IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. FRANK J. BRADY, et al., Respondents.	)	CASE NO. 59,034
STATE OF FLORIDA, Petitioner, v. VERNON WAYNE BEASLEY, Respondent.	)	CASE NO. 59,085
STATE OF FLORIDA, Petitioner, v. PHILLIP NEAL REINERSMAN, Respondent.	)	CASE NO. 59,097

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner herein adopts the Preliminary Statement as recited in its Initial Brief on the Merits.

STATEMENT OF THE CASE

Petitioner herein adopts the Statement of the Case as recited in its Initial Brief on the Merits.

STATEMENT OF THE FACTS

Respondents, in a display of advocacy which is the hallmark of the legal profession, have attempted to paint a distorted, one-sided picture of the facts in typical argumentative fashion. Petitioner will rely upon its facts as presented in its Initial Brief on the Merits. Petitioner maintains that its facts encompass all the relevant testimony which is necessary to a full disposition of the merits of the search and seizure issue. Indeed, the Fourth District Court of Appeal in the case sub judice did not even see the necessity to recite

the facts in argumentative fashion in order to support the principles enunciated in its opinion. However, lest Petitioner be accused of itself propounding a one-sided statement of the facts (which Petitioner was careful not to do), Petitioner would note that a reading of the one hundred twenty-two (122) page transcript of the September 26, 1978 hearing demonstrates the accurateness in all material respects of Petitioner's statement of the facts as contained in its Initial Brief on the Merits.

POINT INVOLVED ON APPEAL

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

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.

Respondents appear to totally misconstrue the thrust of Petitioner's argument. Some of Respondents' briefs contain passages purportedly referring to Petitioner's initial brief on the merits, which have nothing to do with Petitioner's initial brief on the merits. All of Respondents' briefs dwell on the issue of "probable cause." However, the real issue before this Court is one of a reasonable expectation of privacy.

Petitioner concedes that there was no probable cause to obtain an anticipatory search warrant. At most, the officers had unspecified and uncorroborated information that one or two planes (call numbers identified) may or may not land in the south Florida area, possibly (or possibly not) carrying contraband. The officers, pursuant to their knowledge of Respondent Brady's operation, and their knowledge of the fact that Respondent Brady had an extremely large tract of land containing an air-strip, suspected that Respondent Brady's ranch may be the landing site. The officers did not even know an exact date. In fact, when they went to the ranch on the evening prior to the evening in question, no planes landed. Thus, how can it be said that an anticipatory warrant could have been obtained on the basis of

the sketchy, uncorroborated, hearsay information which the officers had. The officers had reasonable suspicions about what was to take place, and that is why they sent out surveillance teams. However, reasonable suspicion is not the same as probable cause. As testified by Detective Frawley, on pages 35 through 36 of the transcript,

> Q: "All right. Detective, I think the thousand dollar question or ten thousand dollar question why didn't you have a search warrant for that ranch on April 22, 1978?
>
> A: Well, in my opinion obtaining search warrants in Martin County, which I've obtained a number of, I don't really know of a judge that will sign a search warrant without a complete legal description of what you're searching. The subject of the search was not there at the present time. Had the numbers and possible Cessena and possible twin engine. If I obtained the search warrant -- if I wrote a search warrant on those grounds, I don't believe a judge would have signed it. And I couldn't obtain a search warrant for a vacant airstrip because that wasn't the subject of the search to begin with."

Thus, in United States v. Gattie, 511Fed.2d 608 (5th Cir. 1975), the court stated that it was at a loss to understand how the agents could obtain a warrant to search the house in question for marijuana which they merely hoped was to be later taken to the house. Additionally, in United States v. Vento, 533 Fed. 2d 838 (3rd Cir. 1976), the court stated as follows, on pages 865 through 866 of that opinion:

> "DeLuca asserts that warrant for the search of his car ought to have been obtained after the 11:25 a.m. conversation was intercepted, since the agents could have anticipated the afternoon's search. This argument is not persuasive, however, because the agents could not have known with any certitude that DeLuca would meet Vento that afternoon. And they did not know how DeLuca would travel to the Vento residence, whether by his own car or in another, until he actually arrived. It is not evident that there was probable cause for a search of DeLuca's car in time to obtain a warrant."

Further, in Baxter v. State, 1980 FLW 2240, 1DCA No. SS-19, opinion filed November 26, 1980, the Court recognized that when the officers had time to obtain a search warrant, sufficient probable cause had not yet fully developed. When sufficient probable cause fully developed, there were exigent circumstances. Likewise, in the case sub judice, based on the information that the officers had, there was insufficient probable cause to obtain a search warrant until the plane actually landed (thereby corroborating the information that the officers had). Of course, at that time, exigent circumstances existed by virtue of the mobility of the plane and the cars. Inasmuch as the officers herein could not have known with any certitude exactly where, when, and how the contraband would arrive, there was insufficient probable cause to obtain a search warrant at a point in time when there was sufficient time to do so. Any variation in Respondents' plans from the information which the officers had knowledge of would have defeated such a search warrant. Indeed, had the officers been able to successfully

obtain a search warrant, Respondents would be arguing before this Court that there was insufficient probable cause to support a search warrant!

However, as previously noted, the issue is not one of "probable cause" or of the officers' ability vel non to obtain a search warrant, but one of whether or not Respondents had a reasonable expectation of privacy. The fact that the protection of Respondents' privacy interests might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the officers' conduct in violation of search and seizure doctrines. Petitioner need not reiterate that which has already been fully discussed in its initial brief on the merits regarding the long-established legal principle that one has no constitutionally protected reasonable expectation of privacy in the open fields. Hester v. United States, 265 US 57, 44 S.Ct. 445, 68 Led 898 (1924), initially stated this proposition of law, and Katz v. United States, 389 US 347, 88 S.Ct. 507, 19 Led 2d 576 (1967), validated the continued legitimatacy of this doctrine. A long line of federal cases (many of which were cited in Petitioner's initial brief on the merits) have accepted this doctrine even though fences were crossed, no trespassing signs were ignored, and gates were forced open with keys of uncertain parentage. Indeed, in Conrad v. State, 218 NW 2d 252 (Wisconsin 1974), an officer

had a bulldozer dig up several holes on private property looking for the body of a murder victim. The law which has evolved in all these cases is that officers 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 officer 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. United States v. Diaz-Segovia, 457 Fed Sup. 260 (D.C. Maine 1978). Where there is no reasonable expectation of privacy, there is no necessity for probable cause or for a search warrant. It cannot be gainsaid that the facts of this case do not lend themselves to Respondents' connotation that the officers were on a "search and destroy mission" reminiscent of Nazi Germany. Nothing could be further misleading or inflammatory. The officers had information which gave rise to reasonable suspicions of criminal activity which was quite possibly going to take place on the Brady ranch during sometime over the weekend in question. While this information could not rise to the level of probable cause until a plane actually arrived, it is not as if the officers had no information at all.

It has always been recognized that there is a twofold requirement before one exhibits a reasonable expectation of privacy: (1) That a person have exhibited an actual (subjective) expectation of privacy, and (2) that the expectation be one that society is prepared to recognize as "reasonable." Respondents would compare the actions of the officers to those which may take place in Nazi Germany. However, based upon the information which was within the knowledge of the officers, and the fact that this case involves the open fields, Petitioner maintains that the officers' actions were quite reasonable. Certainly, this Court cannot condone the unmitigated criminal behavior of one who buys up an extremely large acreage of land, places an airstrip on the same, fences and posts the same, and then proceeds to smuggle in any contraband he sees fit under the protection of the Fourth Amendment. Indeed, when it comes to these types of activities in the open fields, the Fourth Amendment cannot extend its protection that far. Otherwise, the system of justice in this country would be made a mockery. Justice demands a balancing test. Petitioner submits that Respondents' "subjective" expectation of privacy is not one that society is prepared to recognize as reasonable. The second prong of the test as to what constitutes a reasonable expectation of privacy has not been satisfied here. Open air drug smuggling activities, whether or not they be within a fenced area, and whether or not they be in a secluded area, cannot be given constitutional protection. Otherwise, the drug problem which

currently faces this nation would be but a mere drop in the bucket compared to what would result. One must remember that the exclusionary rule was meant to deter unconscionable police activity. It was not meant to be a technical escape hatch for criminals.

The actions of the officers herein do not transcend that level of intrusion which society is not prepared to tolerate. However, by contrast, society is not prepared to tolerate such unmitigated and unpreventable illegal activity conducted in the open air as that done by Respondents in the case sub judice. The balance must be struck in favor of the decent folks of society.

Finally, Petitioner must reiterate that, contrary to Respondents' assertions, the degree of the officers'trespass does not bring into play the exclusionary rule. A trespass is a trespass. Petitioner presented cases in its initial brief on the merits which involved such outrageous trespasses on the part of the officers involved that the instant situation looks like play school in comparison. See, for example, Conrad, supra. The fact that the officer is a trespasser does not vitiate an otherwise reasonable seizure. This does not mean that the breaking of fences should be approved, but the disapproval of a trespass and the sanctions for it must come from aspects of the law other than the exclusionary rule. See, for example, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 US 388, 91 S.Ct. 1999, 29 Led 2d 619 (1971); Conrad, supra.

Petitioner submits that Respondents may pursue their civil causes of action. However, the activities of the officers involved herein were within the ambit of the Fourth Amendment, and cannot afford Respondents (whose guilt is not even challenged) an opportunity to escape justice.

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's order granting Respondents List's and Manuel's Motion for Discharge.

Respectfully submitted,

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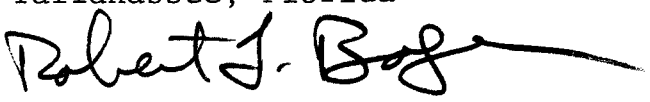

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished, by mail, to Steven M. Greenberg, Esquire, 744 N.W. 12th Avenue, Miami, Florida 33136, Philip G. Butler, Jr., Esquire, 315

Third Street, Suite 316, West Palm Beach, Florida 33401, Alan Karten, Esquire, 3550 Biscayne Boulevard, Suite 504, Miami, Florida 33137, Bruce H. Fleisher, Esquire, 370 Minorca Avenue, Suite 15, Coral Gables, Florida; and to Joel S. Fass, Esquire, 626 N.E. 124th Street, North Miami, Florida 33161, this 24th day of December, 1980.

Robert L. Boge

Of Counsel