0/a 6-8-82 ✓ C

IN THE SUPREME COURT OF FLORIDA

DEBRA JAYNE DeMONTMORENCY,	)	
Petitioner,	)	
v.	)	CASE NO. 61,179
STATE OF FLORIDA,	)	
Respondent.	)	
	)	

FILED

APR 6 1982

SID J. WHITE
CLERK SUPREME COURT
By ____________
Chief Deputy Clerk

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The State accepts the Introduction of the Petitioner.

STATEMENT OF THE CASE

The State accepts the Statement of the Case of the Petitioner.

STATEMENT OF THE FACTS

The State accepts the Statement of the Facts of the Petitioner.

ISSUE ON APPEAL

SEIZURE OF PETITIONER'S MARIJUANA DID NOT VIOLATE HER CONSTITUTIONAL RIGHTS.

Petitioner argues that the entry by the agents upon her property and the subsequent seizure of her marijuana violated her constitutional rights to be free from unreasonable search and seizure under the United States and state constitutions.

As noted by the Florida First District Court of Appeal in DeMontmorency v. State, 401 So.2d 858 (Fla. 1st DCA 1981), the question presented to this Court is the continuing validity of the so-called "Open Fields Doctrine" which was recognized by the United States Supreme Court in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed.2d 898 (1924).

As noted by Petitioner, the facts are not in dispute. Officers, acting on a tip, drove through an open gate into a pasture next to Petitioner's property, parked their car, crossed over a barbed wire "hog fence" into a rough wooded portion of Petitioner's property, traveled some 300 feet within the fence, and observed Petitioner's growing marijuana. Petitioner's house trailer was located approximately 750 to 800 feet from where her marijuana was discovered. At another point on the property adjoining Petitioner's property, different from the point where the officers crossed the fence into Petitioner's property, it was possible to observe the growing marijuana from outside the fenced

area. DeMontmorency at 860.

Petitioner improvidently relies upon State v. Morsman, 394 So.2d 408 (Fla. 1981), Norman v. State, 379 So.2d 643 (Fla. 1980) and State v. Brady, 406 So.2d 1093 (Fla. 1981) for the proposition that under her circumstances, the Open Fields Doctrine is inapplicable.

In regard to Morsman and Norman, the First District Court of Appeal was careful to distinguish its decision. Id. at 860-861.

The First District Court of Appeal accepted the protection of Morsman insofar as the curtilage of Petitioner's property extended. Id. at 860. Relying upon Morsman, the First District Court of Appeal rejected the State's argument of "plain view".

Neither Morsman nor Norman dealt with the Open Fields Doctrine, upon which the First District Court of Appeal relied in affirming Petitioner's conviction, although in Norman this Court noted that whatever the precise boundaries of the Open Fields Doctrine the doctrine does not extend to a warrantless search of a closed structure on property. Norman at 647. No structure was pierced by the officers when the fields of marijuana cultivated by Petitioner were secured.

Helpful to this Court in reconciling the seeming conflicts between the Florida cases is Lightfoot v. State, 356 So.2d 331 (Fla. 4th DCA 1978), cert. den. 361 So.2d 833 (1978). In Lightfoot,

an officer was called by a neighbor to the neighbor's home because the neighbor suspected that the Defendant was cultivating marijuana plants in his backyard. Officers arrived, observed three pots containing what the officers believed to be marijuana in the Defendant's backyard from the neighbor's backyard, seized the plants and subsequently arrested the Defendant. The Fourth District Court of Appeal held that anyone who keeps marijuana plants in open view in his or her backyard in the plain view of a neighbor has no reasonable expectation of privacy.

In Morsman, the view was from within the Defendant's backyard; the record in Morsman did not indicate that the plants were visible from outside the yard. Consequently, Morsman's backyard was constitutionally protected and Lightfoot's was not. Morsman at 409.

Here, Petitioner's open fields were visible from a point on adjoining property other than the place where the two officers crossed the fence. DeMontmorency at 860. Consequently, Petitioner had no expectation of privacy in her open fields of marijuana. Hester v. United States, supra.

In regard to State v. Brady, supra, the First District Court of Appeal distinguished the Fourth District Court of Appeal's opinion on its facts, properly observing that the "locked gate, the fact that the property was posted, and the forced entry are facts which" separate the Brady case from this case. DeMontmorency

at 861-862. Of some possible interest in connection to State v. Brady is the absence of Petitioner's development of the record. DeMontmorency at 859-860, note 2.

As interpreted by courts other than the First District Court of Appeal, the Open Fields Doctrine is still alive and well. In Giddens v. State, 274 S.E.2d 595 (Ga. 1980), cert. den. Giddens v. Georgia, ___ U.S. ____, 101 S.Ct. 1733, 68 L.Ed.2d 222 (1981), law enforcement officers crossed over barbed wire fencing (which was locked) and went into a field wherein marijuana was discovered. The Georgia Supreme Court concluded that this was, nonetheless, an open field to which Fourth Amendment protections under Hester, supra, did not extend.

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 two or three feet deep holes were dug by a bulldozer under the officers' direction in the open fields portion of the land. Finally, after bulldozing a pile of rocks and digging underneath, the body of a murder victim was found. Although the Wisconsin Court recognized that the Defendant manifested an expectation of privacy, it concluded that it was not one which society was prepared to accept. The Court premised its reasoning upon the Open Fields Doctrine, noting that the area simply was not protected by the Fourth Amendment.

In United States v. Basile, 569 F.2d 1053 (9th Cir. 1978), the Open Fields Doctrine was used to defeat the Defendant's claim

of violation of the Fourth Amendment when officers crossed a fence onto private property and looked into an apparently abandoned truck which was probably 100 yards from the Defendant's house.

Likewise, in United States v. Brown, 473 F.2d 952 (5th Cir. 1973), the Open Fields Doctrine defeated the Defendant's claim of a Fourth Amendment violation when officers dug up the ground at a point adjacent to a chicken coop and found evidence of a robbery. Other federal circuits have followed the Fifth and Ninth Circuit. See United States v. Cain, 454 F.2d 1285 (7th Cir. 1972), United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976) and Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968).

Petitioner's field of marijuana was disassociated from the curtilage of her mobile home and as such was not entitled to an expectation of privacy under Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) because even though Petitioner evinced an expectation of privacy in her fields, her expectation of privacy was not one which society is prepared to recognize as reasonable. Phillips v. State, 177 So.2d 243 (Fla. 1st DCA 1965), DeMontmorency v. State, supra, and State v. Brady, supra, dissenting opinion of Justice McDonald at 1099.

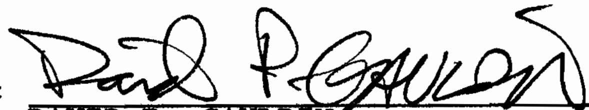
The trial court did not err in affirming Petitioner's conviction and the First District Court of Appeal's opinion in this case should be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the First District Court of Appeal's opinion in this case should be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General

BY: 
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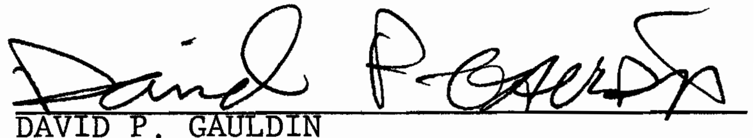
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Geoffrey C. Fleck, Esquire, and Alan S. Ross, Esquire, Weiner, Robbins, Tunkey & Ross, P.A., 2250 Southwest Third Avenue, Miami, FL 33129 by U.S. Mail this 6th day of April, 1982.


DAVID P. GAULDIN