

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-998

TITLE UNITED STATES, Petitioner V. RONALD DALE DUNN

PLACE Washington, D. C.

DATE January 20, 1987

PAGES 1 thru 43



(202) 628-9300

200 B STREET, N.W.

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 UNITED STATES, :
4 Petitioner :
5 v. : No. 85-998
6 RONALD DALE DUNN :
7 -----x

8 Washington, D.C.

9 Tuesday, January 20, 1987

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:04 a.m.

13 APPEARANCES:

14 ROY T. ENGLERT, ESQ., Assistant to the Solicitor

15 General, Department of Justice, Washington, D.C.;

16 on behalf of the Petitioner.

17 LOUIS DUGAS, JR., ESQ., Orange, Texas; on behalf

18 of the Respondent.
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C O N T E N T S

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ROY T. ENGLERT, JR., ESQ.,	
on behalf of the Petitioner	3
LOUIS DUGAS, JR., ESQ.,	
on behalf of the Respondent	25

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1 would invite the Court's attention to page 51a in the
2 Appendix to the Supplement to the petition for
3 certiorari, which depicts the relevant part of that
4 ranch property in Texas.

5 The area searched was the area shown at the
6 top of this chart, where the large barn is. As the
7 Court can see, the barn is removed by some 60 yards from
8 the house; there's a fence around the house; there's a
9 fence around the barn; and there is an intervening
10 fenced area.

11 On the night of November 5th, 1980, two law
12 enforcement officers entered the ranch property and
13 approached this barn. When they arrived at the barn,
14 they did not enter it. Instead, they stood outside, and
15 using their flashlights, looked through the open side of
16 this pole barn, looking through a non-opaque wire
17 netting.

18 QUESTION: Well, what is a pole barn, Mr.
19 Englert?

20 MR. ENGLERT: Your Honor, it's a barn in which
21 there are poles supporting the overhang. It has an open
22 side, as opposed to being a structure with four walls.

23 QUESTION: Are three sides closed and one
24 open? Or are all four sides open?

25 MR. ENGLERT: One side is open, Your Honor.

1 In plain view, within this barn, the officers
2 saw an amphetamine laboratory in operation.

3 Without entering any of the buildings on the
4 ranch property, they left and secured a warrant for the
5 seizure of this illegal drug laboratory.

6 In 1982 the Fifth Circuit held that the
7 officers had violated the Fourth Amendment by
8 approaching this barn, because it was within the
9 protected curtilage of the Dunn ranch house.

10 The government petition for certiorari to
11 review that decision. Certiorari was granted. The
12 decision was vacated and remanded for further
13 consideration in light of Oliver.

14 On remand, in 1985, the Court of Appeals found
15 it clear in the Oliver case that this barn was not
16 within the protected curtilage of the ranch house. It
17 held, nonetheless, that the officers had violated the
18 Fourth Amendment by peering into it.

19 The government again petitioned for
20 certiorari, and while our petition was pending, several
21 judges of the Court of Appeals entered dissents from the
22 denial of rehearing en banc.

23 The panel then vacated its 1985 opinion and
24 reinstated its 1982 opinion, holding that the barn was
25 within the protected curtilage.

1 thi The question before this Court, therefore, is
2 whether the barn is within the curtilage of the ranch
3 house.

4 he The Court of Appeals has committed manifest
5 error by holding that this barn was with the curtilage.
6 This Court has now stated several times that the
7 curtilage is an area of intimate family activities
8 immediately adjacent to the home.

9 an A barn is not such an area. It is the
10 antithesis of such an area. The typical barn houses
11 fertilizer --

12 n? QUESTION: Any barn? Any barn?

13 You: MR. ENGLERT: No, Your Honor, the typical barn
14 is used for the opposite purposes. Certainly, a barn
15 could be converted into an area of family activity.

16 out QUESTION: What about a stable? Is that an
17 area of family activity?

18 ou! MR. ENGLERT: I should think not, Your Honor.

19 QUESTION: Never?

20 es MR. ENGLERT: Unless it were converted, I
21 can't imagine such a place, no.

22 QUESTION: Blackstone disagrees with you, and
23 I think he knew more about curtilage than you do,
24 probably.

25 Honor MR. ENGLERT: Your Honor, a property

1 immediately adjacent to the home may be protected as
2 curtilage without the necessity for its own use for
3 intimate family activity, because its immediate
4 adjacency to the home makes it part of the area that is
5 protected.

6 Of course, the concept of curtilage came out
7 of the English common law of burglary, in which it was a
8 capital offense to enter the curtilage at nighttime with
9 felonious intent.

10 It was not a capital offense to do the same
11 thing outside the curtilage.

12 QUESTION: I agree with all of that. But that
13 makes the test to be distance and not, as you're
14 asserting it is, whether intimate family activities
15 occur.

16 Because it was acknowledged that a
17 close-to-the-home stable was part of the curtilage. And
18 there's no more intimate family activities performed in
19 a stable in Blackstone's time than there are today.

20 MR. ENGLERT: That's true, Your Honor.

21 However, in looking at buildings that are not
22 immediately adjacent to the home, the Courts of Appeals
23 have looked to the use given to a building or to an area,
24 and this Court has stated in Oliver, in Dow, in Ciruolo,
25 that the purpose of curtilage is to protect the area of

1 intimate family activities.

2 So that is at least part of the question, if
3 the Court is going to apply a balancing approach.

4 As Justice Scalia mentioned, of course,
5 distance is a major factor in determining what is and is
6 not curtilage. This barn was some 60 yards away from
7 the home, hardly in the shadow of the home, hardly what
8 most people would refer to as immediately adjacent to
9 the home.

10 It was also separated from the home by not one
11 but several fences. According to the tests of *Care v.*
12 *United States*, the tests that have been applied by the
13 Court of Appeals, there is simply nothing to recommend
14 this barn as part of the curtilage.

15 QUESTION: Mr. Englert, even if we were to
16 conclude that this barn was not in the curtilage, does
17 that end the inquiry? Or do we still have to inquire
18 whether there was an expectation of privacy that should
19 be recognized in the structure of the barn?

20 MR. ENGLERT: Your Honor, in a case in which
21 the officers do not enter the building, but merely look
22 into it from the open fields, we think a holding that it
23 was not within the curtilage would end the inquiry.

24 There may be special rules --

25 QUESTION: Can there be any area around a

1 building in which there is an expectation of privacy
2 which is also protected?

3 MR. ENGLERT: Your Honor, that is precisely
4 what the curtilage doctrine is designed to do.

5 QUESTION: Well, for a commercial structure,
6 for instance, a factory that is constructed out in a
7 field, and it has security fences all around it.

8 Is there any area within the fence that is an
9 area in which there would be a reasonable expectation of
10 privacy, perhaps?

11 MR. ENGLERT: Well, Your Honor, there are
12 suggestions in the Dow case, that with the extraordinary
13 security measures that were taken to protect the ground
14 around the buildings in that case, that there would be a
15 legitimate expectation of privacy against ground level
16 inspection.

17 QUESTION: Is that a kind of curtilage around
18 a commercial property, or what is it?

19 MR. ENGLERT: Your Honor, I don't think it
20 would be appropriate to call that a curtilage, because
21 that is not what the curtilage concept is about.

22 The curtilage concept is about home life.

23 QUESTION: Well, do you acknowledge that there
24 can be an area around a commercial structure which is
25 protected by the Fourth Amendment, by fences?

1 MR. ENGLERT: Your Honor, I think -- if
2 sufficient measures are taken to protect it, I think the
3 Dow case indicates that there is such an area.

4 QUESTION: Well, there was a fence around this
5 barn, was there?

6 MR. ENGLERT: Yes, Your Honor, there was a
7 fence that could be entered around this barn, but --

8 QUESTION: What in the world was the fence
9 there for? Just for ornament?

10 MR. ENGLERT: Your Honor, a fence in these
11 circumstances would often be for the purpose of
12 controlling animal movements.

13 Based on --

14 QUESTION: Mr. Englert, before you go any
15 further, what is this we have before us? Is it a
16 question of fact? I mean, whether it's a distant barn,
17 as Blackstone would say, or not a distant barn; whether
18 it's within the curtilage or not within the curtilage;
19 isn't that a question of fact, and wouldn't we just have
20 to go along with the lower courts, unless what they said
21 was clearly erroneous?

22 MR. ENGLERT: Your Honor, if the Court were to
23 hold that it were a question of fact, it should go along
24 with the District Court's ruling, which did not suppress
25 this evidence, and held that there was not an invasion

1 of the curtilage.

2 QUESTION: Well, what do you think it is? A
3 question of fact or not?

4 MR. ENGLERT: Your Honor, I think it could
5 properly be termed a mixed question of fact involved,
6 because the question of what is curtilage, of course, is
7 a question of law. It's a question of law on which
8 there has been some confusion in the lower courts

9 The question of whether a particular property
10 meets that definition would appropriately be treated as
11 a question of fact.

12 But in these circumstances --

13 QUESTION: The question whether a particular
14 structure is a house or not a house, would you consider
15 that to be a question of law, when it's contested
16 whether there were people living in that place, and
17 therefore, whether it was entitled to Fourth Amendment
18 protection, would you consider that a question of --
19 mixed question of law and fact?

20 MR. ENGLERT: I think it very well might be,
21 Your Honor.

22 QUESTION: Really?

23 MR. ENGLERT: Yes, it depends on what legal
24 standards are to be applied to determine whether
25 something is a house, as well as depending on whether

1 those legal standards were met.

2 We think it would be appropriate for the Court
3 in this case to carry on what I may call the unfinished
4 business of Oliver, and to begin to set bright line
5 rules for what is and what is not curtilage.

6 Both the majority and the dissenting opinion
7 in Oliver suggested that there was a need for bright
8 line rules in this area.

9 QUESTION: What is -- what makes a curtilage?
10 Somebody living there?

11 MR. ENGLERT: Your Honor, if somebody --

12 QUESTION: I mean, right in this, what is the
13 difference between the curtilage and the barn, legally,
14 for this case? What is the difference? They both have
15 fences around them.

16 MR. ENGLERT: Yes, Your Honor, but one is
17 immediately adjacent to the home; one is an extension --

18 QUESTION: Well, what is the difference
19 between a home and a barn?

20 MR. ENGLERT: Your Honor, people live in homes
21 and carry on family activity in homes.

22 QUESTION: Well, doesn't it apply when they're
23 not there?

24 MR. ENGLERT: Yes, it certainly does, Your
25 Honor.

1 QUESTION: When it's absolutely vacant?

2 MR. ENGLERT: Absolutely vacant in the sense
3 of uninhabited, I'm not sure it does.

4 QUESTION: Wouldn't that still be a curtilage?

5 MR. ENGLERT: There's still a curtilage if the

6 --

7 QUESTION: If it was up for sale, and it had
8 been sitting there for three years vacant, it still
9 would be a curtilage.

10 Yet if it was a barn where somebody was
11 sleeping, it wouldn't be. I have trouble with that
12 person in there.

13 MR. ENGLERT: Your Honor, if it were a barn
14 where somebody was sleeping, it would be a different
15 case. In fact, there was questioning in the record in
16 this case about whether Mr. Dunn slept in the barn; and
17 the answer was, no, of course he slept in the house.

18 This is not a case of a barn that has been
19 converted to use for the normal activities of day-to-day
20 living, family life.

21 QUESTION: Well, would there be a difference
22 of what's a curtilage in Maine and what is a curtilage
23 in Texas?

24 MR. ENGLERT: There could be, Your Honor.

25 QUESTION: I'm thinking of the King Ranch. I

1 mean, that's a pretty big curtilage.

2 MR. ENGLERT: I'm not familiar with the King
3 Ranch, Your Honor. But --

4 QUESTION: (Inaudible) from Texas?

5 MR. ENGLERT: No. There may be a difference.
6 And I think it's not so much a difference from state to
7 state, as a difference between urban property and rural
8 property.

9 The curtilage around a suburban home in
10 Springfield, Virginia, where I grew up, and a curtilage
11 around a ranch in Texas may differ.

12 QUESTION: Well, wouldn't your idea of a
13 curtilage be different from me in Harlem, New York?

14 MR. ENGLERT: Yes, Your Honor.

15 QUESTION: Well, what I'm driving at, this is
16 a local court that has twice said just what they thought
17 a curtilage was. And you want us to say they're wrong.

18 MR. ENGLERT: Well, Your Honor, this Court has
19 said three times what it thought a curtilage was, once
20 saying this Court's decision made it clear that this
21 wasn't a curtilage, and then reversing course, and
22 saying without explanation, that it was.

23 Furthermore, the District Court, which was more
24 local than the Court of Appeals, said this wasn't a
25 curtilage.

1 So I would submit that that's really not
2 dispositive of the question.

3 In addition, the fence rule that we have
4 proposed in our brief gives some recognition to the
5 varying nature of a curtilage on different kinds of
6 property.

7 In an area where the homeowner carries on
8 family life in a wider part of his land, he may be
9 expected to erect a larger fence to set off a larger
10 area around his home as the special area.

11 This fence rule that we propose, of course,
12 comes straight out of the common law. Justice Scalia
13 has referred to Blackstone's commentaries, which
14 distinguish a barn within a common enclosure with the
15 house from a distant barn or stable.

16 The common enclosure was critical at the
17 common law, and indeed, the English courts probably went
18 too far even for our purposes in holding that the
19 absence of an enclosure meant the absence of a
20 curtilage; holding that a building as few as three or
21 four feet away would not be within the curtilage if it
22 was not within a common enclosure.

23 There must be different rules for unfenced
24 property, because our fence rule doesn't dispose of it.
25 But the fence rule, which is the rule at common law, we

1 think is the kind of bright line that could
2 appropriately, consistently with Fourth Amendment
3 values, and consistent with the common law, be applied.

4 QUESTION: Well, Mr. Englert, I'm not really
5 sure that your proposed bright line fence rule is one
6 that would serve necessarily our purposes in rural
7 areas, where it's typical, isn't it, that you might have
8 a little fence around your immediate yard to keep the
9 animals out of the flowers and the grass, but still have
10 an outhouse or outbuilding that would be considered a
11 part of the curtilage.

12 At least in the area where I grew up, that was
13 rather typical. And I'm not sure that your fence rule
14 is a wise one.

15 MR. ENGLERT: Your Honor, I'm not sure why
16 that outbuilding should be considered a part of the
17 curtilage. If it's the area over which the animals are
18 allowed to graze, I wonder if that's an area that is
19 really protected against the kind of trespass, but legal
20 trespass --

21 QUESTION: Well, it is to the extent that the
22 outbuildings are, for example, outhouses used for
23 personal purposes or for cooking; the very things you
24 suggest normally are in the curtilage.

25 And there are rural areas where that's still

1 the case. So I'm not sure your fence rule would
2 necessarily serve us well in all cases.

3 MR. ENGLERT: Well, Your Honor, if the
4 outbuilding is, in fact, used as an adjunct to the
5 domestic economy, we would not urge the fence rule; that
6 is not this case.

7 This case involves a barn far away from the
8 house; not used for domestic purposes --

9 QUESTION: Well, you're proposing a rule that
10 covers much more than this case. Justice O'Connor was
11 asking you about the suggestion in your brief that this
12 case ought to be governed by a
13 first-fence-from-the-house rule.

14 MR. ENGLERT: Yes, Your Honor.

15 QUESTION: And that does cover more than this
16 case. And what Justice O'Connor is asking is, you know,
17 what if you have some outbuildings, including an
18 outhouse, that might well be outside the first fence
19 around the house?

20 You wouldn't consider that part of the
21 curtilage of the house?

22 MR. ENGLERT: In the --

23 QUESTION: Just because animals can graze
24 there? Animals can graze in a stable. They graze in
25 stables all the time. And yet a stable could be in the

1 curtilage.

2 MR. ENGLERT: In the exceptional case, where
3 an outbuilding is truly used as an adjunct to the
4 domestic economy, it may be deemed within the
5 curtilage. It may, if it's the equivalent of a house,
6 it may have its own curtilage.

7 But for at least a starting point, at least a
8 strong starting point, to resolve cases other than that
9 exceptional case of an outbuilding used for domestic
10 purposes, we think the fence will serve very well, and
11 it's quite consistent with common law.

12 QUESTION: How far was the barn from the main
13 house here?

14 MR. ENGLERT: Sixty yards, Your Honor.

15 QUESTION: May I ask, do you think your fence
16 rule should apply in precisely the same way in Texas,
17 Iowa, and say, Potomac, Maryland, where you have big
18 homes? Would it be the same rule in a big suburb,
19 suburban estate and a --

20 MR. ENGLERT: Yes, Your Honor.

21 QUESTION: Same rule?

22 MR. ENGLERT: And we think that's one of the
23 virtues of the rule, is that it enables the property
24 owner to define that area that will be treated as a
25 whole with the house, and not just --

1 QUESTION: Does your rule impose a maximum
2 distance that the fence can be from the house?

3 MR. ENGLERT: Your Honor, we have not
4 attempted to set a specific maximum distance. There is,
5 of course, a possibility of a property with a large
6 perimeter fence around a very large area, which does not
7 in any sense demarcate the yard of the house, or what we
8 think should be called curtilage.

9 QUESTION: But I gather you take it 60 yards
10 would be too much?

11 MR. ENGLERT: Sixty yards we think would be
12 too much, yes.

13 QUESTION: And do you think there's any
14 question about our power to draw such a line? Where do
15 we get the power to define it with that precision?

16 MR. ENGLERT: Your Honor, I think it's very
17 difficult to define with that precision. One of the
18 lower courts in the Second Circuit --

19 QUESTION: But if you don't have it precisely
20 defined, what good does it do us?

21 MR. ENGLERT: Well, that is why we propose a
22 precise fence rule, and not a precise distance rule --

23 QUESTION: I see.

24 MR. ENGLERT: -- which will resolve the many
25 cases like this one where a rural property is surrounded

1 by a -- the house on a rural property is surrounded --

2 QUESTION: But you're satisfied this Court has
3 that kind of rule-making authority, I guess.

4 MR. ENGLERT: I'm satisfied that this Court
5 has the power to give guidance to the lower courts in
6 that fashion, yes, Your Honor. Especially because, as
7 I've mentioned several times, the fence rule was the
8 common law rule.

9 And if the curtilage concept --

10 QUESTION: Yes, but you know -- do you think
11 the people in England had the same kinds of property to
12 define that they do in Texas, for example?

13 MR. ENGLERT: No, Your Honor, but the purpose
14 of a fence in England was much the same as the purpose
15 of a fence in Texas in 1980.

16 To define one area of the property --

17 QUESTION: And to control the movement of
18 animals, I suppose, too.

19 MR. ENGLERT: That, also, Your Honor. But it
20 at least defines some part of the property.

21 The three-factor test of *Care v. United States*
22 doesn't set any rules, but it also gives no guidance.
23 It leaves the courts free to say, first, this is the
24 curtilage, then it isn't the curtilage, then it is the
25 curtilage.

1 QUESTION: Of course, your bright line test
2 leaves us afloat on the nearest fence, whatever that is.

3 Suppose it's just a little fence around a
4 small garden. The property owner liked to garden, and
5 he wanted to keep the dogs off the roses; put a little
6 fence around.

7 Would that restrict his curtilage to that
8 first fence?

9 MR. ENGLERT: If it were a house that -- I'm
10 sorry, Your Honor, if it were a fence that also included
11 the house, I think it would define the curtilage.

12 If it were just a fence around the garden,
13 that would be serving the purpose of defining the
14 garden, not defining the area closely associated with
15 the home.

16 QUESTION: Where were the dogs in this case?
17 Certainly there must have been dogs on this farm, but I
18 don't see anything in the record.

19 MR. ENGLERT: Well, Your Honor, perhaps
20 because Mr. and Mrs. Dunn had not moved to this farm
21 yet, they hadn't brought the dogs yet; I don't know.

22 QUESTION: How was this barn used? I mean,
23 wouldn't that be important to the inquiry of whether it
24 was part of the curtilage?

25 MR. ENGLERT: It certainly could be, Your

1 Honor, if it had been converted to family use. We would
2 readily state that it as curtilage, that it was
3 protected.

4 But what the record in this case discloses
5 about the use of this barn is that Mrs. Dunn testified
6 that it was used for nothing; and the officers could see
7 with the aid of their naked eyesight and flashlights
8 that it was used for a drug lab.

9 That's all this barn was used for.

10 QUESTION: What if it was used to make
11 alcoholic beverages for home consumption? Would that
12 make it part of the curtilage?

13 MR. ENGLERT: I think not, Your Honor. I
14 don't think that's the kind of intimate family purpose
15 that this Court was talking about --

16 QUESTION: Suppose there's no fence around the
17 house, and you sneak up and shine your -- officer sneaks
18 up and shines his flashlight through the window, sees
19 something --

20 MR. ENGLERT: Justice White, that's precisely
21 what the curtilage doctrine was designed to protect
22 against. It was designed to set an area around the home
23 that officers could not invade --

24 QUESTION: But you seem to think -- you seem
25 to think that the officers had no business going inside

1 the barn without a warrant; is that right?

2 MR. ENGLERT: Your Honor, if that case were
3 before the Court --

4 QUESTION: Well, is that right or not?

5 MR. ENGLERT: -- we would defend the officers'
6 action.

7 QUESTION: So that -- so they might just as
8 well, instead of shining their flashlight, just enter
9 the barn.

10 MR. ENGLERT: Your Honor, the fact that we
11 would defend that action if we had to, doesn't mean that
12 this isn't a much easier case.

13 QUESTION: Well, let's assume that you needed
14 a warrant to go into the barn.

15 MR. ENGLERT: All right.

16 QUESTION: Why would you be permitted to shine
17 your flashlight through the window --

18 MR. ENGLERT: Because --

19 QUESTION: -- to see something that you
20 couldn't enter and see?

21 MR. ENGLERT: Because it could be seen from
22 the outside.

23 QUESTION: But only with a flashlight.

24 MR. ENGLERT: Well, Your Honor, this Court
25 held in the Lee case, and reiterated in Texas v. Brown,

1 that the aid of a flashlight doesn't convert something
2 into a search if it isn't already a search.

3 QUESTION: Unless you're shining it into a
4 house?

5 MR. ENGLERT: Neither of those cases involved
6 shining in a house, nor does this case involve shining
7 in a house.

8 It's not the use of the flashlight that would
9 make peering through a window --

10 QUESTION: Well, what about a searchlight --
11 what about a searchlight from across the street, shining
12 into a house?

13 MR. ENGLERT: Into the house itself?

14 QUESTION: Yes.

15 MR. ENGLERT: That would raise very different
16 constitutional concerns from this case.

17 QUESTION: Why would it?

18 MR. ENGLERT: Because this Court has said so
19 many times that the whole --

20 QUESTION: You can't look in a house with the
21 aid of a light from outside the curtilage, but you can
22 look in a barn that you need a warrant to get into?

23 MR. ENGLERT: Yes, Your Honor, because it's a
24 barn and not a house.

25 QUESTION: That's the government's submission.

1 MR. ENGLERT: Yes, Your Honor.

2 If the Court has no further questions, I'd
3 like to reserve the remainder of my time for rebuttal.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Englert.

6 We'll hear now from you, Mr. Dugas.

7 ORAL ARGUMENT OF LOUIS DUGAS, JR., ESQ.,

8 ON BEHALF OF THE RESPONDENT

9 MR. DUGAS: Katz provides a zone of privacy
10 which grants inherent immunity to those properly within
11 that zone of privacy against unreasonable searches and
12 intrusions by government agents.

13 The vitality of these Fourth Amendment rights
14 is mandated to protect businessmen as well as other
15 persons from violation of their reasonable expectations
16 of privacy.

17 Historically, society has accepted certain
18 spaces as private for so long that a presumption of
19 privacy attaches.

20 This is true of Dunn's farm. And further,
21 Dunn took a number of steps to preserve his privacy.
22 The barn was located in a clearing surrounded by woods
23 on a 198-acre tract.

24 This 198 acres was circled by a perimeter
25 fence. The ranch house and buildings were at the end of

1 a private drive approximately one-half mile from a
2 public road.

3 QUESTION: None of that's relevant.

4 MR. DUGAS: Sir?

5 QUESTION: None of that's relevant. If the --
6 if the dwelling house had been nowhere near the barns,
7 and all of those facts still existed, it wouldn't make
8 any difference if there was a perimeter fence, would
9 it? Wouldn't the open fields doctrine still apply?

10 MR. DUGAS: No, sir.

11 QUESTION: It wouldn't?

12 MR. DUGAS: If you didn't have the house and
13 the barn located in that area --

14 QUESTION: Let's assume the barn was way over
15 on the other side of the ranch. Let's assume it's the
16 King Ranch, as Justice Marshall said, and there's a barn
17 at one -- you know, one extreme of it, and the dwelling
18 house is on the other; and the whole ranch is fenced.

19 As I understand our cases, the barn would be
20 considered part of the open fields, or in any fields on
21 the King Ranch.

22 Now, perhaps law officers might be guilty of
23 trespass if the state law did not allow law officers to
24 go on property like that. But the Fourth Amendment
25 wouldn't apply on the whole ranch, would it?

1 You're not saying that whenever there's a
2 fence around --

3 MR. DUGAS: No, I'm not, Your Honor.

4 QUESTION: Then what relevance does it have
5 that there was a fence all around this --

6 MR. DUGAS: Well, this will show that Mr. Dunn
7 took subjective steps to protect his privacy against
8 intrusion by anyone.

9 QUESTION: You could say the same thing about
10 the King Ranch. It seems to me it's irrelevant. Really
11 the only question is whether the barn is part of the
12 house.

13 MR. DUGAS: Well, the barn is not part of the
14 house as such, but the barn serves a function with the
15 house.

16 This was a barn for cattle. It had a place to
17 feed the cattle. And certainly on a 198 acre farm in
18 Texas, which is small by most Texas standards, this is
19 part of the community, part of the house, the whole
20 function.

21 QUESTION: Well, that I understand. I think
22 that's the issue.

23 MR. DUGAS: Yes, sir. And that's what this --
24 the officers didn't know what was in the barn before
25 they crossed the fence leading into the barn. But they

1 did. And they violated the curtilage of the barn.

2 I think the barn has a curtilage of its own.

3 QUESTION: You think there's a separate
4 curtilage around the barn?

5 MR. DUGAS: Yes, ma'am.

6 QUESTION: And have any of our cases
7 recognized that?

8 MR. DUGAS: In Dow Chemical, there's a note
9 about the Swart -- United States v. Swart, which is a
10 Seventh Court of Appeals opinion, and it refers to a
11 business curtilage.

12 Dow said it did not address that issue in that
13 case. I think in this case, we have that situation.

14 QUESTION: Why would there be a business
15 curtilage?

16 MR. DUGAS: A business curtilage? Well, if
17 we're going to protect businesses -- and of course the
18 protection of businesses didn't come into effect until
19 about 1967 in the See case. The businessman has as much
20 right to privacy as an individual who has a home.

21 QUESTION: But does that really make sense, or
22 is that accurate to say, in the light of our decisions,
23 that a businessman such as your client, manufacturing
24 amphetamines in the barn, has as much right as someone
25 who wants to use their home, perhaps to manufacture

1 amphetamines?

2 MR. DUGAS: Yes, sir, we're looking at this
3 after the fact. The officers didn't know what it was
4 being used for.

5 QUESTION: But it seems to me what you say
6 neglects all of the emphasis in our cases about the
7 peculiar sanctity of the home.

8 MR. DUGAS: There is a sanctity of the home.
9 But I think that business ventures, business people, and
10 I think in Dow it was stated, that they had a right to
11 privacy within the buildings --

12 QUESTION: Yes, the cases certainly establish
13 that. But what you're asking the Court to say is that
14 there's a curtilage doctrine that applies to a business
15 premise the same way it applies to the home premises.

16 And I'm suggesting to you that I don't think
17 that argument is really made out, at least on what
18 you've said so far.

19 MR. DUGAS: Well, sir, a business has a right
20 to protect -- they have a right to put a fence up, as
21 counsel for the government has said, to protect their
22 grounds, to provide security.

23 And perhaps this is a new approach, but a
24 business should be entitled to a curtilage as well as a
25 home.

1 Admittedly in Blackstone's time, this was not
2 the case. But we're not living in Blackstone's time.
3 And I think the concept of curtilage must move forward.

4 QUESTION: Well, the question here is whether
5 you could sneak up to the barn and look through the
6 window. Isn't that the issue?

7 MR. DUGAS: Yes.

8 QUESTION: And you couldn't do that with a
9 house, I take it?

10 MR. DUGAS: That's correct.

11 QUESTION: And you say the same rule should
12 apply?

13 MR. DUGAS: Yes, sir.

14 QUESTION: But there are no cases like this?
15 You say you're proposing rather new?

16 MR. DUGAS: I'm not proposing something new,
17 because the Seventh Court of Appeals has already said,
18 in the Swart case, that there was something like --
19 there was a business curtilage.

20 QUESTION: But just the fact that it's a
21 trespass doesn't make the difference, does it?

22 MR. DUGAS: No, sir, it's whether the officer
23 has a right to be there to look in the window, whether
24 it's the home or the barn.

25 QUESTION: Well, technically, he's a

1 trespasser. But that hasn't prevailed against the open
2 fields doctrine, has it?

3 MR. DUGAS: No, sir, it has not as far as
4 Oliver goes. But this is not an open fields. What if
5 in Oliver you had had a house in the middle of that
6 field where these officers went in to search? That
7 house would certainly be entitled to a curtilage.

8 But as the Court said in Dow, Dow plainly has
9 a reasonable, legitimate and objective expectation of
10 privacy within the interior of its covered buildings;
11 and it's equally clear that expectation is one society
12 is prepared to observe.

13 And we submit that this is an area --

14 QUESTION: Well, that's sort of a conclusion.
15 The last part of it is what we're talking about, I guess.

16 MR. DUGAS: Yes, sir.

17 QUESTION: That it's one society is prepared
18 to approve. And I guess that's what you're asking us to
19 say, that society approves it?

20 MR. DUGAS: Yes, sir. Yes, sir.

21 QUESTION: But how do you know whether society
22 approves it or not? I mean, you know, the person who's
23 in the middle of an open field and conducting activities
24 in a forest, he expects that he is unobserved and has
25 privacy; he's on his own land.

1 And we've said that we don't approve that
2 expectation of privacy. Now, why should we approve this
3 one? Do you really think barns are somehow -- I can
4 understand how houses, and the area immediately around
5 the house. We talk about the sanctity of the home.

6 We don't talk about the sanctity of the barn
7 as opposed to woods?

8 MR. DUGAS: Because it's an enclosed
9 structure, Your Honor. You couldn't see it from the
10 air. You couldn't see it from the ground unless you
11 walked right up within its -- pardon the expression, but
12 curtilage.

13 QUESTION: You could say the same about --

14 MR. DUGAS: And you broke the curtilage and
15 went in and looked.

16 QUESTION: You could say the same about the
17 woods on an open -- on an open tract, privately owned
18 tract.

19 MR. DUGAS: But the woods, you could look down
20 and see from the air.

21 QUESTION: Not in the summer.

22 QUESTION: So it's the structure?

23 MR. DUGAS: Sir?

24 QUESTION: It's the structure that makes the
25 difference?

1 MR. DUGAS: Yes, sir. I submit that the
2 structure makes the difference. That --

3 QUESTION: Well, wasn't this barn open on one
4 side?

5 MR. DUGAS: Yes, ma'am. It was for feeding
6 cattle. It had a gate across where you could go in; the
7 cattle could feed, and go back into the fenced area.

8 QUESTION: So the policeman could have looked
9 into the barn from a greater distance. Your objection
10 is that they went inside the fence around the barn. Had
11 they stood outside the fence and used a more powerful
12 flashlight and if necessary binoculars, that would have
13 been all right?

14 MR. DUGAS: I wouldn't say it would be all
15 right, but it probably would pass.

16 QUESTION: But crossing the fence, they
17 violate the sanctity of the barn somehow?

18 MR. DUGAS: Yes, sir.

19 QUESTION: Counsel, you cited a Seventh
20 Circuit case, but I don't think you cited it in your
21 brief, and I don't have the name of it. Could you --

22 MR. DUGAS: It's United States v. Swart.

23 QUESTION: Warth? Is that a recent case?

24 MR. DUGAS: It's 697, I believe. It's --

25 QUESTION: And was that a barn case?

1 MR. DUGAS: No, sir, it was an automobile
2 business where officers went after the business had
3 closed and stood near the cars to determine if they had
4 what's called a chop shop. And the Seventh Circuit held
5 that there was a question of whether or not there was a
6 business curtilage.

7 And that case is 679 Fed. 2d 698, it's a 1982
8 case.

9 QUESTION: And so that goes to the original
10 question presented by the government rather than the
11 revised question, not whether it's in the curtilage, but
12 whether you can look in the hole in the barn?

13 MR. DUGAS: Yes, sir.

14 But historically fences have served as
15 privacy, regardless of Oliver. The fences have served
16 to give notice to the world that you can't come in.

17 And this is true, even in the 1830s, for
18 travellers who would walk -- there's an art show on at
19 the Corcoran Museum of Art called "Views and Visions".
20 And it has photographs -- or paintings of early
21 Americana. And one of the statesmen said, it's
22 considered rather ill bred to go into a man's orchard
23 near his own house. You may look long enough around you
24 before you espy a board warning you that man-traps and
25 spring guns are set, or threatening you with a

1 prosecution for trespassing.

2 Now, the public has accepted fences as this
3 measure of privacy. Mr. Dunn had such a fence around
4 his entire ranch.

5 QUESTION: And yet you agree that that would
6 not preclude observation of various places on the ranch
7 within that fence, under Oliver?

8 MR. DUGAS: No, sir, they even flew -- in
9 Dunn, they flew over and took pictures of the ranch that
10 afternoon; they took aerial photographs.

11 QUESTION: So what is the materiality of this
12 exterior fence?

13 MR. DUGAS: Well, it tells me as an individual
14 I can't go onto that man's land without his permission.
15 His gate is locked. It should say the same thing to the
16 law enforcement officers.

17 QUESTION: But Oliver said it doesn't say the
18 same thing to the law enforcement people.

19 MR. DUGAS: Well, that's why we're saying that
20 the Court should consider what the state courts have
21 held, that this is a matter of privacy. The courts in
22 Texas -- the legislature in Texas has enacted a privacy
23 statute for trespassing. It specifically said to
24 prevent intrusion on the property.

25 QUESTION: Well, but that isn't what -- the

1 Fifth Circuit didn't rely on that in its judgment.

2 MR. DUGAS: No, it didn't.

3 QUESTION: Are you asking us to change Oliver?

4 MR. DUGAS: If I could, yes, sir.

5 QUESTION: Well, you're always free to ask.

6 MR. DUGAS: Yes, I am. I am. Yes, sir. I am
7 doing that.

8 QUESTION: But I take it you don't think
9 that's critical to your case, to have to overrule Oliver?

10 MR. DUGAS: No, sir, I do not. I do not.

11 Interestingly enough, the government not only
12 looked into the barn, but they looked in the carport,
13 which was adjacent to the house. And if you look at the
14 plats, you can see that even under the government's
15 interpretation of curtilage, that that would be a
16 violation of the curtilage.

17 It says: We attempted to see if there were
18 any vehicles in the garage, but all the windows and the
19 doors, everything, were blocked up.

20 And they say: We didn't need to go into the
21 house. I don't know what that meant, but I would assume
22 that they shined their flashlights in the house, too,
23 during this entire evening of searching this barn.

24 And this barn was searched not once but three
25 times without a search warrant. Apparently, it became a

1 daily excursion for the officers to go onto this man's
2 land and go back and bring with them certain people.

3 Now, if Mr. Dunn had been home, there may have
4 been a confrontation with them crossing the fence at
5 night, and there could have been problems. And that's
6 why I've asked you, as part of this, to consider the
7 Texas trespass laws, which would allow a citizen of
8 Texas to use force on someone trespassing on his
9 property.

10 And then we would really have problems.
11 Because the people in Texas would not hesitate to shoot
12 anyone at night, including the sheriff, whose
13 trespassing on their property.

14 QUESTION: Well, that's a risk the sheriff
15 takes, I guess.

16 MR. DUGAS: Yes, sir, it is.

17 QUESTION: Do you know --

18 QUESTION: They better read Oliver, I think.

19 QUESTION: Do you know, if this case had been
20 a Texas State prosecution rather than a Federal
21 prosecution, do you know whether the Texas courts would
22 have admitted the evidence?

23 MR. DUGAS: There's one case dealing with the
24 similarity. That was a chicken coop that was 125 feet
25 away, which translates into 40 yards. And the court

1 held that the chicken coop was within the curtilage.

2 QUESTION: (Inaudible) fields?

3 MR. DUGAS: Yes, sir, in the Kantu case.

4 QUESTION: Do you have that citation?

5 MR. DUGAS: Yes, sir, I have. It's 557
6 Southwestern 2nd 107.

7 There are some other cases that hold between
8 100 and 400 yards from the residence is not curtilage.
9 There are other Texas cases, older Texas cases, that
10 hold this.

11 So you have an area somewhere between 40 yards
12 and 100 yards that the Texas courts would recognize as
13 curtilage.

14 QUESTION: Are these cases burglary cases or
15 are they suppression of evidence cases?

16 MR. DUGAS: The Kantu case is a marijuana
17 suppression case, Your Honor. The --

18 QUESTION: The earlier ones you referred to,
19 are they burglary -- they're probably -- if they're that
20 old, they're probably burglary cases.

21 MR. DUGAS: Could be moonshine, Your Honor.

22 Let's see, the Wolf case, which is 1928, was a
23 moonshine case. And in the Wolf case, a Texas case, they
24 say: An unreasonable search is one which entrenches
25 upon the peaceful enjoyment of the house in which he

1 dwells or in which he works and does business, and those
2 things connected therewith, such as gardens, outhouses,
3 and appurtenances necessary for the domestic comfort of
4 the dwelling house, or that in which the business is
5 conducted.

6 And so therefore I would say that the barn
7 would be considered an appurtenance under that
8 definition.

9 QUESTION: (Inaudible) depend on how the
10 barn's being used? I mean, suppose I have this same
11 property, and 100 yards away, let's suppose I paint the
12 barn red, and I call it the little red barn, and I run a
13 restaurant there. Or I have auctions in the barn. In
14 other words, I'm using it for a public business, and the
15 public comes in and out of the barn all the time.

16 MR. DUGAS: Yes, sir.

17 QUESTION: But I live 100 yards away in my
18 ranch house. Now, you wouldn't consider that barn,
19 though it's still a barn, you wouldn't consider that to
20 be part of the curtilage, would you?

21 MR. DUGAS: Not while it's open to the public,
22 Your Honor.

23 QUESTION: No, I mean, at night. The public's
24 gone. Public's gone home.

25 MR. DUGAS: I think the barn would have its

1 own curtilage in that event.

2 QUESTION: Well, never mind that. Is it part
3 of the curtilage of the house?

4 MR. DUGAS: Sir?

5 QUESTION: Maybe it has its own, but is it
6 part of the curtilage of the house?

7 MR. DUGAS: Yes, sir. Well, you've invited
8 the public, and certainly you would have a lesser
9 expectation of privacy, and I don't know that it really
10 would be within the curtilage of the house in that
11 situation.

12 However, in this definition in the Wolf --

13 QUESTION: So it really does depend a lot on
14 the use of the barn. It's very hard to say whether it
15 is or it isn't until you know how it's being used. Now,
16 if that's crucial, we now know how this was being
17 used. It was being used to manufacture unlawful
18 substances, right?

19 MR. DUGAS: Yes, sir. But I didn't know that
20 you rested on the results of the search the goodness or
21 unreasonableness of the search.

22 QUESTION: Well, let's assume it was being
23 used to manufacture lawful substances. Would you
24 consider that part of the house?

25 MR. DUGAS: I'm sorry, I did not hear the last

1 part.

2 QUESTION: Would you still consider it part of
3 the curtilage of the house? You have a barn, and you
4 start a manufacturing business in the barn, lawful;
5 lawful substances.

6 You'd consider that part of the curtilage of
7 the house, still?

8 MR. DUGAS: Yes, sir. You could have the barn
9 transformed as a room to send your children to, as a
10 playroom. And one of the reasons for barns being 60
11 yards away from the house is an obvious one.

12 Barns have odors. They have varmints. You
13 don't want those right next door to the house where the
14 odors will permeate the housewife's cooking. Nor do you
15 want the varmints trespassing through the house.

16 So that's one of the basic reasons that barns
17 are 60 yards away, or more.

18 Now, the new immigration reform act has a
19 provision in it that says INS officers are restricted to
20 searching farms and agricultural lands within 25 miles
21 of the border.

22 So Congress is speaking to this question in
23 this situation. They're saying that you -- if it's
24 beyond 25 miles, you can't go on and question anyone
25 about whether he's an illegal alien or not.

1 QUESTION: The Federal Government is
2 suggesting a similar bright line rule here, the first
3 fence rule.

4 MR. DUGAS: You're referring to the 25 miles
5 and the fence, Your Honor?

6 QUESTION: Yes.

7 MR. DUGAS: I suppose they are, but --

8 QUESTION: It seems to me that your 25-mile
9 example cuts the other way, because Congress presumably
10 -- must have assumed that you can go and make such
11 searches within the 25-mile area without violating the
12 Fourth Amendment?

13 MR. DUGAS: Yes, sir, I would say that. They
14 said they were restricted to 25 miles of the border. So
15 I would assume that they could go on lands in that area;
16 but not 26 miles from it.

17 If there are no further questions, I'll take
18 my seat.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Englert -- pardon, Mr. Dugas.

21 Mr. Englert, you have six minutes remaining.

22 MR. ENGLERT: No rebuttal, Your Honor.

23 CHIEF JUSTICE REHNQUIST: Very well, the case
24 is submitted.

25 (Whereupon, at 10:52 a.m., the case in the

above-entitled matter was submitted.)

UNITED STATES, Petitioner V. RONALD DALE BORN

BY Paul A. Richardson
(REPORTER)

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