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# Criminal Procedure: Search and Seizure - Plane View Surveillance of the Curtilage in California v. Ciraolo

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# NOTES

CRIMINAL PROCEDURE: Search and Seizure—"Plane" View Surveillance of the Curtilage in *California v. Ciraolo*

## I. INTRODUCTION

The United States Supreme Court addressed the issue of aerial surveillance of the curtilage in *California v. Ciraolo*.[1] In lower court proceedings, the California Court of Appeal had reversed Ciraolo's Superior Court conviction for marijuana cultivation on the grounds that the warrantless airplane flight by police over Ciraolo's backyard constituted an unreasonable search.[2] The Supreme Court conceded that Ciraolo probably manifested a subjective expectation of privacy by constructing two fences around his backyard[3]; however, the Court found that his expectation was unreasonable by societal standards and did not merit fourth amendment protection.[4]

This Note examines the rationale of *Ciraolo*. In addition, this Note focuses on the Court's treatment of the reasonable expectation of privacy test and of the curtilage doctrine.

## II. STATEMENT OF THE CASE

In September, 1982, the Santa Clara, California, Police Department received an anonymous telephone tip that marijuana was growing in Ciraolo's backyard.[5] A ground-level investigation proved fruitless because two fences surrounded the backyard.[6] Later the same day, investigating officers flew over Ciraolo's house in a private airplane at an altitude of one-thousand feet.[7] During the course of the flight, the officers identified the plants growing in Ciraolo's backyard as marijuana plants.[8]

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1. California v. Ciraolo, 106 S.Ct. 1809 (1986). Chief Justice Burger delivered the opinion of the Court, joined by Justices White, Rehnquist, Stevens, and O'Connor, with Justices Powell, Brennan, Marshall, and Blackmun dissenting.

2. People v. Ciraolo, 161 Cal.App.3d 1081, 208 Cal.Rptr. 93. (Cal.Ct.App. 1984).

3. *Ciraolo*, 106 S.Ct. at 1811-12.

4. *Id.* at 1813.

5. *Id.* at 1810. The exact words of the source were, "[c]an see grass growing in yard, Stebbins by Clark, S/B on left." Brief in opposition to petition for writ of certiorari at 2, California v. Ciraolo.

6. *Ciraolo*, 106 S.Ct. at 1810. The yard was enclosed by a six-foot tall outer fence and a ten-foot tall inner fence. The police officer was unable to see into the backyard from ground level. *Id.*

7. *Id.* Two Santa Clara police officers trained in marijuana identification were passengers in the airplane. *Id.*

8. *Id.* The marijuana plants were eight to ten feet in height. The officers photographed the area from the airplane with a 35mm camera. *Id.* at 1810-11.

Based on the information obtained during the flight, the officers obtained a search warrant for Ciraolo's property.[9] Upon execution of the search warrant, the officers seized 73 marijuana plants and arrested Ciraolo.[10]

The trial court denied Ciraolo's motion to suppress the evidence and Ciraolo pleaded guilty to a charge of marijuana cultivation.[11] The California Court of Appeal reversed the conviction, holding that the purposeful observation carried out by the officers from the airplane violated Ciraolo's reasonable expectation of privacy.[12] The California Supreme Court denied the State's petition for review.[13]

The United States Supreme Court granted the State's petition for certiorari and reversed the California Court of Appeal.[14] The Supreme Court held that Ciraolo's expectation of privacy was unreasonable by societal standards[15] and, as a result, was not entitled to fourth amendment protection.[16]

## III. THE HISTORICAL BACKGROUND OF THE FOURTH AMENDMENT

In *Ciraolo,* the Court reached its conclusion through a fourth amendment analysis which looked to Ciraolo's reasonable expectation of privacy from governmental intrusion.[17] Before addressing the Supreme Court's application of the fourth amendment, however, it is first necessary to consider both the historical underpinnings of the amendment and the historical development of fourth amendment jurisprudence.

The fourth amendment[18] is divided into two clauses: the first protects

9. *Id.* at 1811. The affidavit filed in support of the search warrant described both the anonymous tip and the officers' observations. *Id.* The affidavit included an exhibit consisting of a photograph of Ciraolo's backyard, house, and neighboring homes. *Id.*

10. *Id.* Ciraolo never disputed the fact that the plants were marijuana plants. *Id.*

11. *Id.*

12. *Id.* Ciraolo appealed his conviction in the Superior Court, contending the Superior Court erred in failing to suppress the evidence seized during a search of his residence. People v. Ciraolo, 161 Cal.App.3d 1081, 1084, 208 Cal.Rptr. 93, 94 (Cal. Ct. App. 1984). The Court of Appeal held that the aerial observation which supported the warrant violated the fourth amendment. *Id.* at 1090, 209 Cal.Rptr. at 98. That court also held that Ciraolo's backyard was within the curtilage of Ciraolo's home and that the two fences manifested Ciraolo's reasonable expectation of privacy. *Id.* at 1089, 209 Cal.Rptr. at 97. *See infra* text accompanying notes 29-30 and 49-57 for discussion of the curtilage doctrine.

13. *Ciraolo,* 106 S.Ct. at 1811.

14. *Id.* at 1811.

15. *Id.* at 1813.

16. *Id.* at 1813.

17. *Id.* at 1811.

18. 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.

the basic right of citizens to be free from unreasonable searches and seizures, and the second requires that warrants be particular and supported by probable cause.[19] Although the amendment was the Framers' response to general warrants issued by the Crown,[20] the amendment's protection has been extended beyond the types of intrusion present at the time the amendment was drafted.[21]

Prior to 1967, the Court employed the concept of the "constitutionally protected area" as a means of determining the extent of fourth amendment protection from warrantless governmental intrusions.[22] This analysis of fourth amendment protection focused on the defendant's property interest in a particular area and looked to whether the governmental activity

19. *See, e.g.*, Payton v. New York, 445 U.S. 573, 584 (1980), for a discussion of the history of the fourth amendment as well as some of the cases involved in fourth amendment jurisprudence.

20. *Payton*, 445 U.S. at 584-85. *See also* Boyd v. United States, 116 U.S. 616, 624-27 (1886). During the American colonial period, revenue officers acted pursuant to writs of assistance which enabled them to conduct discretionary searches of places upon suspicion of smuggling. *Boyd*, 116 U.S. at 625. The authors of the fourth amendment sought to prevent this abuse of power by adopting the principles in Lord Camden's discussion of the general warrant in Entick v. Carrington and Three Other King's Messengers, 19 Howell's State Trials 1029 (1765). *Boyd*, 116 U.S. at 626, 627.

In *Entick*, Lord Camden interpreted trespass law as prohibitive of every invasion of private property, however minute. *Entick*, 19 Howell's State Trials at 1066. The Court held that a search pursuant to a general warrant resulted in the self-compelled accusation of both the innocent and the guilty. *Id.* at 1073. Camden held the warrant void and found against the messengers in trespass. *Id.*

21. *Boyd*, 116 U.S. at 630. Justice Bradley stated that the principles of Lord Camden's discussion "affect the very essence of constitutional liberty and security." *Id. Boyd* rejected the notion that Camden's principles reached only the specific examples of the case in which they were enunciated. Rather, *Boyd* extended those principles to all invasions of privacy by the government or its employees. *Id.* The holding in *Boyd* was to be applied to protect the "sanctity of a man's home and the privacies of life." *Id. See also supra* text accompanying notes 18-20.

The present embodiment of that broad interpretation of the fourth amendment is that warrantless searches and seizures are *per se* unreasonable "subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967).

22. Amsterdam, *Perspectives on the Fourth Amendment*, 58. MINN. L. REV. 349, 357 (1974). Under this doctrine, fourth amendment protection was linked to the protection of property interests, requiring a physical trespass by the government before fourth amendment protection would apply. *See* Olmstead v. United States, 277 U.S. 438, 466 (1928) (interception of a telephone conversation was not prohibited by the fourth amendment because no actual invasion of either suspect's house took place).

The Court's focus on the constitutionally protected area continued in Goldman v. United States, 316 U.S. 129 (1942). In *Goldman*, the police used a detectaphone, placed against a partition wall, to overhear a conversation in an adjoining room as well as the portions of telephone conversations made from the room. *Id.* at 134. The Court found no search under the fourth amendment had taken place because no physical penetration of the suspect's premises had occurred. *Id.* at 134-36.

In Silverman v. United States, 365 U.S. 505 (1961), government agents advanced a "spike mike" along a party wall of an adjoining house until it touched a heating duct in the suspect's house. The Court held that a physical intrusion into a constitutionally protected area without a warrant violated the fourth amendment. *Id.* at 511-12. The petitioners in *Silverman* argued that the Court should overrule the physical penetration limitation on fourth amendment protection. *Id.* at 508. The Court acknowledged the improvements in surveillance technology, but declined to create a broader holding than that necessary to fit the facts in *Silverman*. *Id.* at 508-09. Instead, the Court relied on the actual intrusion by the officers as the grounds for reversing the petitioners' convictions. *Id.* at 512. The Court stated, "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch." *Id.*

impinged upon those interests.[23] For approximately 180 years, the Court required a physical intrusion by the government before a person could invoke fourth amendment protection.[24] The defendant who invoked fourth amendment protection tried to prove that the area in question was a protected one and that the government intruded.[25] The government attempted to prove that the area was neither protected nor deserving of fourth amendment protection.[26]

The Court's reliance on the concept of protected areas in fourth amendment cases required it to engage in a more meticulous examination of the nature of the area in order to determine the scope of the amendment's protection against unreasonable searches and seizures.[27] The Court's examination was based on the language of the amendment which expressly created the right to be secure in one's *home* against unreasonable searches and seizures.[28] In defining protected areas, the Court extended the protection afforded the home to the area which surrounded it.[29] The Court used the term "curtilage" to describe the area immediately surrounding the home. As an extension of the home, curtilage deserved the heightened protection of the fourth amendment.[30] Conversely, the Court denied fourth amendment protection to that portion of the property known as "open fields", the property surrounding a home which was not within the curtilage.[31]

The petitioners in *Silverman v. United States*[32] pointed out the limited utility of the protected area analysis when applied to situations where the government employed technological means to eavesdrop without actual intrusion.[33] The protected area analysis evolved from the broader property

23. Amsterdam, *supra* note 22, at 357.

24. The time period is from the date of adoption up to the decision in Katz v. United States, 389 U.S. 347 (1967).

25. On occasion this resulted in the submission of competing lists of protected areas in briefs to the Court. *See, e.g.*, Katz v. United States, 389 U.S. 347 n.8 (1967).

26. *Id.*

27. Amsterdam, *supra* note 22, at 357.

28. U.S. CONST. amend. IV. The language of the amendment indicates the importance of the home to the Framers at the time the Amendment was drafted. *See* Boyd v. United States, 116 U.S. 616, 630 (1886).

29. Hester v. United States, 265 U.S. 57, 59 (1924). Revenue officers arrested operators of an illegal distillery without a warrant for either a search or an arrest. *Id.* at 58. The officers obtained evidence in a field near the suspect's home. *Id.* Justice Holmes, writing for the Court, held that fourth amendment protection did not extend to activities occurring in "open fields". *Id.* at 59, citing 4 W. Blackstone, Commentaries *223, 225. The pertinent part of the Commentaries is a discussion of civil trespass to property in which the author considered the area immediately surrounding the home, referred to as the curtilage, to be co-extensive with the home for the purpose of the privacy interest. 4 W. Blackstone, Commentaries *223, 225, 226.

30. *Hester*, 265 U.S. at 59.

31. *Id.*

32. 365 U.S. 505 (1961).

33. *Id.* at 508-09. The petitioner in *Silverman*, seeking to invalidate the protected area analysis, argued that the government could eavesdrop on a conversation in a room without a physical trespass;

law concept of trespass.[34] It was, therefore, an inadequate analytic tool in situations where the government obtained information from the home or a home-like area without a physical intrusion.[35]

In *Katz v. United States*,[36] the Court abandoned the property notion of constitutionally protected areas and adopted an analysis centered on a person's justifiable reliance on privacy in an area.[37] Katz was suspected of violating interstate gambling laws.[38] The police used a listening device placed on the outside of a public telephone booth in order to hear Katz's conversation within.[39] The Court, finding that a search and seizure had occurred, held that the absence of physical intrusion had no constitutional significance and reversed Katz's conviction.[40] The Court held that the trespass limitation, derived from the constitutionally protected area analysis, could "no longer be regarded as controlling."[41]

Justice Harlan, in a concurring opinion, set out a two-part analysis which has become the standard by which the Court has determined fourth amendment protection.[42] The analysis requires that a person manifest a subjective expectation of privacy,[43] and that the person's expectation of privacy be reasonable by societal standards.[44]

Harlan observed that the home is normally the place where a person expects privacy.[45] He qualified this statement, however, by saying that

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in fact, the government could eavesdrop without even being near the room. *Id.* at 509. The petitioners discussed devices such as parabolic microphones and techniques such as flooding a room with a particular frequency of sound, as examples of the recent technological developments which would enable the government to intrude without physical trespass. *Id.* The Court, however, limited its inquiry and did not address the merits of the protected area analysis because the facts showed an actual intrusion by the government agents. *Id.*

34. *Hester*, 265 U.S. at 59, citing 4 W. Blackstone, Commentaries *223, 225, 226.

35. *See Silverman*, 365 U.S. at 508-09.

36. 389 U.S. 347 (1967).

37. *Id.* at 353. The Court held that the fourth amendment protects people, "not simply areas", from unreasonable searches and seizures. *Id. Katz* directed courts to look to the person's justifiable reliance on privacy in a particular area in order to determine the extent of fourth amendment protection. *Id.*

38. *Id.* at 348.

39. *Id.*

40. *Id.* at 353, 359.

41. *Id.* at 353. The Court explicitly addressed the holdings in *Olmstead*, 277 U.S. 438 and *Goldman*, 316 U.S. 129 and found the trespass doctrine to be so "eroded" by later cases that it no longer had dispositive value in fourth amendment analysis. *Id.*

42. *Id.* at 361 (Harlan, J., concurring). Harlan noted that although the fourth amendment protects people, any inquiry to ascertain the extent of protection usually requires reference to a place. *Id.*

43. *Id.* This is the part of the analysis Harlan referred to as the "actual" expectation of privacy. *Id.* Analysis under this part of the test looks generally to the outward manifestations of a person's expectation of privacy. *Id.*

44. *Id.* Under this part of the test, the Court has looked to the societal interest in protecting certain areas from warrantless governmental intrusion on the grounds that "certain areas deserve the most scrupulous protection." *See, e.g.*, Oliver v. United States, 466 U.S. 170, 178 (1984) (no fourth amendment protection to activities taking place in open fields because the activities occurring in that area are not those usually associated with the home).

45. *Katz*, 389 U.S. at 359.

even in the home, "objects, activities, or statements that a person exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."[46] It is important to note in this context that Harlan was not using "plain view" as a term of art which describes an exception to the warrant requirement.[47] Rather, plain view in *Katz* was used in its simple and literal sense: that which is plainly visible.[48]

Seventeen years after *Katz*, in *Oliver v. United States*,[49] the Court applied the reasonable expectation of privacy test to facts which raised questions about the continued vitality of the curtilage/open fields distinction.[50] In *Oliver*, the defendants had posted "No Trespassing" signs around the fields in which they were growing marijuana.[51] Acting on an anonymous tip, the police investigated and discovered marijuana plants.[52] Finding no reasonable expectation of privacy, the Court reaffirmed the traditional curtilage-open fields distinction.[53] The Court held that the distinction was based upon the explicit language of the fourth amendment's special protection afforded to people in their homes.[54] Further, the common law history of protecting the curtilage as if it were part of the home provided sufficient grounds for maintaining the distinction after *Katz*.[55] Contrasting the special protection afforded the home with the kind

46. *Id.*

47. The plain view doctrine is based on the proposition that once police are lawfully in a position to directly observe an object, the owner loses his privacy interest in that object. Illinois v. Andreas, 463 U.S. 765, 771 (1983). The plain view doctrine has been considered to be both an exception to the presumptive unreasonableness of warrantless searches and seizures and as an extension of prior fourth amendment justification for an officer's access to an object. *See* Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) (plurality opinion).

The first limitation on the plain view exception is that plain view alone is never enough to justify warrantless seizure of evidence. *Id.* at 468. The second limitation is that the discovery of evidence in plain view must be inadvertent. *Id.* at 469. *But see* Texas v. Brown, 460 U.S. 730, 739 (1983) (plurality opinion). The *Brown* court did not reach the inadvertence issue, but held that a lawfully positioned officer need only comply with a "common sense" standard in determining whether there is probable cause to associate the property with criminal activity. *Id.* Justice Harlan's concurrence in *Katz* predated all three opinions and should not be equated with the plain view doctrine developed in later cases, which addressed exceptions to the warrant requirement of the fourth amendment.

48. *Katz*, 398 U.S. at 361.

49. 466 U.S. 170 (1984).

50. *Id.*

51. *Id.* at 170.

52. *Id.*

53. *Id.* at 176-78.

54. *Id.* The *Oliver* court referred to the Holmes quotation of the fourth amendment in *Hester* which established the home as one of the areas deserving protection. *Id.*, citing *Hester*, 265 U.S. at 59.

55. *Oliver*, 466 U.S. at 180. The Court stated, "At common law the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life'." *Id.* The Court did not expressly identify factors to be used in determining whether property is within the curtilage, but pointed to cases in which the circuits had done so. *Id.*

In March, 1987, the Court set out four factors to be used in resolving curtilage questions: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an

of activities which take place in open fields, the Court denied fourth amendment protection where activities took place "out of doors" except in the area "immediately surrounding the home."[56] The Court thus found no reason to deny fourth amendment protection to the area within the curtilage, stating that the curtilage warrants the fourth amendment protections that attach to the home.[57]

## IV. DISCUSSION AND ANALYSIS

### A. The Court's Reasoning in *California v. Ciraolo*

The Court applied existing fourth amendment jurisprudence to reach its decision in *California v. Ciraolo*.[58] The Court first looked to Ciraolo's reasonable expectation of privacy under the rule found in Justice Harlan's concurring opinion in *Katz*.[59] The Court inquired whether Ciraolo's expectation of privacy was reasonable by societal standards.[60]

Ciraolo asserted that his expectation was reasonable because the area observed by the police was within the curtilage of his home, an area in which activities deserve heightened protection.[61] The Court acknowledged the special protection afforded the areas within the curtilage, but refused to accept Ciraolo's claim that this fact, *per se*, barred all police observation.[62] The Court used *United States v. Knotts*[63] as support for the

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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." United States v. Dunn, 107 S.Ct. 1134, 1139 (1987).

56. *Oliver*, 466 U.S. at 178.

57. *Id.* at 180.

58. 106 S.Ct. 1809 (1986).

59. *Ciraolo*, 106 S.Ct. at 1811. The Court did not address the "subjective expectation" part of the *Katz* test because the state did not challenge the lower court finding that Ciraolo had manifested such an expectation by constructing the two fences. *Id.* at 1811-12.

60. *Id.* at 1813.

61. *Id.*

62. *Id.*

63. 460 U.S. 276 (1983). In *Knotts*, the Court found no reasonable expectation of privacy on the part of a suspected drug manufacturer who was the subject of police observation on a public highway while driving in his car. *Id.* at 277. The suspect had purchased a drum of chloroform which was to be used in the manufacture of illicit drugs. *Id.* at 277. The drum contained an electronic beeper which would give officers the location of the drum should their visual surveillance fail. *Id.* at 285. Through their visual and electronic surveillance the police ultimately learned the location of the manufacturing site, a cabin in the woods of Wisconsin. *Id.* The Court held that the beeper provided no information to the police in addition to what they could have obtained by observing the suspect on his journey to the cabin. *Id.* Justice Rehnquist, writing for the Court, emphasized that the beeper was not used to reveal information about the movement of the drum within the cabin or to give information in any way that would not have been visible to the naked eye. *Id.* Thus, the Court's holding in *Knotts* condoned only the surveillance which took place without intrusion into the interior of the cabin. *Id.*

In addition, the police in *Knotts* obtained a search warrant prior to entering the cabin, an area deserving the most heightened fourth amendment protection. *Id.* at 279. Therefore, prior to their entry into the cabin, the police had proved probable cause sufficient to justify issuance of a search warrant. *Id.*

proposition that merely taking measures to restrict certain views that a policeman may have of an area does not preclude an officer's view of the area from some other lawful vantage point.[64] By using *Knotts* in this manner, the *Ciraolo* majority equated the outside observation of the cabin in *Knotts* with the police observation of Ciraolo's backyard.[65] The *Ciraolo* Court found no significant difference between the observation carried out in *Knotts* and that carried out in *Ciraolo* in terms of the positioning of the police officer in a lawful vantage point.[66]

The Court found it significant that the police did not physically intrude into Ciraolo's backyard in order to see its contents.[67] Emphasizing the absence of physical intrusion, the Court pointed out that the officers were in public navigable airspace[68] and that "any member of the public flying in this airspace" could have glanced down and seen what the police officers saw.[69] The majority was unpersuaded by Justice Harlan's caveat from his concurring opinion in *Katz*, cautioning that the fourth amendment should not be limited to proscribing only those situations in which the police have physically trespassed onto a defendant's property.[70] The majority found Harlan's warning to be "plainly aimed" at future electronic developments and not at "simple visual observations from a public place."[71]

Chief Justice Burger, writing for the majority, contrasted Ciraolo's "unlawful activities" with Katz's act of entering the telephone booth with the expectation that his words would remain private.[72] The Court held that Ciraolo was not "entitled to assume" that his unlawful conduct would remain private and refused to extend fourth amendment protection to Ciraolo's activities.[73]

### *B.* Analysis of the Court's opinion in *Ciraolo*

In reaching its decision to deny Ciraolo's expectation of privacy, the Court: (1) addressed the legitimacy of the privacy expectation in the

64. *Ciraolo*, 106 S.Ct. at 1812. The lawful vantage point from which police observed the suspect in *Knotts* was outside the suspect's cabin. *Knotts*, 460 U.S. at 278.

65. *Ciraolo*, 106 S.Ct. at 1812.

66. *Id.*

67. *Id.* at 1813.

68. *Id.*

69. *Id.*

70. *Id. See also Katz*, 389 U.S. at 362.

71. *Ciraolo*, 106 S.Ct. at 1813. The majority's focus on electronic developments as the only exception to the physical trespass limitation indicates an overly literal reading of *Katz* which relegates the real issue, absence of physical trespass as a limitation on fourth amendment protection, to a position of secondary importance. *See infra* text accompanying notes 126-33.

72. *Ciraolo*, 106 S.Ct. at 1813. Once again the majority referred to Ciraolo's activities as "illicit" in an atttempt to create a significant difference between *Katz* and *Ciraolo* for the purpose of its analysis. *Id.*

73. *Id.*

context of the curtilage/open fields doctrine; (2) erroneously relied on *Knotts* to expand a "public vantage point" exception to the protection afforded the curtilage while ignoring crucial differences between *Knotts* and *Ciraolo;* (3) acknowledged absence of physical trespass as important to Fourth Amendment analysis despite earlier decisions which held otherwise; and (4) looked to the criminal conduct of the defendant in addressing the reasonableness of his privacy expectation.

1. Legitimacy of the privacy expectation

The majority began its inquiry by questioning the legitimacy of Ciraolo's expectation of privacy.[74] The Court focused on whether the fourth amendment protects the curtilage from all intrusion, or whether the protection is conditional.[75] The Court turned to *Oliver v. United States*[76] for its test of the legitimacy of Ciraolo's privacy expectation.[77] In *Oliver,* the Court determined the legitimacy of the expectation by asking whether "the government's intrusion infringes upon the personal and societal values protected by the fourth amendment."[78] *The Ciraolo* Court acknowledged the heightened protection afforded the curtilage.[79] The majority opinion also conceded that the area observed by the police was within Ciraolo's curtilage.[80] Assuming that the privacy interest in the home and curtilage is one of the legitimate personal and societal values protected by the fourth amendment for the purpose of the *Oliver* legitimacy test, the majority neglected to show exactly how Ciraolo's expectation of privacy failed the legitimacy test and led to a denial of fourth amendment protection.

The test from *Oliver* may be inadequate in cases involving the curtilage. In *Oliver,* the Court rejected the notion of intent to conceal private activity as a formulation of the test.[81] The *Oliver* Court, however, determined that the property in question was in open fields and not within the curtilage.[82] The question, unaddressed in *Ciraolo,* is whether the *Oliver* test would be applicable in a case where the property in question was clearly within the curtilage. If the curtilage were the area in which one may

74. *Id.* at 1811.

75. *Id.* at 1812. Ciraolo argued that because the area observed by the police was within the curtilage, no police observation was permissible. *Id.*

76. 466 U.S. 170.

77. *Ciraolo,* 106 S.Ct. at 1812.

78. *Oliver,* 466 U.S. at 182. The Court rejected defendants' argument that the expectation was legitimate whenever the individual chose to conceal private activity. *Id.* The defendants had posted "No Trespassing" signs and had fenced the field in which they were growing marijuana. *Id. See also supra* text accompanying notes 49-57.

79. *Ciraolo,* 106 S.Ct. at 1812.

80. *Id.*

81. *Oliver,* 466 U.S. at 182.

82. *Id.*

always entertain the most heightened expectation of privacy, then a test developed in an open fields inquiry should consistently find that the governmental intrusion infringed upon the personal and societal values protected by the fourth amendment. To be consistent with the Court's long-standing position that the area within the curtilage is inviolable,[83] the test of legitimacy would only need to ascertain the locus of the activity to determine whether it occurred within the curtilage. Upon a finding that the area is within the curtilage, the expectation of privacy would necessarily be held to be legitimate.

2. The Court's reliance on *Knotts*

Based on existing fourth amendment analysis, Ciraolo's subjective expectation of privacy in the activities taking place in his backyard seems legitimate. The Court, however, held Ciraolo's expectation of privacy unreasonable in part because Ciraolo's backyard was exposed to "public view" from the air.[84] The Court reasoned that because the police attained a lawful vantage point, their view into Ciraolo's backyard from the air did not constitute a search within the meaning of the fourth amendment.[85] The majority relied on *Knotts* to support this proposition.[86] Two significant differences between the cases serve to undermine the Court's reliance on *Knotts:* first, the nature of the surveillance was substantially different;[87] and second, the timing of the search warrants in relation to the surveillance of home and curtilage was substantially different.[88]

83. *See Hester*, 265 U.S. at 58-59. *See also Oliver*, 466 U.S. at 180.

84. At no time does the Court equate the notion of "public view" with the "plain view" doctrine. The plain view doctrine is discussed *supra* in text and accompanying notes 39 and 40. The "doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior fourth amendment justification and who has probable cause to suspect that the item is connected with criminal activity." Illinois v. Andreas, 463 U.S. 765, 771 (1983).

85. *Ciraolo*, 106 S.Ct. at 1812. The Court noted that anyone flying over Ciraolo's home could have seen what the officers saw and this fact seems to be the basis of the public vantage point argument. Justice Powell, dissenting, found this reasoning to be "wholly without merit." *Id.* at 1818 n.8 (Powell, dissenting). Powell pointed out that people on commercial or private flights have only fleeting opportunities to observe activity taking place within the curtilage of a home and that they rarely associate what they see with a particular individual. *Id.* He also found fault with the majority's disregard of the reasons for which most people fly in airplanes and the reasons the police used the airplane on the occasion in question. *Id.*

The *Ciraolo* conclusion is based on a partial reading of the entire paragraph in *Katz* in which Justice Stewart discussed public view. *Katz*, 389 U.S. at 351. Part of the paragraph in *Katz* supports the proposition that public exposure is inconsistent with a claim of fourth amendment protection. *Id.* However, the very next sentence in the same paragraph states, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* In *Ciraolo*, the Chief Justice's public view argument prevailed. Yet *Ciraolo* never explicitly overruled or addressed the majority opinion from *Katz* on the issue of public view and fourth amendment protection.

86. *Ciraolo*, 106 S.Ct. at 1812.

87. *See infra* text accompanying notes 89-100.

88. *See infra* text accompanying notes 101-25.

In *Knotts*, the police observed the suspect's car traveling over public highways and utilized a beeper to track the location of a drum of chloroform to a particular house.[89] At one time the officers trailing the suspect broke off surveillance when the suspect began evasive action.[90] A helicopter was then used to ascertain the physical location of the beeper once it again became stationary.[91] The remainder of the surveillance prior to obtaining the search warrant involved observation of the house from the outside.[92]

The *Knotts* court limited its holding to these particular circumstances when it stated that at no time was the beeper used to "reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin."[93] In *Knotts*, the interior of the cabin represented the area deserving the protection of the fourth amendment.[94] Finding the surveillance within the bounds of the fourth amendment, the *Knotts* court emphasized that the police never obtained information about activities occurring within the cabin.[95] From their public vantage point in *Knotts* the police did not observe activities occurring in any area protected by the fourth amendment.

In *Ciraolo* the police also obtained information through naked-eye observation.[96] That, however, is where the similarity with *Knotts* ends. The purpose of the police surveillance in *Ciraolo* was visually to invade the area within the curtilage of Ciraolo's property.[97] The police in *Ciraolo* made no effort to observe the outside of Ciraolo's house in order to obtain further information.[98] Rather, they directly observed an area which, by the Court's own admission, has traditionally been afforded the most heightened protection under the fourth amendment.[99] Most importantly, the acts of the police in obtaining information about activities occurring within the curtilage of Ciraolo's property went beyond the acts approved by the Court's limited holding in *Knotts*.[100] So while the police in *Knotts* may have indeed observed their suspect from a lawful vantage point, the police in *Ciraolo* carried out a qualitatively different kind of search when

89. *Knotts*, 460 U.S. at 278-79.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 285.
94. *Id.* at 284-85.
95. *Id.*
96. *Ciraolo*, 106 S.Ct. at 1810-11.
97. *Id.*
98. *Id.*
99. *Id.* at 1812.
100. *See supra* text and accompanying notes 89-95.

they flew into the air and looked down into Ciraolo's fenced backyard. It is this difference which casts doubt on the support *Knotts* provides to the majority opinion.

The second significant distinction between *Knotts* and *Ciraolo* is in the timing of the search warrants in relation to the observation of the home and curtilage in each of the two cases. In *Knotts,* the police obtained a search warrant prior to entering the cabin,[101] an area in which activities enjoy the traditional expectation of privacy afforded a dwelling.[102] The police in *Knotts* supported the search warrant with information obtained prior to any invasion of the interior of the cabin.[103]

In contrast, the police in *Ciraolo* obtained the warrant to search Ciraolo's home and seize the marijuana plants after looking into Ciraolo's backyard.[104] Unlike the officers in *Knotts,* the police in *Ciraolo* acted on nothing more than an anonymous tip and gathered information about activities occurring in Ciraolo's backyard, an area having heightened fourth amendment protection.[105] The police acted in the absence of a search warrant when they flew over Ciraolo's house for the sole purpose of looking into the curtilage.[106] Yet the *Ciraolo* majority opinion ignored the considerable fourth amendment jurisprudence which addresses warrantless intrusions into the home.[107]

Warrantless intrusions into the home have been held to be unreasonable searches and seizures under the fourth amendment, subject only to a few well-defined exceptions.[108] The framers of the amendment included language which expressly identified the home as one of the entities especially protected by the amendment.[109] Thus, they recognized the importance of keeping the home free from unreasonable governmental intrusions. Equally important, the Court historically had extended fourth amendment protection to activities occurring within the curtilage, but not to those occurring in open fields.[110] Through the incorporation of the framers' intent into the common law, the presumptive inviolability of the home and of the area

101. *Knotts,* 460 U.S. at 279.
102. *Id.* at 282, 285.
103. *Id.* at 278-79.
104. *Ciraolo,* 106 S.Ct. at 1810-11.
105. *Id.*
106. *Id.*
107. *See infra* text accompanying notes 107-25.
108. Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) (plurality opinion). In *Coolidge,* the Court held that the exceptions to warrantless intrusions into the home were based on the presence of "exigent circumstances". *Id.* at 475. However, this exception is not applicable in *Ciraolo* because the State never claimed it acted pursuant to such exigent circumstances, nor did the majority indicate that it was an issue.
109. U.S. CONST. amend IV.
110. *See supra* text accompanying notes 50-57.

within the curtilage has become a well established principle of fourth amendment analysis. [111]

The cases on warrantless intrusions into the home illustrate the Court's traditionally high regard for the principle of the presumptive inviolability of the home.[112] In *Steagald v. United States,* agents used an arrest warrant for a third party as a pretext for entering an apartment belonging to persons not named in the warrant.[113] After two searches of the apartment uncovered cocaine and paraphenalia, the police obtained a search warrant for the apartment and found a larger quantity of cocaine.[114] At trial, the police claimed that they entered on the belief that the party named in the arrest warrant was within the premises.[115] The Supreme Court reversed the petitioners' convictions in the lower court on the grounds that the reasonableness of the officers' belief was never subjected to the "detached scrutiny of a judicial officer" as required by the fourth amendment.[116]

The Court emphasized the importance of a search warrant for invasions of the home in *Johnson v. United States.*[117] Justice Jackson wrote, "Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing."[118]The point at which the privacy interest yields to the right of search is to be "decided by a judicial officer, not by a policeman or government enforcement agent."[119]

In *Payton v. New York,*[120] the Court held that a state statute authorizing police to enter a private residence without a warrant to make a routine felony arrest was unconstitutional.[121] In *Payton,* the officers, acting with probable cause but without warrants, entered premises of the appellant without consent.[122] The Court used unequivocal language in discussing the legitimate privacy expectation in the home: "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home. . . . Absent exigent

111. *Id.*
112. *See infra* text accompanying notes 112-25.
113. 451 U.S. 204, 213 (1981).
114. *Id.* at 206-07.
115. *Id.* at 207.
116. *Id.* at 213. The Court held that the officers' arrest warrant served to protect the named individual from an unreasonable seizure because of the scrutiny of the issuing magistrate. *Id.* The warrant, however, did nothing to protect the occupants of the apartment from an unreasonable search and seizure. *Id.*
117. 333 U.S. 10 (1948).
118. *Id.* at 13-14.
119. *Id.*
120. 445 U.S. 573 (1980).
121. *Id.*
122. *Id.* at 576.

circumstances that threshold may not reasonably be crossed without a warrant."[123]

In each of the above cases the government committed a warrantless intrusion into the home. In each of the cases, the Court emphasized the special protection afforded the home under the fourth amendment.[124] In cases such as *Oliver* and *Ciraolo,* the Court equated the activities occurring within the curtilage with those occurring in the home for the purpose of fourth amendment protection.[125] The *Ciraolo* court never brought into question the continued vitality of the curtilage doctrine as it could have done by expressly limiting the scope of the holdings in *Hester* and *Oliver.* Rather, the Court sought to overcome the presumptive unreasonableness of the police surveillance by creating something called "public view" and by erroneously relying on the holding and facts of *Knotts* to support its decision.[126]

3. The absence of physical trespass in the public view exception

One of the building blocks in the *Ciraolo* court's "public vantage point/ public view" exception to the warrant requirement is that the police flight over Ciraolo's backyard took place in a "physically non-intrusive manner."[127] In 1967 the court explicitly rejected this limitation on fourth amendment protection in *Katz v. United States*.[128] Writing for the majority in *Katz,* Justice Stewart rejected the technical trespass limitation and broadened the scope of fourth amendment protection beyond the traditional concepts of property law.[129] He stated, ". . . the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[130] Justice Harlan concurred, stating that physical trespass limitations on fourth amendment protection were "bad physics as well as bad law."[131] The *Katz* court found no value to the argument that warrantless searches were constitutionally more palatable merely because the police employed the least intrusive means to effect them.[132]

The *Ciraolo* majority frequently invoked *Katz* in support of its position. Yet it inexplicably relied on the absence of physical intrusion to render

123. *Id.* at 589-90.

124. *See supra* text accompanying notes 107-10.

125. *See supra* text accompanying notes 74-83.

126. *Ciraolo,* 106 S.Ct. at 1812-13.

127. *Id.* at 1813.

128. 389 U.S. 347, 353 (1967). *See supra* text accompanying notes 36-48 for a more thorough discussion of *Katz*.

129. *Id.*

130. *Id.*

131. *Id.* at 362 (Harlan, J., concurring).

132. *Id.* at 356-57. Justice Stewart was not impressed with the notion of police restraint in obtaining evidence without a warrant. *Id.* at 356. *Katz* mandated restraint in the form of a search warrant, to be imposed by judicial officer, after detached scrutiny of the evidence supporting a finding of probable cause. *Id.*

the police surveillance in *Ciraolo* acceptable under the fourth amendment.[133] The Court did this in spite of the fact that the physical trespass limitation was put to rest in *Katz*, a case which is fundamental to modern fourth amendment jurisprudence.[134]

4. The link between unlawful activities and a reasonable expectation of privacy

The Chief Justice took great pains throughout *Ciraolo* to declare Ciraolo's activities "unlawful"[135] and to incorporate this designation into the Court's analysis of the reasonableness of Ciraolo's expectation of privacy.[136] The reasoning and the result in *Ciraolo* suggest that the reasonableness of one's expectation of privacy will be linked to whether the observed activity was lawful or unlawful.[137]

In *United States v. Jacobsen*,[138] the Court rejected the proposition that a warrantless search could retroactively be characterized as reasonable simply because agents discover contraband after the invasion occurs.[139] The requirement that a warrant be issued by a neutral magistrate upon a showing of probable cause precludes a *post hoc* finding of unreasonableness simply because certain activity was later characterized as criminal.[140] In *Ciraolo*, the majority did not address *Jacobsen*, nor did they explain the significance of stressing the "illicit" characterization to Ciraolo's acts.

The police could not have known about the lawfulness of Ciraolo's activities prior to their aerial search of his backyard. Should the unlawfulness of an activity become important in determining the reasonableness of the privacy expectation, police would be inclined to search without a warrant when unlawful activity is suspected rather than carry out further surveillance in an effort to establish probable cause. The suspect would thus be presumed guilty before any judicial officer has the chance to determine whether probable cause exists. By labelling Ciraolo's conduct unlawful in the context of determining fourth amendment protection, the opinion suggested a new condition for situations in which police may search without a warrant and in which persons may invoke protection from unreasonable searches.[141] At best, it is unclear to what extent a *post hoc* finding of criminal activity will justify a warrantless intrusion by the government.

133. *Ciraolo*, 106 S.Ct. at 1813.
134. *Katz*, 389 U.S. at 353.
135. *Ciraolo*, 106 S.Ct at 1811-13.
136. *Id.*
137. *Id.*
138. 466 U.S. 109 (1984).
139. *Id.* at 114.
140. *Id.* at 114-15. "The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Id.*
141. *Ciraolo*, 106 S.Ct. at 1811, 1813.

## V. CONCLUSION

Ciraolo created exceptions to the heightened protection from warrantless governmental intrusion traditionally afforded the curtilage.[142] Police may now use airplanes to observe activities in backyards which they could not observe at ground level.[143] The Court held that as long as the police are in public navigable airspace, they may observe activities occurring within the curtilage.[144]

The Court also applied the "absence of physical trespass" limitation on fourth amendment protection in arriving at this result.[145] The Court held that the combination of "public vantage point" and lack of physical intrusion created a constitutionally palatable police surveillance which did not constitute a search under the fourth amendment.[146] The Court's holding diminished the amount of protection from governmental intrusion one may expect in the curtilage and allows the state to carry out significant intrusions into the private lives of its citizens. The Court reached its result through a flawed fourth amendment analysis which looked to lack of intrusiveness and the subsequent finding of criminal conduct by the defendant in order to determine the reasonableness of a warrantless intrusion into the area within the curtilage of a home. The Court used this approach to establish that the intrusion was not excessive and, therefore, not a search within the meaning of the fourth amendment.[147]

Justice Bradley warned against reaching such a result through this kind of inquiry in *Boyd v. United States*[148] more than 100 years ago:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property. . . . It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . A close and literal construction [of fourth amendment provisions] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."[149]

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142. *Id.* at 1812-13.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. 116 U.S. 616 (1886).
149. *Id.* at 630, 635.