59,054

4-81
O.A.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. FRANK J. BRADY, et al., Respondents.	)	CASE NO. 59,054
STATE OF FLORIDA, Petitioner, v. VERNON WAYNE BEASLEY, Respondent.	)	CASE NO. 59,089
STATE OF FLORIDA, Petitioner, v. PHILLIP NEAL REINERSMAN, Respondent.	)	CASE NO. 59,097

FILED

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PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Prosecution in the trial court, the Nineteenth Judicial Circuit Court of Florida, and the Appellant in the Fourth District Court of Appeal. Respondents were Defendants in the trial court, and Appellees in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appear before this Honorable Court, Petitioner and Respondents.

The original record consists of the Record on Appeal in two cases which were consolidated by the Fourth District Court of Appeal for appellate purposes. The following symbols from the original record will be used:

"R I"	Record on Appeal in 4DCA Case No. 78-2121;
"R II"	Record on Appeal in 4DCA Case No. 78-2771; and
"T"	Transcript of Hearing on Motion to Suppress Physical Evidence, held on September 26, 1978.

All emphasis will be supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Respondents List and Manuel were arrested on April 22, 1978 (R I 170). Respondents Brady, Elliot, and Eckard were apparently arrested on the same day. The most recent amended informations charged Respondents Brady, Elliot, and Eckard with

(1) delivery of marijuana in excess of 100 pounds, (2) possession of marijuana in excess of 100 pounds, (3) conspiracy to possess marijuana in excess of 100 pounds, and (4) importation of marijuana (R I 161-164). Respondents List and Manuel were charged in the most recent amended information with attempted possession of marijuana in excess of 100 pounds (R I 188).

On August 16, 1978, Respondent Brady filed a motion to suppress evidence (R I 181-182). On September 1, 1978, Respondents Elliot and Eckard also filed a motion to suppress evidence (R I 196-197). Respondents List and Manuel similarly filed motions to suppress evidence on September 21, 1978, and September 25, 1978 (R I 201-207). These motions to suppress physical evidence were granted by the trial court on October 2, 1978 (R I 308, 313). It is to be noted that Respondents Brady, Elliot and Eckard filed motions to suppress wiretap evidence (R I 183-186, 194-195); however, these motions were not ruled upon by the trial court.

Petitioner filed its timely notice of appeal from the order granting Respondents' motions to suppress physical evidence, on October 2, 1978 (R I 308). Petitioner also filed, on October 2, 1978, a motion for extension of speedy trial pending appellate proceedings (R I 312). This motion was granted on October 13, 1978 (R I 320).

During the pendency of the initial appeal, on November 15, 1978, Respondents List and Manuel filed a motion for speedy trial discharge (R II 261-262). This motion was granted by the trial court on December 5, 1978 (R II 266).

Petitioner filed its notice of appeal from the trial court order granting the discharge on December 18, 1978 (R II 269). By order of the Fourth District Court of Appeal, on February 28, 1979, the two appeals commenced by the filing of a notice of appeal from the trial court order granting the motion to suppress and from the trial court order granting the motion for discharge were consolidated.

Following the submission of briefs, and oral argument, the Fourth District Court of Appeal filed its opinion, affirming the trial court order granting the motion to suppress, but reversing the trial court order granting the motion for discharge. Brady v. State, 379 So.2d 1294 (Fla. 4DCA 1980). The Fourth District Court of Appeal denied Petitioner's motion for rehearing and/or suggestion for certification on March 19, 1980.

Notice of discretionary jurisdiction was timely filed on or about April 3, 1980. Briefs on jurisdiction were filed by all parties concerned, and this Honorable Court accepted jurisdiction on September 23, 1980. The instant brief follows.

STATEMENT OF THE FACTS

The following facts are derived from the transcript of the motion to suppress physical evidence proceedings, held on September 26, 1978. The facts were substantially undisputed, and were, in general terms, reflected in the opinion of the Fourth District Court of Appeal.

Respondent Brady initially took the stand. On the day in question, he had possession and lived on a trailer on the ranch in question in Martin County, Florida (T 4, 16). The ranch was fenced with barbed wire and posted (T 4, 5, 25). It was nearly all cultivated and totally used for cattle operation and horses (T 6). It consisted of 1,800 acres of open land (T 6). There is an air strip on the property (T 6). On the night in question, the gate to the fence was locked and secured (T 7-8). Respondent Brady saw officers on the property during the evening hours of the night in question, without his permission and without a warrant (T 8). Respondent Brady testified that the trailer was approximately 2,000 feet from the air strip, where he was arrested (T 16). No building on the property was searched on the night of the arrest (T 17).

Captain Dempsey of the Polk County Sheriff's Office next took the stand. Information in his possession was that an aircraft (possibly a red and white Cessna Titan, N5411G) would be coming into the South Florida area, possibly loaded with contraband (T 21). He had the approximate time and radio frequency that would be used (T 21). There was also information

as to a possible second aircraft (T 21-22). Having no information regarding a specific airport in South Florida, Captain Dempsey gave this information to Captain Fogelman of the West Palm Beach Sheriff's Office (T 22). Captain Dempsey's information regarding the radio frequency was that the lights around the airstrip would be activated by a particular radio frequency (T 24-25).

Detective Frawley of the Martin County Sheriff's Office (T 27) next took the stand. He was on the property on the night in question (T 27-28). His information was that one or two planes, possibly twin-engine Cessnas, would be landing at the Brady ranch carrying contraband (T 28, 29). He had the call numbers of the planes (T 28). The information was that the planes may be landing on April 21, 1978 (rather than April 22, 1978) (T 28). A surveillance team was set up on April 21, 1978, on the property adjoining the Brady ranch (T 29-30). However, there was no activity that evening (T 30-31). The next day, April 22, 1978, Detective Frawley was informed that the planes would be using a given frequency to trigger the lights on the runway (T 31). Once again, Detective Frawley began setting up surveillance for <u>that</u> evening (T 31-32). Two of three surveillance teams were physically on the Brady property (T 32-33). Detective Frawley saw the plane land at approximately 9:30 p.m., and started toward the plane (T 33-34). Upon his arrival, he observed a plane and two vehicles, and three individuals who were already in custody (T 34). Detective Frawley observed bales with black plastic

covering in plain view in the vehicles and on the aircraft (T 34, 35). Due to his experience and training, Detective Frawley testified that he knew this packaging to be consistent with marijuana smuggling (T 34). Furthermore, Detective Frawley testified regarding the marijuana odor which he recognized emanating from the vehicles (T 34-35). Detective Frawley testified that no search warrant had been obtained prior to the landing of the plane due, in part, to the fact that the plane was not there yet, and they did not know enough detail (T 35-36). Although Detective Frawley testified that his observation of the plane landing occurred while he was on Respondent Brady's property, no buildings were searched on the property (T 36). Detective Frawley testified that he broke the lock on the gate and entered the property because he believed a felony was about to be committed (T 57).

Detective Wethington of the Palm Beach County Sheriff's Office (T 60) was the last witness to take the stand. He was on one of the surveillance teams at Respondent Brady's property (T 60). He initially saw the lights around the runway go on and then go off approximately three minutes later (T 60-61). The runway lights flickered a few times thereafter (T 73). He also saw a Jeep come into the area of the runway (T 73). Subsequently he saw a plane land on the runway (T 61). He was on the Brady property at this time (T 61). Upon observing the plane land, he proceeded to the area of the plane (T 61-62). He observed three white males starting to load, and then placed them into custody (T 62). He was able to see and smell

what his experience and training told him were bales of marijuana wrapped in dark plastic covering (T 63-64). He was able to recognize the odor of marijuana emanating from the Jeep and the aircraft (T 64, 65). He never searched any building or dwelling (T 65). Detective Wethington's observation point was approximately 300 yards into Respondent Brady's property, although it was approximately 400 yards away from the runway (T 71).

After the trial court granted Respondents' aforementioned motions to suppress, and an appeal was taken therefrom to the Fourth District Court of Appeal, Respondents List and Manuel (who had been charged with attempted possession of cannabis in excess of 100 pounds) filed a motion for speedy trial discharge (R II 261-262). The trial court had considered List's and Manuel's charge to be a misdemeanor, and therefore granted their motion for discharge inasmuch as they had not been tried within 90 days. As previously mentioned, Petitioner appealed that order to the Fourth District Court of Appeal, and said court reversed the speedy trial discharge, holding that attempted possession of marijuana in excess of 100 pounds is a third degree felony.

POINTS ON APPEAL

POINT I

WHETHER THE "OPEN FIELDS DOCTRINE" HAS CONTINUING VITALITY, AND CONSTITUTES AN EXCEPTION TO THE WARRANT REQUIREMENT UNDER THE FACTS OF THE INSTANT CASE?

POINT II

WHETHER SECTION 893.13(1)(A)(2), FLA. STAT. (1977), PROSCRIBES MERE POSSESSION OF IN EXCESS OF 100 POUNDS OF CANNABIS AS A FELONY OF THE SECOND DEGREE?

ARGUMENT

POINT I

THE "OPEN FIELDS DOCTRINE" HAS CONTINUING VITALITY, AND CONSTITUTES AN EXCEPTION TO THE WARRANT REQUIREMENT UNDER THE FACTS OF THE INSTANT CASE.

The United States Supreme Court, in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), stated that there is no Fourth Amendment protection in the open fields. "The distinction between the latter and the house is as old as the common law." 265 U.S. at 59. There is no question but that the "open fields doctrine" survives to this date. While Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), indicated that the analysis of Fourth Amendment doctrine should be whether one's reasonable and justifiable expectations of privacy were violated, Katz certainly did not overrule Hester, supra. Indeed, Mr. Justice Harlan, in his concurring opinion in Katz, indicated that Hester still survives such that a person has no constitutionally protected reasonable expectation of privacy in the open fields. In subsequent cases, the United States Supreme Court has validated the continued legitimacy of the "open fields doctrine." See, e.g., Air Polution Variance Board v. Western Alfalfa Corporation, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974); Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).

Furthermore, whether or not there was a trespassory

intrusion is not controlling in Fourth Amendment analysis. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), emphatically rejected the notion that "arcane" concepts of property law ought to control the ability to claim the protections of the Fourth Amendment. See also, Rawlings v. Kentucky, ___ U.S. ___, 100 S.Ct. ___, 65 L.Ed.2d 633 (1980). Even a property interest in the premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon. Rakas, supra, at f.n. 12. Thus, it has been uniformly held that one has no legitimate and reasonable expectations of privacy in the open fields, and therefore no warrant is required even if, arguendo, probable cause existed and there was sufficient time to obtain the same.

In United States v. Basile, 569 F.2d 1053 (9th Cir. 1978), officers crossed a fence onto private property and looked into an apparently abandoned truck which was probably 100 yards from the defendant's house. Therein, they saw sugar sacks containing marijuana bricks. The court stated

> "The Fourth Amendment's protections do not extend to the 'open field' area surrounding a dwelling and the immediately adjacent curtilage, and therefore, information gained as a result of a civil trespass on an 'open field' area is not constitutionally tainted, nor is the search and seizure which ultimately results from acquiring that information." Id. at 1056.

In United States v. Brown, 473 F.2d 952 (5th Cir. 1973), officers conducted a warrantless search of private property containing an

abandoned farmhouse. The officers dug up the ground at a point adjacent to the chicken coop and found evidence of a robbery. The court stated:

> "We think . . . that the 'open fields doctrine' still prevails. Search of open fields without a search warrant is not unreasonable and is not constitutionally impermissible." Id. at 954.

In United States v. Cain, 454 F.2d 1285 (7th Cir. 1972), the defendant owned 300 acres of farm land, a portion of which was operated as a commercial hunting club. Agents trespassed on the land and found evidence of "baiting" for the purpose of taking wild fowl in violation of federal regulations. The court held that the search of open fields without a search warrant is not constitutionally "unreasonable." This is true even though entrance to the area searched was gained by trespass. In Atwell v. United States, 414 F.2d 136 (5th Cir. 1969), government agents trespassed upon private property and found a still approximately 250 yards from the back of a house in open land beyond the curtilage of the house. The court held,

> "But inasmuch as the protection of the Fourth Amendment against unreasonable searches and seizures does not extend to 'open fields,' there was no unreasonable search. [Citations omitted]. Moreover, even if the officers were trespassing on private property, a trespass does not of itself constitute an illegal search." Id. at 138.

In Martin v. United States, 155 F.2d 503 (5th Cir. 1946), officers trespassed on private property and observed the

defendants with illegal whiskey. The defendants were arrested. The court held,

> "The Fourth Amendment secured the people against not all, but only unreasonable searches and seizures of their persons, houses, papers, and effects. Enclosed or unenclosed grounds or open fields around their houses are not included in the prohibition." Id. at 505.

There is nothing in Florida law which is inconsistent with the above principles. Not all warrantless searches are prohibited, merely "unreasonable" warrantless searches. Gilbert v. State, 289 So.2d 475 (Fla. 1DCA 1974); State v. White, 312 So.2d 475 (Fla. 4DCA 1975). Furthermore, it has long been felt that one's reasonable expectation of privacy in a place other than a private dwelling and surrounding curtilage is less, and therefore more open to legitimate governmental intrusion. See generally, Miranda v. State, 354 So.2d 411 (Fla. 3DCA 1978). It has been held that the property afforded the people against unreasonable searches and seizures does not extend to the grounds of the property (except, perhaps, curtilage) even though the searching authority is a trespasser. Cobb v. State, 213 So.2d 492 (Fla. 2DCA 1968); Phillips v. State, 177 So.2d 243 (Fla. 1DCA 1965); Dinkens v. State, 291 So.2d 122 (Fla. 2DCA 1974); Boim v. State, 194 So.2d 313 (Fla. 3DCA 1967); State v. Belcher, 317 So.2d 842 (Fla. 2DCA 1975).

In the case sub judice, Respondents were using an airstrip located on 1,800 acres of fenced and posted open land for the purpose of smuggling contraband drugs. While there was a trailer on the land, said trailer was approximately 2,000 feet

(or 670 yards) from the airstrip (T 16). Officers positioned themselves approximately 300 yards within the fence, which was approximately 400 yards away from the runway (T 71). They never approached any building or dwelling (T 17, 71). While Respondents may have manifested a "subjective" expectation of privacy, it certainly could not be considered a "reasonable" expectation of privacy inasmuch as the illegal activity was being conducted in the open air in the middle of 1,800 acres of open field. It matters not that the land was fenced or posted for, as stated in Martin, supra, open fields may be enclosed or unenclosed. There were great expanses of open land within the confines of the fence, and there can be no contention that the officers invaded what may have been considered a reasonable expectation of privacy surrounding a building, trailer, or curtilage thereof. As stated by Mr. Justice Harlan in his concurring opinion in Katz, supra,

> "My understanding of the rule that has emerged from prior decisions is that there is a two-fold 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.'" 389 U.S. at 361.

This quote has been adopted by subsequent majority opinions of the United States Supreme Court. Rakas, supra, at f.n. 12. See also, Basile, supra; Norman v. State, 379 So.2d 643 (Fla. 1980).

Certainly, Petitioner does not contend that the open fields extend to the curtilage of a dwelling or outbuilding;

however, it has uniformly been held that the fact that such dwelling or outbuilding is enclosed by a fence does not afford search and seizure protections to the open fields beyond the curtilage but still within the fence. Indeed, it cannot be gainsaid that open fields may be enclosed. Martin, supra; United States v. Diaz-Segovia, 457 F.Sup. 260 (D.C. Ma. 1978), officers crossed a fence into private property; United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976), officers crossed a fence into private property; Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968), officers crossed two boundary fences onto private property; Cobb, supra, citing Martin, supra, for the proposition that enclosed grounds can constitute open fields; United States v. Greenhead, Inc., 256 F.Sup. 890 (D.C. Ca. 1966), officers crossed a fence through two padlocked gates onto private property; Phillips, supra, which held that to extend the concept of immunity from unreasonable search and seizure so as to prohibit the search of any property included in a fenced area in which a dwelling may be located without having first obtained a search warrant would extend the protection afforded by the Constitution to an absurdity; McDowell v. United States, 383 F.2d 599 (8th Cir. 1967), officers trespassed through an area that was posted "No Trespassing"; Monnett v. United States, 299 F.2d 847 (5th Cir. 1962), officers went inside a fence onto private property.

While the officers herein may have physically broke the fence, such has no effect upon the open fields doctrine. Simply stated, there is no legitimate, justifiable, or reasonable

expectation of privacy in the open fields, whether fenced or unfenced. Petitioner does not dispute that an intrusion such as was made in the instant case would constitute a trespass punishable by law. Certainly, such breaking of fences should not be approved, but the disapproval of a trespass and sanctions for it must come from other aspects of the law than the exclusionary rule. See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), for a discussion of other remedies. Thus, in Conrad v. State, 218 N.W.2d 252 (Wis. 1974), officers trespassed upon 40 acres of private land on which a house was set. Several holes two or three feet deep were dug by a bulldozer under the officers' direction in the open fields portion of this land. Finally, after bulldozing a pile of rocks and digging underneath, the body of a murder victim was found. The Wisconsin Supreme Court, in a well-reasoned opinion, rejected the defendant's contention therein that he had a reasonable expectation of privacy on his private property such that the officer should not be allowed to dig holes thereon looking for evidence of a homicide without a warrant. The court recognized that the defendant manifested an expectation of privacy, but concluded that it was not one which society was prepared to accept. The court discussed the open fields doctrine, and the fact that the digging therein did not occur within the curtilage of any building:

> "Under the 'open fields' doctrine, the fact that evidence is concealed or hidden is immaterial. The area is simply not within

> the protection of the Fourth Amendment. If the field where the body was found does not have constitutional protection, the fact that the sheriff, rather than observing the evidence that might have been in plain view, dug into the earth to find the body and committed a trespass in so doing does not confer protection." Id. at 257.

The Wisconsin Supreme Court went on to say that a search may be made in the open fields without a warrant and without probable cause, and that which is found will not be suppressed by the courts. Certainly, the significantly lesser intrusion which occurred herein likewise does not fall within the ambit of search and seizure analysis because, no matter how outrageous a trespass may be, there simply is no reasonable expectation of privacy outside the curtilage and in the open fields.

In Norman v. State, 379 So.2d 643 (Fla. 1980), this Court had occasion to analyze under search and seizure doctrine a situation where an officer trespassed onto private property over a fence and peered into a closed structure within the fenced property. This Court held that such an intrusion violated search and seizure doctrine. However, this Court recognized the "open fields" doctrine and stated,

> "Whatever the precise parameters of this longstanding but seldom used doctrine, it certainly does not extend to a warrantless search of a closed structure on fenced property." Id. at 647.

Thus, it was not the trespass over the fence which brought into play search and seizure doctrine, for this Court made no holding regarding the officer's entry through the fence. It was the search of the closed structure within said fence that could not

be upheld under the open fields doctrine. Had this Court felt the entry through the fence, standing alone, to have been illegal under the open fields doctrine, the holding would have specified this. However, by premising the holding upon the warrantless search of a closed structure on fenced property, rather than upon a mere entry into fenced property, this Court found police error only in the warrantless search of the closed structure, not in the entry through a locked fence.

In United States v. Williams, 581 F.2d 451 (5th Cir. 1978), the Fifth Circuit Court of Appeals had occasion to review a factual setting in which officers went onto private property and detected the odor of moonshine liquor coming from a structure thereon. In so doing, the officers crossed over a fence at a point where it had been walked down almost to the ground. The court recognized that the fence, even in its best days, was not to keep anyone out but to keep the hogs in. As such, the fence was considered not such as to create any reasonable expectation of privacy. Such is not to say that had the fence been an exclusionary one, it would have created a reasonable expectation of privacy. The court simply stated that such a fence could not even arguably create a reasonable expectation of privacy. The Fifth Circuit Court of Appeals did hold that one of the domestic buildings on the land constituted an integral part of that group of structures making up the farm home (thereby bringing the Fourth Amendment into play) because it was not separated from the house by any fence, outbuilding, or great expanse of open land. In the case sub judice, there

was indeed a great expanse of open land separating the airstrip from the trailer (almost one-half mile). As such, Respondents could have no reasonable expectation of privacy on the basis of the fact that there was a trailer on the land.

In Diaz-Segovia, supra, officers trespassed over a fence and onto private property which contained a house. The federal district court entered into a thorough discourse of the open fields doctrine, concluding that,

> "The rule of law that the court draws from the above cases is that agents are allowed to trespass upon individuals' property as long as they do not search the house or curtilage and do not physically enter or peer into enclosed buildings, vehicles, or the like. An agent may observe activity from a vantage point which may be upon a defendant's property, if such observation is made across 'open fields' from an area sufficiently removed from the dwelling to prevent unauthorized surveillance inside the house." Id. at 270.

In the case sub judice, there was no violation of this rule of law. Similarly, in United States ex rel. Saiken v. Bensinger, supra, officers crossed over a fence which surrounded 20 acres of land on which the defendant's residential and agricultural structures were located. Again, the court entered into a thorough discourse of the open fields doctrine. The court noted that land is not taken out of the concept of being "open fields" merely because it is fenced.

Similarly, in Fullbright, supra, agents crossed what presumably was the boundary fence of the farm, then a field, and then another little fence to reach their position for

observation. Again, the court stated that this was open fields, not protected by the Fourth Amendment.

In Greenhead, supra, agents, without probable cause or a warrant, trespassed upon 600 acres of land which was enclosed by a fence with two padlocked gates. The agents opened the gates with a key of uncertain parentage. Again, this was held to be nothing more than a trespass upon open fields, not protected by the Fourth Amendment. In analyzing the conduct in the case sub judice, there is absolutely no legal basis to distinguish breaking through the fence herein from trespassing through the locked gates in Greenhead.

The same conclusions were reached in McDowell, supra, wherein agents trespassed through an area which was closed off with "No Hunting" and "No Trespassing" signs:

> "While it is well established that the protection of the Fourth Amendment extends to the curtilage, at no time was the dwelling of appellant Bryce McDowell, or the curtilage surrounding that dwelling, invaded for the purposes of the search. It cannot be seriously contended the open fields in question were a part of the curtilage." Id. at 603.

The facts in the case sub judice also clearly demonstrate that there was no breach of the curtilage of any building, much less the curtilage of the trailer. Curtilage has been defined as the yard, courtyard, or piece of ground lying around or near to a dwelling house, included within the same fence. It means the yard or court for the protection and security of the mansion house. For a structure or an enclosed parcel of ground which is separate and apart from one's dwelling

to be regarded as within the curtilage, it must be customarily used in connection with a person's dwelling, and it is not brought within the curtilage by the fact that the occupants of the dwelling make use of it on special occasions or in exceptional circumstances. Phillips, supra. Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family. Conrad, supra; Fullbright, supra; Care v. United States, 231 F.2d 22 (10th Cir. 1956). Under any definition one may care to use, the officers herein were not positioned anywhere near the curtilage to any building. Their position, approximately one-half mile from the trailer, and approximately 400 yards from the airstrip, was totally unrelated to the trailer or any other area customarily used in connection with the trailer.

Finally, Petitioner would submit that to extend the concept of immunity from unreasonable search and seizure so as to prohibit the search of any property included in a fenced area in which a dwelling may be located without having first obtained a search warrant, would extend the protection afforded by the Constitution to an absurdity. The open fields doctrine is of longstanding and continued vitality. It cannot be so restricted as to make it a refuge for criminals. The very concept of an open field is inconsistent with a reasonable, justifiable, or legitimate expectation of privacy. In fact,

Petitioner has found no cases which indicate that one has a reasonable expectation of privacy in an open field, rather than in a dwelling or building together with curtilage appurtenant thereto. Such a doctrine as that, which would extend search and seizure protections to persons situated in the same posture as Respondents herein, would be giving blanket authority for any person to buy or lease a great expanse of open land, surround it with a fence, and conduct any illegal operation out in the open air that one so chooses. One could place an airstrip on the land, such as was done here, and continually and always evade the efforts of law enforcement in deterring drug smuggling. Effective law enforcement absolutely precludes the application of such talismanic standards. In Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436, Mr. Justice Jackson stated:

> "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." 333 U.S. at 14-15.

Implicit in that statement of a balancing test is the concept that as the facts of the case approach the periphery of privacy, the requirements demanded of an officer are correspondingly less exacting. We must keep the balance true for both the decent folks and for those who defy the law. Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Blackmun stated in their concurring opinion to United States v. Mendenhall, ___ U.S. ___, 100 S.Ct. ___, 64 L.Ed.2d 497 (1980),

> "The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement." 64 L.Ed.2d at 514.

The open fields should not be allowed to be a refuge for criminals by the mere act of placing a fence around those fields. A manifestation of privacy is not sufficient. The privacy manifested must be that which society is prepared to tolerate. Petitioner submits that such unmitigated and unpreventable illegal activity conducted in the open air as that presented in the case sub judice cannot give rise to a legitimate expectation of privacy, i.e., one which society is prepared to tolerate. Such a protection to criminal defendants would reduce the Fourth Amendment to an absurdity.

POINT II

SECTION 893.13(1)(A)(2), FLA. STAT. (1977), PROSCRIBES MERE POSSESSION OF IN EXCESS OF 100 POUNDS OF CANNABIS AS A FELONY OF THE SECOND DEGREE.

Herein, Petitioner will respectfully rely upon the argument on this point presented by Petitioners in the consolidated cases of State v. Beasley, F.S.C. No. 59,085, and State v. Reinersman, F.S.C. No. 59,097, said cases being further consolidated with the instant case before this Court.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Petitioner would respectfully request that this Honorable Court quash the decision of the Fourth District Court of Appeal in regard to the reversal of the trial court's order granting Respondents' motions to suppress, and affirm the decision of the Fourth District Court of Appeal in regard to the reversal of the trial court order granting Respondents List's and Manuel's motion for discharge.

Respectfully submitted,

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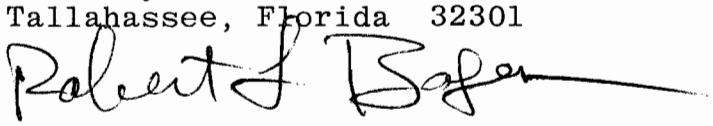

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been mailed to Steven M. Greenberg, Esq., 744 N.W. 12th Avenue, Miami, Florida 33136; Philip G. Butler, Jr., Esq., 315 3rd Street, Suite 316, West Palm Beach, Florida 33401; Alan Karten, Esq., 3550 Biscayne Boulevard, Suite 504, Miami, Florida 33137; Bruce H. Fleisher, Esq., 370 Minorca Avenue, Suite 15, Coral Gables, Florida; and to Joel S. Fass, Esq., 11601 Biscayne Boulevard, Suite 202, North Miami, Florida 33181, this 16th day of October, 1980.

Robert L. Boyce

Of Counsel