CASE NOTES

CONSTITUTIONAL LAW—A Police Officer's Naked-Eye Observation of the Interior of a Partially-Covered Greenhouse from the Vantage Point of a Helicopter Circling at an Altitude of 400 Feet Is Not a "Search" for Which a Warrant Is Required Under the Fourth Amendment—*Florida v. Riley*, 488 U.S. 445 (1989).

The fourth amendment of the United States Constitution affords protection against unreasonable searches and seizures.[1] Recently, the United States Supreme Court refined its guidelines regarding the extent technological advances may be used by law enforcement officials to observe residential interiors together with their curtilages[2] without effectively conducting "searches."[3]

I. INTRODUCTION

In August 1984, the sheriff's office in Pasco County, Florida, received an anonymous tip that marijuana was being cultivated in a rural residential greenhouse.[4] A mobile home served as the greenhouse and was located ten to twenty feet behind the residence.[5] Two sides of the greenhouse were enclosed, but the other two were not.[6] Its contents, however, were protected against observation from surrounding property by trees, shrubs, and the mobile home.[7] The greenhouse was covered by corrugated roofing panels,

---

1. The fourth amendment states:
> 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.

2. The United States Supreme Court extends fourth amendment protection to the curtilage, defining it as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' . . . consider[ing it] part of the home itself for Fourth Amendment purposes." Oliver v. United States, 466 U.S. 170, 180 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). The Court most recently explained "the protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207, 212-13 (1986).

3. Florida v. Riley, 488 U.S. 445 (1989).

4. *Id.* at 448.

5. *Id.*

6. *Id.*

7. *Id.*

some translucent and others opaque.[8] Two missing roof panels allowed a small portion of the greenhouse's contents to be viewed from the air.[9] The open area constituted approximately ten percent of the total roof area.[10] A wire fence surrounded the mobile home and greenhouse, and the property was posted with a "DO NOT ENTER" sign.[11]

A sheriff's deputy investigated the tip.[12] After determining the greenhouse was not visible from the road, he flew over the property in a helicopter, circling twice from an altitude of 400 feet.[13] The deputy was able to discern with his naked eye the contents of the greenhouse through the roof openings. He concluded marijuana was growing in the greenhouse.[14] After making this observation, the deputy obtained a warrant.[15] A subsequent search revealed marijuana was growing in the greenhouse.[16]

Michael A. Riley, the petitioner and owner of the property, was charged with possession and manufacture of marijuana, a violation of Florida Statute section 893.13.[17] The trial court granted Riley's motion to suppress the admission of the marijuana into evidence[18] under the Florida Rules of Criminal Procedure.[19] Florida's Second District Court of Appeals

---

8. *Id.*
9. Appendix to Brief for Petitioner at 39, Florida v. Riley, 488 U.S. 445 (1989) (No. 87-764).
10. Florida v. Riley, 488 U.S. at 448.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 448-49.
16. *Id.*
17. Riley v. State, 511 So. 2d 282, 284 (Fla. 1987). Florida Statutes, Section 893.13, provides:

> (1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, purchase, manufacture, or deliver, or possess with intent to sell, purchase, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:
>
> 1. A controlled substance named or described in § 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) is guilty of a felony of the second degree, punishable as provided in §§ 775.082, 775.083, and 775.084.

FLA. STAT. ANN. § 893.13 (West Supp. 1989).

18. Riley v. State, 511 So. 2d at 284.
19. *Id.* The relevant portion of the pre-trial motion section of the Florida Rules of Criminal Procedure provides:

> (h) Motion to Suppress Evidence in Unlawful Search.
>
> (1) *Grounds.* A defendant aggrieved by an unlawful search and seizure may move to suppress anything so obtained for use as evidence because:
>
> (1) The property was illegally seized without a warrant, or
>
> (2) The warrant is insufficient on its face, or
>
> (3) The property seized is not that described in the warrant, or
>
> (4) There was no probable cause for believing the existence of the grounds on which the warrant was issued, or
>
> (5) The warrant was illegally executed.

reversed the trial court's evidentiary ruling,[20] but certified the case to the Florida Supreme Court as one of "great public importance."[21] The Florida Supreme Court stated the question was "[w]hether surveillance of the interior of a partially covered greenhouse in a residential backyard from the vantage point of a helicopter located 400 feet above the greenhouse constitutes a 'search' for which a warrant is required under the fourth amendment and article 1, section 12 of the Florida Constitution?"[22] The Florida Supreme Court reversed the district court of appeals.[23]

A. *Florida Supreme Court Analysis*

On a writ of certiorari[24] the United States Supreme Court *held*, reversed.[25] A police officer's naked-eye observation of the interior of a partially-covered greenhouse from the vantage point of a helicopter circling at an altitude of 400 feet is not a "search" for which a warrant is required under the fourth and fourteenth amendments to the United States Constitution. *Florida v. Riley*, 488 U.S. 445 (1989). In reinstating the suppression order,

---

(2) *Contents of Motion.* Every motion to suppress evidence shall clearly state the particular evidence sought to be suppressed, the reasons for suppression and a general statement of the facts on which the motion is based.

FLA. R. CRIM. P. 3.190(h).

20. State v. Riley, 476 So. 2d 1354, 1355 (Fla. Dist. Ct. App. 1985).

21. Riley v. State, 511 So. 2d at 283. The District Court of Appeal certified the question to the state supreme court as a question of first impression, thus requiring a constitutional interpretation by the state's highest court. State v. Riley, 476 So. 2d at 1356. Article 1, Section 12, of the Florida Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

FLA. CONST. art. I, § 12.

22. Riley v. State, 511 So. 2d at 283.

23. Florida v. Riley, 488 U.S. at 449.

24. The Court had proper jurisdiction given the fact the Florida Supreme Court mentioned the Florida Constitution in posing the question and again in its conclusion that both the federal and state constitutions had been violated. Florida v. Riley, 448 U.S. at 448. "[T]here being no indication that the decision 'clearly and expressly . . . is alternatively based on bona fide separate, adequate, and independent grounds,' we have jurisdiction." *Id.* (quoting Michigan v. Long, 463 U.S. 1032, 1034 (1983)).

25. Florida v. Riley, 488 U.S. at 452. The plurality opinion was delivered by Justice White and joined by Chief Justice Rehnquist, and Justices Kennedy and Scalia. *Id.* at 447.

the Florida Supreme Court applied the United States Supreme Court standard[26] established in *Katz v. United States*.[27] "*Katz* and its progeny established a two-pronged test for determining whether the government had intruded on an individual's reasonable expectation of privacy. First, an individual by his conduct must exhibit an actual subjective expectation of privacy. Second, society must be willing to recognize that expectation as reasonable."[28] The Florida Supreme Court considered *Katz* in light of two recent United States Supreme Court decisions involving aerial surveillance,[29] *California v. Ciraolo*[30] and *Dow Chemical Co. v. United States*.[31] Both *Ciraolo* and *Dow Chemical* involved fourth amendment challenges to aerial surveillances.[32] In *Dow Chemical*, however, the Court rejected the company's claim that the property surrounding its chemical manufacturing plant was a curtilage, and thus subject to fourth amendment protection under a *Katz* analysis.[33] Because the Court considered Dow Chemical's property subject to an "open fields" analysis, the case provided

---

26. Riley v. State, 511 So. 2d at 284.

27. Katz v. United States, 389 U.S. 347 (1967).

28. *Id.* at 284-85 (citations omitted).

29. *Id.* at 284.

30. California v. Ciraolo, 476 U.S. 207 (1986). In *Ciraolo*, the Court held the fourth amendment was not violated by a naked-eye aerial observation of a backyard enclosed by two high fences. *Id.* at 213-15. The police of Santa Clara County, California received an anonymous tip that marijuana was growing in the respondent's backyard. *Id.* at 209. After attempting an unsuccessful ground-level observation, the police flew over the property in a fixed-wing airplane at an altitude of 1000 feet. *Id.* From this vantage point, they were able to identify the marijuana growing in the backyard. *Id.* A search warrant was obtained, the marijuana was discovered, and the respondent was charged with violating California law. *Id.* at 209-10. The trial court denied a motion to suppress the admission of the marijuana as evidence, but a California appeals court reversed, finding a fourth amendment violation. *Id.* at 210. In reversing, the Court held the fourth amendment "simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 215.

31. Dow Chem. Co. v. United States, 476 U.S. 227 (1986). The Supreme Court decided *Dow Chemical* the same day as *Ciraolo*, and the case involved a similar aerial observation. In *Dow Chemical*, the Environmental Protection Agency ("EPA"), after being denied a second request for inspection of Dow's 2000-acre chemical manufacturing complex at Midland, Michigan, hired a commercial aerial photographer to photograph Dow's facilities from altitudes of 12,000, 3000, and 1200 feet. *Id.* at 229. In rejecting Dow's claim that this constituted warrantless search, the majority wrote:

> We conclude that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance, such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

Id. at 239.

32. California v. Ciraolo, 476 U.S. 207 (1986); Dow Chem. Co. v. United States, 476 U.S. 237 (1986).

33. Dow Chem. Co. v. United States, 476 U.S. at 237-38.

little guidance to the Florida court in interpreting *Katz*.[34] Nevertheless, both *Dow Chemical* and *Ciraolo* illustrated the Court's wrestling with the concept of a "reasonable expectation of privacy"[35] in light of law enforcement's technological advancements.

In analyzing *Ciraolo*, however, the Florida Supreme Court applied the *Katz* standard. The court distinguished *Ciraolo*, finding the facts surrounding the seizure from Riley's greenhouse substantially different.[36] Among the differences noted: (1) The surveillance in *Ciraolo* was by a fixed-wing aircraft at 1000 feet, whereas a helicopter circled Riley's property from a vantage point of only 400 feet;[37] and (2) Ciraolo's marijuana was growing in his backyard, open to view from the air, but Riley had confined the marijuana to the greenhouse.[38] The Florida Supreme Court wrote:

> After *Ciraolo*, there is little question that naked-eye observations of marijuana growing in an enclosed backyard from fixed-wing aircraft within navigable airspace do not violate the federal constitution. However, *we do not read* Ciraolo *as sanctioning an unlimited right to any type of examination of residential property from the air.* Indeed, we note the care taken to qualify and limit the permissible observation to the "naked eye" from "navigable air space" at an "altitude of 1000 feet" in a "physically nonintrusive manner."[39]

In rejecting the state's argument that the holding of *Ciraolo* required admission of the evidence, the court stated:

> We do not believe that the details observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft. The possibility of observation of the interior of a greenhouse by passengers on commercial and private aircraft in the public airways is extraordinarily remote.[40]

---

34. *Id.* at 239. The Court concluded that "the open areas of the industrial plant complex with numerous plant structures spread over an area of 2000 acres are not analogous to the 'curtilage' of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field." *Id.*

35. California v. Ciraolo, 476 U.S. at 213. In *Ciraolo*, the Court reached its decision after considering the technological implications of aerial surveillance, concluding that such government flights were common. *Id.* "That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.*

36. Riley v. State, 511 So. 2d 282, 286-87 (1987).

37. *Id.* at 287.

38. *Id.* at 283, 284.

39. *Id.* at 287 (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986) (emphasis added)).

40. *Id.* at 288 (citation omitted).

B. *United States Supreme Court Analysis*

In reversing the Florida Supreme Court, the United States Supreme Court did not factually distinguish *Riley* from *Ciraolo*.[41] The Court ignored that the *Riley* search involved a helicopter circling at 400 feet, whereas in *Ciraolo* the search was accomplished by a fixed-wing airplane canvassing the property at 1000 feet.[42] The Court simply wrote:

> Under the holding in *Ciraolo*, Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1000 feet or, as the Florida Supreme Court seemed to recognize, at an altitude of 500 feet, the lower level of navigable airspace for such an aircraft.[43]

The plurality began its analysis with the premise that "[w]hat a person knowingly exposes to the public even in his home or office, is not a subject of Fourth Amendment protection."[44] The Court quickly concluded that because helicopter flight at low altitudes is not unheard of, and because law enforcement officials were operating within the Federal Aviation Administration ("FAA") minimum flight guidelines, Riley "knowingly" exposed the contents of his greenhouse.[45] The plurality's analysis did not clearly reflect the *Katz* standard.

II. THE *KATZ* STANDARD

The *Katz* privacy standard is a two-pronged test used to determine if governmental action has collided with constitutionally-protected privacy interests.[46] Justice Harlan articulated the standard in his concurrence in *Katz*,[47] a case involving telephone surveillance of wagering information transmitted across state lines.[48] Justice Harlan wrote: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[49] Both prongs must be satisfied for

---

41. The *Ciraolo* decision represented the Court's most recent application of the *Katz* standard to aerial surveillances.
42. *Id.* at 449.
43. *Id.* at 450.
44. *Id.* at 449 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).
45. *Id.* at 450-51.
46. Katz v. United States, 389 U.S. 347 (1967).
47. *Id.* at 360 (Harlan, J., concurring).
48. *Id.* at 347.
49. *Id.* at 361 (Harlan, J., concurring).

the government to be successful in a fourth amendment challenge of a search and seizure.[50]

The first prong—the manifestation of an expectation—is almost always met.[51] In many cases, there has been a clear manifestation that the challenger has made an effort to conceal the contents of his or her home or surrounding curtilage.[52] The reasonableness of that expectation—the second prong—is a tougher hurdle for the defendant to meet.[53] If someone takes measures to conceal the contents of his or her home, it does not automatically follow that this expectation is reasonable.[54] In *Ciraolo*, for example, the Court suggested some expectation of privacy existed, but concluded Ciraolo failed to pass the second prong, explaining:

> That the area is within the curtilage does not by itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. *Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.*[55]

Thus, under the line of cases applying the *Katz* standard, an attempt to conceal the activities or the contents within the home, garage, or greenhouse will not in and of itself satisfy the standard.[56] Society must also sanction this expectation.[57]

III. THE COURT'S FAILURE TO APPLY THE *KATZ* STANDARD

The plurality in *Riley* purported to apply the *Katz* standard, as interpreted through *Ciraolo*, to the government's aerial observation of Riley's greenhouse.[58] The analysis, however, was flawed because the plurality failed to apply both prongs of the standard to the facts of *Riley* and asked only whether Riley had a reasonable expectation of privacy.[59] Rather than applying both prongs, the Court merely arrived at the following conclusion:

---

50. Riley v. State, 511 So. 2d 282, 284-85 (1987).
51. California v. Ciraolo, 476 U.S. 207, 211 (1986).
52. *Id.*
53. Florida v. Riley, 488 U.S. at 451.
54. *Id.*
55. California v. Ciraolo, 476 U.S. at 213.
56. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
57. *Id.*
58. Florida v. Riley, 488 U.S. at 450.
59. *See id.*

> Riley could not *reasonably* have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft. . . . Any member of the public could have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse.[60]

The plurality did not establish independently whether Riley had manifested an expectation of privacy[61] that society was prepared to recognize as reasonable.[62] The plurality instead substituted its analysis in *Ciraolo* for a separate determination based on the specific facts involved in *Riley*.[63] The borrowing of *Ciraolo*'s language to support its conclusion was indicative of the plurality's terse analysis: "private and commercial flight [by helicopter] in the public airways is routine."[64] The plurality opinion contained a substantial discussion of the development of the *Katz* standard and its application to *Ciraolo*,[65] but the Justices made very little effort to draw distinctions between *Ciraolo* and *Riley*.[66]

In deciding Riley's expectation was unreasonable under the recasted standard, the plurality relied heavily on the fact the police were not violating any FAA minimum flight regulations.[67] Although the plurality emphasized that it was not suggesting all inspections of curtilages from aircraft would always pass muster under the fourth amendment simply because the plane is within navigable airspace, "it is of obvious importance that the helicopter in this case was *not* violating the law."[68] The plurality stated that "[w]e would have a different case if flying at the altitude had been contrary to law or regulation."[69] Thus, the Court effectively pronounced that society is less willing to recognize any privacy expectation relating to aerial surveillances whenever a flight is found to be within FAA regulations.[70] In her concurring opinion, Justice O'Connor questioned the plurality's heavy reliance on the FAA-acceptable flight altitudes, stating:

> In my view, the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety not to protect "[t]he right of the

---

60. *Id.* at 450-51 (emphasis added).
61. *See id.*
62. *See id.*
63. *Id.* at 450.
64. *Id.* (quoting California v. Ciraolo, 476 U.S. 207, 215 (1986)). It is troublesome that the substance of the majority's analysis of the facts in this case involved substituting the term "airplane" for "helicopter" and 1000 feet for 500 feet. *See id.*
65. *Id.* at 449-50.
66. *Id.*
67. *Id.* at 451.
68. *Id.*
69. *Id.*
70. *Id.* at 452.

> people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[71]

She also cautioned against too broad an interpretation of the plurality's opinion.[72] "The fact that a helicopter could conceivably observe the curtilage at virtually any altitude or angle, without violating FAA regulations, does not in itself mean that an individual has no reasonable expectation of privacy from such observation."[73]

Justice Brennan, in his dissenting opinion which was joined by Justices Marshall and Stevens, also criticized the plurality's reliance on FAA regulations.[74] He argued that in fourth amendment search and seizure analyses, the circumstances that lead the property owner to conclude he or she has an expectation of privacy in the home and curtilage have to be considered in light of the *Katz* standard.[75] In discussing the second prong of the *Katz* standard, Brennan stated: "*Katz* teaches . . . that the relevant inquiry is whether the police surveillance 'violated the privacy upon which [the defendant] justifiably relied.'"[76]

In focusing on the legal status of the government's flight over Riley's property, the Court failed to acknowledge the possibility that society might recognize Riley's privacy expectation as reasonable and, at the same time, fully support minimum flight regulations that do not impermissibly intrude on heightened privacy expectations.[77] It is also logical to assert there might come a point, or a flight level, when constitutional rights are infringed.[78] Thus, the two interests, while in competition, are not mutually exclusive.[79] The plurality's analysis, in combining both prongs, failed to follow the steps required by *Katz*.[80] Once a privacy expectation is shown, it must be judged against societal reasonableness standards and not FAA guidelines.[81]

A major flaw in the plurality's analysis was its apparent ignorance of the substantive differences between aircraft and helicopters, such as their flight frequency[82] and respective intrusive qualities.[83] Secondly, it failed to

---

71. *Id.* (O'Connor, J., concurring) (quoting U.S. CONST. amend. IV)).
72. *Id.* (O'Connor, J., concurring).
73. *Id.* at 454 (O'Connor, J., concurring).
74. *Id.* at 456 (Brennan, J., dissenting).
75. *Id.* at 457 (Brennan, J., dissenting).
76. *Id.* at 456 (Brennan, J., dissenting) (quoting Katz v. United States, 389 U.S. 347, 353 (1967)).
77. *See* California v. Ciraolo, 476 U.S. 207 (1986).
78. *See* Brief for Respondent at 26, Florida v. Riley, 488 U.S. 445 (1989) (No. 87-764) (citations omitted).
79. Florida v. Riley, 488 U.S. at 456 (Brennan, J., dissenting).
80. *See id.* at 449.
81. *See id.* at 456 (Brennan, J., dissenting).
82. *See id.* at 450 n.2.

note the difference between Ciraolo's fenced yard and Riley's greenhouse, as well as the 600 feet in altitude which further distinguished the two surveillances.[84]

While fixed-wing aircraft flight may have become so routine[85] as to render unreasonable a person's expectation of privacy within his or her residence, yard, or greenhouse it does not necessarily follow that helicopter flight is similarly common.[86] The most recent FAA statistics report more than 10,000 helicopters are registered in this country.[87] This number is much smaller than the number of fixed-wing aircraft.[88] Simply because the petitioner in *Ciraolo* was found to have an unreasonable expectation of privacy based on the number of registered airplanes, it does not logically follow that Riley's expectation was also unreasonable.[89]

Similarly, the plurality also failed to recognize the more intrusive nature of helicopters over airplanes.[90] Although the plurality summarily dismissed as inconsequential the factual distinctions between airplane and helicopter surveillance, the respondent's brief pointed out significant differences between helicopters and fixed-wing aircraft similar to the plane used in *Ciraolo*.[91] Helicopters are frequently louder and noisier than other aircraft.[92] The National Organization for the Reform of Marijuana Laws ("NORML") filed suit in a California federal court challenging the constitutionality of a state-sponsored aerial surveillance program aimed at

---

83. The California court described the inherently intrusive nature of helicopter surveillance:

> To say any sighting from a helicopter in non-navigable airspace validates a search warrant sanctions a broad range of aerial acrobatics performed in lawful manner but admittedly intrusive, such as in interminable hovering, a persistent overfly, a treetop observation, all accompanied by the thrashing of the rotor, the clouds of dust, and earsplitting din.

People v. Sabo, 185 Cal. App. 3d 845, 854, 230 Cal. Rptr. 170, 175 (1986), *cert. denied*, California v. Sabo, 481 U.S. 1058 (1987).

84. The Court wrote that "[u]nder the holding in *Ciraolo*, Riley could not reasonably have expected the contents of his greenhouse to be immune from examination." Florida v. Riley, 488 U.S. at 450.

85. *See* Brief for Respondent at 19, Florida v. Riley, 488 U.S. 445 (1989) (No. 87-764) (citations omitted).

86. *See* People v. Sabo, 185 Cal. App. 3d, 230 Cal. Rptr. 170 (1986), *cert. denied*, California v. Sabo, 481 U.S. 1058 (1987).

87. Florida v. Riley, 488 U.S. at 450 n.2.

88. California v. Ciraolo, 476 U.S. 207, 215 (1986).

89. Riley v. State, 511 So. 2d 282, 288 (1987).

90. The Florida Supreme Court concluded that unlike the circumstances in *Ciraolo*, "we do not find unreasonable his expectation that [the greenhouse's] contents would not be examined from a helicopter hovering below 500 feet." *Id.*

91. Brief for Respondent at 16-17, Florida v. Riley, 488 U.S. 445 (1989) (No. 87-764) (citations omitted).

92. National Organization for the Reform of Marijuana Laws v. Mullen, 608 F. Supp. 945, 957 (N.D. Cal. 1985).

eradicating the production of marijuana.[93] In arguing the program's unconstitutionality, the NORML highlighted the intrusive nature of helicopters.[94] The NORML asked one witness to give an account of a recent helicopter flight over her home:

> When asked what it was like to have a helicopter passing over [the resident's home] at 50 or 100 feet, [she] responded: "Well, when it's down at 50 feet your hair is actually blowing out and the leaves from the trees are blowing down on your head and the children are kind of hanging on to you because it feels like you'll be gusted away."[95]

The legislative notes accompanying the Code of Federal Regulations' minimum altitude regulations support this account:

> The rule recognizes the special flight characteristics of the helicopter. . . . However, if a helicopter is flown over a congested area . . . at less than 1000 feet above the highest obstacle, the pilot is required to fly with due regard to places in which an emergency landing can be made with safety . . . .[96]

The court in the *NORML* case concluded helicopters serve important law enforcement objectives, but their intrusive nature presents special problems in the area of privacy and "search" principles.[97] The court noted that in surveillance operations, "an airplane can see far less than a helicopter."[98] A California state court also considered the "extraordinarily intrusive"[99] nature of helicopters.[100] When a couple from San Diego County, California attempted to suppress the admission of marijuana seized under circumstances almost identical to those in *Riley*,[101] a California Court of

---

93. *Id.* at 949.

94. *Id.* at 955-56.

95. *Id.* at 956.

96. Legislative Notes to Minimum Altitude Standards, 14 C.F.R. § 91.79(b) (1987).

97. National Organization for the Reform of Marijuana Laws v. Mullen, 608 F. Supp. 945, 967 (N.D. Cal. 1985). The court in *National Organization for the Reform of Marijuana Laws v. Mullen*, wrote:

> It is not just the highly disruptive character of low helicopter flights that distinguishes them from the common airplane overflights that we are all accustomed to, but also the degree of their intrusiveness into 'the privacies' of life. . . . This case demonstrates how the unique versatility of helicopters renders them at once an effective law enforcement tool and an unprecedented threat to civil liberties.

Id.

98. *Id.*

99. *See* Brief for Respondent at 16, Florida v. Riley, 488 U.S. 445 (1989) (No. 87-764) (citations omitted).

100. People v. Sabo, 185 Cal. App. 3d 845, 230 Cal. Rptr. 170 (1986), *cert. denied*, California v. Sabo, 481 U.S. 1058 (1987).

101. *Id.* at 847-48, 230 Cal. Rptr. at 170-71.

Appeals found the surveillance to be an unconstitutional infringement on recognized privacy expectations.[102] Under its interpretation of *Ciraolo*, the court wrote:

> We judicially notice the unique capabilities of the helicopter to gambol in the sky—turning, curtsying, tipping, humming-bird-like suspended in space, ascending, descending and otherwise confounding its fixed wing brethren doomed to fly straight . . . . While a helicopter may be lawfully operated in the performance of its various capabilities, i.e., present no hazard to person or property, its usage as a platform for aerial surveillance conducted below minimum flight levels and not in navigable airspace, does not per se validate the search under the *Ciraolo-Dow* rationale.[103]

Even assuming society may not recognize as reasonable an expectation that yards or open fields[104] be free from observation, the plurality failed in its application of the *Katz* standard to note a key distinction: Riley sought to protect his privacy expectations within a covered greenhouse, and not, as was the case in *Ciraolo*, a yard or open field.[105] The plurality's analysis suggests all flights that are lawful are also constitutional.[106] Because "FAA regulations do not impose a minimum altitude requirement on helicopter traffic,"[107] police intrusions similar to those involved in *Riley* do not violate the "aims of a free and open society,"[108] no matter what steps were taken by Riley to shield from view the contents of his greenhouse.

The fault in this reasoning is apparent. While someone may not expect their open fields of marijuana to be free from police observation by aircraft, it is illogical to suggest one may never "reasonably" expect that a covered greenhouse, with only two panels missing, would be free from observation by helicopter, plane, or any aircraft.[109] This type of analysis improperly shifts the focus from privacy expectations and their reasonableness, to questions of whether law enforcement officials have a legal right to operate in such areas. The burden should remain on the defendant, but such a burden properly rests in establishing the reasonableness of his or her privacy expectation. A focus on the legality of the governmental action serves to dilute the teaching and the purpose of *Katz* and its progeny.

---

102. *Id.* at 877, 230 Cal. Rptr. at 176.

103. *Id.* at 853, 230 Cal. Rptr. at 175.

104. "Open fields" relates to the doctrine first articulated by the Court in Oliver v. United States, 466 U.S. 170 (1984). In rejecting a fourth amendment claim involving a Kentucky field in which marijuana was found growing, the Court stated: "The distinction [between curtilages and open fields] implies that only the curtilage, not the neighboring open fields, warrants Fourth Amendment protections that attach to the home." *Id.* at 180.

105. Florida v. Riley, 488 U.S. 445 (1989).

106. *Id.* at 457 (Brennan, J., dissenting).

107. *Id.* at 458 (Brennan, J., dissenting).

108. *Id.* at 457 (Brennan, J., dissenting).

109. *Id.* (Brennan, J., dissenting).

The plurality's analysis begs the question of whether there remains any reasonable expectation of privacy in the airways at any level and in any aircraft provided the observer has a legal right to be there under FAA regulations:[110]

> Under the plurality's exceedingly grudging Fourth Amendment theory, the expectation of privacy is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal. It is defeated whatever the difficulty a person would have in so positioning herself, and however infrequently anyone would in fact do so. In taking this view, the plurality ignores the very essence of *Katz*.[111]

In failing to follow the *Katz* standard, the plurality's analysis has served to confuse, rather than shed light on, this area of the law. The Court's decision in *Riley* provides little guidance to law enforcement officers and citizens alike as to what are the outer limits of police observation under the Constitution. Under the *Riley* decision newer technologies, which emerge and gain wide public acceptance and usage, may pose new threats to the old adage that a man's castle is his home.

Michael W. Briggs

---

110. In his dissent, Justice Brennan wrote: "I cannot agree that one 'knowingly exposes [an area] to the public' solely because a helicopter may legally fly above it." Florida v. Riley, 488 U.S. at 457 (Brennan, J., dissenting).

111. *Id.*