surveillance' of Jones for a four-week period 'would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,' our cases suggest that such visual observation is constitutionally permissible." Ignoring this precedent, the South Dakota Supreme Court majority opined in *State v. Jones* that "there is no controlling law" that "concerns long-term, remote surveillance[]." Through this blanket statement, the *State v. Jones* majority attempted to suggest that *United States v. Jones* is outdated and non-controlling, even though the United States Supreme Court explicitly stated in its *Jones* opinion that "visual observation is constitutionally permissible."  

The South Dakota Supreme Court's contention that *United States v. Jones* does not apply centers on a single sentence in the *Jones* opinion in which Justice Scalia, author of the majority, states that, although "our cases suggest that such visual observation is constitutionally permissible [, i]t may be that achieving the same result [(targeted surveillance)] through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy[]."

With this

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182. *See Jones*, 2017 SD 59, ¶¶ 54-55, 903 N.W.2d at 116 (Gilbertson, C.J., concurring in the result) (noting that even under *Katz*, Jones did not have a subjective or reasonable expectation of privacy). *See also infra* Part IV.C (analyzing that even under the two prongs of *Katz* the majority should have come to the conclusion that Jones did not have a subjective or reasonable expectation of privacy).

183. *See Jones*, 2017 SD 59, ¶ 61, 903 N.W.2d at 119 (Gilbertson, C.J., concurring in result) (pointing out that these facts are sufficient enough for essentially every other court in the nation to conclude that video camera surveillance in a public place does not violate the Fourth Amendment). *See also infra* Part IV.D (outlining cases in which long-term surveillance has been held to not constitute a Fourth Amendment search).

184. *See infra* Part IV.A-D (suggesting that regardless the precedent or test employed, the United States Supreme Court and other persuasive authorities would have denied Jones’s motion to suppress).


187. *Id.*

188. *Jones*, 2017 SD 59, ¶ 40, 903 N.W.2d at 113.


quote, the South Dakota Supreme Court suggested the United States Supreme Court holding in *Jones* was not dispositive and instead left open the constitutionality of long-term surveillance.\(^{191}\) However, this characterization takes Justice Scalia's comment out of context, ignoring the fact that the United States Supreme Court has discussed electronic, sense-enhancing means and technology as a Fourth Amendment search in multiple cases.\(^{192}\)

For example, in *Kyllo v. United States*, decided nearly eleven years before *United States v. Jones*, the United States Supreme Court concluded that the use of a thermal-imaging device "aimed at a private home from a public street to detect relative amounts of heat within the home, constituted a ‘search’ within the meaning of the Fourth Amendment."\(^{193}\) Notably, in reaching this conclusion, the *Kyllo* Court distinguished mere visual observation from law enforcement's use of "sense-enhancing technology[.]\(^{194}\) The Court stated, "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant."\(^{195}\) Justice Scalia's *Jones* opinion cites this seminal case of *Kyllo* in making the distinction that mere visual observation does not constitute a search compared to the use of a thermal-imaging device which, even without a trespass "explores details of the home that would previously have been unknowable."\(^{196}\) The discussion by Justice Scalia in *Jones* that visual observation through electronic means, without an accompanying trespass, may be an unconstitutional invasion of privacy refers to the type of situation found in *Kyllo*, in which there is no "physical trespass" per se, but the interior of the home is still searched due to enhanced technology.\(^{197}\) Therefore, Justice Scalia's comment in the *Jones* opinion, that the South Dakota Supreme Court extracted out of context, does not create an "open window" in which long-term surveillance has not been decided by the Court, but rather points to the type of technology found in the existing precedent of *Kyllo*.\(^{198}\) By understanding Justice Scalia's comment in *Jones* as a foreboding referral to situations in which the use of sense-enhancing means without a per se physical trespass may be a search under the Fourth Amendment, one can see that *Jones* merely distinguishes the visual observation of public areas

\(^{191}\) *Id.* ¶¶18-26, 903 N.W.2d at 108-10.


\(^{193}\) *Id.* at 29.

\(^{194}\) *Id.* at 34-35.

\(^{195}\) *Id.* at 40.

\(^{196}\) See *Jones*, 565 U.S. at 412 (citing *Kyllo*, 533 U.S. at 31-32).

\(^{197}\) Compare *id.* (stating that "our cases suggest that such visual observation is constitutionally permissible"), with *Kyllo*, 533 U.S. at 34-35 (holding that the technology in question is not in general public use and as such the information obtained by the thermal imager was the product of a search).

\(^{198}\) *Jones*, 565 U.S. at 412. See also *State v. Jones*, 2017 SD 59, ¶ 34, 903 N.W.2d 101, 111 (stating, "[a]gain, the United States Supreme Court left open the question whether long-term surveillance is an unconstitutional invasion of privacy").
used through a camera from the troubling use of "sense-enhancing technology" that explores inside a zone of privacy.¹⁹⁹

Notably, the use of "sense-enhancing technology" was not the case in *State v. Jones.*²⁰⁰ In *State v. Jones,* the circuit court found that "the pole camera could not see inside of [Jones's] residence or in the backyard[]."²⁰¹ The camera used in *Jones* did not "explore details of the home that would previously have been unknowable without physical intrusion" as was the concern with the thermal-imaging device at issue in *Kyllo.*²⁰² Further, apart from the method of surveillance, Jones's residence had no obstructions preventing public observation of the premise.²⁰³ These facts alone have been sufficient for a vast majority of courts to conclude that video surveillance with cameras positioned in public areas is not a Fourth Amendment search.²⁰⁴

Therefore, contrary to the majority's assertion that there is no controlling United States Supreme Court authority, *State v. Jones* was controlled by the binding opinions of *United States v. Jones* and other precedent cases such as *Kyllo v. United States.*²⁰⁵ When analyzing the facts under these opinions, the question before the South Dakota Supreme Court was whether the device used by the detectives, a video camera, was (i) "in general public use" and whether the device was used to (ii) "explore details of the home that would previously have been unknowable without physical intrusion[]."²⁰⁶ Under this analysis, the South Dakota Supreme Court should have come to the conclusion that cameras have been in the general public's use for years, and that the camera at issue not only lacked any sort of sound or night vision equipment, but it also was not the type of structure-penetrating camera such as the thermal-imaging device in *Kyllo.*²⁰⁷ As such, law enforcement was using a device that is in general public use to observe only that which was visible by the naked eye.²⁰⁸ By employing the DCI pole camera, the detectives in *Jones* did not utilize sense-enhancing technology, and under both *United States v. Jones* and *Kyllo v. United States,* as well as persuasive

¹⁹⁹. Compare *Jones,* 565 U.S. at 412 (discussing sense-enhancing technology without a per se physical trespass), with *Kyllo,* 533 U.S. at 34-35 (holding that the thermal imager was sense-enhancing technology not in public use).

²⁰⁰. See Appellant's Brief, supra note 19, at 3 (stating that the device used to monitor Jones's residence was a camera and noting that the camera did not allow officers to see inside the house).

²⁰¹. *Jones,* 2017 SD 59, ¶ 61, 903 N.W.2d at 118-19.

²⁰². *Kyllo,* 533 U.S. at 40.

²⁰³. See Appellee's Brief, supra note 15, at 5 (stating that Jones's trailer did not have a fence or other enclosure which obstructed a full view of the mobile home).

²⁰⁴. *Jones,* 2017 SD 59, ¶ 61, 903 N.W.2d at 119. See also *United States v. Houston,* 813 F.3d 282, 287-88 (6th Cir. 2016) (holding that ten-week surveillance is not a Fourth Amendment search); United States v. Bucci, 582 F.3d 108, 116-17 (1st Cir. 2009) (holding an eight-month surveillance is not a Fourth Amendment search); United States v. Pratt, No. 16-CR-20677-06, 2017 WL 2403570, at *5 (E.D. Mich. June 2, 2017) (holding fourteen-month surveillance is not a Fourth Amendment search); United States v. Brooks, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012) (upholding five-month-long surveillance because it "was 'a prudent and efficient use of modern technology' to enhance their sense of sight and allowed for law enforcement to see 'what may be seen' from a public vantage point where they had a right to be").

²⁰⁵. *Jones,* 2017 SD 59, ¶ 40, 903 N.W.2d at 113.

²⁰⁶. *Kyllo,* 533 U.S. at 40.

²⁰⁷. Id. at 29-30.

²⁰⁸. *Jones,* 2017 SD 59, ¶ 60, 903 N.W.2d at 118.
authority throughout the nation, such surveillance does not constitute a Fourth Amendment search.\textsuperscript{209}

B. QUANTITY IS NOT QUALITY: THE MAJORITY INCORRECTLY ASSERTED A NEW QUALITY-AND-QUANTITY FACTOR TO FOURTH AMENDMENT JURISPRUDENCE

In its analysis, the South Dakota Supreme Court attempted to adopt an almost new Fourth Amendment theory advanced by United States Supreme Court Justice Alito in his \textit{Jones} concurrence.\textsuperscript{210} In turn, the South Dakota Supreme Court added a new element, focusing on the aggregate nature of the surveillance, grounded in Justice Alito’s approach in \textit{Jones}.\textsuperscript{211} According to the majority, surveillance which usually would be within public vantage points may constitute a Fourth Amendment search based on the quality and quantity of information obtained.\textsuperscript{212} By employing this new element, the court was able to conclude that due to the bounds and “wealth” of personal information in an eight-week period, the use of a pole camera in this set of facts is within the meaning of a Fourth Amendment search.\textsuperscript{213} This premise, however, is flawed.\textsuperscript{214}

The South Dakota Supreme Court’s use of Justice Alito’s concurrence is inappropriate, as a majority of the United States \textit{v. Jones} Court declined to adopt this “quality-and--quantity of information approach” because of previous foundational precedent.\textsuperscript{215} The United States Supreme Court recognized that they had held in \textit{Kyllo} that the “Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.”\textsuperscript{216} The Supreme Court unambiguously noted in \textit{Kyllo} that the question whether police conduct constitutes a search depends on the method of surveillance and not the \textit{product} of surveillance.\textsuperscript{217} Justice Scalia’s majority opinion in \textit{Jones} only

\textsuperscript{209} \textit{Id.} See also supra Part III.D (discussing developments in other jurisdictions’ interpretation of Supreme Court precedent).

\textsuperscript{210} \textit{Jones}, 2017 SD 59, ¶¶ 19, 25, 903 N.W.2d at 108-10 (suggesting that Justice Alito’s view is controlling because Justice Sotomayor “endorsed” Justice Alito’s writing).


\textsuperscript{212} \textit{Jones}, 2017 SD 59, ¶¶ 34-35, 903 N.W.2d at 111-12.

\textsuperscript{213} \textit{Id.} ¶ 36, 903 N.W.2d at 112.

\textsuperscript{214} Compare \textit{id.} (employing the quality--quantity factor), with United States \textit{v. Houston}, 813 F.3d 282, 287-88 (6th Cir. 2016) (holding that ten-week surveillance is not a Fourth Amendment search by focusing on the method and not the product of the search), and United States \textit{v. Bucci}, 582 F.3d 108, 116-17 (1st Cir. 2009) (holding an eight-month surveillance is not a Fourth Amendment search), and United States \textit{v. Pratt}, No. 16-CR-20677-06, 2017 WL 2403570, at *5 (E.D. Mich. June 2, 2017) (holding fourteen-month surveillance is not a Fourth Amendment search), and United States \textit{v. Brooks}, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012) (upholding five-month-long surveillance because it was ‘a prudent and efficient use of modern technology’ to enhance their sense of sight and allowed for law enforcement to see ‘what may be seen’ from a public vantage point where they had a right to be”).

\textsuperscript{215} \textit{Jones}, 2017 SD 59, ¶ 56, 903 N.W.2d at 117-18. See also \textit{id.} ¶ 56, 903 N.W.2d at 118 n.4 (noting that the majority’s suggestion that Justice Sotomayor “endorsed” Justice Alito’s writing is incorrect, as Justice Sotomayor did not join Justice Alito’s writing and rather explicitly joined the majority opinion which declined to reach the various issues expounded upon in Justice Alito’s concurrence).

\textsuperscript{216} \textit{Kyllo} v. United States, 533 U.S. 27, 37 (2001).

\textsuperscript{217} \textit{Id.} at 37-40.
confirms this understanding that the method of technology, and not the product of said surveillance, is what must be analyzed.\textsuperscript{218} As pointed out by Chief Justice Gilbertson, “if the quality and quantity of information obtained dictates whether surveillance is a search, then the method of obtaining that information should not matter . . . this conclusion is clearly contrary to Jones.”\textsuperscript{219} Thus, an analysis that focuses on the quality--and--quantity of information is flawed based on controlling precedent.\textsuperscript{220}

Further, the addition of a quality--and--quantity factor to a Fourth Amendment analysis leads to arbitrary results.\textsuperscript{221} As was noted throughout oral arguments in United States v. Jones, Justice Alito’s proposed position invites arbitrary line drawing.\textsuperscript{222} By way of example, under the quality--and--quantity analysis, short-term monitoring, consistent with the holding in Knotts, would \textit{not} be a search due to the small amount of “product” the monitoring provides.\textsuperscript{223} Yet, if, as in Knotts, brief monitoring through electronic surveillance is not a search, at what period of time does said surveillance trigger constitutional protection under the Fourth Amendment?\textsuperscript{224} This problem was aptly summarized throughout oral argument in United States v. Jones, with one Justice noting, “[i]f there is no invasion of privacy for one day, there is no invasion of privacy for one-hundred days.”\textsuperscript{225} Even if one were to look at the “quantity” of surveillance, as was noted previously, the Supreme Court has held before that a year-long public surveillance of a residence does not constitute a search within the constitutional bounds of the Fourth Amendment.\textsuperscript{226} Therefore, if in Kyllo, one year was not “too long” for traditional long-term surveillance, the eight-week period at issue before the South Dakota Supreme Court is not “too long” under the flawed quantity--and--quality

\textsuperscript{218} See United States v. Jones, 565 U.S. 400, 407 n.3 (2012) (explaining that the court’s duty is to look at the method of investigation and whether the method in question would have constituted a “search” within the original meaning of the Fourth Amendment).

\textsuperscript{219} See Jones, 2017 SD 59, ¶ 59, 903 N.W.2d at 118 (quoting Jones, 565 U.S. at 412) (observing that a singular method of surveillance may be constitutional although obtaining the same exact information through use of another method is unconstitutional, such as the use of thermal-imaging device at issue in Kyllo).

\textsuperscript{220} See supra Part IV.A (outlining how United States v. Jones and Kyllo v. United States are controlling precedent).

\textsuperscript{221} See Jones, 565 U.S. at 430 (Alito, J., concurring) (analyzing a search based on the quality and quantity of the information obtained).

\textsuperscript{222} See id. See also Oral Argument at 42:40, Jones, 565 U.S. 400 (No. 10 1259), https://www.oyez.org/cases/2011/10-1259 (questioning if such a position leads to arbitrary results by noting, “if there is no invasion of privacy for one day, there is no invasion of privacy for one-hundred days”).

\textsuperscript{223} Jones, 565 U.S. at 430.


\textsuperscript{225} See Oral Argument at 42:40, Jones, 565 U.S. 400 (No. 101259), https://www.oyez.org/cases/2011/10-1259 (noting the arbitrariness between one day vs. one-hundred days line-drawing stating “but if there is no invasion of privacy, no matter how many days you do it, there is no invasion of privacy”).

\textsuperscript{226} See Kyllo v. United States, 533 U.S. 27, 35 n.2 (2001) (noting that “the police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful”).
Thus, even under this quantity–and–quality approach, Jones’s motion to suppress should have been denied.228

C. THE KATZ MEOW: EVEN APPLYING KATZ, POLE SURVEILLANCE WOULD NOT REQUIRE A WARRANT IN OTHER JURISDICTIONS

Even if one were to ignore United States v. Jones and controlling precedent so that the South Dakota Supreme Court were forced to apply the two-part Katz test with a quality–and–quantity analysis to the circumstances of State v. Jones, properly applying both the subjective and objective expectation of privacy prongs would lead a court to conclude that the public pole camera was not a search under the Fourth Amendment.229

I. Subjective Expectation of Privacy

Jones did not have a subjective expectation of privacy, for Jones’s activities were “vividly and continuously exposed to the public.”230 Under the first prong of Katz, Jones never established that he subjectively believed his activities in front of his home, “particularly the dumping of his trash,” were concealed from public view.231 As noted in Chief Justice Gilbertson’s dissent of the majority’s analysis, Jones did not “even claim—let alone prove—that [he] subjectively believed his activities in front of his home were concealed from public observation.”232 The Jones majority even conceded that Jones did not assert this expectation in his brief, nor attempt to conceal the front of his home from public observation.233 The majority additionally acknowledged that Jones did not claim he had an expectation of privacy in each individual activity outside his home.234

Regardless of these facts, the court’s opinion regarding Jones’s subjective expectation of privacy never discusses whether Jones actually had an expectation, but rather is dedicated wholeheartedly to only examining whether there was a possibility that Jones could have had a subjective expectation of privacy.235 The court merely concludes that Jones could have had one, suggesting that Jones had a subjective expectation of privacy in the whole of his movements, specifically

228. See infra Part IV.B (arguing that even under this approach, there was no Fourth Amendment violation).
230. Id. ¶ 27, 903 N.W.2d at 110.
231. Id. ¶ 54, 903 N.W.2d at 116.
232. Id.
233. Id. ¶¶ 27-28, 903 N.W.2d at 110. See also Appellee’s Brief, supra note 15, at 5 (indicating that Jones’s trailer did not have a fence or other enclosure which obstructed a full view of the mobile home).
235. See id. ¶¶ 27, 31, 903 N.W.2d at 110-11 (examining only whether there was a possibility that Jones could have had an expectation of privacy, not that he asserted one). See also id. ¶ 54, 903 N.W.2d at 116 (commenting on the lack of the discussion in the opinion regarding Jones’ actual subjective expectation of privacy).
being “free from 24/7 targeted, long-term observation of his comings and goings from his home, his guests’ comings and goings, the type of cars coming and going from his home, etc.” 236 Thus, this argument consists of attempting to analogize the case to the facts of State v. Zahn, suggesting that Jones had a subjective expectation of privacy in the “whole of his movements.” 237

However, one cannot make the argument that Jones had a subjective expectation of privacy in his movements in his front lawn for Jones’s trailer “was not obstructed by any fence, gate, or anything else that blocked its view from the public street or pole camera.” 238 The First Circuit Court of Appeals, and other jurisdictions, has held that a defendant not obstructing the view of such an area shows a lack of subjective expectation of privacy. 239 This is because the legitimacy of an expectation of privacy depends, in part, on the ability of the person to control their circumstances. 240 As such, based on these facts alone, Jones did not subjectively show he believed his public front yard, or his actions in front of his home, were concealed from observation from the public. 241 The majority suggests that the court cannot adopt this type of understanding of subjective expectation of privacy in which you only look at whether Jones attempted to conceal every activity outside his home. 242 To the majority, adopting such an understanding would require them to ignore the method of surveillance. 243

But adopting this view, advocated by Chief Justice Gilbertson, does not require the court to ignore the method of surveillance used. 244 If one were to go back to the precedent of United States v. Jones and Kyllo v. United States, the focus of the opinions is clearly on the method of surveillance (rather than quality—and—quantity). 245 Therefore, adopting such an understanding of subjective

236. Id. ¶ 28, 903 N.W.2d at 110.
237. Id. (citing State v. Zahn, 2012 SD 19, 812 N.W.2d 490).
238. Appellee’s Brief, supra note 15, at 5.
239. See United States v. Bucci, 582 F.3d 108, 116-17 (1st Cir. 2009) (noting “[t]here was no fences, gates, or shrubbery located in front of [Bucci’s residence] that obstruct the view of the driveway or the garage from the street. Both [are] plainly visible”). See also Sherbrooke v. City of Pelican Rapids, 513 F.3d 809, 815 (8th Cir. 2008) (suggesting that what a person knowingly exposes to the public does not qualify for Fourth Amendment protection).
240. See Katz v. United States, 389 U.S. 347, 351 (1967) (drawing on the notion that what a person knowingly exposes to the public is not the subject of Fourth Amendment protection as opposed to what an individual seeks to preserve as private). See also United States v. Houston, 813 F.3d 282, 287-88 (6th Cir. 2016) (holding that the defendant had no expectation of privacy).
241. Compare United States v. Bucci, 582 F.3d 108, 116-17 (1st Cir. 2009) (noting “[t]here was no fences, gates, or shrubbery located in front of [Bucci’s residence] that obstruct the view of the driveway or the garage from the street. Both [are] plainly visible”), with Appellee’s Brief, supra note 15, at 5 (noting that there was no fence).
243. Id.
244. Jones, 2017 SD 59, ¶ 59, 903 N.W.2d at 118.
245. See infra Part IV. A-B (arguing that under Jones and Kyllo the focus of the opinions is not on the quality or quantity of the surveillance). See also Houston, 813 F.3d at 287-88 (6th Cir. 2016) (holding that ten-week surveillance is not a Fourth Amendment search); Bucci, 582 F.3d at 116-17 (holding an eight-month surveillance is not a Fourth Amendment search); United States v. Pratt, No. 16-CR-20677-06, 2017 WL 2403570, at *5 (E.D. Mich. June 2, 2017) (holding fourteen-month surveillance is not a Fourth Amendment search); United States v. Brooks, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012) (upholding five-month-long surveillance because it “was ‘a prudent and efficient use of modern technology’ to
expectation of privacy would not require the majority to ignore the method of surveillance used but rather would highlight that the method used by law enforcement in this case, a camera, observed only that which was also readily observable to the public by a naked eye.246

Further, the *Jones* majority argued that Jones had a subjective expectation of privacy because "traditional law enforcement surveillance techniques cannot accumulate the vast array of information that targeted, long-term video surveillance can capture."247 However, traditional law enforcement surveillance techniques could have captured the same amount of information that the pole camera’s long-term video surveillance captured, and this type of understanding of subjective privacy once again focuses on the method and not the product.248 Officers, at the average taxpayer’s expense, could employ stake-outs for weeks in front of a defendant’s home, viewing the defendants coming and goings from his or her home, guests coming and going, the types of cars which stop by the home, etc.249 The majority erroneously believed that these public details are not only details that enjoy an expectation of privacy, but that these aspects of life could not be monitored without the use of video surveillance through a camera.250 On the contrary, police stake-outs, informants, and one’s own neighbors all would be able identify exactly what that DCI pole camera surveyed—who enters and exits a specific home, the time of the occupant’s arrival and departure, the license plates of visiting cars, how one’s garbage is removed, what service providers are contracted—all parts of an individual’s daily life accessible the public eye.251

Finally, the majority turned their subjective expectation analysis back to their 2012 *Zahn* decision, specifically dicta from the opinion which noted, “[w]hile a enhance their sense of sight and allowed for law enforcement to see ‘what may be seen’ from a public vantage point where they had a right to be”).

246. *Jones*, 2017 SD 59, ¶ 60, 903 N.W.2d at 118. *See also* California v. Ciraolo, 476 U.S. 207, 213 (1986) (suggesting that the Fourth Amendment does not “preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible”).


248. *See, e.g.*, Illinois v. Andreas, 463 U.S. 765, 771 (1983) (suggesting that “[o]nce police are lawfully in a position to observe an item firsthand, its owner’s privacy interest in that item is lost”); *Brooks*, 911 F. Supp. 2d at 840 (arguing that law enforcement can utilize their limited resources to conduct surveillance with a pole camera, and as such officers can observe a defendant’s actions as recorded the same way had they stationed themselves outside of his or her residence); State v. Sloane, 939 A.2d 796, 797 (N.J. 2008) (holding that searching through a database of criminal records is not a Fourth Amendment “search” because the criminal records are matters of public record regardless of their aggregate nature).

249. *Compare Houston*, 813 F.3d at 287-89 (arguing that a neighbor can see exactly what an officer employed in a stake-out could see), *with* State v. Jones, 2017 SD 59, ¶ 28, 903 N.W.2d 101, 110 (suggesting that long-term surveillance is unique in that it is the only way to observe a variety of private aspects of one’s life such as the types of cars coming and going from a home, etc.).

250. *Jones*, 2017 SD 59, ¶ 28, 903 N.W.2d at 110 (arguing that long-term surveillance is unique in that it is the only way to observe a variety of private aspects of one’s life such as the types of cars coming and going from a home, etc.).

251. *See, e.g.*, *Brooks*, 911 F. Supp. 2d at 840 (suggesting that law enforcement should utilize their limited resources to conduct surveillance to observe a defendant’s actions the same way had they stationed themselves outside of his or her residence). *See also* United States v. Gbemisola, 225 F.3d 753, 759 (D.C. Cir. 2000) (holding that there is no reasonable expectation of privacy for acts knowingly performed within stranger’s sightline); Sloane, 939 A.2d at 797 (arguing that searching through a database of criminal records is not a Fourth Amendment “search” because the criminal records are matters of public record regardless of their aggregate nature).
reasonable person understands that his movements on a single journey are conveyed to the public, he expects that those individual movements will remain ‘disconnected and anonymous.’ Not only is this verbiage dicta, but within the dicta the majority conceded that a person should understand his movements outside his home are conveyed to the public. The majority’s holding in Jones seems to hinge on the notion that although officers, just like a next-door neighbor, are able to see things exposed to the public, an expectation of privacy arises when officers are able to “capture [] something not actually exposed to public view—the aggregate of all of [the defendant’s] coming and going from the home, all of his visitors, all of his cars, all of their cars, and all of the types of packages or bags he carried and when.” As discussed above, however, incorporating this new quality–and–quantity element into their expectation of privacy analysis, is improper. The majority erroneously concluded that Jones had a subjective expectation of privacy. Jones did not show and did not have a subjective expectation of privacy in his public front yard, or his actions in front of his home.

2. Reasonable Expectation of Privacy

Even if Jones subjectively believed his activities in front of his home were hidden from observation from the public, this belief would not meet the second Katz prong of objective reasonableness. Indeed, when citizens have a reasonable expectation of privacy, law enforcement must first obtain a warrant. The United States Supreme Court, however, has long held that what a person exposes to the public eye, even in protected areas such as the home, business or office, is not the subject of Fourth Amendment constitutional protections.


253. See Jones, 2017 SD 59, ¶ 30, 903 N.W.2d at 110-11 (acknowledging that the quoted verbiage from Zahn, 2012 SD 19, ¶ 22, 812 N.W.2d at 497 was dicta).


255. See infra Part IV.B (arguing that the use of quantity–and–quality approach is improper).

256. Compare Jones, 2017 SD 59, ¶ 31, 903 N.W.2d at 111 (concluding Jones had a subjective expectation of privacy), with id. 2017 SD 59, ¶ 54, 903 N.W.2d at 116 (Gilbertson, C.J., concurring in result) (finding no subjective expectation of privacy).

257. See infra Part IV.C.1 (arguing Jones did not have a subjective expectation of privacy in the front of his home); Jones, 2017 SD 59, ¶ 54, 903 N.W.2d at 116 (suggesting Jones lacked a subjective expectation).


259. State v. Zahn, 2012 SD 19, ¶ 32, 812 N.W.2d at 500. See also United States v. Jacobsen, 466 U.S. 109, 111-12 (1984) (noting “the concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities”).

Therefore, “visual observation [of the portion of a house that is public view] is not [a] ‘search’ at all” under a reasonable expectation of privacy.\(^{261}\) As noted in *Kyllo*, although “there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists [in the case of the search of the interior of homes], and that is acknowledged to be reasonable” there is no such criterion for protection of public areas.\(^{262}\) Further, even Justice Alito in his *Jones* concurrence recognized that some sort of monitoring “of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable.”\(^{263}\)

The *State v. Jones* majority argued that Jones had a reasonable expectation in the public areas of his front yard, based in large part on changes in “21st-century surveillance techniques[].”\(^{264}\) Interestingly, although the court dismissed *Kyllo* as an opinion decided “years ago” in order to conclude that there was no controlling United States Supreme Court precedent, the opinion, in the same breath, relies on *Kyllo* for the majority’s key proposal that technological advancements affect the public’s growing expectation of privacy and as such bolsters Jones’s reasonable expectation of privacy claim.\(^{265}\) Society does not recognize as reasonable an unfettered expectation of privacy for actions outside of your home that can be seen by the naked eye of your neighbor, a cop, or a camera.\(^{266}\)

Detective Rogers could have observed Jones’s movements in the same fashion that the camera captured the movements if he had been parked along a public street.\(^{267}\) In response, the majority attempted to argue that a camera, unlike an officer parked in his car, “does not grow weary, or blink, or have family, friends, or other duties to draw its attention.”\(^{268}\) Yet, many courts have suggested that the substitution of a camera for in-person surveillance does not offend the Fourth Amendment or a reasonable expectation of privacy.\(^{269}\) On the contrary,
courts have held that it is an “efficient use of modern technology” to allow law enforcement to see “what may be seen” from public vantages where police officers and all of the public have a right to be, and therefore the use of the camera does not offend an expectation of privacy reasonable to society.\textsuperscript{270} As such, the type of surveillance found in \textit{Jones} is reasonable, because “what could be seen on the surveillance recording was in no way different (other than angle of view) from that which any person could see from the public street.”\textsuperscript{271}

Paradoxically, as Justice Alito recognized, “[t]he best that we can do in [a] case is to apply existing Fourth Amendment doctrine and to ask whether the use of [the unregulated technology] in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.”\textsuperscript{272} Had the South Dakota Supreme Court properly applied existing Fourth Amendment doctrine, it would have reached the conclusion that the use of the pole camera did not involve a degree of intrusion offensive to a reasonable person.\textsuperscript{273} Even under the \textit{Katz} analysis, the South Dakota Supreme Court should have concluded, in line with the legal conclusion of the circuit court, that Detective Roger’s warrantless use of a pole camera did not constitute a search under the Fourth Amendment.\textsuperscript{274} Although structure-penetrating intrusions into the home contravene reasonable expectations of privacy, defendants do not have “a legitimate expectation of privacy in activities which occurred in the public alleyway, readily observable by any passerby.”\textsuperscript{275} Jones did not have a reasonable expectation of privacy in the front of his home.\textsuperscript{276}

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06-CR-336, 2008 WL 375210 at *2 (E.D. Wis. Feb. 11, 2008) (a pole camera surveilling the defendant’s home to monitor traffic coming and going is not a violation of the Fourth Amendment for “police could have stood on the street outside defendant’s house and observed the comings and goings from his driveway”); United States v. Nowka, No. 5:11-CR-474-VEH-HGD, 2012 WL 6610879, at *5 (N.D. Ala. Dec. 17, 2012) (finding that a camera mounted on a utility pole monitoring defendant’s movements in plain view was not a violation of the Fourth Amendment).
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\textsuperscript{270} Brooks, 911 F. Supp. 2d at 843.
\textsuperscript{271} Nowka, 2012 WL 6610879, at *5.
\textsuperscript{273} See Houston, 813 F.3d at 287-88 (holding that the camera recordings did not violate the defendant’s reasonable expectation of privacy because an individual could observe the same area from the public road). \textit{See also} Christopher Slobogin, \textit{Community Control Over Camera Surveillance: A Response to Bennett Capers’s Crime, Surveillance, and Communities}, 40 FORDHAM URB. L.J. 993, 997 (2013) (discussing Supreme Court caselaw to reflect the view that what is exposed to the public is not something that can have a reasonable expectation of privacy).

\textsuperscript{274} See Houston, 813 F.3d at 287-88 (6th Cir. 2016) (noting that the defendant “had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads. The ATF agents only observed what [the defendant] made public to any person traveling on the roads surrounding the farm”). \textit{See also} Travis S. Triano, Note, \textit{Who Watches the Watchmen? Big Brother’s Use of Wiretap Statutes to Place Civilians in Timeout}, 34 CARDOZO L. REV. 389, 409 (2012) (suggesting that one’s reasonable expectation of privacy is not enjoyed in many public settings because “being subject to a video recording is an accepted fact of modern society”).


\textsuperscript{276} \textit{See infra} Part IV.C.2 (arguing Jones did not have a reasonable expectation of privacy in the front of his home); State v. Jones, 2017 SD 59, ¶55, 903 N.W.2d 101, 116 (suggesting Jones lacked a reasonable expectation).
D. IGNORANCE IS STRENGTH: THE MAJORITY IGNORES OTHER PERSUASIVE PRECEDENT AND BRANCHES OF GOVERNMENT

The *Jones* majority ignored the “overwhelmingly—if not unanimously” national understanding that things “viewed by the naked eye need no warrant.” Not only did the majority to ignore *United States v. Jones* and *Kyllo v. United States* as controlling precedent, the majority opinion ignored the national acceptance that public surveillance does not constitute a Fourth Amendment search. Opinions from myriad jurisdictions have found similar long-term surveillance not to be a search under the Fourth Amendment requiring a warrant and further that the defendant did not have a reasonable expectation of privacy. Most recently, the Sixth Circuit Court of Appeals “rejected the claim that the length of the period of monitoring [makes] surveillance constitutionally unreasonable.” This persuasive authority makes clear that the United States Constitution does not require law enforcement to obtain a search warrant before conducting “long-term” surveillance from a public vantage point. Instead of aligning itself with federal courts of appeal and other lower courts, the *Jones* majority ignored judicial decisions, creating a new, flawed standard in the state of South Dakota.


278. See also supra Part IV.A (discussing the South Dakota Supreme Court ignoring United States established case law such as *United States v. Jones* and *Kyllo v. United States*).

279. See *Jones*, 2017 SD 59 ¶ 61 903 N.W.2d at 119 (quoting a variety of case law). See also *United States v. Powell*, 847 F.3d 760, 773-74 (6th Cir. 2017) (pole camera surveillance upheld); *United States v. Anderson-Bagshaw*, 509 Fed.Appx 396, 405-06 (6th Cir. 2012) (holding that since the “backyard” was visible from a publicly accessible location, the government agents were constitutionally permitted to view whatever portions of it were visible from this point . . . . The camera revealed only Bagshaw’s activities outside in her yard—a fixed space which was open to public view. It did not “generate a precise record of [her] public movements that reflect[ed] a wealth of detail about her familial, political, professional, religious, and sexual associations” like a GPS device would do); *United States v. Houston*, 813 F.3d 282, 287-88 (6th Cir. 2016) (holding that ten-week surveillance is not a Fourth Amendment search); *United States v. Bucci*, 582 F.3d 108, 116-17 (1st Cir. 2009) (holding an eight-month surveillance is not a Fourth Amendment search); *United States v. Pratt*, No. 16-CR-20677-06, 2017 WL 2403570, at *5 (E.D. Mich. June 2, 2017) (holding fourteen-month surveillance is not a Fourth Amendment search); *United States v. Thompson*, 811 F.3d 944, 949-50 (7th Cir. 2016) (finding no reasonable expectation of privacy in video recordings made of defendant); *United States v. Garcia-Gonzalez*, No. CR 14-10296-LTS, 2015 WL 5145537, at *5 (D. Mass. Sept. 1, 2015) (examining law enforcement’s use of a pole camera employed by the FBI for surveillance of property adjacent to the defendant and the installation of a new pole camera following the defendant’s move and holding that a pole camera’s extended viewing of a residence did not violate any reasonable expectation of privacy because it did not attempt to see more than was possible from the public view and the length of time it was installed did not constitute a violation of a reasonable expectation based on binding precedent upholding the surveillance by a warrantless pole camera place for eight months); *United States v. Wymer*, 40 F. Supp. 3d 933, 939-41 (N.D. Ohio 2014) (discussing Fourth Amendment concerns arising from a warrantless installation of a pole camera for the sole purpose of surveying defendant and concluding that there was no reasonable expectation of privacy because the property was exposed to public view).

280. See *Powell*, 847 F.3d at 773 (explaining further that “law enforcement may use technology to augment their activities”).

281. See supra Part III.D (outlining the holdings of various court of appeals and district courts with similar facts regarding the legality of a pole camera and its surveillance of public areas).

282. Compare supra Part III.D (outlining the holdings of various court of appeals and district courts with similar facts regarding the legality of a pole camera and its surveillance of public areas which did not
Further, the Jones majority ignored other branches of government, specifically the South Dakota legislature.\textsuperscript{283} As noted by Chief Justice Gilbertson, if the concern is that law enforcement would place video cameras in front of every house, for any reason, for any length of time, "the best solution to such concerns is legislative—not judicial."\textsuperscript{284} If the controlling law should change, then such change should come "from either the United States Supreme Court or the South Dakota Legislature."\textsuperscript{285} Although the majority argued that the "decision [did not] declare a rigid rule against law enforcement's use of long-term, remote surveillance" it is apparent that it has.\textsuperscript{286} If the concern is that an "Orwellian . . . surveillance society" will occur because public monitoring is not a Fourth Amendment search, instead of contravening existing United States Supreme Court precedent and persuasive authority from other jurisdictions, the South Dakota Supreme Court should have allowed the legislature to change South Dakota statutes to meet this potential new privacy concerns of citizens.\textsuperscript{287} The majority should not have ignored the possibility of a legislative solution.\textsuperscript{288}

V. CONCLUSION

In one of his poignant opinions, Justice Potter Stewart noted, "[i]t must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."\textsuperscript{289} By claiming that the DCI pole camera was a Fourth Amendment search requiring a warrant, the South Dakota Supreme Court in essence held that "the U.S. Constitution requires law enforcement to obtain a search warrant before conducting 'long-term surveillance' (in this case, two-month video surveillance) of the front of a residence from a public vantage point."\textsuperscript{290} This premise is flawed, and ignores controlling
precedent that maintains: "mere visual observation does not constitute a search."291 Under similar facts, the United States Supreme Court, as well as persuasive authority, would have held that the visual surveillance such as that conducted in Jones does not constitute a Fourth Amendment search. The ruling in Jones, therefore, strays from both binding and persuasive opinions, and in doing so, creates a new, deviated standard grounded in a new quality-and-quantity analysis for the State of South Dakota. The South Dakota Supreme Court should have affirmed Jones's conviction under basic Fourth Amendment principles, and sent a strong message that quantity is not quality, and the public eye is not a Fourth Amendment search.
