Constitutional Law - Fourth Amendment - Right of Privacy - Warrantless Aerial Search

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Recent Decisions

Constitutional Law—Fourth Amendment—Right of Privacy—Warrantless Aerial Search—The United States Supreme Court has held that a warrantless aerial search from an altitude of 400 feet of an individual’s curtilage does not violate the Fourth Amendment right of privacy guarantee.


Michael A. Riley (hereinafter Riley) maintained a greenhouse 10 to 20 feet behind a mobile home in which he lived.¹ The greenhouse and mobile home, located on approximately five acres of rural property, which Riley rented, were surrounded by fencing and were posted with a “DO NOT ENTER” sign.² The greenhouse was covered on two sides, but the view into the greenhouse from the two open sides was obstructed by trees, shrubs and the mobile home.³ Approximately 90 percent of the roof of the greenhouse was covered by translucent and opaque corrugated roofing panels, the remaining 10 percent was uncovered.⁴

Deputy Sheriff Gell of the Pasco County Sheriff's office, responding to a tip that marijuana was being grown in the greenhouse, located Riley's property, and attempted to view the greenhouse contents from a road in front of the trailer.⁵ Unable to determine what type of plants were being grown inside the greenhouse from this vantage point, Deputy Gell arranged to fly over

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². *Id.* Riley testified that he rented the property and was living at the residence at the time of the incident. Riley also testified that he constructed the greenhouse behind the trailer. Joint Appendix for Florida v. Riley, 109 S. Ct. 693 (1989), (No. 87-764).
⁴. *Id.*
⁵. *Id.* Testimony of Sheriff Gell indicated that he and Deputy Longworth located Riley's property and positioned themselves at different places on the road in front of the trailer. They did not attempt to see inside the greenhouse from areas adjacent to the property that were not on the road. Joint Appendix for Florida v. Riley, 109 S. Ct. 693 (1989), (No. 87-764).
the greenhouse with the Sheriff Department's helicopter pilot.\textsuperscript{6} From a flight height of approximately 400 feet, Deputy Gell was able to see into the openings of the greenhouse roof, look into an uncovered side of the greenhouse that was obscured from view from the road, and determine, through plain eye view, that the plants being grown were marijuana.\textsuperscript{7} With this information, a warrant was obtained and a subsequent search of the premises revealed marijuana plants.\textsuperscript{8} Subsequently, Riley was charged with unlawful possession of marijuana under Florida law.\textsuperscript{9} Riley moved to suppress the evidence\textsuperscript{10} of the marijuana plants arguing that under the Fourth Amendment\textsuperscript{11} and Florida laws,\textsuperscript{12} he had an actual and reasonable expectation of privacy that was constitutionally protected.\textsuperscript{13} The State argued that since all aerial cases in the past had been decided on the issue of whether aerial observations were made from a lawful viewing point, the evidence should not be suppressed since the police were at a legal aerial vantage point.\textsuperscript{14} The trial court found that the defendant had an actual and reasonable expectation of privacy under the Fourth Amendment and granted the motion to suppress the evidence.\textsuperscript{15}

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\item[6.] Riley, 109 S. Ct. at 695.
\item[7.] Id. Deputy Gell indicated that when the pilot first flew over the house, the helicopter was at 400 feet. He did not know if the helicopter flew lower than this. Deputy Gell took photos with a zoom lens but indicated he could see the greenhouse and its contents much better than the camera's pictures depicted. Deputy Gell also testified that no binoculars were used. Joint Appendix for Florida v. Riley, 109 S. Ct. 693 (1989), (No. 87-764).
\item[8.] Riley, 109 S. Ct. at 695.
\item[9.] Id.
\item[10.] Id. The Supreme Court held in Mapp v. Ohio, 81 S. Ct. 1684 (1961), that evidence seized in an illegal search was barred from being used in a state prosecution by application of the Fourth Amendment to the states through the Fourteenth Amendment Due Process Clause. Id. at 1694. Thus, if the visual search was illegal, evidence with respect to this visual citing of marijuana would be excluded. This is known as the exclusionary rule in Fourth Amendment analysis.
\item[11.] U.S. CONST. Amend. IV. The Fourth Amendment provides that “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 . . .” Id.
\item[12.] FLA. CONST. art I, § 12. The Florida Constitution provides that it is a “right of the people to be secure in their persons, houses, papers . . . against unreasonable searches and seizures . . .” Id.
\item[13.] Joint Appendix for Florida v. Riley, 109 S. Ct. 693 (1989), (No. 87-764). Riley argued that since an effort was made to conceal the marijuana from view by both the road and the air, a reasonable expectation of privacy was shown. Id.
\item[14.] Id.
\item[15.] Riley, 109 S. Ct. at 695. The trial court reasoned that the defendant exhibited a reasonable expectation of privacy from aerial viewings because the openings in the roof were to allow sunlight. The trial court also distinguished this case from open field aerial viewing.
The Florida Court of Appeals reversed the decision of the trial court relying on Randall v. State.\textsuperscript{16} In Randall, the court held that the aerial viewing of a backyard by police did not constitute governmental intrusion which rose to a level of an impermissible search even though the defendant exhibited a reasonable expectation of privacy.\textsuperscript{17} The Riley court, however, noting that this was an issue of great public importance, certified to the Florida Supreme Court the question of whether a legal, 400 foot aerial observation of a backyard, where an individual has exhibited a reasonable expectation of privacy, is permissible.\textsuperscript{18}

The Florida Supreme Court, applying the two prong test of Katz v. United States,\textsuperscript{19} found that an actual expectation of privacy was exhibited by Riley's fence and covering on the greenhouse and that this expectation was reasonable, based on the reasoning that no person should be forced to go to extraordinary steps to protect his backyard from helicopter viewing at 500 feet.\textsuperscript{20} The Florida Supreme Court applied and distinguished California v. Ciraolo,\textsuperscript{21} and Dow Chemical Co. v. United States,\textsuperscript{22} which held that fixed wing aircraft flights within the legal airspace did not violate one's expectation of privacy.\textsuperscript{23} The court opined that an aerial view from a helicopter at 500 feet in the instant case was not comparable to the

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  \item 16. 458 So.2d 822 (1984). Defendant's backyard was obscured from view by a reed fence. The police, acting on an anonymous tip that marijuana was growing in the backyard, subsequently were able to view the plants from a helicopter at a routine flying altitude. The court reasoned that the police were where they were legally entitled to be; therefore, the information obtained could be used as the basis for a warrant. 458 So. 2d at 823-826.
  \item 17. Id. at 825.
  \item 18. State v. Riley, 476 So.2d 1354 (1985). The Riley court noted that the Randall decision certified the issue to the Florida Supreme Court but, as the parties did not pursue the case, no holding was issued. 476 So.2d at 1356.
  \item 19. 389 U.S. 347 (1967). In Katz, the two prong test is best summarized by Harlan's concurring opinion as first, an individual must exhibit an actual subjective, expectation of privacy and second, that expectation must be recognized as reasonable by society. 389 U.S. at 361.
  \item 21. 476 U.S. 207 (1986). In Ciraolo, the police, responding to an anonymous tip, inspected defendant's property from an airplane at an altitude of 1,000 feet because the property was obscured at ground level from a ten (10) foot fence. The Court held that the second prong of the Katz test was not met as it was not reasonable for defendant to expect his backyard to be free from observation from aircraft in legal airspace. The search did not, therefore, constitute a Fourth Amendment violation. Id. at 209-15.
  \item 22. 476 U.S. 227 (1986). In Dow Chemical, the Court upheld the taking of aerial photos at a minimum of 1,200 feet of an industrial plant. The Court reasoned that the area of a plant is more analogous to an open field than to curtilage within the backyard and is, therefore, open to viewing by persons in lawful air space. Id. at 238-39.
  \item 23. 511 So. 2d at 285 (citing Dow, 476 U.S. at 238-39).
\end{itemize}
higher lawful aerial vantage point of at least 1,000 feet of the fixed wing aircraft in those cases. The court thus held that the surveillance constituted a search under the Fourth Amendment and Article 1, section 12 of the Florida Constitution. The court quashed the decision of the Second District Court and remanded for reinstatement of the trial court’s suppression order. The United States Supreme Court granted the state’s petition for certiorari challenging the Florida Supreme Court’s decision.

The plurality, stating that California v. Ciraolo was controlling, held that no violation of the Fourth Amendment occurred. The Court relied on two major points of Ciraolo: first, the proposition that a home and its curtilage are not necessarily protected from searches without physical invasion; and second, that the police, while at a legal vantage point, generally have a right to observe whatever may be seen. Inferentially, the Court also relied on the two prong test of Katz to determine that Riley’s expectation of privacy was unreasonable. The Court theorized that because Riley’s greenhouse was subject to viewing from the air, Riley could not have reasonably expected his property to be free from viewing by aircraft in lawful airspace.

Further, the plurality emphasized that the helicopter was not violating a law or FAA regulation, and also that there was nothing to indicate that helicopters at 400 feet are a rarity, thus little support existed for Riley’s claim that he reasonably anticipated his greenhouse would be free from aerial observation. Finally, the Court concluded that since there was a lack of physical interference not only with the use of the home or the curtilage but with the intimate details associated with the use of the home or curti-

24. *Id.* at 287. The court reasoned that although the petitioner may not have a reasonable expectation of privacy from viewing from a fixed wing aircraft in navigable airspace, the petitioner certainly had a reasonable expectation that his backyard would not be viewed from a helicopter flying at 500 feet. The court further noted that surveillance by a helicopter was particularly intrusive in a way that a fixed wing aircraft could not be. *Id.*
25. *Id.* at 289.
26. *Id.*
29. *Id.* at 696.
30. *Id.*
31. *Id.*
32. *Id.* at 697, n.3, (Citing 14 C.F.R. § 91.79 (1988)). The Court explained that these regulations provide, in general, for the minimum safe altitude of fixed wing aircraft of 1,000 feet in congested areas and 500 feet in areas that are not congested. *Id.*
lage, no Fourth Amendment violation had occurred.\textsuperscript{34}

Justice O'Connor, concurring in the Court's conclusion, objected to the emphasis that the majority placed on compliance with FAA airspace regulations in determining that no Fourth Amendment violation occurred.\textsuperscript{35} O'Connor's analysis of this point involved a discussion of \textit{Ciraolo} and its holding that the curtilage is not protected from aerial observation at 1,000 feet.\textsuperscript{36} O'Connor stated that this holding was not based on the fact that aerial observations at 1,000 feet were legal, but was based upon the fact that air travel at this altitude is so routine that one cannot reasonably expect their curtilage to be protected from observation.\textsuperscript{37} Justice O'Connor analyzed the differences between helicopter observations and ground level observations stating that effective precautions can be taken to block ground level observations while the same may not be true for air level observations.\textsuperscript{38} The Justice relied on \textit{Rakas v. Illinois}\textsuperscript{39} in support of the contention that the Fourth Amendment does not require individuals to completely enclose and seal off their curtilage from aerial view.\textsuperscript{40}

O'Connor summarized that, based on \textit{Katz}, the proper procedure was to determine if helicopter travel by the public at 500 feet was so routine that Riley could not have had a reasonable expectation of privacy.\textsuperscript{41} Placing the burden of proof on the defendant through \textit{Nardone v. United States},\textsuperscript{42} O'Connor theorized that no reasonable expectation of privacy existed because there was no reason to believe that flights at 400 feet were nonroutine and Riley failed to provide evidence to the contrary.\textsuperscript{43} O'Connor concluded that no Fourth Amendment violation occurred.\textsuperscript{44}

In a dissenting opinion, written by Justice Brennan and joined by Justices Marshall and Stevens, the plurality was criticized for ignoring the reasonable reliance of privacy requirement of \textit{Katz} and for placing too much emphasis on compliance with air space

\begin{itemize}
\item[34.] \textit{Id.}
\item[35.] \textit{Id.} at 698. Justice O'Connor emphasized that FAA airspace regulations are to promote safety and not to protect Fourth Amendment privacy rights. \textit{Id.}
\item[36.] \textit{Id.}
\item[37.] \textit{Id.}
\item[38.] \textit{Id.}
\item[40.] \textit{Riley}, 109 S. Ct. at 698.
\item[41.] \textit{Id.}
\item[42.] 308 U.S. 338, 341 (1939).
\item[43.] \textit{Riley}, 109 S. Ct. at 699.
\item[44.] \textit{Id.}
\end{itemize}
regulations.45 The dissent noted that under this theory, no privacy violation would ever occur as long as one was in a position legally allowed.46 The dissenters, discussing the majority’s use of Ciraolo, pointed out that the requirement of a legal vantage point is not the holding of Ciraolo, but rather a passing comment in the case.47 The dissenting opinion seized upon the fact that since few private citizens could have access to this legal viewing point, public observation of Riley’s property would not be commonplace, and Riley’s expectation of privacy was therefore reasonable.48

Noting the absence of any minimum flight altitudes for helicopters in the FAA regulations, the dissenters questioned if any conceivable limits could be placed on the plurality’s holding.49 Justice Brennan observed that the plurality’s reference to possible limits on flights that interfere with one’s use of property does not necessarily equate with the Fourth Amendment protection of one’s personal privacy.50 The dissent further pointed out that there is nothing in the plurality’s opinion to suggest that this holding is limited to curtilage observations, and that, therefore, direct observation by the police into a home from a legal vantage point could now be allowed.51

Brennan attacked the plurality’s inference that a Fourth Amendment violation would have occurred had the police interfered with the intimate details of the use of the home.52 Finally, Brennan accused the Court of wrongly allowing the activity of the defendant to determine whether a Fourth Amendment violation had occurred.53

In summarizing the dissent’s position, Justice Brennan first stated that while he agreed with Justice O’Connor that the basic issue was whether Riley’s expectation of privacy was reasonable due to the presence of routine public flights, he disagreed with her

45. Id. at 699-705.
46. Id.
47. Id. at 700, n.1.
48. Id. at 700.
49. Id. at 702.
51. Riley, 109 S. Ct. at 703.
52. Id.
53. Id.
result. Justice Brennan suggested that the Court should take judicial notice that public flights such as these are a rarity and that, therefore, Riley had a reasonable expectation of privacy. In lieu of this, Justice Brennan determined that the burden of proof on the issue of flight frequency at 400 feet lies with the state, which has greater access to information of this type. The Justice reasoned, therefore, that since the state did not meet this burden, a Fourth Amendment violation had occurred. Justice Brennan concluded his dissent with a dramatic illustration that lack of limits on the plurality's holding could lead to George Orwell's depiction of Big Brother is watching you.

Justice Blackmun in a separate dissenting opinion agreed with Justice O'Connor and Justice Brennan that the case turned on the issue of whether Riley had a reasonable expectation of privacy and that the issue was to be decided by the frequency of nonpolice flights. Justice Blackmun, disagreed, however, with Justice Brennan's suggestion that judicial notice be taken on the issue. Justice Blackmun relied on his judicial estimate that public flights such as these are a rarity and placed the burden of proof on the prosecution to prove otherwise. Justice Blackmun indicated that he would remand the instant case to give the prosecutor the opportunity to meet the burden, but he, nevertheless, concluded that a failure to meet this burden would constitute a Fourth Amendment violation.

The historical origin of Fourth Amendment interpretation by the Supreme Court began when the Court defined the type of rights the Fourth Amendment protected. In Boyd v United States the defendant, an alleged revenue tax defrauder, was or-

54. Id. at 704.
55. Id.
56. Id.
57. Id.
58. Id. at 704-705. ORWELL, NINETEEN EIGHTY-FOUR 4 (1949).
59. Riley, 109 S. Ct. at 705.
60. Id.
61. Id.
62. Id. Justice Blackmun relies on 4 W. LAFAVE, SEARCH AND SEIZURE, 11.2(b), p.228 (2d ed 1987) which reasons that a judicial estimate of probabilities involved may be used to base burdens of proof in Fourth Amendment cases.
63. Riley, 109 S. Ct. at 705.
64. 116 U.S. 616, 618-620, (1886). In Boyd, defendant had been ordered to forfeit 35 cases of plate glass for an alleged violation of the custom revenue laws. Defendant had been charged with attempting to defraud the government from lawful monies associated with the 35 cases of plate glass. In order for the government to prove their case, it was necessary for the invoice from a previous shipment to be produced. Under Section 5 of the Act of June 22,
dered to produce documents associated with a previous order or, in the alternative, have the alleged charges taken as confessed in accordance with the custom revenue laws. Defendant argued that the compulsory production of a person's private papers was an unreasonable search and seizure and thus violated his Fourth Amendment rights.65

In order to decide this issue, the Court researched the history surrounding the writing of the Fourth Amendment.66 After discussing the framer’s opposition to the general warrants of the period, the Court summarized that,

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, . . . 67

The Court next analyzed the interrelationship between the Fourth and the Fifth Amendments stating that unreasonable searches and seizures are almost always made for the purposes of compelling a man to incriminate himself.68 Based on the history of the amendment and the theorized use of the documents for self incrimination, the Court concluded that the compulsory production of private papers and books violated both the Fourth and Fifth Amendments.70

The next major area of development in Fourth Amendment law determined the limits of protection afforded to the area surround-

1874, the government could require the defendant to produce such an invoice and if the defendant failed to produce said invoice, the charges would be taken as true. 18 Stat. 187. Id. at 618-620.


66. Id. at 625. The Court discussed the government of Great Britain's oppressive method of issuing general warrants to revenue officers to search for smuggled goods in both her colonies and Great Britain. The Court indicated this was a most oppressive act since every man's liberty was at stake. Additionally, the Court discussed the popular movement in Great Britain that displayed a fierce opposition to general warrants issued for the purpose of searching private houses to find private papers so that libel charges by the government could be levelled. Id. at 625-626.

67. Id. at 630.

68. U.S. Const. Amend. V. The fifth amendment states that "No person shall be . . . compelled in any criminal case to be a witness against himself, . . ." Id.


70. Id. at 635. The Court stated that although the case in question was devoid of many aggravating circumstances of search and seizures, it effected the substantial purpose of the amendments. The Court finally noted that constitutional provisions should be liberally construed and that the court, in its enforcing of these provisions should have as its motto, obsta principiis. Id.
ing an individual’s home. In *Hester v. United States*\(^{71}\) the Supreme Court first enunciated the open field doctrine. In *Hester*, federal officers were standing a distance away from the defendant’s house when they observed an alleged wrongdoing.\(^{72}\) Defendant argued that the officers could not testify as to what they observed outside of the house as this evidence was obtained through an illegal search and seizure of his home.\(^{73}\) The Court in one of it’s most oft-quoted decisions stated that although a trespass did occur, the Fourth Amendment protects persons, houses, papers and effects and is not applicable to protection of open fields, areas outside of defendant’s home and curtilage.\(^{74}\)

The open fields doctrine declared by the Supreme Court in *Hester* is still the law today.\(^{75}\) However, the open fields doctrine has been distinguished by the Court from the curtilage concept of Fourth Amendment protection. Curtilage is defined as the land immediately surrounding and associated with the home. To determine what constitutes curtilage, an examination of the relationship between the following factors is performed: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put and the steps taken by the resident to protect the area from observation by people passing by the area.\(^{76}\) The curtilage of one's home may be entitled to Fourth Amendment protection while the open fields surrounding one’s home lack Fourth Amendment protection.\(^{77}\)

The Supreme Court’s initial standards for determining when Fourth Amendment protection existed concentrated on the aspect of a physical invasion or search of a person, house, office or mate-

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71. 265 U.S. 57 (1923).
72. *Id.* at 58. Defendant was accused of violating the prohibition law by distributing liquor from his house. The officers observed defendant throwing away a bottle outside of his home. 265 U.S. at 58.
73. *Id.*
74. *Id.* at 59. Justice Holmes, writing for the majority, stated that this distinction between open fields and the house is as old as the common law. *Id.* at 59.
75. *Oliver v. United States*, 466 U.S. 170 (1984). This open fields doctrine was reaffirmed in *Oliver v. United States*, 466 U.S. 170 (1984). In *Oliver* defendant was growing marijuana on his private farm. The farm was posted with “no trespassing” signs. Police entered the farm despite the effort by defendant to keep the farm free from trespassers. The Court held that no reasonable expectation of privacy could exist in the defendant since these were open fields. The Court explained that there is no societal interest in protecting the privacy of these areas and that open fields do not provide the setting for intimate activities the Fourth Amendment is designed to protect. 466 U.S. at 183.
rial things.\textsuperscript{78} \textit{Olmstead v. United States}\textsuperscript{79} justified this physical invasion or trespass doctrine by implying that the words of the Amendment itself show that the search is to be of material things. In \textit{Olmstead}, evidence against the defendant, who was accused of violating the National Prohibition Act, was gathered through the use of a wiretap.\textsuperscript{80} The Court, observing that there was no physical trespass nor seizure of person, paper or tangible effect, concluded that the Fourth Amendment had not been violated.\textsuperscript{81}

Fourth Amendment law in this particular area did not change until the landmark case of \textit{Katz v. United States}\textsuperscript{82} which set today's standard for determining when an unreasonable search and seizure has occurred. In \textit{Katz}, the government gathered evidence by listening to and recording defendant's conversations which occurred behind the closed door of a public telephone booth.\textsuperscript{83} Defendant, who was accused of transmitting wagering information, charged that his right to privacy was violated by the listening devices and that the telephone booth was an area constitutionally protected from government invasions.\textsuperscript{84} The government on the other hand argued that since no physical invasion occurred, no Fourth Amendment violation was present under the trespass doctrine of \textit{Olmstead}.\textsuperscript{85}

The Court declined to address these arguments stating that the Fourth Amendment is for the protection of people not places.\textsuperscript{86} It was further noted that Fourth Amendment protection does not extend to what a person knowingly exposes to the public.\textsuperscript{87} The Court explained, however, that in this instance the defendant sought to exclude the public to his conversation by the closing of

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\item[79.] 277 U.S. at 464.
\item[80.] \textit{Id.} at 457. The Court noted the taps were made in the basement of an office and in streets near the house. \textit{Id.} at 457.
\item[81.] \textit{Id.} at 464. The Court in Goldman \textit{v. United States} 316 U.S. 129 (1942) and Silverman \textit{v. United States}, 365 U.S. 505 (1961), followed this line of reasoning that a physical trespass or seizure of a tangible item had to occur for a Fourth Amendment violation to be present.
\item[82.] 389 U.S. 347 (1967).
\item[83.] \textit{Id.} at 348.
\item[84.] \textit{Id.}
\item[85.] \textit{Id.} at 352.
\item[86.] \textit{Id.} at 351.
\item[87.] \textit{Id.} The Court cited Lewis \textit{v. United States}, 385 U.S. 206 (1966) and United States \textit{v. Lee}, 274 U.S. 559 (1927) in support of these decisions.
\end{enumerate}
\end{footnotesize}
the phone booth doors and was thus entitled to believe that his phone call would not be broadcast to the world.\textsuperscript{88} The Court therefore rejected the earlier holdings of \textit{Olmstead} and its progeny and stated that Fourth Amendment protection is not dependent on the presence of a physical intrusion into a given area.\textsuperscript{89} The Court held that the interception of this private phone conversation was a search and seizure.\textsuperscript{90}

The \textit{Katz} Court further noted that although this search and seizure was confined to the least intrusive manner and the officers did reasonably expect to find evidence of a particular crime, the search and seizure did not comply with constitutional standards that require the showing of probable cause for a warrant to issue, nor did it fall under the well delineated exceptions to this requirement.\textsuperscript{91} The majority finally summarized by saying that no matter where a person may be, he is entitled to be free from unreasonable searches and seizures.\textsuperscript{92}

In an oft-quoted, concurring opinion, Justice Harlan summarized the new rule of Fourth Amendment protection as a twofold requirement.\textsuperscript{93} First, an individual must exhibit an actual, subjective expectation of privacy, and, second, that expectation must be recognized as reasonable by society.\textsuperscript{94} Harlan expounded on his rule by explaining that objects, activities or statements in the plain view or in the open, as in \textit{Hester}, would not be protected because no expectation of privacy can be shown.\textsuperscript{95}

Harlan's standard is still the benchmark for analysis of Fourth Amendment cases by today's court.\textsuperscript{96} In the application of this standard by the courts, no precise procedure has been set forth to determine whether a reasonable expectation exists and if the expectation is justified by society.\textsuperscript{97} Today's Court has, however, fur-

\textsuperscript{88} \textit{Katz}, 389 U.S. at 352.
\textsuperscript{89} \textit{Id.} at 353. The Court decided that the trespass doctrine of these earlier cases was no longer of constitutional significance. 389 U.S. at 353.
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.} at 357. The Court summarized the exceptions to a warrant requirement as circumstances incident with arrest, circumstances justified on the grounds of hot pursuit by a law enforcement agent or circumstances indicating the suspects consent. \textit{Id.} at 357-358.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 361.
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.}
\textsuperscript{97} \textit{Oliver}, 466 U.S. at 178-79. The Court states that no single factor determines
ther explained the rule to state that a legitimate expectation of privacy does not depend on whether the individual chooses to conceal the private activity but depends upon whether the government's activities infringe upon the personal and societal values protected by the Fourth Amendment. 98

The Supreme Court first addressed the issue of available Fourth Amendment protection in cases involving aerial surveillance in *California v. Ciraolo* 99 and *Dow Chemical Co. v. United States.* 100

In *Ciraolo*, defendant was suspected of growing marijuana in his yard. 101 Police, unable to see in the yard from ground level because of a six foot fence surrounding defendant's yard, obtained a private plane and flew over the defendant's house at an altitude of 1,000 feet. 102 The police, who at this altitude were able to identify marijuana plants growing in the yard with the naked eye, proceeded to photograph the marijuana. 103 A search warrant was obtained and the marijuana plants were then seized. 104 Defendant argued that the warrantless aerial observation of his yard violated the Fourth Amendment. 105

In applying the first prong of the *Katz* standard for its analysis, the Court stated that the defendant had clearly met the test of manifesting a subjective intent of maintaining privacy with respect to ground level observations. 106 The Court next discussed that it was not clear if defendant had manifested a subjective expectation of privacy from all vantage points of observation of his back yard. 107 After noting this discrepancy, the Court abandoned this prong without clearly deciding on this issue of subjective expecta-

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98. *Id.* at 181-82. The Court interchanges legitimacy with reasonableness in defining the standard for Fourth Amendment protection. *Id.*


101. 476 U.S. at 209.

102. *Id.*

103. *Id.* at 209, 213.

104. *Id.* at 209-210.

105. *Id.* at 211.

106. *Id.*

107. *Id.* at 211-212. The Court hypothesized that a double decker bus or a police officer on top of a truck would be able to see over the 10-foot fence. *Id* at 211.
tion of privacy from above ground level observations. 108

The Court next addressed the second prong of the Katz test by deciding whether or not the defendant’s expectation was reasonable. 109 The Court stated that the defendant’s backyard was in his curtilage, an area where privacy expectations are most heightened. 110 It was noted, however, that even if the area is within the curtilage not all police observations would be barred since what is knowingly exposed to the public is not subject to Fourth Amendment protection. 111 The Court additionally commented that an officer is not required to shield his eyes when passing by a home nor is an officer restricted from observing at a legal public vantage point those activities an individual has taken some measures to conceal. 112 The majority enlarged this point by pointing out that the airplane was in public navigable airspace and that any member of the public could have observed what the officers viewed. 113 The Supreme Court thus held that in an age where flights are routine, it would be unreasonable for defendant to expect that his yard would be constitutionally protected from naked eye observations at 1,000 feet. 114

In Dow Chemical the petitioner, Dow Chemical Company, accused the Environmental Protection Agency of, inter alia, a warrantless aerial observation of its chemical plant through the use of a precision aerial mapping camera at altitudes of greater than 1,200 feet. 115 Petitioner had maintained elaborate security around its complex at ground level, however, due to the cost of covering its equipment, the aerial view was not covered. 116 The Fourth Amendment issue in this case was whether the taking of aerial photographs without a warrant violated petitioner’s right against unreasonable searches and seizures. 117

In deciding this issue, the Supreme Court first addressed

108. Id. at 212. W. R. LaFave notes that the courts have given little attention to the first prong of the Katz standard in their interpretation of Fourth Amendment law. LaFave, Forgotten Motto of Obsta Principiis In Fourth Amendment Jurisprudence, 28 ARIZ. L.R. 291, 297.
109. Ciraolo, 476 U.S. at 212.
110. Id. at 213.
111. Id. (The court quoted Katz, 389 U.S. at 351.)
112. 476 U.S. at 213.
113. Id. at 213. The Court cites 49 U.S.C. § 1304 (1976) which states that any citizen of the United States has a public right of transit through navigable airspace. Id. at 213-214.
114. Id. at 215.
116. Id. at 229.
117. Id. at 233.
whether petitioner's chemical plant could be considered part of his curtilage. The Court noted the differences between the intimate activity associated with the privacy of a home and its curtilage, versus the outdoor spaces between the structures and buildings of a manufacturing plant. The Court observed that petitioner took no precautions against this aerial surveillance and pointed out that no physical entry occurred from the surveillance. The Court held that the open area of an industrial plant complex is not analogous to the curtilage of a dwelling place for the purpose of aerial surveillance and that such a complex is more comparable to an open field.

The second aspect of Fourth Amendment protection the Court in Dow investigated was whether use of the aerial mapping camera was permissible without violating petitioner's rights. The Court first noted that the camera was a common, commercial camera used in map making. The Supreme Court next stated that these are not highly sophisticated photos and, therefore, the mere fact that vision is enhanced does not give rise to constitutional problems. As a result, it was held that the taking of the aerial photographs did not violate petitioner's Fourth Amendment rights.

The Supreme Court's analysis in Ciraolo and Dow Chemical of warrantless aerial surveillance laid the foundation for the analysis of the case at hand. Florida v. Riley was a warrantless aerial surveillance case, involving naked eye observation of the defendant's curtilage by a police officer in a helicopter hovering at approximately 400 feet. At the outset of its opinion, the plurality in Riley stated that Ciraolo was the controlling case. The Riley Court then went on to address the issue of curtilage and found

118. Id. at 235.
119. Id. at 236.
120. Id. at 237 n.4.
121. Id. at 239.
122. Id. at 238. The Court stated that Oliver recognized that public and police may survey from the air lawfully. Id. at 238. However, in Oliver, petitioner and respondent both agreed on this issue while the Court did not rule on this. Oliver v. United States, 466 U.S. 170, 179.
123. 476 U.S. at 238.
124. Id. The Court noted that technology not available to the general public such as satellite technology may very well violate one's constitutional rights. Id. at 238.
125. Id. at 239.
127. Id. at 695.
that Riley's greenhouse was within the curtilage of his home.\textsuperscript{128} As in \textit{Ciraolo}, the Riley Court did not apply the heightened Fourth Amendment protection usually afforded the curtilage of one's home, and thus rendered the curtilage doctrine hollow.\textsuperscript{129} The Supreme Court, having found that the greenhouse was within the curtilage, should have proceeded to hold that the area was entitled to heightened Fourth Amendment protection which would preclude surveillance of this type and thus the importance of the curtilage doctrine in today's society would have been preserved.

The plurality next addressed the first prong of the \textit{Katz} standard: did the defendant have an actual, subjective expectation of privacy. As in \textit{Ciraolo}, the Court noted that Riley took precautions from ground level observations only, thus, implying that Riley only had a subjective expectation of privacy from ground level observations, and not from aerial observations.\textsuperscript{130} The Riley Court again duplicated \textit{Ciraolo} by bypassing a decision on whether or not Riley exhibited a subjective expectation of privacy with respect to air level observations of his curtilage. The first prong of the \textit{Katz} standard was thus passed over by the Court without any meaningful guidelines to determine what constitutes a reasonable expectation of privacy from air level observations.

The second prong of the \textit{Katz} standard, whether the defendant's expectation of privacy is one which society would recognize as reasonable, was answered in the negative by the plurality. The Riley Court had no problem drawing the conclusion that Riley could not have reasonably expected the contents of the greenhouse to be free from viewing by aircraft in navigable airspace since he did not have the greenhouse covered from all vantage points.\textsuperscript{131} The Riley Court's justification of this negative answer was, however, severely lacking. In its reasoning, the Court did not find it significant that the police officer's observations were made from a helicopter that hovered above the defendant's yard rather than from a fixed wing aircraft like the one that flew over the defendant's yard in \textit{Ciraolo}.\textsuperscript{132} Instead, the Court noted that \textit{Ciraolo} implied that a fixed wing aircraft flying at 500 feet would also have been reasonable as 500 feet is within the legal navigable airspace limit for fixed

\textsuperscript{128} \textit{Id.} at 696.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}
wing aircraft,\textsuperscript{133} and commercial flight in public airways is routine in this country.\textsuperscript{134} The Court, in a final effort to justify its conclusion that Riley had no subjective expectation of privacy, went on to state that there was no indication that such flights are unheard of in Pasco County, Florida.\textsuperscript{135} This conclusion was apparently derived from facts showing there are more than 10,000 registered helicopters in the United States, that helicopters have been used in police work since 1980 with more than 1,500 in use as of 1980, and finally, there are 31,697 helicopter pilots.\textsuperscript{136} No suggestion or standard was offered by the court to show how these facts would make it unreasonable for an individual in Pasco County, Florida, to think that his backyard would be free from a helicopter hovering over it at 400 feet. The Court did not address whether in this particular locale these types of search flights are commonplace or if Riley's yard was located in an area that has frequent helicopter traffic due to standard flight patterns. These factors would be better gauges than the number of helicopters and pilots in the United States for use in the determination of whether an individual in Pasco County, Florida, could reasonably believe that his yard was entitled to Fourth Amendment protection from overhead low level flights.

In attempting to justify its holding, the Court further stated that since the helicopter was operating within the current law, the 400 foot flight elevation is of no significance.\textsuperscript{137} The Court added that the police were doing what any member of the public could do and, thus, this action passed Fourth Amendment muster.\textsuperscript{138}

The Riley plurality's final comment addressed the issue of a physical invasion or penetration of Riley's property by the helicopter. The Court stated that the helicopter had not interfered with the use of Riley's property because no undue noise, wind or dust, or threat of injury was present.\textsuperscript{139} Through this commentary, the

\textsuperscript{133} Id.
\textsuperscript{134} Id. (The Court quoted Ciraolo, 476 U.S. at 215).
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 696, n.2. The Court quoted E. Brown, The Helicopter in Civil Operations 70 (1981), Federal Aviation Administration, Census of U.S. Civil Aircraft, Calendar Year 1987, p. 12 and Federal Aviation Administration, Statistical Handbook of Aviation, Calendar Year 1986, p. 147; 1988 Helicopter Annual 9 to illustrate the facts.
\textsuperscript{137} Riley, 109 S. Ct. at 696-97. The Court noted that the FAA regulations permit the operation of helicopters at this level as long as the operation is conducted without hazard to persons or property. 14 CFR § 91.79 (1988), Riley. 109 S. Ct. at 697 n.3.
\textsuperscript{138} Id. 109 S. Ct. at 697.
\textsuperscript{139} Id.
plurality appears to take us back to the pre-\textit{Katz} standard of requiring a physical invasion or trespass before Fourth Amendment protections exist. The plurality thus purported to apply the two pronged test of \textit{Katz} to determine the reasonableness of Riley's expectation,\footnote{Id.} and in the same breath, disregarded the \textit{Katz} determination that Fourth Amendment protections are not dependent on the presence of a physical intrusion into a given area.\footnote{Katz v. United States, 389 U.S. 347, 353 (1967).}

Justice O'Connor's concurring opinion stated that the standard in \textit{Ciraolo} was controlling.\footnote{Riley, 109 S. Ct. at 697.} Like \textit{Ciraolo}, curtilage protection of one's backyard was discussed and subsequently disregarded by the Justice with the statement that all police observation of the curtilage is not necessarily barred by the Fourth Amendment.\footnote{Id. at 698.}

The first prong of \textit{Katz}, the exhibition of a subjective expectation of privacy, was also omitted in the concurring opinion, thus, leaving no standard for determining what would constitute a subjective expectation of privacy in aerial surveillance cases. The second prong, the reasonableness requirement, was discussed in several aspects and utilized to reach a decision. Justice O'Connor noted that reasonableness requires that an individual take precautions against public observation.\footnote{Id. at 698.} Noting that an individual conceivably could not block off all aspects of aerial surveillance, Justice O'Connor stated that compliance with FAA regulations in all instances would not guarantee that an individual lacked a reasonable expectation of privacy.\footnote{Id.} The Justice abandoned the implication of this statement and summarized that the second prong, the reasonable expectation of privacy requirement, is determined by the regularity of public air travel at these altitudes and not based upon the regularity of police air travel at the same altitudes.\footnote{Id.} Justice O'Connor placed the burden of proof in establishing regularity of flights on the defendant.\footnote{Id. at 699.} Noting the lack of evidence introduced by Riley concerning regularity of public flights and stating, without any detailed support, that there is reason to believe there is considerable public use of airspace at these altitudes, Justice O'Connor concurred with the majority and held that

140. \textit{Id.}
143. \textit{Id.}
144. \textit{Id.} at 698.
145. \textit{Id.}
146. \textit{Id.}
147. \textit{Id.} at 699.
Riley's expectation of privacy was unreasonable.\textsuperscript{148}

Justice Brennan's dissent applied the \textit{Katz} two prong standard but did not discuss the curtilage doctrine and its application to the facts at hand. Justice Brennan's dissent began by severely criticizing the plurality's purported application of the \textit{Katz} standards. The dissent, basing its resolution of the aerial surveillance issue on the second prong of the \textit{Katz} test, also failed to address the first prong requirement of the exhibition of a subjective expectation of privacy by the defendant. The dissenting opinion agreed with Justice O'Connor by stating that under \textit{Katz} the question to be answered is whether public observation of Riley's curtilage was so commonplace that Riley's expectation of privacy could not be considered reasonable.\textsuperscript{149} Justice Brennan disagreed with Justice O'Connor's solution to this question being based upon her having reason to believe that there are considerable flights of this nature.\textsuperscript{150} The dissent proposed that judicial notice be taken that flights over populated areas at these altitudes are a rarity in locations like Riley's and thus Riley's expectation would be reasonable.\textsuperscript{151} Justice Brennan also disagreed with placing the burden of proof, with respect to regularity of flights, on the defendant as Justice O'Connor did.\textsuperscript{152} Justice Brennan stated that the State has greater access to this information and that the burden should fall on them.\textsuperscript{153} Since the state failed to meet this burden, Riley's expectation would thus be assumed to be reasonable.\textsuperscript{154}

In a separate dissent, Justice Blackmun agreed with Justices O'Connor and Brennan that the question to be answered was whether a reasonable expectation of privacy existed.\textsuperscript{155} This analysis, which also excluded the application of the curtilage doctrine and the answering of the first prong of the \textit{Katz} test, proceeded directly to the second prong of the \textit{Katz} test. In applying this second prong, Justice Blackmun agreed that the determination of reasonableness should be based on frequency of flights and not on the fact that the helicopter was at a lawful altitude.\textsuperscript{156} Justice Blackmun rejected Justice Brennan's solution to this question of taking

\begin{itemize}
  \item \textsuperscript{148} \textit{Id.}
  \item \textsuperscript{149} \textit{Id.} at 701.
  \item \textsuperscript{150} \textit{Id.} at 704.
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} \textit{Id.}
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} \textit{Id.}
  \item \textsuperscript{155} \textit{Id.} at 705.
  \item \textsuperscript{156} \textit{Id.}
\end{itemize}
judicial notice on the frequency of such flights and instead proposed that the burden of proof with respect to such flights be placed on the prosecution, since, in his estimation, such flights are not frequent. Justice Blackmun noted that a Fourth Amendment violation occurred since this burden was not met by the prosecution but recommended remanding the case to allow the prosecution a chance to meet this burden.

It appears that the standards used by today’s Supreme Court in evaluating Fourth Amendment rights under the Katz reasonable expectation test in aerial surveillance cases are unclear yet the results are predictable. The Court will discuss such principles as a heightened expectation of privacy in one’s curtilage but places little significance there in its final analysis. The Court also purports to be using the Katz two pronged test for Fourth Amendment protection, but has resisted answering the first prong concerning what is necessary for a subjective expectation of privacy with respect to surveillance of one’s property from the air. Since the Court glided over the first prong, it may be reasonable to infer from the Riley case that no extra precautions are needed in order to exhibit a subjective expectation of privacy from air level observations as compared to ground level observations. In answering the second prong, the Court has not set forth any consistent criterion for determining what is reasonable. Additionally, the dicta in Riley indicates that the Court may be moving towards the trespass doctrine of the pre-Katz era.

The Supreme Court needs to confirm how much effort is necessary for an individual to exhibit a subjective expectation of privacy with respect to aerial surveillance. This effort should not be unobtainable by the ordinary, reasonable person. In other words, an individual should not, under ordinary circumstances, be required to completely cover his backyard in order to have a subjective expectation of privacy with respect to overhead flights. To decide otherwise would make Fourth Amendment protection in aerial surveillance cases involving curtilage meaningless to the average individual.

The Supreme Court finally needs to set forth standards for evaluating reasonableness. Courts have had no problem deciding what an ordinary, reasonable person would expect in other situations.

157. Id.
158. Id.
159. See supra note 109.
The Court in the area of Fourth Amendment protection should also have no problem in determining what subjective expectations society would think of as reasonable in aerial surveillance cases. Reasonableness could depend on factors such as the location of the individual with respect to airports or the length or duration of the flight over the individual's property.

It is probably true that most individuals today realize that public flights occur overhead, but it is also probably true that most individuals do not expect these public flights to spy in depth on their activities in their backyards. Most individuals would probably realize that with today's aircraft and technology, aerial surveillance could happen, but most individuals, if questioned about this, would probably think that it would not happen. The Court in Riley should have been willing to consider and place weight on the expectation of ordinary individuals in society as to the sanctity of their homes and yards from aerial observation by police by laying down a clear standard for such a determination. The Court failed to do this. As a result, the scope of Fourth Amendment protection in aerial observation cases appears to be limited and unclear at best.

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