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SUPREME COURT, U.S.  
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# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1513

TITLE CALIFORNIA, Petitioner V. DANTE CARLO CIRAOLO

PLACE Washington, D. C.

DATE December 10, 1985

PAGES 1 thru 39



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IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA, :

Petitioner, :

V. : No. 84-1513

DANTE CARLO CIRAOLO :

- - - - -x

Washington, D.C.

Tuesday, December 10, 1985

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:43 o'clock p.m.

APPEARANCES:

LAURENCE K. SULLIVAN, ESQ., Deputy Attorney General of  
California, San Francisco, California; on behalf of  
the petitioner.

MARSHALL WARREN KRAUSE, ESQ., Larkspur, California;  
appointed by this Court; on behalf of the respondent.

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1           The facts in this case, Your Honors, are that  
2     the police received an anonymous complaint that  
3     marijuana could be seen growing in a yard at a home in  
4     the city of Santa Clara. An officer went by the house  
5     on foot, and from the street he saw a rear fence which  
6     had bamboo stakes attached to the top of it elevating  
7     the fence up to ten feet.

8           The officers undertook air observation from an  
9     airplane at an altitude of not less than 1,000 feet of  
10    ground level, and navigated through air traffic in a  
11    flight line with the San Jose, California, airport.  
12    Without visual or optical aids, the officers observed in  
13    the back yard at 15-by-25-foot marijuana garden which  
14    was composed, according to the officers' affidavit, of  
15    plants that he described as "full and approximately  
16    eight to ten feet tall." The officers from the aircraft  
17    took a photograph. They later obtained a search  
18    warrant, and they seized a total of 73 cultivated  
19    marijuana plants.

20           The respondent Ciruolo pled guilty in the  
21    trial court after unsuccessfully moving to suppress all  
22    the evidence resulting from the aerial observation, and  
23    as permitted by California law, he appealed the denial  
24    of the motion to suppress to the Court of Appeals. In  
25    reversing that, the appellate court held that the aerial

1 observation was an unreasonable search under the Fourth  
2 Amendment, and the California Supreme Court denied a  
3 hearing.

4 The ultimate issue in this case is, as in the  
5 companion case, Dow, whether Ciraolo had an expectation  
6 of privacy against aerial observation of his garden that  
7 society is prepared to recognize as reasonable.

8 Our position in this case is straightforward.  
9 When a person's property is concealed from public view,  
10 then the fact of its possession is private, but if  
11 property is in public view, it is in no sense private,  
12 and hence it is not a subject of Fourth Amendment  
13 protection.

14 Ciraolo's garden, whatever else one can say  
15 about it, was knowingly exposed to the scrutiny, the  
16 observation, the identification, if you will, of  
17 literally anyone in aircraft above or around his  
18 property.

19 QUESTION: I take it the curtilage aspect is  
20 immaterial.

21 MR. SULLIVAN: In this case, Your Honor, it  
22 wouldn't matter if it was in the open field. It  
23 wouldn't matter if it was in the curtilage.

24 QUESTION: Well, it isn't in the open field,  
25 but it is, as you say, open to view from above. Do you

1 contest the fact that it was in the curtilage?

2 MR. SULLIVAN: No.

3 QUESTION: What do you understand the word  
4 "curtilage" to signify?

5 MR. SULLIVAN: My answer, Your Honor, is  
6 Ciraolo's yard. And that is the short answer. You can  
7 take various definitions of it. The one that I believe  
8 is most useful is, it is the area immediately  
9 surrounding the home to which extends the domestic  
10 activities of the household, which may be but need not  
11 necessarily be enclosed within a fence.

12 QUESTION: What would you say about a large  
13 greenhouse? Sometimes they have greenhouses these days  
14 that cover three or four acres, and even California's  
15 tall marijuana, a ten, twelve-foot greenhouse. Would it  
16 be the same. They could take pictures through the glass  
17 of the greenhouse, aerial pictures?

18 MR. SULLIVAN: If you can see, in my view, if  
19 you can see through the greenhouse, sure, you can take  
20 pictures, and the reason to me is --

21 QUESTION: And if you can persuade someone  
22 that that is marijuana --

23 MR. SULLIVAN: And if you can --

24 QUESTION: -- that is, if you are going to get  
25 a warrant before you actually seize it.

1 MR. SULLIVAN: And if you can persuade them  
2 that is marijuana, you should be able to get a warrant.  
3 To me the photography case, if that is what Your Honor  
4 is asking, specifying the -- or focusing on the  
5 photography that the officer did, to me it is  
6 indistinguishable from a case where the officer was  
7 looking down from the airplane, saw it, and had a  
8 stenographer and said, here, I am going to describe to  
9 you under oath right now what I am looking at. To me  
10 that was controlled by the Court's decision in  
11 Jacobson. You are controlling against the risk of  
12 misdescription.

13 QUESTION: Mr. Sullivan, I assume you agree  
14 that a police officer would not be authorized to make a  
15 ground entry examination of the curtilage in this case.

16 MR. SULLIVAN: Yes.

17 QUESTION: Now, what about a low level  
18 hovering helicopter examination?

19 MR. SULLIVAN: One of the attorneys --

20 QUESTION: Do you think there is a distinction  
21 there?

22 MR. SULLIVAN: One of the attorneys in the  
23 prior case, Your Honor, said that there is a California  
24 case, and that is right, there is. There is a  
25 California case, for what it is worth. Well, this is a



1 California case, too, and we think it is wrong.

2 QUESTION: What is your view of --

3 MR. SULLIVAN: My view is that there are lots  
4 of other ways of handling that kind of problem. The  
5 Constitution doesn't necessarily constitutionalize FAA  
6 regulations. It seems to me there might well be  
7 remedies through an injunction action --

8 QUESTION: Is there a Fourth Amendment  
9 violation by virtue of the low level hovering helicopter  
10 in your view or not?

11 MR. SULLIVAN: I suspect that if you are  
12 hovering over 20 feet you have got a strong case that it  
13 may well be, but I am saying that if this Court was ever  
14 presented with that situation, it probably would first  
15 look to the question of whether there realistically are  
16 better ways of adapting or controlling for that kind of  
17 abuse.

18 I don't mean to say in any way that cops  
19 should be going around hovering at 25 feet. I am saying  
20 that the Fourth Amendment does respond to the fact that  
21 there are remedies, and you don't necessarily have to  
22 constitutionalize something every time somebody says,  
23 gee, that really seems offensive to me.

24 QUESTION: Well, perhaps you don't, but do you  
25 recognize that there are Fourth Amendment limits to the

1 type of technology and enhancement of ordinary powers of  
2 observation that police can use?

3 MR. SULLIVAN: The Fourth Amendment to my mind  
4 imposes limits on the expectations of privacy which  
5 people have that society is prepared to recognize. In  
6 this case --

7 QUESTION: Are we prepared to recognize an  
8 interest against the use of infrared photography or some  
9 other visual enhancement devices of that kind?

10 MR. SULLIVAN: In my view that would turn --  
11 my feeling would be no, Your Honor. And the reason is,  
12 in the context of this case, is the same, is that we  
13 don't have people going around with infrared devices  
14 shooting at them through windows. We do have  
15 airplanes. We do have people that use airplanes for no  
16 other reason than to look down on the ground, including  
17 fenced yards.

18 So it seems to me there is a foreseeability  
19 aspect there, and that may well cross the line. The  
20 infrared problem may well do it. That may be enough to  
21 violate the Fourth Amendment. I am not saying that  
22 whatever technology exists police can use. I am saying  
23 that when you are dealing with something as routine, and  
24 I use that word purposely, because as I understand Mr.  
25 Ciruolo's position before this Court, it is not just

1       that the public can see his yard. It is that the police  
2       can see it routinely, that that is okay, but what they  
3       can't do is view it when they think he has got  
4       marijuana, and they have a reasonable suspicion for  
5       thinking that.

6                QUESTION: May I follow up on one of Justice  
7       O'Connor's questions? She asked you about a ground  
8       intrusion, and you say that would violate the Fourth  
9       Amendment.

10              MR. SULLIVAN: Yes.

11              QUESTION: What if the police rented a fire  
12       truck or a tall crane and climbed up to the top of it  
13       and looked over the fence? Fourth Amendment violation  
14       or not?

15              MR. SULLIVAN: Yes, I think the ladder  
16       situation, the hook and ladder situation is a  
17       foreseeability problem, and I think I stated in my  
18       brief, Your Honor, that to my mind the reason why the  
19       knothole or the ladder hypothetical causes a problem is  
20       precisely because the homeowner has taken means to  
21       protect against the kind of intrusion you are talking  
22       about.

23              For example, in the knothole situation, the  
24       guy -- really the question is does he have to maintain  
25       his fence, because that is how the observation was

1 made. That seems to me to be a quite different question  
2 from, does he have to take any protections at all, which  
3 is Ciruolo saying, no, he doesn't. That seems to me to  
4 be a categorically different question.

5 As far as the ladder is concerned, I go back  
6 to the proposition that ordinarily when you have a  
7 situation where a person can walk into a hotel lobby,  
8 which I did this morning, and saw sitting there aerial  
9 photography of Washington, including pictures of fenced  
10 residential yards, I think you are in a different  
11 situation than saying that the police can go up and take  
12 a hook and ladder truck and stair out over your fence.

13 I mean, putting aside, quite aside any  
14 physical invasiveness difference, and I think there  
15 probably is --

16 QUESTION: If that is your test, what if the  
17 respondent here had grown a big tree or something that  
18 partially but not totally concealed the marijuana plant  
19 because he wanted to avoid this very risk? Would he  
20 then be entitled to protection?

21 MR. SULLIVAN: If it is exposed to the air  
22 space, then it can't be a very good tree.

23 QUESTION: It is exposed to all except a very  
24 sharp-eyed police officer with a good, sharp camera,  
25 just as it is exposed on the ground unless you get a



1 ladder. I am not sure --

2 MR. SULLIVAN: Well, that is not this case,  
3 Your Honor, because in this case the officer just had to  
4 look down, and he wasn't using --

5 QUESTION: I understand. My hypothetical is  
6 that. I am just wondering if you are saying that the  
7 Fourth Amendment protection would obtain if he tried but  
8 just didn't quite succeed in concealing it from the air.

9 MR. SULLIVAN: Yes. Well, that is the same as  
10 the knothole question, and to my mind, to my mind there  
11 are a lot of permutations to that. Did he know that the  
12 tree only partially exposed it? It is like the  
13 knothole. Does someone have to take extreme measures to  
14 see it?

15 QUESTION: What is your answer to the  
16 knothole?

17 MR. SULLIVAN: Well, the answer to the  
18 knothole is that in many cases I can foresee it being  
19 perfectly legitimate. If I am walking down a sidewalk  
20 and I turn my head and I see a hole in a wall, and  
21 through it I see a plant, a marijuana plant, I don't  
22 consider that to be a violation of the Fourth  
23 Amendment. Before I am going to say it is a violation,  
24 I am going to ask a lot of questions, like what is the  
25 purpose of the hole? Some holes in fences are for

1 seeing through. I mean, they give you a hole so that  
2 you can look through the fence.

3 I would want to know if the officer has to  
4 step off the sidewalk.

5 QUESTION: If it is a knothole you have to  
6 stand on a ladder to see through, then it is bad?

7 MR. SULLIVAN: Well, there are -- you have to  
8 draw distinctions that respond to people's  
9 foreseeabilities, to the foreseeability of situations.  
10 And it doesn't bother me to say that people don't expect  
11 the police to put a ladder up to their fence and to say  
12 at the same time that if a policeman is walking down the  
13 sidewalk and you left a hole like this in your fence and  
14 he turns his head and sees a marijuana plant, he can act  
15 on that. That distinction doesn't bother me at all, no.

16 In our view, Ciruolo cannot claim an  
17 expectation recognized by society that members of the  
18 public can see his marijuana garden but police may not  
19 do so any more than he could legitimately claim that  
20 redhaired people can see his marijuana garden from  
21 aircraft but not brownhaired people.

22 What the Fourth Amendment in our view permits  
23 the police to do is to enter an area that is publicly  
24 accessible, and there, and certainly navigable air space  
25 is such an area, and there they may see what is normally

1 exposed to view.

2 QUESTION: I would like to test out something  
3 in Justice O'Connor's question. Suppose there was  
4 invented, and maybe there has already been invented a  
5 gadget that can aim and go through the walls of a house  
6 and listen to the conversations inside. If the police  
7 did that, going through the walls of a private home, and  
8 recorded a conversation about some criminal activity,  
9 would that be a violation of the Fourth Amendment  
10 without a warrant?

11 MR. SULLIVAN: Yes, and I suspect the Court  
12 would spend about a half-page on that, citing the  
13 decision in Karo. In fact, I think there was the  
14 mention of parabolic microphones, that if the officer  
15 marches down the street and doesn't have the parabolic  
16 microphone on, it won't violate the Constitution, but if  
17 he starts aiming it routinely or randomly at anybody's  
18 house or in an focused way at someone's house  
19 specifically, it is going to violate it.

20 Sure, the exploitation of technology into the  
21 home can be threatening and invokes Fourth Amendment  
22 protections. I think that brings up, Your Honor, what I  
23 understand to be Ciracolo's core contention in this case,  
24 and that is that the statement in Oliver that the  
25 distinction between open fields and curtilage implies

1 that the curtilage warrants the Fourth Amendment  
2 protections that attach to the home. That was the  
3 statement that I believe was made in the lead opinion.

4 I think what Ciruolo is asking this Court to  
5 do is to read that statement as meaning that the  
6 distinctin between curtilage and the open field implies  
7 that the level of expectations in the home attached to  
8 the curtilage. That is not what the statement said. It  
9 said protections of the Fourth Amendment.

10 The level of privacy expected in the home, I  
11 submit to you, is different than the level of privacy  
12 outside in the curtilage because by custom, by habit,  
13 when we want the highest level of privacy, we retire  
14 into the home. It seems to me that in order to know  
15 what protections attach to the curtilage, one has to  
16 know what level of protection attaches to the home, but  
17 for this Court that is not a new question. That was  
18 answered in Katz, and it seems to me that Katz controls  
19 this case.

20 The statement was, around which this case  
21 seems to revolve like the moon around the earth is what  
22 a person knowingly exposes to the public even in his own  
23 home or office is not a subject of Fourth Amendment  
24 protection. But what he seeks to preserve as private  
25 even in an area accessible to the public may be



1       protected.

2               Now, to my mind that doesn't take a lawyer to  
3       figure out what the court was saying. I mean, it  
4       responds to something that we all understand and know.  
5       It responds to the realities of life. If you keep  
6       something out of public view in your home or your  
7       curtilage the fact that some individual may have means  
8       of observing it does not mean that the government  
9       necessarily can do so without justification.

10              But if the public can see it by virtue of  
11       where you placed it, it doesn't matter if it was in your  
12       home or in your yard, and it doesn't matter that you  
13       hoped it would be secret from government, because you  
14       disclosed it. There is no privacy interest advanced  
15       protecting from observation what was entirely visible to  
16       everyone, including the officer who could have acted as  
17       a private citizen and observed the very same thing.

18              I think if that contention is accepted in this  
19       case, then all of Ciruolo's other arguments as far as  
20       fences acting as roofs or being a badge of expectation,  
21       as far as the focus argument that I can expect police to  
22       look at my yard routinely but I don't expect them to  
23       look at it when they have reasonable suspicion, all the  
24       rest of those arguments just seem to me to fall by the  
25       wayside.

1 QUESTION: Mr. Sullivan, in Oliver we had an  
2 open field a substantial distance from any residence.  
3 And you have just been talking about the privacy  
4 protected within a home. The curtilage, as suggested in  
5 Oliver, often is considered to be a part of the  
6 residential area occupied by a family. Your argument  
7 is, however, as I understand it, that the curtilage is  
8 more like an open field than it is like a home. Is that  
9 what your argument is?

10 MR. SULLIVAN: No, Your Honor, because if I  
11 was going to make that argument, I would be saying -- I  
12 would be contradicting myself in saying the police can  
13 walk into your back yard. They can't. And that is true  
14 whether or not, in my view, whether or not there is a  
15 fence or not. They can't walk into the curtilage. They  
16 can't physically trespass it.

17 QUESTION: They may photograph it.

18 MR. SULLIVAN: If they can see it -- I mean,  
19 all I have to argue, and what I am arguing is, if they  
20 can see it with the naked eye from air space, sure, they  
21 can take a camera and photograph exactly what they saw,  
22 which is what they did here.

23 QUESTION: And that would be true, for  
24 example, if you had a type residence with a patio in the  
25 back surrounded by a brick wall and, say, a swimming

1 pool in one part of it, and marijuana being planted  
2 right beside the swimming pool. Same rule, I suppose,  
3 would be your argument.

4 MR. SULLIVAN: If you can see the marijuana  
5 with your naked eye from air space, I don't think it  
6 makes one whit of difference or not the officer has a  
7 camera with him or not, because all he is doing is --  
8 the expectation of privacy vis-a-vis aerial observation  
9 wasn't there to begin with. You didn't have a secret  
10 from anyone --

11 QUESTION: From the air.

12 MR. SULLIVAN: From the air. That is right.  
13 You didn't have a secret to begin with. You didn't have  
14 a privacy interest from aerial observation to begin  
15 with, and therefore that expectation cannot be created  
16 through the fact that the officer having identified your  
17 marijuana now takes a picture of it so he can show the  
18 magistrate. I just don't understand that argument.

19 QUESTION: Mr. Sullivan, if I understand your  
20 argument, the case would be different for you if the  
21 marijuana, instead of being these very large plants,  
22 were tiny plants, and at 1,000 feet they would have to  
23 use high-powered equipment that was very, very  
24 sophisticated in order to detect the fact it was  
25 marijuana. It would be visible, but you couldn't really

1 know what it was without the camera.

2 MR. SULLIVAN: I suspect that might well be a  
3 different case. Yes, Your Honor.

4 QUESTION: You would distinguish that case.

5 MR. SULLIVAN: I understand I was hearing the  
6 previous example given by Justice Powell, I believe, of  
7 looking through one of the glass buildings that has  
8 opaque windows in it, and using some sort of penetration  
9 aid to visually observe that. Well, to my mind, maybe I  
10 am being overly simplistic. The public doesn't carry  
11 those around with them. They can't see into the  
12 building. So maybe the government shouldn't be able to  
13 use that, at least not without some kind of regulation,

14 If that is true, all right, but that is not my  
15 case. What I am saying is that if the public can be  
16 there and if the police can be there and see the thing  
17 routinely, which I guess they can, because Ciruolo says  
18 random patrol is okay, why in the world can't they be  
19 there because they are following up their suspicion that  
20 led them to that place? It just doesn't make any sense  
21 to me.

22 I think that there is no constitutional  
23 requirement in this case that the government have a  
24 warrant. I think that there is no requirement that the  
25 constitution places on police that they have some



1 quantum of suspicion for why they were looking. I think  
2 what they can do is go into navigable air space, and I  
3 think they can use their eyes, and I think they can see  
4 what everybody else can see.

5 Now, that may seem to be not the most  
6 earthshaking proposition this Court has ever heard, but  
7 I think it is all that this Court needs to say in order  
8 to reverse the Court of Appeals. And I urge it to do  
9 so.

10 CHIEF JUSTICE BURGER: Mr. Krause?

11 ORAL ARGUMENT OF MARSHALL WARREN KRAUSE, ESQ.,  
12 APPOINTED BY THIS COURT, ON BEHALF OF THE RESPONDENT

13 MR. KRAUSE: Mr. Chief Justice, and may it  
14 please the Court, there is a word that hasn't been  
15 mentioned much today, and that is the warrant. The  
16 warrant clause of the Fourth Amendment is what we think  
17 is extremely and most significant in this case. There  
18 are very good reasons for requiring a warrant, and I  
19 don't need to repeat them here because this Court has  
20 repeated them in Katz and in Comera and in Karo, and we  
21 all know what they are.

22 Now, there are exceptions to the warrant  
23 requirement, and they show that privacy or security in  
24 our society is never 100 percent pure or 100 percent  
25 secured. There is always the possibility, no matter how

1 private and intimate an area is, that smoke will be  
2 discovered, and the fire department will come in,  
3 despite your protestations that this is Fourth Amendment  
4 sacred ground.

5           There is always the possibility that there will  
6 be an accidental entry, that the police acting  
7 legitimately make a mistake as to the address and come  
8 into your home and your privacy is invaded, and anything  
9 that is seen in plain view during that invasion is  
10 subject to admission in a criminal court, because it is  
11 in plain view while the police are acting properly.

12           A friend can breach your trust and tell the  
13 police everything that you said in confidence, and there  
14 will be an occasionally air traveler who can look down  
15 into your back yard, no matter how private you would  
16 like it to be with your swimming pool and your other  
17 private activities in your back yard. There will be an  
18 occasional air traveler.

19           Why does that deprive Mr. Ciruolo of privacy  
20 any more than these other exceptions to the warrant  
21 clause? Why does that excuse the police from taking the  
22 perfectly reasonable step of taking their anonymous tip  
23 and what other information they could gather by  
24 appropriate police work and presenting it to a  
25 magistrate and getting appropriate authority to invade

1 the privacy?

2 QUESTION: I suppose the answer to that is,  
3 they didn't have probable cause.

4 MR. KRAUSE: Well, I don't know whether it is  
5 up to us to say that. If they didn't have probable  
6 cause on the facts that are in this record, they could  
7 have investigated more. They could have determined if  
8 Ciruolo was perhaps named in another police report with  
9 regard to marijuana cultivation. They could have done  
10 innumerable things.

11 Instead, the police decided that they were  
12 going to be the magistrate and they were going to  
13 authorize a search of Mr. Ciruolo's curtilage, his back  
14 yard. I think that kind of a focused aerial invasion of  
15 this protected area is much different than a casual  
16 overflight on which the State of California relies in  
17 this case.

18 QUESTION: Is there any limit in your view to  
19 what may constitute curtilage around a residence as to  
20 space?

21 MR. KRAUSE: There certainly is. I have read  
22 about 100 lower federal courts on curtilage, and there  
23 are all sorts of different opinions as to what it is,  
24 but not one case ever denies the idea that a back yard  
25 right next to someone's home is curtilage.

1 QUESTION: How big can it be? No limit?

2 MR. KRAUSE: I think it depends upon what  
3 really is the intimate area connected with the house,  
4 and I wouldn't mind accepting Mr. Sullivan's definition  
5 that he gave in his portion of the argument. Something  
6 intimately connected with the house. People go in and  
7 out of their house. They use the outdoor area in the  
8 same way that they use the indoor area when they are  
9 fortunate enough to have one, and they have their right  
10 to privacy in the same way.

11 I would not distinguish. I would agree with  
12 Justice Powell in the Oliver case that there really is  
13 no distinction between the privacies of the home and the  
14 privacies of the back yard, the intimate area of the  
15 home, unless you give up that distinction. If you don't  
16 build a fence and you let your neighbors look in, then  
17 you have waived the right of privacy.

18 But in Ciracolo's case, he did not do that. He  
19 built his fence, and I think there is no question that  
20 it is within the curtilage.

21 QUESTION: Suppose, given the enormous profits  
22 in the drug business, that someone takes two acres or  
23 four acres and builds a wall entirely around it as tall  
24 as the ceiling of this room. Is that all private? Is  
25 that curtilage?



1           MR. KRAUSE: I think that you are pressing me  
2 to give an answer when I can't give it. There is a  
3 limited to what the curtilage is. What that limit is, I  
4 don't know. I would say that if you look at Blackstone,  
5 you look at the common law aspect, where this whole idea  
6 of curtilage developed, and it had another name in the  
7 common law, by the way. It is called the homestead,  
8 which is something I discovered.

9           But anyway, that means that it is connected in  
10 some way with the living areas of the home, and if it is  
11 totally devoted to agricultural pursuits, it doesn't  
12 seem to me quite the same. I would say that if there is  
13 a barn, if there is a house used for purposes of the  
14 main house, you could have that as the curtilage, but it  
15 is impossible to give an exact definition.

16           I want to get back to the focused aerial  
17 surveillance here, because I think that focus is  
18 extremely important. This was not a casual overflight,  
19 Justices. This was an intense look at someone's  
20 particular back yard, someone as to whom evidence of  
21 criminal activity was already present in the minds of  
22 the police. This was a situation where a warrant was  
23 certainly possible to obtain. I don't know whether one  
24 would have been obtained or not. It depends on the  
25 magistrate.

1           QUESTION: Mr. Krause, did I detect anything  
2 in the brief that your position would be a little  
3 different if this were a routine police patrol by air?

4           MR. KRAUSE: Yes, I think our position would  
5 be a little different because that kind of a situation  
6 raises the same issue that Justice White dealt with in  
7 the Camara case, that it is impossible to be specific as  
8 to probable cause as required by the Fourth Amendment,  
9 so I have suggested that under those circumstances where  
10 there is routine aerial surveillance of back yards on an  
11 intense basis that is going to take place, that the  
12 administrative warrant solution would seem to be ideal,  
13 and could be adopted on the same basis that this Court  
14 adopted such a solution in the Camara case.

15           One more thing about the focused nature of  
16 this search. The police knew that it was Mr. Ciraolo's  
17 back yard. It wasn't, as you are landing in National  
18 Airport you might see someone's back yard, you don't  
19 know who that person is, you don't know anything about  
20 that person. They knew it was Mr. Ciraolo's back yard.

21           QUESTION: I am not sure that I understand  
22 your focus argument. Suppose we are just concerned with  
23 a ground search, and police have reasonable suspicion of  
24 drug dealing out of a certain house. They are not  
25 required to go get a warrant. They can instead choose

1 to make a focused examination of the exterior of the  
2 premises and make a stakeout and take all the time they  
3 want to determine the situation.

4 MR. KRAUSE: I agree, Justice O'Connor.

5 QUESTION: So why isn't the same thing true of  
6 the examination from the air?

7 MR. KRAUSE: Because the focus was not on what  
8 they could see from the ground. The focus was on what  
9 they could see under very special circumstances, not as  
10 an air traveler --

11 QUESTION: No, but they could have seen it in  
12 a routine patrol. Why can't they focus on it from the  
13 air?

14 MR. KRAUSE: Because the focus intensifies the  
15 attention given to a particular back yard. A routine  
16 surveillance from the air may or may not have uncovered  
17 Mr. Ciraolo's agricultural endeavors. We don't know.  
18 There is no evidence along that score. The only thing  
19 that we do know is that it required an expert to be  
20 picked up by the police who has been trained in  
21 marijuana surveillance from the air, told that marijuana  
22 is suspected in Mr. Ciraolo's back yard, specifically  
23 directed to that place. That is why the focus is much  
24 more intense than you would ever get.

25 Now, in your example, of course, the police

1 can bring all the experts they want to look at the  
2 outside of this home, but when you are talking about  
3 curtilage, this Court has said that is protected area.

4 QUESTION: Well, protected from what? From an  
5 entry on the ground.

6 MR. KRAUSE: Protected in the same way that  
7 the home is protected from an unwarranted entry.

8 QUESTION: I don't think the Court has said  
9 that. I think that is the question, and I don't think  
10 the Court has said that.

11 QUESTION: Certainly Oliver didn't say that.  
12 All it said was, the curtilage is different from the  
13 open field. It didn't say it is entitled to the same  
14 protection as the house.

15 MR. KRAUSE: The Oliver case said, joined the  
16 home and the curtilage in opposition to the open field,  
17 and I am sure that the majority wrote that opinion to  
18 answer the attacks of the dissent, who were complaining  
19 about the Oliver case narrowing privacy, and they said,  
20 no, we don't narrow privacy in the areas where it really  
21 counts, in the curtilage and in the home.

22 Now, I read that case to say that the  
23 curtilage does have the same protection as the home. If  
24 it doesn't, then I have something to learn, but I think  
25 if it doesn't, it should have, and if it doesn't



1 completely have the same protection, it should have  
2 nearly the same protection, because in their back yard  
3 is the place where we have the right to have our access  
4 to light and to air and to have the kind of repose we  
5 need in our society.

6 QUESTION: Yes, but you wouldn't show any  
7 protection if there were no fence.

8 MR. KRAUSE: If there were no fence, it would  
9 be --

10 QUESTION: It would still be curtilage.

11 MR. KRAUSE: It would be a waiver. It would  
12 be the kind of thing, the same thing that Justice  
13 Brennan talked about in his concurring opinion in the  
14 Lewis case, where the police sent an informant into the  
15 home to broadcast outside what was going on in the  
16 home. Justice Brennan said that that was a waiver of  
17 Fourth Amendment rights in the home. When you invite  
18 someone in, you invite them to say what has happened in  
19 the home.

20 So if you invite the public to look into your  
21 back yard by not protecting it, you have waived your  
22 Fourth Amendment rights.

23 QUESTION: Well, in this day and age, with the  
24 frequency of air travel, it may well be that if you  
25 don't put a patio cover over your back yard you waive

1 any right for an aerial look.

2 MR. KRAUSE: I think the kind of frequency of  
3 air travel you are talking about, Justice O'Connor, and  
4 I will have to get back to the focus, is not the same  
5 kind of scrutiny as I am talking about. I am talking  
6 about the police knowing whose back yard this is, so  
7 whatever they see, no matter if it is legal or illegal  
8 conduct, they can report, we saw such and such happening  
9 in the Ciraolo back yard. That is open to anyone who  
10 wants to listen to them to talk about, and they go in  
11 without warrant, without permission, without anything.

12 The government, the state is arguing here,  
13 they are saying cover your back yard or we will spy on  
14 you at will. We will invade your privacy without  
15 judicial authorization. We have no obligation to report  
16 to anyone on what we found. We have no restrictions as  
17 to time, place, or manner. And by the way, it is too  
18 late to act after your privacy has already been  
19 violated, and there is a case on that. It is called  
20 NORML versus Mullen, and it is in 608 Federal  
21 Supplement, where the drug enforcement agency was using  
22 helicopters to actually chase young girls down the  
23 street to actually -- they went so far as to have  
24 helicopters hovering so near outhouses as it blew the  
25 toilet paper out the window.

1 [General laughter.]

2 MR. KRAUSE: They were abusing, and we expect  
3 that such an abuse should not happen. They could be  
4 gathering evidence of crime, and they could also be  
5 spying on a political gathering. They are attempting to  
6 deprive us of our privacy in our back yard without limit  
7 and without warrant.

8 As far as what the curtilage is, Justice  
9 Rehnquist, I think a very good description of what we  
10 expect in the curtilage is found in the Sixth Circuit en  
11 banc decision in the Dow Chemical case, and I hope my  
12 predecessors in this Court will excuse me for citing  
13 that opinion, but it is a very fine discussion of what  
14 is the curtilage, how far it extends, and what it means  
15 in American jurisprudence, and I think the Sixth Circuit  
16 was using that to distinguish it from the Dow plant, and  
17 perhaps for that reason they laid it on very heavy, but  
18 it is a very fine description of what the curtilage of  
19 the home is.

20 I think that the Oliver discussion of  
21 protection of the curtilage would be meaningless if an  
22 airplane could fly over and spy as we have in our case.  
23 I think that Mr. Ciraolo if he should learn in advance  
24 that police were going to fly over his back yard and  
25 look carefully at what he was doing in his back yard any

1 time they wanted under any conditions, I think he could  
2 obtain a civil injunction against that invasion of  
3 privacy, because I think this air space --

4 QUESTION: On what grounds, Mr. Krause?

5 MR. KRAUSE: On grounds of invasion of privacy  
6 and --

7 QUESTION: You mean not a federal  
8 constitutional --

9 MR. KRAUSE: Well, I think he could have a  
10 Bivens injunction, yes.

11 QUESTION: Well, that would assume there is a  
12 Fourth Amendment violation.

13 MR. KRAUSE: And I think there is, for this  
14 reason.

15 QUESTION: But that is what we are trying to  
16 decide here. I mean, it doesn't help your argument here  
17 trying to convince us that there is a Fourth Amendment  
18 violation to say he could also if there were a Fourth  
19 Amendment violation get a Bivens action civil  
20 injunction.

21 MR. KRAUSE: I realize that without what I am  
22 going to say next, but what I am going to say next is  
23 that the --

24 QUESTION: Would you have a dirty hands  
25 problem?

1 MR. KRAUSE: Well, you could say that.

2 QUESTION: The government is interfering with  
3 my violation of the law.

4 MR. KRAUSE: I think that certainly without  
5 the warrant situation you have got the jumping the fence  
6 situation, as Mr. Sullivan agreed, that he couldn't peak  
7 over the fence by jumping the fence or putting up a  
8 ladder. Instead, he thinks that he can do the same  
9 thing by taking up an airplane, but it is the same  
10 privacy that is invaded.

11 QUESTION: But am I correct in understanding  
12 that you would find no objection if the police as a  
13 routine matter sent up an officer every day to fly at  
14 1,000 feet and look for these plants?

15 MR. KRAUSE: Yes, I would find an objection.  
16 I would think that that was a situation that is ideal  
17 for an administrative warrant, and if they are going  
18 to --

19 QUESTION: I understand you would think of an  
20 administrative warrant, which isn't, of course, isn't  
21 even mentioned in the warrant clause, but apart from the  
22 warrant, when you say that that would -- that would be  
23 prohibitive, if you say that is prohibitive, then you  
24 are not relying on your focus argument.

25 MR. KRAUSE: I would say that it is



1 prohibitive without an administrative warrant to  
2 specifically look into people's property for purposes of  
3 criminal law violation. In that answer, I am not  
4 relying on my focus argument. I am relying on my focus  
5 argument in this case.

6 Now, Justice Rehnquist, what I wanted to say  
7 is that I look at this aerial view as a right of  
8 innocent passage kind of issue under international law  
9 where ships can go through private waters because they  
10 are passing through, but when it comes to a different  
11 purpose, if a ship's purpose in passing through the  
12 territorial waters of the United States is to spy on the  
13 United States, the United States need not give that ship  
14 the right of innocent passage, and I think the same is  
15 true with regard to a plane whose sole purpose is to  
16 invade the privacy of the back yard.

17 The homeowner need not give the police that  
18 right to invade. That is why I say a civil action could  
19 be brought.

20 Now, I see no difference between flying over  
21 and putting up a ladder. Logically, there is no  
22 difference whatsoever. Putting up a ladder probably  
23 allows you to verify what is there much better and it  
24 doesn't intrude on everybody else's privacy. At least  
25 when you put up a ladder, you only see Mr. Ciruolo's

1 back yard. You don't see the ten or twelve back yards  
2 that you have seen in your aerial surveillance.

3 The problem is to the government I imagine  
4 that it appears to be more snoopy. It appears to be  
5 dirty business, as Justice Holmes condemned in the  
6 Olmstead case, because you are snooping, and somehow to  
7 elevate the police at a 1,000-foot level is different.  
8 Now, 1,000 feet is about ten times the width of this  
9 chamber. It is really not that high. It is less than a  
10 quarter of a mile. I see no difference between that and  
11 the ladder situation.

12 In the Carroll case the government said, of  
13 course, that their privacy invasion was only a little  
14 one. It was only putting the beeper in someone's home.  
15 But Justice White pointed out that if the government had  
16 sent in the FBI to check to see whether the chemicals  
17 were present, that would, of course, be a violation of  
18 the Fourth Amendment, so it is similarly a violation of  
19 the Fourth Amendment when they obtain the same  
20 information by sending in a beeper.

21 And here they obtained the same information  
22 not by the ladder, which they agree is condemned, but by  
23 sending up the airplane. I think that the idea that Mr.  
24 Ciruolo has waived his right to be free of a focused  
25 aerial surveillance made for that specific purpose of

1 gathering criminal evidence is unnecessary for good  
2 police work.

3           Ciraolo didn't open his privacy up. The  
4 police are trying to open it up. They are trying to  
5 insert a can opener and open it up. They are trying to  
6 say that it doesn't matter what our purpose is because  
7 some stray airplane might have flown over. This is the  
8 hypothetical situation that doesn't decide Fourth  
9 Amendment cases. Fourth Amendment cases are decided by  
10 the realities, and there is a footnote in the Carroll  
11 case, Footnote 4, in which the hypotehtical possibility  
12 that privacy could be invaded is said not to deprive  
13 people of Fourth Amendment rights.

14           The warrant requirement here, I can't see how  
15 it could frustrate the police purpose. It would prevent  
16 an arbitrary intrusion into the privacies of life. The  
17 words from the Katz case which Justice Stewart wrote,  
18 "What a person knowingly exposes to the public is  
19 exposed," I think that word, "knowingly," is important.  
20 Mr. Ciraolo did not knowingly expose his back yard.

21           Then Justice Stewart went on to say, "But what  
22 he seeks to preserve as private even in an area  
23 accessible to the public may be constitutionally  
24 protected." That is what we have here.

25           There is an atmosphere of security, Your

1 Honors, necessary for the freedom we treasure, and it is  
2 threatened in this case as it would be by parabolic  
3 microphones or satellite surveillance in great detail.  
4 This case is not just the foot in the door. This is the  
5 whole monster let loose, if there is no control on the  
6 police.

7 Our citizens are not to be seen as ants from  
8 an airplane but people who need their repose and their  
9 privacy to be the free people that they are. The Fourth  
10 Amendment, we submit, protects them from the shroud of  
11 darkness which the government is attempting to place  
12 upon them in this case.

13 Thank you.

14 CHIEF JUSTICE BURGER: Do you have anything  
15 further, Mr. Sullivan?

16 ORAL ARGUMENT OF LAURENCE K. SULLIVAN, ESQ.,

17 ON BEHALF OF THE PETITIONER - REBUTTAL

18 MR. SULLIVAN: Just very briefly, Your Honor.  
19 I do agree with one thing that Mr. Krause does say in  
20 this case, and that is that Fourth Amendment cases are  
21 decided by reality and not hypotheticals, but what he  
22 keeps talking about seems to be some distinction between  
23 intense looking and non-intense looking, and routine and  
24 focusing, and for the life of me I don't understand  
25 those arguments, because -- I mean I know what air

1 patrol involves, and air patrol involves focusing.

2 You don't look at the whole world from an  
3 airplane. You look at something specific, and you go  
4 from place to place looking. That is what air patrol  
5 is. So, in terms of focusing, I just don't understand  
6 what the practical difference Mr. Krause is speaking of.

7 The only other thing I wanted to say is, the  
8 tenor or the sound that I get from the respondent in  
9 this case is that there is something really oppressive  
10 and egregious and perhaps subjective but nonetheless  
11 there, and I know the Court doesn't like to listen to  
12 quotes, but to get the flavor of this case, the fellow's  
13 name involved in this is Officer Schutz, Detective John  
14 Schutz, and he was the only witness at the suppression  
15 hearing, and this is the officer as he makes --  
16 describing his intensive scrutinizing, his focus.

17 "We were extremely busy with plotting our  
18 direction. We had a number of different places to go.  
19 We had to watch for other aircraft. We were in a flight  
20 line with the San Jose Airport. And all I recall was  
21 plotting these various locations on my map attempting to  
22 get one point after another without tying up air traffic  
23 too long."

24 Now, I don't know. I mean, maybe I'm wrong.  
25 But it doesn't sound like to me this guy is an airborne



1 spy. It sounds to me like he is a guy who wants to get  
2 home to the wife and kids.

3 QUESTION: All he had to do was to get a  
4 warrant.

5 MR. SULLIVAN: Your Honor, he couldn't get a  
6 warrant. He didn't have probable cause. And the  
7 question here is, do you ground the aircraft because  
8 they don't have probable cause? If you say that, well,  
9 then, you know, what we are really talking about here is  
10 the marijuana dealers or growers will do whatever you  
11 say. If you say a fence acts as a roof under the  
12 Constitution, they will all build a fence. I mean, that  
13 is really what it comes down to. They will do exactly  
14 what you tell them to do. They will adapt their ways to  
15 whatever is appropriate to get protection.

16 QUESTION: You really mean that they will do  
17 what I tell them to do?

18 (General laughter.)

19 QUESTION: You really mean that?

20 MR. SULLIVAN: I mean that they --

21 QUESTION: You really mean that?

22 MR. SULLIVAN: I mean --

23 QUESTION: Do you really mean it or not?

24 (General laughter.)

25 QUESTION: Do you or do you not?

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MR. SULLIVAN: No, Your Honor.

QUESTION: Thank you.

MR. SULLIVAN: I simply mean that they read  
opinions carefully, and I didn't mean it in any other  
way but that.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.  
The case is submitted.

(Whereupon, at 2:28 o'clock p.m., the case in  
the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1513 - CALIFORNIA, Petitioner V. DANTE CARLO CIRAOLO

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BY Paul A. Richardson

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