

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-15 & 82-1273

TITLE RAY E. OLIVER, Petitioner v. UNITED STATES; and
MAINE, Petitioner v. RICHARD THORNTON

PLACE Washington, D. C.

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1 APPEARANCES (Continued):

2 ALAN I. HOROWITZ, ESQ., Office of the Solicitor General,
3 Department of Justice, Washington, D.C.; on behalf of
4 the Respondent United States.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Haddad, I think you
3 may proceed whenever you are ready.

4 ORAL ARGUMENT OF FRANK E. HADDAD, JR., ESQ.,

5 ON BEHALF OF PETITIONER OLIVER

6 MR. HADDAD: Mr. Chief Justice, and may it
7 please the Court:

8 The state police without a warrant, probable
9 cause or exigent circumstances searched the Petitioner
10 Oliver's farm and found marijuana growing in a corn
11 field. Oliver moved to suppress the evidence in the
12 District Court. That motion was sustained.

13 A panel of the Sixth Circuit affirmed. On
14 petition for rehearing en banc the Sixth Circuit held
15 that the per se open fields doctrine permitted the state
16 police to conduct the open field search, and that
17 holding by the Sixth Circuit was contrary to the
18 position of seven other circuits who have rejected the
19 per se open fields doctrine as well as most of other
20 state courts.

21 The issue presented in this case is whether
22 the Court's decision in Katz decided in 1967 holding
23 that the Fourth Amendment protects an individual if he
24 has an actual and a reasonable expectation of privacy
25 modified the per se open fields doctrine to the extent

1 of regarding a search warrant or requiring a search
2 warrant for the search of a highly secluded field from
3 whence the public is excluded and where a reasonable
4 expectation of privacy is shown to exist on behalf of
5 the Petitioner.

6 The facts in this case are that a police
7 officer, a Kentucky State Police officer, received an
8 anonymous tip and based on that anonymous tip, the
9 anonymous tip being that there was marijuana being grown
10 on the Oliver farm. Based on that tip he and another
11 police officer without a search warrant and without
12 probable cause and without having any exigent
13 circumstances proceeded to Mr. Oliver's farm.

14 Mr. Oliver's farm has proved to have been 22
15 miles from the nearest town in a very, very remote area
16 of Kentucky. To get to the field that they ultimately
17 found the marijuana growing in it was necessary for the
18 police officers to enter Mr. Oliver's property, drive
19 several hundred yards to his house and then continue
20 driving nearly another mile into the property.

21 During this travel according to Mr. Oliver and
22 there is some dispute about the number, but there were a
23 number of posted No Trespassing signs. They traveled
24 on beyond the house as I say for another mile when they
25 came upon a locked gate blocking the roadway.

1 This locked gate also had on it a No
2 Tresspassing sign. The officers parked their car not
3 being able to go beyond that gate in the car and walked
4 around the gate.

5 This area was fenced within the farm and the
6 proof is that the farm had boundary fences around it as
7 well. After going past this gate or walking around this
8 gate they proceeded about a quarter of a mile on when
9 someone yelled to them, "Come back. There is no hunting
10 allowed in this property."

11 The officers walked back to the barn or the
12 camp or where this person was standing and they could
13 not find the person that they had seen who yelled at
14 them. So they proceeded on for another approximate
15 quarter of a mile until they get into the property to
16 the field approximately a mile and a half.

17 They traveled on that last journey, that last
18 quarter mile journey, they traveled apart of that way
19 through very dense underbrush and very dense wooded
20 area. They finally came upon the corn field and they
21 could only when they got to that corn field observe that
22 marijuana was growing in the corn field.

23 They could not see that marijuana from any
24 other position until they had driven back approximately
25 a mile and a half and stood actually on the field or in

1 the field.

2 QUESTION: That is they could not see. I
3 suppose somebody in a helicopter could.

4 MR. HADDAD: Yes, they could.

5 The situation that we have here is that the
6 officers after finding this marijuana they came back out
7 and while traveling on the road they saw Mr. Oliver and
8 ultimately arrested him and charged him with
9 manufacturing and growing marijuana in violation of the
10 federal statute that was involved. The holding in Katz
11 and many cases before the Katz case was that searches
12 conducted outside the judicial process without prior
13 approval by a magistrate were per se unreasonable
14 subject to a few well delineated exceptions.

15 The government in this case contends that the
16 open fields doctrine is the exception in this case, that
17 this search should be held legal. Our contention is
18 that since Oliver excluded the public -- the
19 distinctions we will make in a moment -- this was not an
20 open field since he had excluded the public and took
21 such precautions as I have outlined to exclude everyone
22 from it.

23 The definition of --

24 QUESTION: So you are not asking us to
25 overrule the Hester case then?

1 MR. HADDAD: No, sir.

2 The definition of open fields has changed
3 through the years. In Hester the Court held that the
4 police could search in an area from which they are not
5 excluded.

6 There are other views of Hester holding that
7 it is a per se open fields doctrine.

8 QUESTION: Do we know that much about the
9 facts in Hester, Mr. Haddad? It is just that very kind
10 of conclusory statement in Justice Holmes' opinion.

11 MR. HADDAD: Yes, sir. I think that you are
12 correct in that, but there was a holding there or some
13 holding to the effect that the defendant himself is who
14 led the police to the evidence by passing the jugs of
15 whiskey to the other person that was on the property at
16 the time which the officers were able to observe. They
17 also held in that case that there were other people who
18 came onto and off of the property even while the
19 officers were there and after the arrest had been made.

20 So we next come to the Olmstead case about
21 four years later when there was a holding that has been
22 referred to as the per se locational theory, and that
23 was that anything outside of the curtilage was
24 considered to be an open field and no warrant was
25 needed. In the Katz decision this Court rejected the

1 Olmstead's per se theory of the open field doctrine, and
2 in more recent cases since Katz the holding has been
3 that a field is not open if the public was excluded.

4 In the Air Pollution Variance Board v. Western
5 Alfalfa case decided in 1974 the Court analyzed that a
6 federal agent can trespass onto an area where the public
7 is not excluded and view that which was exposed to the
8 public without violating the Fourth Amendment. So they
9 held that if the public was not excluded the area was an
10 open field, and in that case they held, which was an
11 OSHA warrantless search case, they held that the search
12 was okay and legal.

13 In Marshall v. Barlow a few years later, some
14 four years later, this Court using the same analysis
15 held that without a warrant the government agent is in
16 no better position than a member of the public and
17 observations capable of being made by the public can be
18 made by the agent without a warrant. In that case the
19 Court held as unconstitutional the authorization under
20 the OSHA Act or search without a warrant because it
21 permitted a warrantless government agent to search in an
22 area where the public was excluded.

23 So we get into that fine distinction that this
24 Court has made that if the public was excluded the area
25 is not an open field. If the area is not an open field

1 then the Fourth Amendment applies.

2 If the Fourth Amendment applies then we must
3 use the two-part Katz test to determine if the Fourth
4 Amendment has been violated. When we look at the first
5 part of the Katz test which is was there an expectation
6 of privacy we find in this particular case that this man
7 had his property fenced.

8 He had it posted throughout with No
9 Trespassing signs. He had a gate to the road which had
10 a chain and lock on it. There was a travel back into
11 the farm approximately a mile and a half into a secluded
12 area through wooded areas to find the marijuana growing
13 in the corn field.

14 There was also the additional, which the Sixth
15 Circuit dissenting opinion put a lot of weight upon --
16 There was also the additional fact that somebody on the
17 property had hollered to the police officers that no
18 hunting was allowed and to come back or to come back, no
19 hunting was allowed.

20 So when we apply that and as the District
21 Court judge said in his memorandum -- opinion, short of
22 guards at the entrance it is difficult to see what else
23 the defendant could have done to assert his privacy
24 interest in the property --

25 QUESTION: Mr. Haddad, perhaps this varies

1 from place to place in the country, but wouldn't you
2 agree that putting a No Hunting sign on premises does
3 not necessarily mean that the owner wishes to exclude
4 people who do not intend to hunt?

5 MR. HADDAD: This was a No Trespassing signs
6 throughtout here. It is the same I would imagine as No
7 Hunting, but it said No Trespassing.

8 QUESTION: It said No Trespassing?

9 MR. HADDAD: Yes, sir. All of them said No
10 Trespassing.

11 QUESTION: Well, then what comfort do you draw
12 from the additional conversation about hunting?

13 MR. HADDAD: None except that I felt that --
14 The Sixth Circuit dissenting opinion felt that that was
15 something added to show that there was an expectation of
16 privacy when someone on the property yelled, "Come
17 back. There is no hunting allowed on the property."

18 QUESTION: Well, that might cut the other
19 way. It might indicate to people if you are not hunting
20 it is okay.

21 MR. HADDAD: I do not think so, not with the
22 clear delineation of all of these signs on the property
23 and particularly with one on that locked gate that said
24 No Trespassing. The government really does not realize
25 the significance of a No Trespassing sign in that rural

1 area of Kentucky.

2 It means just what it says, no trespassing,
3 and the society in the second part of the Katz test was
4 was this expectation of privacy one that society is
5 prepared to accept as reasonable.

6 QUESTION: Would you say that that is true?
7 Suppose the officers had come up here to this sign and
8 it says No Trespassing but they see some marijuana
9 growing right inside the fence.

10 MR. HADDAD: That would be plain view, Your
11 Honor, and that would be an exception.

12 QUESTION: Well, I know but plain view never
13 lets you into a private place.

14 MR. HADDAD: It would in this instance I am
15 afraid.

16 QUESTION: Why? Why? There is a No
17 Trespassing sign. Go get a warrant.

18 MR. HADDAD: But if it comes --

19 QUESTION: You cannot stand outside a house
20 and look through the window and see contraband or guns
21 lying on the table and go in the house without a
22 warrant.

23 MR. HADDAD: I agree with Your Honor, but if
24 this were in plain view then the open fields --

25 QUESTION: Well, the gun would be in plain

1 view through the window in a house. Can you enter the
2 house without a warrant?

3 MR. HADDAD: No, sir. But the point is that
4 if this were in a place where the public could observe
5 it then it is an open field. If it was a place where
6 the public could observe it without trespassing in this
7 situation then it would be --

8 QUESTION: Then they may trespass?

9 MR. HADDAD: Well, it is an exception. It is
10 another exception to the rule. It does not permit the
11 trespassing. It permits --

12 QUESTION: Well, at least then the sign does
13 not mean what it says.

14 MR. HADDAD: No, sir. I disagree, sir. The
15 sign means exactly what it says, no trespassing. If you
16 see something -- You could not see it in this case.
17 Everybody agrees and the government stipulates --

18 QUESTION: Well, if you are relying upon the
19 sign to give you an expectation of privacy apparently it
20 does not all the time.

21 MR. HADDAD: I am not depending upon the sign
22 alone as the government would have the Court believe in
23 their brief. We are depending upon all of these
24 circumstances in this particular case --

25 QUESTION: What you are saying is that a field

1 can have some expectation of privacy, but in no event
2 would it acquire the expectation of privacy that you
3 would have in a house because of the different treatment
4 of what is seen in plain view from outside the field.

5 MR. HADDAD: Exactly. I think that is where
6 your Hester case comes back into play, and it would
7 permit the search if it was visible to the public or
8 from an area where the public was. Then whether there
9 is trespassing signs or not you could go onto the
10 property and seize that in the plain view doctrine.

11 QUESTION: What difference does it make that
12 this could have been seen from the air?

13 MR. HADDAD: Well, it does not make any
14 difference at all in this case because if it can be seen
15 and the air searches have been held legal because the
16 air is a place where the public is expected to be
17 traveling in the air over commercial planes or in
18 private planes or in anything else. That would be
19 permissible.

20 QUESTION: What about a police helicopter
21 looking for marijuana?

22 MR. HADDAD: It would be permissible and the
23 cases have so held, sir.

24 QUESTION: Mr. Haddad, is the field on the
25 Cumberland River?

1 MR. HADDAD: Yes, sir.

2 QUESTION: And the Cumberland is navigable?

3 MR. HADDAD: The Cumberland is navigable but
4 there was a stipulation entered into this record by the
5 government and the defense attorney that this property,
6 these particular fields could not be observed from the
7 Cumberland River. There is a stipulation in the record
8 to that effect.

9 QUESTION: Here is a police helicopter flying
10 around over this corn field or over this marijuana field
11 in which corn was growing, one or the other --

12 (Laughter)

13 QUESTION: The police see marijuana growing.
14 They then radio down to the police car that is stopped
15 right by the No Trespassing sign. May the police then
16 go right on into the corn field?

17 MR. HADDAD: Well, I think they would have a
18 right at that point under the open fields doctrine
19 because any member of the public could do the same
20 thing, could fly around in the air in a helicopter and
21 observe that.

22 QUESTION: Well, there is not much of an
23 expectation of privacy then is there in that corn
24 field?

25 MR. HADDAD: There is for people who walk onto

1 the ground where there are No Trespassing signs and all
2 these other things. The second part of the Katz test is
3 whether or not society -- the expectation of privacy is
4 one that society is prepared to accept as reasonable.

5 We say that it is. Certainly society is ready
6 to accept as reasonable a farmer's right to exclude
7 other people from his property, and certainly there
8 could be a valid presumption that a reasonable
9 presumption exists that society would not favor
10 warrantless government intrusions.

11 Thank you.

12 CHIEF JUSTICE BURGER: Ms. Zeegers.

13 ORAL ARGUMENT OF DONNA L. ZEEGERS, ESQ.,

14 ON BEHALF OF RESPONDENT THORNTON

15 MS. ZEEGERS: Mr. Chief Justice, and may it
16 please the Court:

17 In State of Maine v. Richard Thornton the area
18 in question was not as a matter of fact akin to an open
19 field. The area by its very nature of being a heavily
20 wooded area was not akin to an open field.

21 It was not a field for one thing, and it was
22 not open in any sense of the word. If you will look at
23 the information in this case starting from the affidavit
24 by the police officer after he had made his warrantless
25 search they made reference to an informant here who had

1 told about marijuana growing in back of someone's
2 trailer home in a heavily wooded area.

3 The police officer said in the affidavit as
4 well that he went to the heavily wooded area and saw
5 what he wanted to see and then asked the magistrate to
6 give him a search warrant to search the heavily wooded
7 area. Also at the suppression hearing it is very clear
8 from the record that the area searched was in fact woods
9 and not fields.

10 There were photographs. An aerial photograph
11 in particular showed that the complete property except
12 for some very small patches, smaller than this table,
13 were in fact open. The rest of it was a completely
14 heavily wooded area.

15 The police themselves made testimony that the
16 area that they searched was heavily wooded. Mrs.
17 Thornton's testimony, the defendant's wife's testimony,
18 was also that the area was heavily wooded.

19 Therefore, the Supreme Judicial Court of Maine
20 should be free as a matter of fact to determine that the
21 nature of the particular area was not an open field. It
22 was in fact closed woods and secluded woods.

23 QUESTION: Then let me take you back to the
24 questions we were putting to your colleague about a
25 helicopter or a light plane flying over the area taking

1 pictures and then presenting the pictures to a
2 magistrate with enlargements showing that there were
3 marijuana plants and getting a warrant. What would you
4 say about that?

5 MS. ZEEGERS: Yes. Mr. Chief Justice, my
6 feeling on that would be that if they made an aerial
7 search that may have been enough to establish probable
8 cause to get a search warrant. Well, in my situation it
9 may have been difficult to in fact observe marijuana
10 growing because the patches were so small in this
11 heavily wooded area. Perhaps if they had binoculars
12 they might have been able to see them.

13 But if it were a large area and they were
14 easily seen, then that would have been enough to
15 establish probable cause. But in fact there would be
16 not a privacy violation from the air to the extent of
17 the privacy violation of police actually coming onto
18 your property.

19 In terms of the individual's expectations the
20 individual expects that people are not going to come
21 onto his private property, but the individual does not
22 have as great an expectation that people may not see
23 things from the air.

24 It is important to note that there is no
25 definition of open field in the Hester case, and I think

1 because of that Maine certainly should be free to
2 determine whether or not an area searched is an open
3 field or it is not an open field. It is important to
4 note also that the Maine court never rejected the open
5 fields doctrine nor did they reject Hester.

6 In fact, they have applied the open fields
7 doctrine in cases in Maine and they cited three or four
8 cases in the opinion where the open fields doctrine had
9 been applied stating --

10 QUESTION: You are not suggesting, Ms.
11 Zeegler, that the Maine Supreme Judicial Court decided
12 this case wholly on a state law ground.

13 MS. ZEEGERS: Well, Mr. Justice Rehnquist, I
14 do feel that there is adequate and independent state
15 grounds for this decision, and the reason that I am
16 saying that is because the State of Maine had to talk
17 about federal cases because they had to correct the
18 erroneous assumptions of Petitioner in the case
19 regarding the application of Katz and Hester to this
20 case.

21 QUESTION: If you would look at pages A-12,
22 A-13, A-14 in the Petition where you set out the opinion
23 of the Supreme Court of Maine, when they are talking
24 about expectation of privacy they first talk about
25 Hester and Katz and then they go on and say the Maine

1 cases are in accord. Now that sounds to me as though
2 they are certainly primarily resting it on federal
3 constitutional grounds.

4 MS. ZEEGERS: Well, again, Your Honor, it is
5 my position that the court had to discuss Hester and
6 Katz because those were the cases that were raised by
7 the Petitioner on appeal so they had to discuss them,
8 but then they said we are in accord in determining
9 whether or not there was a search. Then the court cited
10 18 Maine cases to support that decision of whether or
11 not there was a search.

12 Therefore, the federal cases if they were used
13 other than just to correct their assumptions they were
14 used only as guidance in Maine similarly for adopting
15 the --

16 QUESTION: Weren't the Maine cases in turn
17 relying on federal law?

18 MS. ZEEGERS: It is my position that some of
19 the cases did cite Katz but not all of them, and it is
20 very clear from the face of the opinion that the court
21 did adopt its own version of a search and did --

22 QUESTION: Well, of course, all we can do here
23 is decide the federal question.

24 MS. ZEEGERS: That is right.

25 QUESTION: If you are correct that the

1 decision below rested as well on Maine, the ground rule
2 would still prevail.

3 MS. ZEEGERS: That is correct.

4 QUESTION: On remand.

5 MS. ZEEGERS: Yes, sure.

6 In terms of the Maine Supreme Judicial Court's
7 holding on the applicability of the open fields doctrine
8 that is completely in accord with its own prior
9 decisions and with decisions of this Court. The two
10 factual circumstances which must be considered in Maine
11 before the open fields doctrine applies are the openness
12 with which the activity is pursued, whether the activity
13 is open and patent.

14 Number two, the lawfulness --

15 QUESTION: How many trees do you need to get
16 rid of the open field?

17 MS. ZEEGERS: Well, I think certainly in this
18 case we had no field at all. There were only trees on
19 this property, and it is significant to note that nobody
20 could have seen these tiny patches in amongst the fields
21 from any other land other than the defendant's land.
22 They could also not been seen from the defendant's
23 driveway, from the defendant's house, from neighboring
24 land or from the road.

25 QUESTION: So you do not want it to apply to

1 anybody but a field of this type?

2 MS. ZEEGERS: I am sorry. I did not hear
3 you.

4 QUESTION: I still do not know what field this
5 is. I do not know how many trees are there.

6 MS. ZEEGERS: How many trees are there? There
7 are 38 acres of trees in this case.

8 QUESTION: How close are the trees?

9 MS. ZEEGERS: They were right next to the
10 trees. The little patches were right next to the
11 trees. The trees completely surrounded them.

12 QUESTION: But you could see them.

13 MS. ZEEGERS: You could see them only when you
14 got onto the land. You could not see them from
15 neighboring land.

16 QUESTION: Not with good binoculars.

17 MS. ZEEGERS: Not with good binoculars even.

18 QUESTION: Is that agreed by both sides?

19 MS. ZEEGERS: That particular issue has not
20 really been addressed. I have been on the property
21 myself and I could tell you that, but that was never
22 raised in the lower court.

23 In terms of the other factual aspect for the
24 applicability of the open fields doctrine was the
25 lawfulness of the officers' presence during their

1 observation of what is open and patent, whether the
2 police have as much right to be in a position of
3 observation as the defendant or the public and whether
4 the permission was given or whether the area was exposed
5 to public view.

6 It is important to note that Petitioner
7 incorrectly cites the holdings on this issue throughout
8 its brief and then uses that holding as a foundation for
9 saying that the court used only a trespass theory in
10 coming to its opinion. That, of course, is not the
11 case.

12 This applicability of the open fields doctrine
13 is completely in accord with the Air Pollution Variance
14 Board case where the open fields doctrine was applied to
15 an area that was visible to the public and from which
16 the public was not excluded. The visibility of the
17 public standard in Air Pollution is as same as the
18 openness standard in Maine v. Thornton.

19 QUESTION: Can I put the same question I put
20 to your friend in the other case? Suppose an inspection
21 of the property from a helicopter and they got down low
22 enough to see through these trees and they saw
23 marijuana. Could they radio out to a police car at the
24 edge of the property and could the officers in the car
25 then walk onto the property and inspect further?

1 MS. ZEEGERS: Well, I think the threshold
2 question there would be whether or not there was a
3 search. If the --

4 QUESTION: Well, that is what I am asking.

5 MS. ZEEGERS: Yes. If the air craft was so
6 low as to violate their privacy and --

7 QUESTION: Well, suppose it wasn't.

8 MS. ZEEGERS: Suppose it was not? Then it
9 would be held not to be a search and they could have
10 enough probable cause --

11 QUESTION: Well, why could the officers
12 nevertheless enter the property?

13 MS. ZEEGERS: They could not enter the
14 property. What they could do is get probable cause and
15 get a search warrant.

16 QUESTION: Well, I am asking you could the
17 officers at the edge of the property when they received
18 the information from the helicopter could the officers
19 then enter the property without a warrant?

20 MS. ZEEGERS: No, Your Honor. I do not
21 believe so because there would be no exception to the
22 warrant requirement in that situation. Viewing property
23 from the air only can establish probable cause.

24 QUESTION: I thought that what privacy there
25 is has already disappeared. As a matter of fact there

1 was not any privacy from the police.

2 The police would already know exactly what is
3 on the property. Why shouldn't it be considered an open
4 field then?

5 MS. ZEEGERS: Because the -- Well, number one,
6 the area was not an open field. The state court
7 addressed that.

8 QUESTION: But it is an open field when a
9 helicopter takes a picture or observes it and concludes
10 that that is marijuana. Is it not then an open field?

11 MS. ZEEGERS: Well, in terms of what the --
12 The openness, of course, has to be the key here, and in
13 Maine they say that the area has to be open and because
14 they see it does not mean that it is open.

15 QUESTION: That pretty well leaves out the
16 whole State of Maine doesn't it?

17 (Laughter)

18 MS. ZEEGERS: That is right. It does, Your
19 Honor.

20 I would like to reserve the rest of my time
21 for rebuttal.

22 Thank you.

23 CHIEF JUSTICE BURGER: Very well.

24 QUESTION: Before you sit down, could I ask
25 you are you familiar with Mr. Haddad's case in

1 Kentucky?

2 MS. ZEEGERS: Yes.

3 QUESTION: Do you think your facts are a
4 little weaker than his facts?

5 MS. ZEEGERS: Well, I think that our facts are
6 a little bit different in terms of our area being a
7 completely wooded area. I think our facts are stronger
8 in this situation.

9 We did not have a gravel road that the police
10 went onto so I think our facts are stronger in that
11 situation. We did not have a locked gate as Oliver did
12 have so I think they balance each other out.

13 QUESTION: Thank you.

14 CHIEF JUSTICE BURGER: Mr. Moss.

15 ORAL ARGUMENT OF WAYNE S. MOSS, ESQ.,

16 ON BEHALF OF PETITIONER MAINE

17 MR. MOSS: Mr. Chief Justice, and may it
18 please the Court:

19 Fourth Amendment protection does not apply to
20 Mr. Thornton's woods because any subjected expectation
21 of privacy he entertained in his woods was unreasonable
22 as a matter of Fourth Amendment law. Subjected
23 expectation may have been rational as a matter of
24 property law, but the Fourth Amendment does not protect
25 property rights.

1 The Fourth Amendment protects people from
2 unreasonable governmental searches and seizures.

3 QUESTION: Do you really believe that?

4 MR. MOSS: Yes, I do.

5 QUESTION: Of course, the court said it.

6 MR. MOSS: Yes, we do believe that that the
7 Fourth Amendment protects persons, houses, papers and
8 effects from unreasonable governmental searches and
9 seizures.

10 QUESTION: Well, that sounds like some
11 property to me. I say, when you name the four things
12 some of them are property rights.

13 MR. MOSS: But the intent here is to protect
14 an underlying core zone of privacy which is essential
15 for the individual to enjoy some fundamental level of
16 freedom in our society.

17 QUESTION: But don't you think that there is
18 substantial property law involved in determining whether
19 there is this expectation of privacy or not?

20 MR. MOSS: There can be property law
21 involved. In a property right in excluding others there
22 is a privacy interest that adheres in that property
23 right in excluding others.

24 But the primary purpose of the Fourth
25 Amendment though is not to protect that property right

1 but to protect a core zone of privacy. The framers put
2 forth certain examples as to what would constitute that
3 core zone of privacy and they said persons, house,
4 papers and effects, and we contend that or agree that it
5 could also include other places which a person
6 personalizes by his activity by construction and use to
7 make like a home.

8 This core zone of privacy, however, would --

9 QUESTION: But no yard or other adjacent area
10 could in your view ever be made so as to invoke Fourth
11 Amendment concerns?

12 MR. MOSS: There could be a buffer zone around
13 the house, and in suburban and urban areas there very
14 well may be a buffer zone around the house to which
15 Fourth Amendment protections would apply in order to
16 preserve the integrity and security of people within the
17 house itself.

18 QUESTION: But no other part of a field or a
19 farm or a piece of property in your view?

20 MR. MOSS: Yes. That is our position. So
21 that --

22 QUESTION: You say that the entry is legal?

23 MR. MOSS: The entry here in this case? It is
24 legal -- It is not unconstitutional. There may be a
25 problem as far as property law goes, and there may even

1 be a problem under Maine law as far as criminal trespass
2 goes, but --

3 QUESTION: What if the owner of the property
4 is there at the gate, and the officers say this is an
5 open field and we have probable cause to believe there
6 is marijuana down at the end of that path and the owner
7 says awfully sorry but you can't come on? May they
8 forceably enter?

9 MR. MOSS: At that particular point as a
10 matter of constitutional law they can enter. As a
11 matter of property law they would get into trouble, but
12 there would be no problem as far as constitutional law
13 goes.

14 QUESTION: They would just be in trouble with
15 Maine but not with the federal government. Is that what
16 you are suggesting?

17 MR. MOSS: That is exactly what we are saying
18 that -- Even in Katz itself this Court recognized that
19 the Fourth Amendment cannot be translated into a general
20 constitutional right of privacy.

21 QUESTION: So that in your view there is just
22 nothing a land owner can do outside the house to invoke
23 Fourth Amendment protections which I take it is the
24 answer you gave Justice O'Connor a minute ago. If the
25 land owner himself out there with a gun cannot keep them

1 out or cannot create any expectation of privacy, nothing
2 can.

3 MR. MOSS: That is our position and I would
4 like to explain that.

5 QUESTION: May I just ask also that doesn't
6 even require probable cause as I understand you.

7 MR. MOSS: Correct, yes.

8 QUESTION: It wouldn't even require reasonable
9 suspicion. The officer could just go up and say we are
10 not sure. There might be marijuana here. We are going
11 to search. They can do it.

12 MR. MOSS: Yes. Fourth Amendment protections
13 would not apply at all.

14 QUESTION: Is your position consistent do you
15 think with some of the administrative search cases from
16 this Court?

17 MR. MOSS: Which cases do you have in mind?
18 We think our position is consistent with Western Alfalfa
19 and also with Camar and Say which are mentioned in
20 Western Alfalfa so we do not see any problem there.

21 I would like to return to Justice White's
22 question as to what a land owner might be able to do to
23 or whether he can create any reasonable expectation of
24 privacy in his fields and woods. Our position is that
25 simply by putting up perimeter fencing and boundaries

1 without actually personalizing the woods and fields
2 themselves but just leaving them either in an
3 undeveloped or in their agricultural state that alone is
4 not sufficient to create any Fourth Amendment interest
5 in those fields and woods.

6 He must do substantially more than that. He
7 must personalize the area in order to create a Fourth
8 Amendment interest in the fields and woods, and without
9 such personalization --

10 QUESTION: I take it that your position
11 doesn't go as far as to say that an officer could -- The
12 land owner is standing at the gate. The officer says
13 "We think there is some contraband sitting down there at
14 the end of this path or some evidence or something."

15 The land owner says, "Well, you can't come
16 on." You say that as far as the Constitution is
17 concerned the officer may enter but then he may search,
18 but may he seize?

19 MR. MOSS: Yes, he may seize in the sense of --

20 QUESTION: Well, there certainly is an
21 interest in what is being seized different from the
22 interest in the land.

23 MR. MOSS: Yes, that is correct.

24 QUESTION: Except that then if you are legally
25 there as far as the Constitution is concerned the items

1 are in plain sight then I take it.

2 MR. MOSS: Yes. That is our position that the
3 items are in plain view. Fourth Amendment protections
4 attach to the seizure. Probable cause would be required
5 in order to -- If the officers had made a warrantless
6 seizure in this case they would have had to have
7 probable cause in order to make seizure.

8 QUESTION: Supposing the items were buried so
9 there is a gun buried in the field somewhere and they
10 suspect and they go out and they dig for it. Couldn't
11 they do that?

12 MR. MOSS: Yes, they could.

13 QUESTION: As soon as they saw it they would
14 have their probable cause and they could seize it.

15 MR. MOSS: Yes, that is correct. Once again
16 it is the position that Fourth Amendment protections do
17 not apply here. Now in the situation that you just
18 posed there might be some state trespass problems.

19 QUESTION: I understand. But the Constitution
20 would not impose any obstacle to going into a property
21 and digging around looking for a gun or body or anything
22 like that.

23 MR. MOSS: Yes. That is the State's
24 position.

25 QUESTION: Your position --

1 QUESTION: Mr. Attorney General, what do you
2 do with the word -- What effect do you give to the word
3 "effects" in the Fourth Amendment?

4 MR. MOSS: Effects are personal effects, but
5 they do not actually reach as far as real estate or
6 property.

7 QUESTION: I didn't say personal. I said
8 effects.

9 MR. MOSS: Well, they said their effects which
10 suggests personal effects.

11 QUESTION: No, it doesn't to me. It's my
12 property.

13 MR. MOSS: Well, it does not say -- In the
14 Fifth Amendment they did use the word "property" but in
15 the Fourth Amendment they did not.

16 QUESTION: You only apply it to the personal
17 property but not the real property. That is your
18 position?

19 MR. MOSS: Yes. It would apply to personal
20 property but not to real property.

21 QUESTION: Give me any case that says that.

22 MR. MOSS: I am sorry. I did not hear the --

23 QUESTION: Give me a case that says that
24 effects means personal property and does not mean real
25 property.

1 MR. MOSS: I think Hester is such a case.

2 QUESTION: Hester did not say one -- All it
3 said was in one sentence that it applies to the house
4 and does not apply to open fields. That is all Hester
5 says.

6 MR. MOSS: Hester said that the -- and if I
7 remember it correctly the exact sentence was something
8 like the special protections of the Fourth Amendment
9 extended to the people and their persons, houses and
10 papers and effects do not extend to the open fields.
11 Then they said that the distinction between the open
12 fields and persons, houses, papers, and effects is --

13 QUESTION: I would like for you to show me
14 that.

15 MR. MOSS: Pardon?

16 QUESTION: It is not in the opinion.

17 MR. MOSS: Yes, it is in the opinion. It is
18 in the opinion and I will read it if you like.

19 This is 257 --

20 QUESTION: Fifty-seven is the page --

21 MR. MOSS: It is on page 59.

22 QUESTION: That is the last paragraph.

23 MR. MOSS: Right. It says "The special
24 protection accorded by the Fourth Amendment to the
25 people in their persons, houses, papers, and effects is

1 not extended to the open fields --

2 QUESTION: Period.

3 MR. MOSS: Yes.

4 QUESTION: It does not say anything about what
5 an open field is.

6 MR. MOSS: That is true.

7 QUESTION: Well, that is what I was trying to
8 say that that does not help you. He could have meant
9 what? He could have meant an open field was a forest.

10 QUESTION: It is your position I take it that
11 when Justice Holmes said open field he did not mean a
12 ten by ten flower garden or a vegetable garden in a lot
13 that is 100 feet by 200 feet. He is talking about
14 something larger.

15 MR. MOSS: Yes. That is correct, and he is
16 not talking about something that is --

17 QUESTION: Name me something in the opinion
18 that gives you the idea that he meant something larger,
19 the word "larger". It is not in there. It just says
20 open field, and I interpret open field to mean one
21 block, one acre or 87 square miles. All could be open
22 field.

23 MR. MOSS: Yes. That would be our position as
24 well.

25 QUESTION: So you could apply this only to an

1 open field.

2 MR. MOSS: No, because we are saying that the
3 Fourth Amendment itself is protecting only a core zone
4 of privacy and once one is outside that core zone --

5 QUESTION: Are you saying it applies only to a
6 house?

7 MR. MOSS: No. We are saying --

8 QUESTION: What further than the house?

9 MR. MOSS: Pardon?

10 QUESTION: What more than the house?

11 MR. MOSS: It could also include a buffer zone
12 that might be around the house.

13 QUESTION: What else?

14 MR. MOSS: It could also include areas outside
15 the house which a person would personalize. It could be
16 a --

17 QUESTION: Like a telephone booth?

18 MR. MOSS: It could be a telephone booth --

19 QUESTION: A barn?

20 MR. MOSS: It could be a barn. It could be a
21 tent that a person puts up in his woods and lives in,
22 but it would not actually be the woods itself.

23 QUESTION: The common law lumped together is
24 the curtilage?

25 MR. MOSS: Yes, although we are not actually

1 using a curtilage analysis. We are talking about a core
2 zone of privacy that the Fourth Amendment is designed to
3 protect.

4 QUESTION: Would the barn's location be
5 relevant?

6 MR. MOSS: It could be if --

7 QUESTION: If it were within the curtilage
8 arguably it could, but suppose it were a mile away from
9 the home?

10 MR. MOSS: Yes, but we are agreeing though
11 that Fourth Amendment protection would apply to a barn.

12 QUESTION: Wherever located?

13 MR. MOSS: Yes, wherever the barn itself is
14 located because that would be the type of --

15 QUESTION: Personalized?

16 MR. MOSS: Yes, and that would be --

17 QUESTION: Personalized barn?

18 MR. MOSS: Yes, in the sense that a person --

19 QUESTION: I mean a barn is personalized.

20 MR. MOSS: Yes, by construction and use in a
21 way that fields and woods even fenced and posted ones
22 are not.

23 The State of Maine's core concern here is that
24 if the Maine court's holding is allowed to stand that it
25 permits people to buy up large tracts of land and fence

1 them and post them and then invoke Fourth Amendment
2 protections for those fields and woods and then conduct
3 elicit activities behind that fencing and posting and
4 invoke the protections of the Fourth Amendment and
5 thereby remain free from government investigation.

6 QUESTION: People can buy houses and conduct
7 illegal activity in them, too.

8 MR. MOSS: Yes, but the house is a core zone
9 of privacy.

10 QUESTION: I mean, your argument that they
11 could use it illegally I do not know that that advances
12 the inquiry, does it, because every area protected by
13 the Fourth Amendment could be used for illegal
14 purposes.

15 MR. MOSS: Yes, but --

16 QUESTION: A yard house, a barn, a stable,
17 whatever it might be.

18 MR. MOSS: Yes. The distinction, though, is
19 in terms of the privacy interest in the house versus the
20 fields and woods.

21 QUESTION: Of course, as the Chief Justice
22 suggests in the question in the earlier case if enough
23 illegal activities are conducted in the house it may
24 turn into a place of business.

25 MR. MOSS: Yes, it could, but we are not in

1 any way saying that the Fourth Amendment would not apply
2 to a place of business.

3 This case is not like Katz in that the court
4 does not have to extrapolate Fourth Amendment principles
5 to the 20th century phenomena of the telephone booth.
6 The fields and woods and farms that we are talking about
7 here were in existence in the late 1700's when the
8 Fourth Amendment was drafted.

9 The framers could have contemplated them.

10 QUESTION: The pine trees look much the same.

11 MR. MOSS: The pine trees look much the same.

12 They left pine trees, woods, fields -- They left them
13 out of the analysis of where Fourth Amendment
14 protections apply, and there would even be -- Our
15 position is that there would actually be even less
16 expectation of privacy now in fields and woods than
17 there was in the 1700's because we now do have airplanes
18 bringing whole areas of fields and woods into public
19 view which would not have been open to view in the late
20 1700's.

21 Thank you.

22 CHIEF JUSTICE BURGER: Mr. Horowitz.

23 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

24 ON BEHALF OF RESPONDENT UNITED STATES

25 MR. HOROWITZ: Mr. Chief Justice, and may it

1 please the Court:

2 The relevant facts in the Oliver case can be
3 stated quite simply. Acting on information that
4 Petitioner was growing marijuana on his farm police
5 drove up a road onto the farm.

6 When a gate which contained a No Trespassing
7 sign blocked that road they continued unobstructed on
8 foot on a frequently used path around the gate and then
9 down the road until they reached the marijuana field.
10 It is not disputed that the marijuana was not discovered
11 until the officers were on Petitioner's property, but it
12 is well settled that that fact alone does not require
13 suppression on Fourth Amendment grounds.

14 The notion that somehow the area was
15 particularly secluded and that there was dense
16 underbrush is not really supported by the record. The
17 police here just walked down the road which is exactly
18 what the information had told them where the marijuana
19 would be --

20 QUESTION: Mr. Horowitz, can I ask you just
21 one question? Would it matter under your submission
22 even if it were totally secluded and secondly even if
23 you had no suspicion your position still is the same is
24 it not?

25 MR. HOROWITZ: Well, to the extent that --

1 QUESTION: As a matter of constitutional law.

2 MR. HOROWITZ: Yes. To the extent that the
3 subjective expectation of privacy of the owner enters
4 into it the fact that it may be very difficult to reach
5 helps them to some extent. Our position is that in an
6 area like this there is still not a warrant requirement,
7 that the privacy expectation is not there.

8 QUESTION: Either there is total expectation
9 of privacy -- You say that is not to be considered in
10 this case.

11 MR. HOROWITZ: Well, total subjective
12 expectation of privacy.

13 QUESTION: That is right.

14 MR. HOROWITZ: Well, --

15 QUESTION: Total objective or subjective? As
16 I understand your position it is wholly immaterial.

17 MR. HOROWITZ: Well, I do not think you can
18 ever have a total subjective or objective expectation of
19 privacy in an area like a field. I mean there is always
20 going to be access. It is just a question of whether
21 access is going to be more difficult or less difficult.

22 QUESTION: You build a very high fence around
23 and electrify it. You can make sure that no human being
24 can get in it --

25 MR. HOROWITZ: It would still open --

1 QUESTION: It is still open to the --

2 MR. HOROWITZ: It is still open because it
3 still does not have walls and it still does not have a
4 roof so it is still open to view from the air.

5 QUESTION: That is enough, just the fact that
6 it is open to visual inspection from the air is enough
7 to destroy whatever other expectation of privacy there
8 might be.

9 MR. HOROWITZ: I think that is the state of
10 law as it is now. I mean --

11 QUESTION: That is your position.

12 MR. HOROWITZ: We have two positions. We
13 suggest that at some point a person can take sufficient
14 measures to exclude outsiders.

15 QUESTION: So would you disagree with your
16 colleague from Maine that -- Say the owner is there at
17 the gate and says, "This sign means exactly what it says
18 and this path is not open to the public. Now just stay
19 out. I have an expectation of privacy and I am not
20 enforcing it."

21 Could the officers then enter?

22 MR. HOROWITZ: Well, the --

23 QUESTION: As far as the Constitution is
24 concerned?

25 MR. HOROWITZ: Well, certainly if they had

1 reasonable suspicion they could enter. It seems to me
2 that -- I would think that he really has to take
3 exclusionary measures --

4 QUESTION: Well, he did. He is. He is
5 standing there and he says "If you are going to come on
6 you will have to force your way on."

7 MR. HOROWITZ: Again I get back to that we
8 have two positions. It would be my position that the
9 Constitution does not prohibit the officer from going on
10 to the land at that point because it is still an open
11 field.

12 QUESTION: With or without an expectation of
13 privacy? I mean with or without reasonable suspicion?

14 MR. HOROWITZ: Yes, but certainly with
15 reasonable suspicious. I mean I can understand --

16 QUESTION: It is terribly important because as
17 soon as you say that you are acknowledging the Fourth
18 Amendment has some application. I thought your position
19 was it had no application.

20 MR. HOROWITZ: Well, again as I say I think we
21 have two positions. I think the state of the law as it
22 is now is that these fields are open. Fourth Amendment
23 protections do not extend to these fields, and it is not
24 a search when police officers go onto these fields.

25 QUESTION: Your primary submission is that you

1 need reasonable suspicion --

2 MR. HOROWITZ: That is our primary submission.

3 QUESTION: Like Maine's submission.

4 MR. HOROWITZ: Yes.

5 QUESTION: That is your first position.

6 MR. HOROWITZ: Yes, that is our first
7 position, but even --

8 QUESTION: Aren't there some areas of this
9 country where you could have fence riders with authority
10 to shoot anybody who passes the fence?

11 MR. HOROWITZ: I am not aware if the law
12 supports any authority to shoot anyone for crossing a
13 fence.

14 QUESTION: Why can't the government be a
15 little more straightforward in its position? I do not
16 mean to suggest anything -- It seems to me that the way
17 you answer the questions so far indicate that the
18 government has a great deal of uncertainty as to exactly
19 what its position is.

20 MR. HOROWITZ: I see I am not making myself
21 clear. It is our position that Fourth Amendment
22 protections do not extend to these areas, but we
23 recognize the possibility that at least where the land
24 owner takes some serious measures to protect those areas
25 and to create an expectation of privacy in those areas

1 that the Court might disagree and the Court might take
2 the view that there should be some Fourth Amendment
3 protection for those areas.

4 In that event it is still our position that
5 these areas can never have the sort of protection that
6 is granted by the warrant clause and the probable cause
7 requirement and at a minimum the police must be able to
8 enter when they have reasonable suspicion. I think that
9 that position only makes common sense -- The
10 consequences of enforcing the warrant clause
11 requirements here are just -- There are just too many
12 cases where any balancing of Fourth Amendment values
13 would suggest that the police ought to be able to enter
14 and they would not be able to enter.

15 There are cases cited in the briefs where kids
16 have gone onto the fields to hunt or fish or something
17 and come back and report to the police that there is a
18 marijuana patch growing or something that might be a
19 marijuana patch growing. It just does not make any
20 sense that the policeman cannot follow these kids back
21 onto the yard where they had just been unless he has
22 probable cause and a warrant.

23 QUESTION: There is no restriction at all.
24 That is what worries me. You say that a police officer
25 can go on anybody's land at any time under any

1 circumstances for anything. You certainly cannot mean
2 that.

3 MR. HOROWITZ: First of all, there is
4 certainly a practical restriction.

5 QUESTION: That is what I mean.

6 MR. HOROWITZ: But I do not think it is a
7 restriction that is constitutionally required. There is
8 a practical restriction in that the police do not -- I
9 do not know how many trillions and trillions of acres of
10 open fields in this country. The police do not have
11 time to go tramping through them.

12 In almost all the cases you see cited
13 involving the open fields doctrine the police only go on
14 the fields because they have a reason because someone
15 has suggested to them. So there is a built in safeguard
16 for that.

17 I do not think the Fourth Amendment itself
18 extends any protection to these areas. If the warrant
19 clause applied here and even if the police had gotten
20 some tip, let's say something that does not amount to
21 probable cause. If they had a tip that there was a body
22 buried in the corner of a field or if there is a kidnap
23 victim being held in a field then they could not go on
24 without getting a warrant and they would not be able to
25 get a warrant because they did not have probable cause.

1 They would have to sit on their hands and do nothing.

2 QUESTION: Do you think there was reasonable
3 suspicion in this case?

4 MR. HOROWITZ: Yes.

5 QUESTION: Just from an unidentified
6 informant?

7 MR. HOROWITZ: Well, there was an anonymous
8 tip. We do not know that much about exactly what there
9 was, but --

10 QUESTION: Do you think an anonymous tip over
11 the telephone is always reasonable suspicion?

12 MR. HOROWITZ: Well, we were told in this case
13 that there was an anonymous tip. It was fairly
14 specific. It told them exactly where the field was at
15 the end of the road, and although I do not know exactly
16 what it was the record also says that this was
17 corroborated by other information the officers had that
18 they had heard other reports in the community.

19 So I guess what they had was several anonymous
20 tips. I think from what we know about it it seems like
21 reasonable suspicion.

22 I think the police have to be able to go onto
23 a field in a case like that where they have reasonable
24 suspicion that there is a kidnap victim or a body buried
25 there or something. Now if they got the same

1 information for --

2 QUESTION: Do they need more suspicion for
3 that than to go into a barn? Say they were told there
4 was a kidnap victim in a barn. What rule would apply?

5 MR. HOROWITZ: A barn is an area certainly --

6 QUESTION: It is unlikely that the kidnap
7 victim is going to be out in the open. It is more
8 likely to be in a structure.

9 MR. HOROWITZ: Possibly.

10 QUESTION: And you would acknowledge that
11 there the Fourth Amendment applies.

12 MR. HOROWITZ: I think the -- Well, depending
13 on what sort of barn it is, but if it is a really
14 enclosed structure --

15 QUESTION: It does not seem to me your kidnap
16 victim argument helps you very much.

17 MR. HOROWITZ: Well, there is a lot of
18 important evidence that may be found in a field and that
19 the police may get information that will be found in a
20 field. It just does not make any sense to keep them
21 off.

22 Now maybe in the case of a barn but certainly
23 in the case of a house they have got the same sort of
24 information --

25 QUESTION: Well, let's stay with the barn.

1 Does it make sense to keep them out of a barn without
2 some kind of either probable cause or a warrant or
3 something like that? What is your view of the law on
4 kidnap victims in barns?

5 MR. HOROWITZ: Well, I am inclined to think
6 that there might be a lesser -- that a barn is not a
7 house and there might be a lesser standard.

8 QUESTION: Would it be higher than the open
9 field?

10 MR. HOROWITZ: I'm sorry?

11 QUESTION: Would it be higher than the open
12 field?

13 MR. HOROWITZ: I think so.

14 In the hypothetical I pose if they have the
15 same information for a house obviously they could not go
16 into a house. That is established. You need a warrant
17 and probable cause to go into a house.

18 I think that illustrates why fields are so
19 different here. The reason why you need a warrant and
20 probable cause to go into a house is because the Fourth
21 Amendment is concerned about protecting certain privacy
22 interests that individuals have.

23 Those are the innocent privacy interests, not
24 so much protection against being discovered while they
25 are committing a crime. It is recognized that there are

1 very serious privacy interests that are always involved
2 in people's homes.

3 Any intrusion into the home is going to
4 involve an intrusion into those sort of interests.

5 QUESTION: Mr. Horowitz, do you accept or
6 agree with the position taken by the State of Maine that
7 there has to be a personalized interest? Your brief
8 does not indicate that you do.

9 MR. HOROWITZ: I am not sure I completely
10 understand what that means.

11 QUESTION: Well, his explanation was that
12 there had to have some relationship to people as perhaps
13 indicated by Katz, and if you had a farm or a piece of
14 property 100 miles from your residence that one
15 elaborately fenced and posted and grew marijuana on it
16 that I would think there would be no personalized
17 interest in that beyond protecting one from crime.

18 As I read your brief you say that if you take
19 adequate precautions wherever the property is located
20 and wholly without regard to any personal interest that
21 the Fourth might apply. Why do you do that?

22 MR. HOROWITZ: Well, the ordinary precautions
23 that farm owners take we do not think are sufficient to
24 implicate any Fourth Amendment interest. Fencing and
25 posting a field I do not think is enough to really

1 exclude people, and it is not enough to create an
2 interest.

3 If they take very elaborate precautions to
4 keep people off then there might be some. I am not
5 sure. I think building a building certainly creates
6 some expectation of privacy and some Fourth Amendment
7 interest.

8 I do not know if there has to be personalized
9 --

10 QUESTION: But a building would not be an open
11 field.

12 MR. HOROWITZ: Right.

13 QUESTION: Hester rather cryptic did not make
14 any exception to whether some effort had been made to
15 conceal or obstruct the entry of the open field did it?

16 MR. HOROWITZ: In this case?

17 QUESTION: In Hester.

18 MR. HOROWITZ: In Hester.

19 QUESTION: What about somebody like Thoreau
20 who goes up to Walden Pond and simply lives in a little
21 are right around there. He just not only grows things
22 but that is where he sleeps at night. That is where he
23 eats his meals.

24 Do you think if he put a fence up around that
25 --

1 MR. HOROWITZ: No.

2 QUESTION: No?

3 MR. HOROWITZ: No. I do not think so and to
4 talk about Hester for a minute I think it is not true
5 that Hester does not have to be overruled or at least
6 substantially modified for Oliver to prevail in this
7 case. The facts in Hester are that the police knew that
8 they were on Hester's property and the record although
9 it is not reflected in the opinion but the record
10 suggests that they climbed over one or two fences to get
11 there so I do not know that that case is very different
12 from this one.

13 I think the Court's decision there reflects a
14 common sense understanding that these sorts of places
15 are not really in a practical sense restricted from
16 outsiders and if people are going to do things in those
17 fields they are exposing them to some extent to be seen
18 by other people and the police have the same rights that
19 the other people do to see these things.

20 I think it is important -- The Fourth
21 Amendment to some extent is a matter of probabilities,
22 and I think it is important to focus on that. Even the
23 warrant clause recognizes the possibility that police
24 may make an unjustified intrusion into a private area if
25 police get a warrant on probable cause.

1 In some not insignificant percentage of those
2 cases their suspicion is going to turn out to be
3 unfounded, and they are going to make an intrusion into
4 the home that invades serious privacy interests and that
5 is not warranted by law enforcement interests. That is
6 the reason we have the warrant and probable cause
7 requirement to minimize those entries as much as
8 possible.

9 Now in the case of a field it just does not
10 make sense to have the same sort of requirements because
11 there is very little privacy value in what goes on in a
12 field. People just do not engage in the sort of private
13 matters that the Fourth Amendment was intended to be
14 directed at when they are out in their fields.

15 So let's assume the police go onto a field
16 with less suspicion. Let's say they have only 5 percent
17 reason to think that there is marijuana in the field and
18 in 95 percent of the entries they turn out to be wrong,
19 but in those 95 percent of the entries they do not see
20 anything except cows and corn and trees.

21 It does not really matter so it just does not
22 make sense to erect this kind of barrier which is going
23 to have a serious impact on law enforcement to protect
24 what is basically a theoretical privacy interest or one
25 that is going to exist in only very unusual cases. I

1 would also like to talk briefly about looking at this
2 case from the standpoint of the land owner.

3 I think the facts in this case are not very
4 strong for an expectation of privacy. The police walked
5 directly onto the field without any barrier.

6 The idea that the No Trespassing sign somehow
7 creates a significant expectation of privacy I think
8 just does not accord with reality. The stipulation in
9 this case was that there was a No Trespassing sign when
10 the officers left the highway and entered into the
11 beginning of Mr. Oliver's farm. This was even before
12 they came to the house.

13 CHIEF JUSTICE BURGER: We will resume there at
14 1 o'clock with three minutes rebuttal remaining.

15 (Whereupon, at 12:00 p.m., the above-entitled
16 matter recessed to reconvene at 1:00 p.m. this same
17 day.)

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1 reasons which do not justify abandonment of the Fourth
2 Amendment reasonable expectation of privacy analysis in.
3 favor of a per se exception.

4 QUESTION: This Court has never extended that
5 to open fields. That is what is at issue in this case
6 isn't it?

7 MS. ZEEGERS: Well, in terms of the per se
8 exception this Court, of course, has never extended that
9 to open fields, but if you look at the reasons for the
10 exception to the warrant requirement that this Court has
11 upheld we have seen that they have been in the context
12 to preserve the safety of police officers, to prevent
13 the loss or destruction of evidence or in the special
14 nature of a government interest such as inventory
15 searches.

16 We have seen hot pursuit, exigent
17 circumstances, automobile searches, searches incident to
18 an area surrounding a lawful arrest, the search of a
19 border, the consent search, the stop and frisk. Of
20 course, these are none of the situations presented in
21 this case.

22 It is important to note that the possibility
23 for police abuse is manifest if we adopted a per se
24 exception because we would need no probable cause. We
25 would allow indiscriminate searches by police to

1 continually hope to find evidence of a crime instead of
2 the general rule that all warrantless searches are per
3 se unreasonable except for a few carefully guarded
4 exceptions.

5 The bright line rule proposed by Petitioner in
6 this case will alter that general rule to the extent
7 that all warrantless searches are per se reasonable
8 except those searches of houses and the core area. This
9 I would have to say is not in keeping with the spirit
10 nor the letter of the Constitution.

11 It is important to note in this case that
12 there was clearly a subjective expectation of privacy
13 which was reasonable.

14 QUESTION: Let me ask you one question. It
15 isn't very often that sensitive constitutional questions
16 can be resolved by use of modern technology, but did I
17 understand you to indicate that if a helicopter or a
18 light plane went over and took one of these very
19 sensitive pictures conclusively showing that it was
20 marijuana and took that to the magistrate that a warrant
21 could properly issue?

22 MS. ZEEGERS: That would be one factor which
23 might be enough to establish probable cause. I mean it
24 would depend on certainly the person taking and
25 examining the picture whether they would have the

1 expertise to determine from the air whether that was
2 marijuana --

3 QUESTION: Assume all that. The magistrate
4 himself if you want or at least a prosecuting attorney
5 takes the pictures, supervises them and they are
6 unquestioned. Now that is enough to get a warrant is
7 it?

8 MS. ZEEGERS: Certainly the case law has said
9 that and I have not heard any constitutional arguments
10 that have said that that is not the correct analysis.

11 QUESTION: There is another proposition
12 announced in a good many opinions that the knowledge of
13 one officer involved in an operation is the knowledge of
14 all.

15 MS. ZEEGERS: Yes.

16 QUESTION: I take Justice White's
17 hypothetical. The man in the light airplane or
18 helicopter is an expert on foliage and he says this is
19 marijuana, and they radio that down to the officers who
20 then move in without a warrant. Is that okay?

21 MS. ZEEGERS: No. That would not be okay.

22 QUESTION: I see. I just wanted to clarify
23 your position.

24 MS. ZEEGERS: Right.

25 CHIEF JUSTICE BURGER: Thank you, gentlemen.

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The case is submitted.

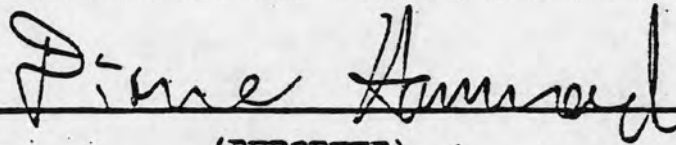
(Whereupon, at 1:04 p.m., the case in the
above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
#82-15 RAY E. OLIVER, Petitioner v. UNITED STATES: and #82-1273 - MAINE,
PETITIONER, v. RICHARD THORNTON

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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