2022 Moot Court Problem

TEENPACT JUDICIAL

2022 TEENPACT JUDICIAL MOOT COURT PROBLEM

(Note: the following case is fictitious and takes place in present day.)

Case File Table of Contents

Chapter 1 - The Problem

1-1 Procedure 3
1-2 Issue on Appeal 3
1-3 Hypothetical Facts 4
1-4 Statement of Raylynn Stevens 5
1-5 Statement of Officer Vanover 6
1-6 Statement of Sheila Davis 7

Chapter 2 - The Law

A. Constitutional Law

2-1 The Fourth Amendment 9
2-2 The Fourteenth Amendment 9

B. Case Law

2-3 Katz v. United States, 389 U.S. 347 (1967) 10
2-4 Oliver v. United States, 446 U.S. 170 (1984) 16
2-5 Collier v. Menzel, 176 Cal. App. 3d 24 (1985) 22
2-6 Connecticut v. Edwards, 214 Conn. 57 (1990) 28
2-7 Hawaii v. Dias, 609 P.2d 637 (1980) 31
2-8 United States v. Ruckman, 806 F.2d 1471 (10th Cir. 1986) 35
2-9 Marullo v. United States, 328 F.2d 361 (5th Cir. 1964) 44
2-10 California v. Greenwood, 486 U.S. 35 (1988) 47
2-11 Kroehler v. Scott, 391 F.Supp 1114 (1975) 51

The decision of the Virginia Court of Appeals, which is now on appeal to the Virginia Supreme Court, appears last.

Chapter 1 - The Problem

1-1 PROCEDURE

Dan Foster was murdered on March 8th, 2021 in the early evening. After investigating the murder scene, the police were led to a man, Rich Koplin, fitting the description of a suspect leaving the scene of the crime. Koplin, a homeless man, informed police that his girlfriend, Raylynn Stevens, murdered Foster with a butcher knife during a drug deal gone bad. Raylynn Stevens is also a homeless person. The investigating officers obtained an arrest warrant and arrested Raylynn Stevens at the Red Storm Metro station several hours later. Ms. Stevens spent the next several months in a local jail awaiting her trial.

The following morning, Koplin directed the police to an area under the US-460 on-ramp at US 501 where Raylynn Stevens lived. The police searched her duffel bag, finding and seizing several items including the butcher knife used to stab Mr. Foster. The police also seized Mr. Foster's wallet and watch.

Prior to the trial of the case, defendant Raylynn Stevens filed a motion to suppress the evidence found by the police. The trial judge ruled as follows:

(1) The Lynchburg Police Department violated the defendant's Fourth Amendment rights by going to her "home" under the US-460 on-ramp at US 501 while she was in custody at the police station. By her conduct in securing her living space and her belongings, the defendant established that she had a legitimate expectation of privacy even while living under an expressway.

(2) Under the circumstances, where the closed containers were found by the police in a secluded place which the officers knew the defendant regarded as her home, where the defendant's absence from that place at the time of the search was due to her arrest and custody by the police, and where the purpose of the search was to obtain evidence of the crimes for which she was in custody, the defendant had a reasonable expectation of privacy in the containers, which was violated by the warrantless search. The evidence yielded by that search is hereby suppressed.

1-2 ISSUES ON APPEAL

Appellant- State of Virginia
Appellee- Raylynn Stevens

This case comes to the Virginia Supreme court after being heard in an intermediate court of appeals and starting out in a trial court in Lynchburg, Virginia. The trial court judge made the two rulings discussed above that were appealed by the state to an intermediate Virginia appellate court. The appellate court ruled

against the Appellee, Stevens, concluding that the trial court incorrectly suppressed the evidence against the Appellee. The opinion of the Court of Appeals of Virginia for the Western Circuit is attached in this record. After losing at the intermediate appeals court, the Appellee filed a timely appeal to the Virginia Supreme Court and the Virginia Supreme Court agreed to hear these two issues on appeal.

It is important to note that there are two separate issues on appeal. The first involves whether the trial court was correct or incorrect in finding that Raylynn Stevens had a reasonable expectation of privacy while living under the expressway and therefore the police had no right to conduct a search. The second issue involves whether the trial court was correct or incorrect in suppressing (or keeping out) the evidence found by the police. Because the appellate court reversed the trial judge's rulings, the appellate court's decisions are now at issue. The state will argue that the appellate court was correct in deciding that the police had a right to be in the area where Raylynn Stevens was living under the expressway and Ms. Stevens had no expectation of privacy in that location. The state will also argue that the search of Ms. Stevens' duffel bag was proper, in accord with the appellate court's ruling, and wishes to introduce the evidence from her duffel bag against Ms. Stevens at a later trial.

Raylynn Stevens will argue that the appellate court was incorrect in finding that she had no reasonable expectation of privacy where she was living. She will also argue that the Virginia Supreme Court should reverse the appellate court's decision to allow the evidence found by the police in her duffel bag to be introduced against her at trial, claiming the evidence was the fruit of an unreasonable, warrantless search.

Accordingly, the two issues on appeal are:

1. Whether Raylynn Stevens had a legitimate expectation of privacy that is protected by the Fourth Amendment while living under the US 460 on-ramp; and

2. Whether the warrantless search of Raylynn Stevens' duffel bag violated Ms. Stevens' Fourth Amendment rights.

1-3 HYPOTHETICAL FACTS

On March 8th, 2021 at 6:00 p.m., Officers Long and Vanover of the Lynchburg City Police Department responded to a call of a burglary in progress at 135 Central Avenue. The report of this incident was made by a next-door neighbor named Ray Lopez. When the two officers arrived at the scene, they entered the residence and found Dan Foster, the owner of the home, lying prostrate on the kitchen floor with multiple stab wounds to his abdomen and chest. Mr. Foster was dead at the time the officers arrived on the scene. No weapon was recovered at the scene.

The two officers went to question Lopez. From his bedroom window, Mr. Lopez had seen a man wearing a yellow raincoat with a hood leaving the scene of the crime. Mr. Lopez was also able to provide a relatively detailed description of this man wearing the raincoat (i.e., unshaven, blue jeans, black boots). Mr. Lopez stated that—based on his perspective at the time, he could not be sure if the man was alone. Based upon this information and some further investigation, Long and Vanover tracked down a homeless man named Rich Koplin at about 8:30 p.m. and took him in for questioning in connection with the murder. Koplin was wearing a yellow raincoat at the time he was picked up by police. Koplin gave several statements in which, although he denied involvement in Foster's death, he admitted being in the victim's house that same day.

In his statements, Koplin implicated his girlfriend Raylynn Stevens in the murder of the victim. He said that they had both gone to Foster's house in order to buy crack cocaine and that they usually did this on a weekly basis. However, he claimed that a dispute arose (apparently over the price of the drugs) in which Foster became violent and smacked Raylynn across the face. He said that in the heat of the moment, Raylynn Stevens grabbed a butcher knife from the kitchen counter and stabbed the victim repeatedly in the stomach and chest. Mr. Koplin said that he immediately left the scene, though Raylynn stayed to clean up, and guessed that this is when Mr. Lopez saw him. On the basis of this information, the officers secured an arrest warrant for the defendant, Raylynn Stevens, and arrested her at approximately 10:30 p.m. outside the Red Storm Metro station.

At approximately 12:30 p.m. the following day, the police, directed by Koplin, went to the area under the expressway where Raylynn Stevens lived and went through her belongings. A duffel bag, apparently belonging to Ms. Stevens, was opened on the spot, and it contained a wallet and watch that belonged to Mr. Foster as well as a butcher knife that appeared to be the weapon used in the murder. When found, the duffel bag was zipped completely closed, but there was no lock on it. It was impossible to see through the fabric or see into the duffel bag without opening it. The wallet contained no cash or credit cards. The remaining contents of the bag were various pieces of women's clothing.

These items were taken back to the station to be used as evidence in the case against Raylynn Stevens for the murder of Dan Foster.

1-4 STATEMENT OF RAYLYNN A. STEVENS

Given voluntarily to police and signed by Ms. Stevens:

My name is Raylynn Stevens. I am twenty-nine years old and have been living in the Lynchburg area for about ten years. I am originally from Topeka, Kansas. I have been living in my home under the on ramp

for about six months now. I lost my job cleaning airplanes for American Airlines very early in the pandemic and was soon evicted from my one-bedroom apartment because I could not pay my rent.

I was the only one occupying the space where I lived under the on ramp and I intended to stay there for as long as I could or as long as I had to. I knew this area was public property but I did not have anywhere else to go. I would leave my home every day but I would secure my belongings so that they could not be seen from the street above and below. I did not want them to be stolen. Also, me and my friend Sheila would take turns looking after each other's stuff while the other one was away. This type of teamwork is becoming a common practice among the homeless in the area. Sheila lived across the street from me under the other side of the on ramp.

I admit that I was with Rich Koplin on the night in question. He and I date, but I'm not sure I'd call us boyfriend and girlfriend. He asked me to accompany him to a nearby residence and he then told me to just wait outside and stay around the corner. I was curious as to why we were at this house but he would not inform me of his reason for taking me there. After waiting for about twenty or so minutes, I heard police sirens and I became nervous, so I took off back to my home under the on ramp. I was nervous because there was word on the street that the police were making sweeps of all the people who lived on the streets and shipping them off to other states or throwing them in jail. However, I had already had two encounters with the police during the six months I'd been living there and I hadn't been forced to move. They were just rude to me. Typical cops.

The duffel bag that was found at my home was indeed mine; however, the watch, the wallet, and the knife were not mine, and I do not know how they got into my bag. The reason that I know about these items is because Officer Long told me they were found in my bag when he accused me of murdering Mr. Foster. I have never even heard of this guy before. My guess is that Rich placed these things in my bag after whatever it was he did that night that I was with him. I do not know what occurred that evening because I never saw Rich again after I took off from street where I was waiting for him, and I can assure you that I didn't kill anybody.

1-5 STATEMENT OF OFFICER JOE D. VANOVER

Statement written at Lynchburg Police Station, pursuant to the investigation protocol:

My name is Joe Vanover, and I am forty-five years old. I began working for the Lynchburg Police Department in 2000. My duties include patrol and investigation of crimes.

On March 8th of 2021, I was on routine patrol when my partner and I responded to a call about a burglary in progress. When we arrived, we found the owner of the residence at 135 Central Avenue, Mr. Dan Foster,

dead due to multiple stab wounds to the chest and stomach. On the basis of an eyewitness description, we were able to track down Rich Koplin. He was seen leaving the victim's house around the time of the crime. He told us that his girlfriend, Raylynn Stevens, had killed Mr. Foster. She was arrested later that evening outside the Red Storm Metro station.

Shortly before noon on March 9, 2021, while Raylynn Stevens was in custody, I convinced her boyfriend, Rich Koplin, to take me to the place where Raylynn was living at the time. He directed me to the area underneath the US 460 on-ramp. He took me to an abutment that was separated from the entrance ramp roadway by a steep embankment that was covered by crushed stone and heavy underbrush. The state Department of Transportation owns the property involved.

I climbed up the embankment and, using a flashlight to illuminate the area, saw several items, including a memory foam mattress pad, a rolled-up sleeping bag, a closed cardboard box, a suitcase, and a small duffel bag. Ms. Stevens, using the metal and cement beams of the highway support structure as shelves, had placed all of her belongings on the beams, with the exception of the duffel bag and the mattress pad The duffel bag was on the ground next to the rolled up pad. There were no structures (such as cardboard boxes) erected around the area of the duffle bag. However, the bag was visible on the ground once I made my way through the heavy brush that both surrounds the crushed stone under the ramp and grows up through some of the rocks. The duffel bag was zipped close and was opaque to the eye.

I opened the duffel bag and found a paper bag inside it. Inside the bag were Mr. Foster's wallet and Rolex watch. I did not open any other items at that time. I then called one of the Lynchburg evidence officers to the scene. He photographed and tagged-all the items and brought them to the police department, where they were opened and 'inventoried' by Sergeant Malone. In addition to the watch and the wallet, the duffel bag contained a butcher knife. Through DNA testing, it was determined that the knife had Mr. Foster's blood on it and had been used to kill Mr. Foster.

1-6 STATEMENT OF SHEILA B. DAVIS

Statement given voluntarily on scene, transcribed, and signed by Ms. Davis:

My name is Sheila Davis. I am thirty-five years old, and I live across the expressway from Raylynn. I have been a friend with her ever since she moved in across the street from me about six months ago. I have been living on the street ever since my boyfriend threw me out of his place about a year ago. I can't find a job, so I just stay on the streets.

Life on the street is not easy. We are always hungry and the police are always hassling us. Raylynn and I take turns watching each other's stuff when the other one is away so that other street people or the police

won't mess with it. It's bad enough that we are forced to live on the streets without having other people, especially the police, messing with what few belongings we do have. Every so often DOT workers will sweep through and run us off; the last time they did was just before Raylynn moved in.

Sometimes the police will come by and just take our stuff for no reason at all. One time they went so far as to take the belongings of a whole bunch of us, pile them up in the lower rocks of the overpass, and burn them. This was done by a few cops while a bunch of others sat in their cars and watched. I told Raylynn about that story after she had moved in, so she would know of the risks the cops pose to us. I don't understand why the cops are always bothering us because we don't bother anybody else. In this country, it seems like the most disadvantaged people are the ones who get taken advantage of the most. We don't want to live on the street, but we don't have any other choice because the shelters downtown are full. Especially since the pandemic.

The day that the cops came and got Raylynn's stuff was when I was over at the shelter up the street where they happened to be handing out lunch. Raylynn was usually at home during that time, but for some reason she wasn't around and I thought it would be alright to leave the stuff for a while, considering that I was really hungry. I don't know why the cops took her stuff, but it's not the first time something like this happened.

Chapter 2 - The Law

2-1 THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2-2 THE FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law, which shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2-3 KATZ V. UNITED STATES, 88 S.CT. 507 (1967)

88 S.Ct. 507
Supreme Court of the United States

Charles KATZ, Petitioner,
v.
UNITED STATES.

No. 35.Argued Oct. 17, 1967. Decided Dec. 18, 1967.

Opinion

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute.1 At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, ***349** because '(t)here was no physical entrance into the area occupied by, (the petitioner).'2 ****510** We granted certiorari in order to consider the constitutional questions thus presented.3

The petitioner had phrased those questions as follows:

'A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

***350** 'B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.'

We decline to adopt this formulation of the issues. In the first place the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' Secondly, the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion,

but its protections go further, and often have nothing to do with privacy at all.4 Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.5 But the protection of a ***511*** person's general right to privacy-his right to be let alone by other people 6-is, like the ***351*** protection of his property and of his very life, left largely to the law of the individual States.7

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a 'constitutionally protected area.' The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312; United States v. Lee, 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. ***352*** See Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688; Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye-it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,10 in a friend's apartment,11 or in a taxicab,12 a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits ***512*** him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, Olmstead v. United States, 277 U.S. 438, 457, 464, 466, 48 S.Ct. 564, 565, 567, 568, 72 L.Ed. 944; Goldman v. United States, 316 U.S. 129, 134-136, 62 S.Ct. 993, 995-997, 86 L.Ed. 1322, for that Amendment was thought to limit only searches and seizures of tangible *353 property.13 But '(t)he premise that property interests control the right of the Government to search and seize has been discredited.' Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782. Thus, although a closely divided Court

supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under * * * local property law.' Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people-and not simply 'areas'-against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

**354* The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and ***513* they took great care to overhear only the conversations of the petitioner himself.

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of **355* such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the * * * allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' Osborn v. United States, 385 U.S. 323, 329-330, 87 S.Ct. 429, 433, 17 L.Ed.2d 394. Discussing that holding, the Court in Berger v. State of New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040, said that 'the order authorizing the use of the

electronic device' in Osborn 'afforded similar protections to those * * * of conventional warrants authorizing the seizure of tangible evidence.' Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' Id., at 57, 87 S.Ct. at 1882.16 Here, too, ***514*** a similar ****356*** judicial order could have accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance.

The Government urges that, because its agents relied upon the decisions in Olmstead and Goldman, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive ****357*** means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.' Wong Sun v. United States, 371 U.S. 471, 481-482, 83 S.Ct. 407, 414, 9 L.Ed.2d 441. 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest. ****515** ****358*** Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-

event justification for the * * * search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' Beck v. State of Ohio, 379 U.S. 89, 96, 85S.Ct. 223, 228, 13 L.Ed.2d 142. And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment ***359** violations 'only in the discretion of the police.' Id., at 97, 85 S.Ct. at 229.

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification * * * that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed. It is so ordered. Judgment reversed.

Concurrence

HARLAN, J., Concurring Opinion

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 U.S. 383, and unlike a field, Hester v. United States, 265 U.S. 57, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic, as well as physical, intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment,[p361] and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.
As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected," because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. Hester v. United States, supra.

The critical fact in this case is that "[o]ne who occupies it, [a telephone booth] shuts the door behind him,

and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. Ante at 352. The point is not that the booth is "accessible to the public" at other times, ante at 351, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. Cf. Rios v. United States, 364 U.S. 253.

In Silverman v. United States, 365 U.S. 505, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment.[p362] That case established that interception of conversations reasonably intended to be private could constitute a "search and seizure." and that the examination or taking of physical property was not required. This view of the Fourth Amendment was followed in Wong Sun v. United States, 371 U.S. 471, at 485, and Berger v. New York, 388 U.S. 41, at 51. Also compare Osborn v. United States, 385 U.S. 323, at 327. In Silverman, we found it unnecessary to reexamine Goldman v. United States, 316 U.S. 129, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider Goldman, and I agree that it should now be overruled.* Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.

Finally, I do not read the Court's opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.

* I also think that the course of development evinced by Silverman. supra, Wong Sun., supra, Berger, supra, and today's decision must be recognized as overruling Olmstead v. United States, 277 U.S. 438, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment.

2-4 OLIVER V. UNITED STATES, 104 S.CT 1735 (1984)

104 S.Ct. 1735
Supreme Court of the United States
Ray E. OLIVER, Petitioner
v.
UNITED STATES.
MAINE, Petitioner
v.
Richard THORNTON.
Nos. 82-15, 82-1273. Argued Nov. 9, 1983. Decided April 17, 1984.

*173 Justice POWELL delivered the opinion of the Court.

The "open fields" doctrine, first enunciated by this Court in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), permits police officers to enter and search a field without a warrant. We granted certiorari in these cases to clarify confusion that has arisen as to the continued vitality of the doctrine.

No. 82-15. Acting on reports that marihuana was being raised on the farm of petitioner Oliver, two narcotics agents of the Kentucky State Police went to the farm to investigate. Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper. At that point, someone standing in front of the camper shouted: "No hunting is allowed, come back up here." The officers shouted back that they were Kentucky State Police officers, but found no one when they returned to the camper. The officers resumed their investigation of the farm and found a field of marihuana over a mile from petitioner's home.

Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance." 21 U.S.C. § 841(a)(1). After a pretrial hearing, the District Court suppressed evidence of the discovery of the marijuana field. Applying Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967), the court found that petitioner had a reasonable expectation that the field would remain private because petitioner "had done all that could be expected of him to assert his privacy in the **1739 area of farm that was searched." He had posted "No Trespassing" signs at regular intervals and had locked the gate at the entrance to the center of the farm. App. to Pet. for Cert. in No. 82-15, *174 pp. 23-24. Further, the court noted that the field itself is highly secluded: it is bounded on all sides by woods, fences, and embankments and cannot be seen from any point of public access. The court concluded that this was not an "open" field that invited casual intrusion.

The Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court. United States v. Oliver, 686 F.2d 356 (CA6 1982). The court concluded that Katz, upon which the District Court relied, had not impaired the vitality of the open fields doctrine of Hester. Rather, the open fields doctrine was entirely compatible with Katz' emphasis on privacy. The court reasoned that the "human relations that create the need for privacy do not ordinarily take place" in open fields, and that the property owner's common-law right to exclude trespassers is insufficiently linked to privacy to warrant the Fourth Amendment's protection. 686 F.2d, at 360. We granted certiorari. 459 U.S. 1168, 103 S.Ct. 812, 74 L.Ed.2d 1012 (1983).

After receiving an anonymous tip that marihuana was being grown in the woods behind respondent Thornton's residence, two police officers entered the woods by a path between this residence and a neighboring house. They followed a footpath through the woods until they reached two marihuana patches fenced with chicken wire. Later, the officers determined that the patches were on the property of respondent, obtained a warrant to search the property, and seized the marihuana. On the basis of this evidence, respondent was arrested and indicted.

*175 The trial court granted respondent's motion to suppress the fruits of the second search. The warrant for this search was premised on information that the police had obtained during their previous warrantless search, that the court found to be unreasonable. "No Trespassing" signs and the secluded location of the marihuana patches evinced a reasonable expectation of privacy. Therefore, the court held, the open fields doctrine did not apply. The Maine Supreme Judicial Court affirmed. State v. Thornton, 453 A.2d 489 (Me.1982). It agreed with the trial court that the correct question was whether the search "is a violation of privacy on which the individual justifiably relied," Id., at 493, and that the search violated respondent's privacy. The court also agreed that the open fields doctrine did not justify the search. That doctrine applies, according to the court, only when officers are lawfully present on property and observe "open and patent" activity. Id., at 495. In this case, the officers had trespassed upon defendant's property, and the respondent had made every effort to conceal his activity. We granted certiorari. 460 U.S. 1068, 103 S.Ct. 1520, 75 L.Ed.2d 944 (1983).

**1740 *176 II

The rule announced in Hester v. United States was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Hester v. United States, 265 U.S., at 59, 44 S.Ct., at 446.

Nor are the open fields "effects" within the meaning of the Fourth Amendment. In this respect, it is suggestive that James Madison's proposed draft of what became the Fourth *177 Amendment preserves "[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures...." See N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 100, n. 77 (1937). Although Congress' revisions of Madison's proposal broadened the scope of the Amendment in some respects, Id., at 100-103, the term "effects" is less inclusive than "property" and cannot be said to encompass open fields. We conclude, as did the Court in deciding Hester v. United States, that the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.

III

This interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Since Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of Amendment analysis has been the question whether a person has a "constitutionally protected **1741 reasonable expectation of privacy." Id., at 360, 88 S.Ct., at 516 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.' " Id., at 361, 88 S.Ct., at 516. See also Smith v. Maryland, 442 U.S. 735, 740-741, 99 S.Ct. 2577, 2580-2581, 61 L.Ed.2d 220 (1979).

A

No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. See *178 Rakas v. Illinois, 439 U.S. 128, 152- 153, 99 S.Ct. 421, 435-436, 58 L.Ed.2d 387 (1978) (POWELL, J., concurring). In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, e.g., United States v. Chadwick, 433 U.S. 1, 7-8, 97 S.Ct. 2476, 2481-2482, 53 L.Ed.2d 538 (1977), the uses to which the individual has put a location, e.g., Jones v. United States, 362 U.S. 257, 265, 80 S.Ct. 725, 733, 4 L.Ed.2d 697 (1960), and our societal understanding that certain areas deserve the most scrupulous protection from government invasion, e.g., Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.

In this light, the rule of Hester v. United States, supra, that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. See also Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865, 94 S.Ct. 2114, 2115, 40 L.Ed.2d 607 (1974). This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the

recognition of the Framers that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v. New York, supra, 445 U.S., at 601, 100 S.Ct., at 1387. See also Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734 (1961); United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972).

In contrast, open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air. For these reasons, the asserted **1742 expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

The historical underpinnings of the open fields doctrine also demonstrate that the doctrine is consistent with respect for "reasonable expectations of privacy." As Justice Holmes, writing for the Court, observed in Hester, 265 U.S., at 59, 44 S.Ct., at 446, the common law distinguished "open fields" from the "curtilage," the land immediately surrounding and associated with the home. See 4 W. Blackstone, Commentaries *225. The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. See, e.g., United States v. Van Dyke, 643 F.2d 992, 993-994 (CA4 1981); United States v. Williams, 581 F.2d 451, 453 (CA5 1978); Care v. United States, 231 F.2d 22, 25 (CA10), cert. denied, 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461 (1956). Conversely, the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields.

*181 We conclude, from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.

B

Petitioner Oliver and respondent Thornton contend, to the contrary, that the circumstances of a search sometimes may indicate that reasonable expectations of privacy were violated; and that courts therefore should analyze these circumstances on a case-by-case basis. The language of the Fourth Amendment itself answers their contention. **1743 Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Under this approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy. The lawfulness of a search would turn on " '[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions....' " New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981) (quoting LaFave, "Case-By-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142). This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances. [Citations omitted.] The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority, Belton, supra, 453 U.S., at 460, 101 S.Ct., at 2864; it also creates a danger that constitutional *182 rights will be arbitrarily and inequitably enforced. Cf. Smith v. Goguen, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 1246-1247, 39 L.Ed.2d 605 (1974).

IV

In any event, while the factors that petitioner Oliver and respondent Thornton urge the courts to consider may be relevant to Fourth Amendment analysis in some contexts, these factors cannot be decisive on the question whether the search of an open field is subject to the Amendment. Initially, we reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate. It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marihuana upon secluded land and erected fences and "No Trespassing" signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marihuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal *183 and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a **1744 trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate. " 'The premise that property interests control

the right of the Government to search and seize has been discredited.' " Katz, 389 U.S., at 353, 88 S.Ct., at 512 (quoting Warden v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782 (1967)). "[E] ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." Rakas v. Illinois, 439 U.S., at 144, n. 12, 99 S.Ct., at 431, n. 12.

The common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful. Id., at 153, 99 S.Ct., at 435 (POWELL, J., concurring). The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. Thus, in the case of open fields, the general *184 rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

V

We conclude that the open fields doctrine, as enunciated in Hester, is consistent with the plain language of the Fourth Amendment and its historical purposes. Moreover, Justice Holmes' interpretation of the Amendment in Hester accords with the "reasonable expectation of privacy" analysis developed in subsequent decisions of this Court. We therefore affirm Oliver v. United States; Maine v. Thornton is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

2-5 COLLIER V. MENZEL, 176 CAL.APP.3D 24 (1985)

176 Cal.App.3d 24, 221 Cal.Rptr. 110
DAVID HENRY COLLIER et al., Plaintiffs and Appellants,
v.
HOWARD C. MENZEL, as County Clerk-Recorder, etc., Defendant and Respondent; COUNTY OF SANTA BARBARA, Real Party in Interest and Respondent.

No. B009565.
Court of Appeal, Second District, California.
Dec 20, 1985.

STONE, P. J.

Appellants filed a petition for writ of mandate in superior court seeking to compel respondent, the Santa Barbara County Clerk-Recorder, to allow appellants to register to vote. They appeal the trial court's denial of their petition. Appellants, three persons identifying themselves as "homeless" citizens and indigents of Santa Barbara County, submitted affidavits of registration to vote to respondent in September 1984. The address appellants listed as their residence on their affidavits was "100 Montecito Street." A park owned by the City of Santa Barbara and commonly known as Fig Tree Park is located at this address, a gathering place for homeless persons. Camping or sleeping overnight on park grounds is prohibited by city ordinance. *30

After receiving their registration affidavits, respondent sent appellants a letter informing them that the address listed on their registration applications was insufficient as a residence address and therefore prevented respondent from determining appellants' correct voting precinct. The letter enclosed blank registration forms so that appellants could clarify their addresses. It also informed appellants that they were legally entitled to vote in the precincts of their former residences until they established new residences.

Appellants contend that their registration applications complied with statutory requirements for voter registration. They further claim that respondent's failure to process these applications violated their right to the equal protection of the laws under the United States Constitution. We conclude the affidavits were sufficient for voter registration purposes and reverse the judgment below. We also conclude that, as a consequence of the denial of these affidavits, appellants were unjustifiably deprived of their right to vote on an equal basis with other citizens.

I. State Registration Requirements

Appellants argue that respondent abused its administrative discretion by failing to accept their registration affidavits because California law does not require that a voter registrant live in an actual building. Appellants assert they have complied with state voter registration laws since they are citizens of California, they live in Santa Barbara, and have the intent to remain there permanently. Respondent counters that its rejection of appellants' registration affidavits was proper as appellants listed for their addresses a place where there are no living facilities. Thus,

respondent contends, appellants have not established an essential factor which would demonstrate a domicile in Santa Barbara. A review of state election laws supports appellants' position. The California Constitution provides that a "United States citizen 18 years of age and a resident in the state may vote." (Cal. Const., art. II, § 2.) Even if a person may be qualified to vote under constitutional standards, he/she may not be entitled to vote if compliance with state registration laws has not been met. (Elec. Code, § 100.) Proper registration is a condition precedent to the exercise of the right to vote. (Kagan v. Kearney (1978) 85 Cal.App.3d 1010, 1015 [149 Cal.Rptr. 867].)

In order to be properly registered, an elector must be a resident of an election precinct. (Elec. Code, § 17; Schaff v. 17 Beattie (1968) 265 Cal.App.2d 904, 910 [72 Cal.Rptr. 79].) Since Fig Tree Park, the alleged *31 residence of appellants, lies within Santa Barbara City, a county election precinct is determinable on the basis of appellants' registration affidavits.

The next issue for consideration is whether appellants are residents of the park. Election Code, section 200, subdivision (a), defines a person's "residence" as his/her "domicile." "The domicile of a person is that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning ...." (Elec. Code, § 200, subd. (b).)

For voting purposes then, the Legislature has set up the following residential requirements: (1) a fixed habitation, and (2) an intention of remaining at that place and of returning to it after temporary absences. Appellants have satisfied both statutory requirements of fixed habitation and intent to remain.

"Habitation" is defined by Webster's New Collegiate Dictionary (9th ed. 1983) at page 545, as "a dwelling place;" "dwelling" is defined as "a shelter (as a house or building) in which people live." We do not find that this reference to a house or building is all-inclusive or eliminates other types of abodes. A dwelling or shelter is a subjective term since it can mean entirely different things to different people. More important, the Legislature has not adopted the traditional notion that a dwelling or habitation for voter registration signifies four walls. Section 207 of the Election Code provides: "Residence in a trailer or vehicle or at any public camp or camping ground may constitute a domicile for voting purposes if the registrant complies with other requirements of this article." Implicit in this language is that a public camping ground itself without residence in a vehicle or trailer is deemed a fixed habitation. We find that the designation of a public park as a residence for voting purposes likewise can qualify as a place of fixed habitation. While a park may not be legally designated as a place for camping, it is a physical area where a person can sleep and otherwise use as a dwelling place. (4)Furthermore, we acknowledge the Coalition's observation that a versatile concept of residency harmonizes with the "fundamental statutory policy" in California of effectuating and maintaining at the highest possible levels voter registration and voting. (Elec. Code, §§ 302, 304.)

Have appellants satisfied the second requirement of a present intent to remain in the park? Appellants' submission of their signed registration affidavits was sufficient compliance with this requirement. Under California law, a person who signs an affidavit of registration has certified that the contents of the affidavit are true and correct. No other written proof of *32 residency is required. (Elec. Code., §§ 301, 500, subd. (j).) We also note that although the city park has no postal address, appellants supplied respondent with a post office box number. They thus fulfilled the additional requirement that a mailing address be provided on the affidavit if it is different from the

residential address. (Elec. Code, § 500, subd. (d).)

It is important to point out that, pursuant to city ordinance, the city park appellants designate as their residence is legally forbidden for use as a residence. Since appellants have "no right" to use the park for a habitation, do they have the required intent to remain there? Yes. Appellants' intent to remain in the park is legally independent of any intent to violate the ordinance. We do not hold that respondent cannot enforce its ordinance making it illegal to live in a public park. We do hold that so long as petitioners actually reside there, they may register to vote in that precinct.

II. Equal Protection

Appellants contend that respondent's refusal to register them to vote discriminates against them as a class of homeless or indigent persons. Appellants do not challenge the constitutionality of the statutory requirement that voter registrants must be residents of an election precinct. Their assertion is that respondent has unconstitutionally interpreted and applied this requirement since appellants have demonstrated they are residents of an election precinct in the City of Santa Barbara.

To decide whether a law or governmental action violates the guarantee of equal protection, it is necessary to determine: (1) the standard of review based on the individual interest involved or the particular classification, and (2) the governmental interest asserted in support of the classification. (Dunn v. Blumstein (1972) 405 U.S. 330, 335 [31 L.Ed.2d 274, 280, 92 S.Ct. 995].) Here, appellants' interest in voting is at stake.

The right to vote on an equal basis with other citizens is a fundamental right in our democratic society and one of 18 the basic civil rights of man which preserves all other rights. (Reynolds v. Sims (1964) 377 U.S. 533, 561-562 [12 L.Ed.2d 506, 527, 84 S.Ct. 1362]; Pitts v. Black (D.C.N.Y. 1984) 608 F.Supp. 696, 708.) Classifications denying this right deserve the strictest scrutiny. (Dunn v. Blumstein, supra. pp. 335-336 [31 L.Ed.2d at p. 280].) Under this stringent standard, the government must not only demonstrate that it has a compelling public interest in utilizing the classification, it must also show that the classification is necessary to serve its objectives. (Id., p. 343 [31 L.Ed.2d at p. 285].)

Respondent contends it is not necessary to find a compelling public interest in order to sustain the validity of statutory residence requirements *33 for voting. Respondent is partially correct. States and their political subdivisions have the unquestioned constitutional authority to restrict availability of the ballot to those persons who reside within their borders. (Carrington v. Rash (1965) 380 U.S. 89, 91 [13 L.Ed.2d 675, 677, 85 S.Ct. 775]; Holt Civic Club v. Tuscaloosa (1978) 439 U.S. 60, 68-69 [58 L.Ed.2d 292, 301, 99 S.Ct. 383].) Thus, registration statutes are usually sustained on the theory that they do not impair or abridge an elector's right to vote, but merely regulate its exercise. "[R]egistration is not a qualification of an elector and cannot add to the qualifications fixed by the constitution; but is to be regarded as a reasonable regulation by the legislature for the purpose of ascertaining who are qualified electors in order to prevent illegal voting." (Minges v. Board of Trustees (1915) 27 Cal.App. 15, 17-18 [148 P. 816].)

Although registration laws are valid if reasonable, these laws and the interpretation of them will receive strict scrutiny if they deny certain classes of residents the right to vote. (Kollar v. City of Tucson (D.C. Ariz. 1970) 319 F.Supp. 482, 485, affd. (1970) 402 U.S. 967 [29 L.Ed.2d 133, 91 S.Ct. 1665].) Thus, a governmental entity is not justified in excluding otherwise qualified voters who have no way of making themselves eligible to vote. (Rosario v. Rockefeller (1973) 410 U.S. 752, 757 [36 L.Ed.2d 1, 6, 93 S.Ct. 1245]; Holt Civic Club v. Tuscaloosa , supra., 439 U.S. 68.)

We have concluded that appellants' affidavits showed appellants are residents of Santa Barbara. We also find that respondent's rejection of appellants' registration affidavits absolutely denied them the right to vote. Hence, respondent's interpretation and application of state registration laws deserve strict scrutiny.

Respondent argues that appellants were not completely denied the right to vote because they have the ability under registration laws to vote in the precinct of their last established domicile. (Elec. Code, §§ 202, subd. (a); 207; 208.) We disagree. Requiring appellants to travel to their former place of residence unnecessarily burdens their right to vote, particularly in view of their alleged indigent status, and, consequently, their restricted mobility. (See Jolicoeur v. Mihaly , supra., 5 Cal.3d 565, 571.)

Does respondent therefore assert a compelling interest in rejecting appellants' affidavits? Further, is it necessary for respondent to reject the affidavits in order to serve its objectives or are there alternative means which will not restrict appellants' right to vote?

Respondent urges that it has a compelling interest in requiring appellants to list known residential addresses since the location of a voter's domicile determines which measures appear on the ballot the voter casts. Respondent states, "Each ballot style reflects a distinct combination of ballot measures and candidates and is dependent upon the political subdivision in which the voter's address is located." Respondent also claims it is interested in preventing the importation of voters in close elections and in preserving the concept of political community. Federal courts have indeed found that states have compelling interests in preventing voting fraud and in maintaining an orderly election procedure. (Dunn v. Blumstein, supra., 405 U.S. 342-344 [31 L.Ed.2d at pp. 284-285]; Kollar v. City of Tucson , supra., 319 F.Supp. 485.)

Nevertheless, do the means justify the ends in the instant case? We conclude they do not. Respondent's election goals do not warrant its refusal to register appellants to vote. With regard to the interest in preventing fraudulent voting, respondent presented no evidence that appellants were more likely to commit fraud than persons who were not homeless. Without such evidence, the status of homelessness raises no presumption that homeless persons are more prone to commit voter fraud than any other group. (Pitts v. Black, supra., 608 F.Supp. 702.)

Appellants further point out the existence of a statutory framework in California to deter dual registration and other voter fraud problems. There is no reason to believe that these statutes would not be effective to deter fraud by a class of homeless registrants. It may have been feasible in 1850 to influence the outcome of an election by rounding up the impecunious and the thirsty, furnishing them with free liquor, pre-marked ballots, and transportation to the 19 polls; to do so now, if possible at all, would require the coordinated skills of a vast squadron of computer technicians. [Observation of Justice Mosk in Ramirez v. Brown (1973) 9 Cal.3d 199, 214

(107 Cal.Rptr. 137, 507 P.2d 1345), revd. sub. opn. Richardson v. Ramirez (1974) 418 U.S. 24 (41 L.Ed.2d 551, 94 S.Ct. 2655).] The disenfranchisement of appellants must be justified, if at all, on some other ground. (Pitts v. Black, supra., 608 F.Supp. 702.)

Respondent's other primary concern is administrative feasibility. It asks how it can, as a practical matter, handle affidavits of registration, which on their face do not list as residences places where people reside. First of all, there is no statutory authority for the proposition that a residence cannot be a place where there are no living facilities. In other words, the old adage, "A man's home is where he makes it," is not statutorily prescribed. We therefore agree with appellants that whether people "sleep under a bush or a tree or in the open air is immaterial regarding their right to vote." The type of place a person calls home has no relevance to his/her eligibility to vote if compliance with registration has been achieved, that is, the designation of a fixed habitation, the declaration of an intent to remain at that place and to return to it after temporary absences, and the designation of an address where mail can be received. (Elec. Code, §§ 200, subd. (b), 500.)

Respondent concedes it is not necessary to live in a house or apartment in order to be allowed to vote. It further states that the standard for establishing a residence for voting purposes found in Pitts v. Black, supra., 608 F.Supp. 696, is an appropriate standard for determining the residence of a homeless person.

Pitts resolves respondent's asserted administrative dilemma of ascertaining a person's election precinct when he/she does not live in a house or apartment or any other building. The federal court there found that it was not administratively infeasible to register homeless individuals to vote who lived in a city park which had no postal address and which spread over several election districts. As long as a homeless person could identify a specific spot within the park where he/she regularly slept, such as a park bench, election officials would be able to determine that person's election district. (Pp. 703, 706.) Furthermore, the court found that the identification of a specific "home base" within a district together with the designation of a place where messages could be received satisfied a stringent domicile standard. (Pp. 703, 710.)

Similarly, although Fig Tree Park has no building numbers, respondent can identify an election precinct for appellants. This is particularly feasible *36 as the park encompasses a small geographical area. Appellants' designation of a fixed premises and a post office box also establishes their domicile within a particular locality. This, in turn, allows them to vote without disturbing the integrity of the political community.

...

It is patently unjust that society ignores the homeless and yet also denies them the proper avenues to remedy the situation. Even more compelling, the denial of the vote to the "homeless" denies them electoral power. Powerlessness breeds apathy, and apathy is the greatest danger to society.

...

Nonetheless, the Equal Protection Clause prohibits using the affluence of the voter as an electoral standard since voter qualifications have no relation to wealth. (Harper v. Virginia Bd. of Elections, supra., 383 U.S. at p. 666 [16 L.Ed.2d at p. 172].) A citizen who is a qualified voter is no more nor no less so because he or she lives in

an unconventional place. "'This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of government of the people, by the people and for the people. The Equal Protection Clause demands no less than substantially equal representation for all citizens, of all places as well as of all races.'" (Id., at pp. 667-668 [16 L.Ed.2d at p. 173].) Denying the opportunity to vote to a resident merely because he or she cannot afford housing denies a citizen's vote on the basis of economic status and is therefore an impermissible basis for determining the entitlement to vote.

We conclude that appellants are entitled to a writ of mandamus directing respondent to allow appellants to register to vote on the ground that their submitted affidavits of registration comply with state registration laws. We further conclude that respondent's refusal to register appellants is not necessary to promote respondent's proffered election 20 goals and is therefore violative of appellants' right to vote under equal protection standards. The judgment appealed from is reversed and remanded to superior court for the issuance of a writ and the determination of costs at trial and on appeal. Gilbert, J., and Abbe, J., concurred.

2-6 CONNECTICUT V. EDWARDS, 214 CONN. 57 (1990)

STATE OF CONNECTICUT v. ROSS BLAINE EDWARDS

Supreme Court of Connecticut.

Decision released February 27, 1990.

Kent Drager, assistant public defender, with whom, on the brief, was G. Douglas Nash, public defender, for the appellant (defendant).

Leon F. Dalbec, Jr., deputy assistant state's attorney, with whom, on the brief, were John M. Bailey, state's attorney, and Lawrence Daly, assistant state's attorney, for the appellee (state).

PETERS, C. J., HEALEY, CALLAHAN, GLASS and HULL, JS. PETERS, C. J.

The dispositive issue in this appeal is the sufficiency of the evidentiary foundation for the request of a defendant, charged with having committed the crime of murder, that the jury be instructed on the lesser included nonintentional homicides of manslaughter in the first and second degrees and criminally negligent homicide. A jury found the defendant, Ross Blaine Edwards, guilty of the murder of his sister, in violation of General Statutes § 53a-54a. The defendant has appealed from the judgment of the trial court sentencing him to a term of life imprisonment. We find error and remand for a new trial.

The jury could reasonably have found the following facts. The defendant was living in his sister's East Hartford apartment, following his release from a New Jersey hospital after a suicide attempt. On the evening of September 17, 1986, he remained in the apartment while she went to work. After her departure, having gotten "high" on cocaine, marijuana and beer, he decided to search for his sister's gun in order to commit suicide. Ultimately successful in this search, he brought the loaded weapon into the spare room where he had been sleeping, sat down and held the gun to his chest. When his sister, upon her return from work, discovered him with the gun, she attempted to disarm him. In the ensuing struggle for the gun, she was fatally shot. After ascertaining that his sister was dead, the defendant unplugged the telephone, undertook various measures to conceal her body, and took some of her money and jewelry, including gold necklaces that she had been wearing. The next morning, he left for New Jersey, where he subsequently was apprehended, wearing her jewelry.

The East Hartford police found the victim's body on September 19, 1986, in response to a complaint from the manager of her apartment complex. The body, wrapped in a white sheet, was buried beneath various articles of clothing, bed linens and a mattress. The officers also found drug paraphernalia, a man's clothing, and papers identifying the defendant. An autopsy of the body revealed a bullet wound to the head, the bullet entering two inches behind the left ear and exiting at the right temple area. The apparent absence of gunpowder grains near the wound indicated that the gun was at least 36 inches away from the victim's head when fired, although the flow of blood and the possible movement of the body provided an alternative explanation.

At trial, the principal issue was the defendant's state of mind at the time of the shooting, because he admitted having killed his sister. He maintained, however, that he had lacked the specific intent to commit murder, because the shooting had occurred in an accidental struggle for possession of his sister's gun while he was intoxicated and suicidal. Accordingly, the defendant filed procedurally proper requests for the jury to be charged on his defense of intoxication as a defense to first degree murder and on the lesser included offenses of first degree manslaughter pursuant to General Statutes § 53a-55 (a) (3),3 second degree manslaughter pursuant to General Statutes § 53a-56 (a) (1),4 and criminally negligent homicide pursuant to General Statutes § 53a58 (a).5 The trial court gave the requested charge on intoxication as relevant to specific intent, but refused to charge on the lesser included offenses on the ground that no evidence had been presented at trial to support those charges. The jury found the defendant guilty of murder as charged.

On appeal, the defendant claims that the trial court erred in: (1) denying his request to instruct the jury on lesser included offenses; (2) denying his motions to suppress evidence seized illegally; and (3) sustaining the state's objection to the testimony of a defense psychiatrist. Because we find error in the first of these trial court rulings, we will consider the others only insofar as they are likely to be implicated in a new trial.

(Sections I and IIA have been redacted for brevity)

II B

We turn finally to the validity of the warrantless search of the apartment which was the defendant's temporary residence. That search, with the consent of its lessee, led to the seizure of a .38 caliber shell casing from a potato chip box and the defendant's backpack.

The defendant cannot prevail in his objection to the seizure of the shell. While the defendant, as an invited guest residing even temporarily in a private residence, may have had a reasonable expectation of privacy in the premises; Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L. Ed. 2d 387 (1978), reh. denied, 439 U.S. 1122, 99 S.Ct. 1035, 59 L. Ed. 2d 83 (1979); Stoner v. California, 376 U.S. 483, 490, 84 S.Ct. 889, 11 L. Ed. 2d 856, reh. denied, 377 U.S. 940, 84 S.Ct. 1330, 12 L. Ed. 2d 303 (1964); United States v. Echegoyen, 799 F.2d 1271, 1277 (9th Cir. 1986); United States v. Lyons, 706 F.2d 321, 327 (D.C. Cir. 1983); State v. Reddick, 207 Conn. 323, 330, 541 A.2d 1209 (1988); the lessee clearly had the authority to consent to the search of her apartment. "In order for third-party consent to be valid, the consenting party must have `possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.' United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L. Ed. 2d 242 (1974)...." State v. Jones, 193 Conn. 70, 80, 475 A.2d 1087 (1984). A police officer testified to the lessee's consent to the search. Moreover, the defendant did not have a reasonable expectation of privacy, in his temporary residence, to an item found in a food container to which 23 any occupant of the apartment had ready access. Accordingly, we find no error with respect to this particular denial of a motion to suppress.

The defendant stands on a different footing, however, with regard to the search of his backpack. Although it is sufficiently clear that the lessee consented to the search of the apartment with the authority to do so, as lessee she did not possess the authority lawfully to consent to the search of her guest's personal effects. "The law obviously does not insist that a person assertively clutch an object in order to retain the protection of the fourth amendment." United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989). The defendant, as a person, who resides at a private residence with permission of the lessee as a guest; State v. Reddick, supra, 329-30; had a justifiable expectation that his personal effects, including the backpack, would remain private. Id.

"This justifiable expectation should not be vitiated by a strained application of the third-party consent doctrine; the consent of the host should ordinarily be insufficient to justify a warrantless search when it is obvious that the searched item is the exclusive property of the guest." United States v. Isom, 588 F.2d 858, 861 (2d Cir. 1978). As "a common repository for one's personal effects, and therefore ... inevitably

associated with the expectation of privacy"; Arkansas v. Sanders, 442 U.S. 753, 762, 99 S.Ct. 2586, 61 L. Ed. 2d 235 (1979); luggage may be lawfully searched, in general, only pursuant to a warrant. Id., 763. We can discern no intrinsic constitutional distinction between a backpack and luggage. United States v. Meier, 602 F.2d 253, 255 (10th Cir. 1979).

The state maintains, nonetheless, that, in the particular circumstances of this case, the lessee's consent to the search validated the seizure of the defendant's backpack. The state calls our attention to the fact that the defendant left his backpack, unlocked, at his temporary residence. We are not persuaded that these circumstances authorized the seizure in this case. Although there might have been a clearer expectation of privacy in a backpack that was locked; United States v. Isom, supra, 861; we agree with the holding of United States v. Most, 876 F.2d 191, 197-98 (D.C. Cir. 1989), that such a security measure is not essential to the defendant's fourth amendment rights. Furthermore, the defendant did not expressly or impliedly give the lessee access to the backpack merely by leaving it in the apartment. Unlike Frazier v. Cupp, 394 U.S. 731, 740, 89 S.Ct. 1420, 22 L. Ed. 2d 684 (1969), on which the state relies, there is no evidence that the defendant in this case ever authorized the lessee to inspect the contents of his backpack.

We therefore conclude that the lessee's consent did not validate the warrantless search of the defendant's backpack. The trial court, accordingly, should have granted the defendant's motion to suppress the evidence thereby seized. As a consequence, the defendant is entitled upon retrial to the suppression of that jewelry and the set of keys to the victim's apartment that were illegally seized from his backpack, unless the state adduces an alternate, legitimate ground for their seizure. There is error, the judgment is set aside and the case is remanded for a new trial. In this opinion the other justices concurred.

2-7 HAWAII V. DIAS, 609 P.2D. 637 (1980)

609 P.2d 637
Supreme Court of Hawai'i.

STATE of Hawaii, Plaintiff-Appellant,

v.

Henry DIAS, Leonard Mau, Colin Lum, Jerry Kaichi, William English, Robert Thomas, Abraham Ahmad, Hiroo Teramae, Gonrado Madanay, James Lau, Phillip Palencia, Defendants-Appellees.

No. 6558.April 10, 1980.

Opinion

MENOR, Justice.

This is an appeal by the State from the trial court's order granting the defendants' motion to suppress evidence of gambling activity.

Acting on information received from an unnamed informant that a gambling game was in progress in a shack on Sand Island, Officer Pedro proceeded to the area known as "Squatters' Row," arriving there at approximately 11:05 p. m. After leaving his car, he walked over to a structure built on stilts and attached to the side of an old bus. The shack was well-lighted and parked nearby were 15-20 automobiles. As the officer approached the building, he heard words that he associated with what he referred to as a "game of craps." Standing at arm's length from the split doorway of the building, he was able to see a gaming table through a two to three-inch gap between the two doors. He immediately entered, without prior announcement, and arrested the defendants. The defendants, who had been charged with gambling, moved to suppress Officer Pedro's testimony in its entirety and the trial court granted the motion. We affirm the order of suppression in part and reverse in part.

Initially, we take judicial notice of the fact that Sand Island upon which the shack was situated is the property of the State of Hawaii. The occupants of the structure were, therefore, squatters on government property. And in this connection, it has been held that squatters are not protected by the Fourth Amendment protection against warrantless searches and seizures. Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975). In Amezquita a group of squatters had occupied part of a farm owned by the Commonwealth of Puerto Rico. They built their homes on the land and were living on the premises when, less than three months later, government agents moved in with bulldozers and began demolishing buildings which they found to be uninhabited. On two prior occasions the squatters had been requested by the government to remove themselves voluntarily from the property. One of the issues before the court was whether the government had the unfettered right to go "looking into and poking through" the homes of some of the squatters without prior judicial authorization. In holding that the squatters had

no reasonable expectation of privacy in the dwellings they had erected without the permission of the government, the First Circuit Court of Appeals observed:

> Nothing in the record suggests that the squatters' entry upon the land was sanctioned in any way by the Commonwealth. The plaintiffs knew they had no colorable claim to occupy the land; in fact, they had been asked twice by Commonwealth officials to depart voluntarily. That fact alone makes ludicrous any claim that they had a reasonable expectation of privacy. 518 F.2d at 11.

In determining whether the defendants in the present case had a reasonable expectation of privacy in the area searched, a two-fold test is to be applied: (1) whether they had exhibited an actual expectation of privacy, and (2) whether the expectation was one which society would deem to be reasonable. State v. Kaaheena, 59 Haw. 23, 575 P.2d 462 (1978); State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977). A man's dwelling, generally, is a place where he expects privacy, and except as to conduct, objects, and statements which he knowingly exposes to public view, he will be deemed to have exhibited an actual expectation of privacy therein. See United States v. Botelho, 360 F.Supp. 620 (D.Haw.1973). This expectation, however, must be one which is recognized by society to be reasonable, and under Amezquita the defendants would be foreclosed from asserting privacy claims under the Fourth Amendment. But while we agree with the basic rule adopted by the court in that case, there are other circumstances here which impel us to reach a different result. In so doing, we have taken judicial notice of the fact that "Squatters' Row" on Sand Island has been allowed to exist by sufferance of the State for a considerable period of time. And although no tenancy under property concepts was thereby created, we think that this long acquiescence by the government has given rise to a reasonable expectation of privacy on the part of the defendants, at least with respect to the interior of the building itself. This, we think, is consistent not only with reason but also with our traditional notions of fair play and justice.

This particular finding, however, does not end our inquiry. The defendants may not now complain of the conduct of Officer Pedro in walking up as close to the shack as he did. While they were entitled to their privacy within the building, they did not have exclusive rights to the land upon which it was situated. This was public property, and they had no right to expect that members of the public, including curious passersby, might not approach as close to the shack as the officer did in this case. Cf. State v. Hook, 60 Haw. 197, 587 P.2d 1224 (1978); Ponce v. Craven, 409 F.2d 621 (9th Cir. 1969). Standing at arm's length from the shack, the officer was able to see into the interior of the building. The gap between the two sections of the doorway was wide enough to enable the officer to observe without any difficulty the prohibited activity which was taking place within the premises. Even before reaching his vantage point, he was able to hear voices and sounds associated with gambling activity. And what a person knowingly exposes to the view and hearing of outsiders is not a subject of Fourth Amendment protection. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); State v. Texeira, Haw., 609 P.2d 131 (1980). If the defendants did not wish to be observed, they could have covered the opening in the split doorway. If they did not wish to be overheard, they could have comported themselves accordingly. Conduct open to view and conversations audible to persons standing outside of a building constitute activities knowingly exposed to the public. Ponce v.

Craven, supra. Accordingly, we hold that as to the visual and aural observations made by Officer Pedro from outside the building, the motion to suppress was improvidently granted. He could testify to what he saw and heard. State v. Texeira, supra.

Evidence obtained following the warrantless entry, however, was properly suppressed. Absent exigent circumstances, the police may not enter a private building or dwelling without either a search warrant or a warrant of arrest. State v. Texeira, supra; State v. Lloyd, 61 Haw. 505, 606 P.2d 913 (1980). Exigent circumstances exist when immediate police action is required to prevent imminent danger to life or serious damage to property, or to forestall the likely escape of a suspect or the threatened removal or destruction of evidence. Id. If, for example, the delay occasioned by the application for, and the issuance of, a warrant would likely result in the escape of a suspect or the removal or destruction of evidence, the police would be authorized to proceed without a warrant. But the justification for the warrantless entry *57 must rest on more than their subjective belief that escape or destruction of evidence was imminent. United States v. Brewer, 343 F.Supp. 468 (D.Haw.1972). The police must be able to point to specific and articulable facts from which it may be determined that the action they took was necessitated by the exigencies of the situation. In State v. Lloyd, supra, the police were faced with conditions which are illustrative. There the defendant was suspected of being in possession of contraband. After seeing him pick up a box allegedly containing marijuana at the airport, the police followed him to his residence. Two of the officers then walked to his front door, knocked, and identified themselves as police officers. Immediately thereafter, they heard persons inside "scurrying about" and then a loud "crashing sound" towards the back of the house. The conduct of the occupants was clearly indicative of flight, and this court held that in the circumstances the warrantless entry was justified.

Whether conditions were such as to authorize the police to bypass the warrant requirement must, of course, necessarily depend upon the facts of the particular case. But the burden is always on the government to show that the conduct of its agents fell within the exception. Katz v. United States, supra; Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970); United States v. Brewer, supra. In the case before us, no such showing has been made.

Here, as in Texeira, the information that gambling was in progress at a given location came from a known and reliable police informant. On the basis of the latter's report, the police might have immediately begun the initial preparations for a search or arrest warrant. Instead, Officer Pedro proceeded directly to Sand Island, arriving there shortly after 11:00 p. m., where he made his own observations. Even then, he might have transmitted this information to headquarters or to other police officers to enable them to apply for a warrant. The game was still in progress, and there was no indication that the game was about to break up or that the players were about to disperse. None of the players was aware of the officer's presence, and as far as the record shows he was in no danger of being discovered. See United States v. Curran, 498 F.2d 30 (9th Cir. 1974). In short, there was absolutely no showing by the State that it would have been impracticable for the police to obtain a warrant, or that the delay attendant upon obtaining prior judicial approval would have likely resulted in the escape of the defendants or the removal or destruction of evidence. State v. Texeira, supra. And as we pointed out in Texeira, mere inconvenience to

the police, or to the judge to whom the application for a warrant is presented, is never a valid reason for by-passing the warrant requirement.

> (T)he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1947).

Reversed in part and affirmed in part, and remanded for further proceedings consistent with this opinion.

2-8 UNITED STATES V. RUCKMAN, 806 F.2D 1471 (10TH CIR. 1986)

806 F.2d 1471

United States Court of Appeals,

Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Frank William RUCKMAN, Defendant-Appellant.

No. 85-2731. Dec. 18, 1986.

Opinion

McWILLIAMS, Circuit Judge.

Frank William Ruckman was convicted August 7, 1985, by a jury for the unlawful possession of destructive devices within the meaning of 26 U.S.C. § 5845(f)(3), namely, the possession of 13 anti-personnel booby traps which were not registered to Ruckman in the National Firearms Registration and Transfer Record as required by 26 U.S.C. § 5841, all in violation of 26 U.S.C. § 5861(d). Ruckman was given a suspended sentence and placed on probation for three years. Ruckman now appeals. We affirm.

Prior to trial, Ruckman moved to suppress the use at trial of any and all physical evidence seized in a warrantless search *1472 of his "home." This search resulted in the seizure, inter alia, of the items which formed the basis for the charge above referred to. No testimony was offered at the hearing on the motion to suppress, counsel for Ruckman and the United States being in apparent agreement as to the critical facts. After argument of counsel, which included considerable colloquy between counsel and the court, the court, by minute order, denied the motion without any comment. Accordingly, we do not have benefit of the trial court's thinking on the issue raised.

From the record, it is agreed that the "home" which was searched by the authorities was a "cave" located in a remote area some 24 miles northeast of St. George, Utah, on land owned by the United States and controlled by the Bureau of Land Management (BLM). It is referred to as being a "natural cave," as opposed, apparently, to a "man-made cave." Ruckman had lived in and around the cave some eight months prior to the events which formed the basis for the present proceeding. Ruckman had attempted to "enclose" the cave by fashioning a crude entrance wall from boards and other materials which surrounded a so-called "door."

The fact that Ruckman was living in the cave area apparently became known to the local authorities. A state warrant calling for Ruckman's arrest issued when Ruckman failed to appear in state court to answer a misdemeanor charge. State and federal authorities later went to the cave area to arrest Ruckman on the state warrant. When the authorities arrived at the scene, Ruckman was nowhere to be found. In this setting, the authorities searched the cave. Certain firearms were found and seized. About this time, Ruckman appeared on the scene, and he was arrested and given his Miranda warning. Asked if there were any other weapons in the cave, Ruckman stated that there was a "shotgun in the corner." The shotgun was located and seized. Ruckman was then taken to the local jail.

Eight days later, the BLM agents and local authorities returned to the cave to "clean it out" and remove Ruckman's belongings. In cleaning out, the authorities found, and seized, the anti-personnel booby traps which formed the basis for the present prosecution. Counsel agree that the ultimate issue is whether Ruckman had a right under the Fourth Amendment to be free from search, without a warrant, of his "home," in this case a natural cave, and counsel further agree that the more immediate issue is whether Ruckman had a subjective expectation of privacy in the cave, and, if so, whether his expectation is one which society is prepared to recognize as being reasonable under the circumstances. Katz v. United States, 389 U.S. 347 (1967). See also Rakas v. Illinois, 439 U.S. 128 (1978).

We shall assume that Ruckman entertained a subjective expectation of privacy, i.e., absent a search warrant or probable cause or exigent circumstances, none of which is contended for by the government, his cave could not be searched by any law enforcement officers without violating Fourth Amendment rights. However, the record, as we read it, contains no statement by Ruckman that he had any subjective expectation of privacy. Perhaps the filing of the motion to suppress presupposes such subjective expectation. In any event, we assume such subjective expectation. No doubt Ruckman would so testify. The real issue is whether such subjective expectation is reasonable under the circumstances of the case. Stated differently, the issue is whether the cave comes within the ambit of the Fourth Amendment's prohibition of unreasonable searches of "houses." Under the circumstances, we conclude that Ruckman's cave is not subject to the protection of the Fourth Amendment.

Ruckman was admittedly a trespasser on federal lands and subject to immediate ejectment. With respect to its own lands, the government has the rights of an ordinary proprietor, i.e., to maintain its possession *1473 and to prosecute trespassers. United States v. Osterlund, 505 F.Supp. 165, 167 (D.Colo.1981), aff'd, 671 F.2d 1267 (10th Cir.1982). While he had been living off the land for several months, the cave could hardly be considered a permanent residence. Counsel himself describes Ruckman as "just camping out there for an extended period of time." Ruckman's subjective expectation of privacy is not reasonable in light of the fact that he could be ousted by BLM authorities from the place he was occupying at any time. While it has been often stated, the Fourth Amendment protects people, and not places (Katz, supra, 389 U.S. at 353), any determination of just what protection is to be given requires, in a given case, some reference to a place. And the place in this instance was on federal (BLM) land. The government's authority over federal lands has been clearly stated by the Supreme Court. "[T]he power over the public land thus entrusted to Congress is without limitations." United States v. San Francisco, 310 U.S. 16 (1940), reh'g denied, 310 U.S. 657 (1940). This power derives from the Constitution. "[A]rticle IV, § 3, cl. 2 of the Constitution provides that 'the Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' " Id. A necessary ancillary to this regulatory power over lands within the public domain is the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights...." Utah Power & Light Co. v. United States, 243 U.S. 389 (1917). The Fourth Amendment itself proscribes, inter alia, an unreasonable search of "houses." Without belaboring the matter, we decline to hold that the instant case comes within the ambit of the Fourth Amendment. The fact that Ruckman may have subjectively deemed the cave to be his "castle" is not decisive of the present problem. As a Ninth Circuit case involving invalid mining claims on public lands pointed out, "[A] person, under the guise of repeatedly locating invalid mining claims, may not use public lands primarily for residential purposes." United States v. Allen, 578 F.2d 236 (9th Cir.1978).

We do not regard the circumstances underlying the "public telephone booth" (Katz, supra) or "public restroom" (People v. Triggs, 95 Nev. 436 (1973)) cases to be of particular relevance. The "open field" cases perhaps have more relevance. In explaining the distinction between "open fields" and the "certain enclaves" which should be free from arbitrary government interference, the Supreme Court has noted that, as a practical matter, "open fields" usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be. Oliver v. United States, 466 U.S. 170 (1984). This Court has found that a person has no legitimate expectation of privacy even in his own private property where that property is surrounded by barbed wire fences, even if there are "No Trespassing" signs posted. United States v. Rucinski, 658 F.2d 741 (10th Cir.1981), cert. denied, 455 U.S. 939 (1982). Other cases with some degree

of relevancy include People v. Sumlin, 431 N.Y.S.2d 967 (1980), in which the New York County Supreme Court held that a casual guest of the employee of a squatter in a city-owned abandoned building did not have any expectation of privacy and that defendant, as a trespasser who was wrongly on premises, could not claim Fourth Amendment violation of rights. Id., at 969-70. In People v. Smith, 448 N.Y.S.2d 404 (1982), the court held that even if defendant was a subtenant, he could not derive any rights from one who has none, i.e., a squatter. Id., 406. A case having perhaps greater relevance than those above cited is Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir.1975), cert. denied, 424 U.S. 916 (1976). There "squatters" *1474 moved onto land owned by the Commonwealth of Puerto Rico and built structures thereon. When the government threatened to oust them, the squatters brought a civil rights action seeking injunctive relief and damages. The district court ruled for the squatters. On appeal, the First Circuit reversed. In holding that the squatters had no reasonable or legitimate expectation of privacy, the First Circuit opined that, under the circumstances of that case, a claim that the squatters had a reasonable expectation of privacy was "ludicrous." Amezquita, supra, at 11. (Legitimacy of a privacy claim is determined by the totality of the circumstances. Rakas, supra, 439 U.S. at 152. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity but whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. Oliver, supra, 466 U.S. at 182-83. Further, considering what constitutes a "home" for Fourth Amendment purposes, the First Circuit commented as follows:

But whether a place constitutes a person's "home" for this purpose cannot be decided without any attention to its location or the means by which it was acquired; that is, whether the occupancy and construction were in bad faith is highly relevant. Where the plaintiffs had no legal right to occupy the land and build structures on it, those faits accomplis could give rise to no reasonable expectation of privacy even if the plaintiffs did own the resulting structures.

Amezquita, supra, at 12.

Judgment affirmed.

McKAY, Circuit Judge, dissenting:

The majority's opinion is a threat to those who fish in the Wind River mountains, those who enjoy survivalist expeditions, and those senior citizens in their recreational vehicles in Bryce Canyon National Park who hold "Golden Eagle" or "Golden Age" Passports. Under the majority's sweeping language, they could be found at any time to be "trespassing" on federal lands and be stripped of any legitimate expectation of privacy in their temporary dwellings, since those dwellings fail to constitute "houses." The majority, in effect, holds that the right of anyone who is on public lands to be free from warrantless searches turns on

whether they have overstayed their permit. Failing, presumably even on technical grounds, to have a "legal right" to occupy land prevents any reasonable expectation of privacy in a dwelling on such land from arising, even if one owns the structure searched on the illegally occupied land.

The court reaches its expansive result by first articulating the issue at hand as "whether the cave comes within the ambit of the Fourth Amendment's prohibition of unreasonable searches of 'houses.' " Maj. op. at 1472. That Mr. Ruckman lived in the cave for eight months, constructed a wall and door to the cave with wooden boards and other material, and installed the rudimentary comforts of home (including a bed, camp stove, and lantern) is not enough, says the court, to raise the fourth amendment priority that has always attached to one's residence, Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980), since he was "just camping out there for an extended period of time." Maj. op. at 1473. This conclusion is at odds with the multiple concessions on the part of the Government that Mr. Ruckman was "living" in the cave. See Statement of Attorney for the Government, Transcript of Hearing on Motions at 21-22 ("the Government searched that place which he was clearly using as a dwelling and they did that without a warrant"); record, vol. 1, document 11, at 2 ("Inside the dwelling was clear evidence that a person was living in and occupying that space."); Id. at 4 (Government conceding that defendant "moved in"); Brief of United States at 5 (referring to cave "he was living in"); Id. at 6 (referring to cave "in which he was living"). Moreover, although phrasing the issue as whether the cave constitutes a "house," much of the court's reasoning immediately following fails to analyze the characteristics of a house, but rather focuses on the fact that Mr. Ruckman was a "trespasser" on federal lands and, as such, could not have a reasonable expectation of privacy in his wilderness home. Viewing these as separate grounds for the court's holding, I find both fundamentally flawed and must respectfully dissent.

First, a finding that the cave fails to qualify as a "house" does not automatically mean that no legitimate expectation of privacy can attach to the cave for fourth amendment purposes. Even if Mr. Ruckman was "just camping out there for an extended period of time," it is not clear to me at all that a camper has no legitimate expectation of privacy in his temporary dwelling.

*1476 After declining to equate the cave with a house, the court jumps to the conclusion that Mr. Ruckman can have no legitimate expectation of privacy in the cave. This analysis implicitly assumes that only homes and houses are accorded fourth amendment protection. This is simply untrue. The Supreme Court acknowledged as much when it recognized "the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." Rakas v. Illinois, 439 U.S. 128, 142, 99 S.Ct. 421, 429, 58 L.Ed.2d 387 (1978) (citing Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)). In ending the analysis after the myopic inquiry as to whether a cave is a house, the court fails to appreciate

both the underlying, broader concerns of the fourth amendment and the ramifications its opinion will have in other contexts. Such inquiries as the court's are, of course, relevant as helpful guides, but should not be undertaken mechanistically. They are not ends in themselves; they merely aid in evaluating the ultimate question in all fourth amendment cases-whether the defendant had a legitimate expectation of privacy, in the eyes of our society, in the area searched.

Second, that Mr. Ruckman may have been a "trespasser" on federal lands should not be dispositive-either in good sense or in keeping with the evolution of fourth amendment theory. Such a position can lead to absurd results. Take, for example, the camper whose "Golden Eagle Passport," see 36 C.F.R. § 71.5 (1985), has expired but yet who nevertheless remains on federal land an extra day. Is he suddenly stripped at midnight of any reasonable expectation of privacy in his tent or recreational vehicle? The court includes privately owned structures in its sweep. Can they now be searched at will by Government authorities, even though at a minute before midnight, such a search would violate the camper's fourth amendment rights? A right as fundamental as the right to be free from unreasonable searches and seizures should not turn on the mere happenstance of a permit's expiration date. Yet, that is the effect of the majority's holding.

Moreover, what of those BLM lands that are not "Designated Entrance Fee Areas" under 36 C.F.R. § 71.3 (1985), as is likely the case here? Regulations issued by the Secretary of the Interior to control the "use, occupancy and development of the public lands through leases, permits and easements," 43 C.F.R. § 2920.0-3 (1985), pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1732, 1740 (1982), create some doubt whether Mr. Ruckman was, indeed, using federal land in an unauthorized manner. The Secretary's regulations state that "[n]o land use authorization is required under the regulations of this part for casual use of the public lands." 43 C.F.R. § 2920.1(d) (1985). "Casual use" is defined as "any short term non-commercial activity which does not cause appreciable damage or disturbance to the public lands, their resources or improvements, and which is not prohibited by closure of the lands to such activities." 43 C.F.R. § 2920.0-5(k) (1985). The Government has made no showing that the land encompassing the cave here was "prohibited by closure." Whether an eight-month residency in this cave constitutes "short term" activity is admittedly subject to debate. The Government, however, has not carried its burden of showing that Mr. Ruckman was a trespasser, other than to repeatedly refer to the cave as "the government cave." Brief of Plaintiff-Appellee at 3, 6; record, vol. 1, document 11, at 4.

More fundamental and worrisome than these observations, however, is that the court takes a giant step backward in fourth amendment analysis when it hinges its determination of whether Mr. Ruckman had a legitimate expectation of privacy in his dwelling on whether or not he was a "trespasser." In the early days of fourth amendment doctrine, property interests were not only a central tenet of search and seizure analysis, they were determinative. Persons aggrieved by searches and seizures needed to prove a property

interest in the place searched or item seized superior to that of the Government's in order to gain redress through an action for trespass or replevin. So strong was the notion of property interests to search and seizure doctrine that "[n]o separate governmental interest in seizing evidence to apprehend and convict criminals was recognized; it was required that some property interest be asserted"-a rule better known as the "mere evidence" rule. Warden v. Hayden, 387 U.S. 294 (1967). Similarly, no fourth amendment violation was deemed to occur without a trespass by the Government upon property of the defendant-a rule better known as the "trespass doctrine." Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928). However, as our society evolved, the emphasis of the protection we enjoy from unreasonable governmental searches and seizures also evolved. Nearly twenty years ago, the Supreme Court recognized this evolution:

> The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.

Warden, 387 U.S. at 304.

The landmark case of Katz v. United States, 389 U.S. 347 (1967), cemented this privacy perspective when it disregarded the "trespass doctrine" enunciated in Olmstead and Goldman. Recognizing that, in our modern society, the fourth amendment "protects people, not places," the Court declared that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Id. at 351-52, (emphasis added). Replacing the outmoded property-interest test was one articulated in Justice Harlan's concurrence: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " Id. at 361.

This focus on the expectation of privacy rather than on legal property interests in the place searched or items seized has not diminished since Katz; it has grown stronger. In Rakas, the Court stated that arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control....

... Katz held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

439 U.S. at 143 (emphasis added). In other words, failing to have a legal property right in the invaded place does not, ipso facto, mean that no legitimate expectation of privacy can attach to that place. If it did, the above-quoted sentence describing Katz would be nonsensical, for fourth amendment protection would then, indeed, turn on a property right in the invaded place. Yet, this archaic analysis is the very analysis to which the majority subscribes. In Rakas, the Court reiterated that "[e]xpectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion *1478 of such an interest." Id. at 144 ; see also United States v. Salvucci, 448 U.S. 83 (1980) ("This Court has repeatedly repudiated the notion that 'arcane distinctions developed in property and tort law' ought to control our Fourth Amendment inquiry." (citing Rakas)); Rawlings v. Kentucky, 448 U.S. 98 (1980) ("Rakas emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment."). To reach its result, the majority in this case, by reverting to discredited notions and obsolete fourth amendment analysis, flies in the face of this evolutionary precedent and of what the fourth amendment attempts to protect for us all.

So, at bottom, the critical inquiry here should be whether Mr. Ruckman had a legitimate expectation of privacy in the cave, so that he should be free, not from all searches, but from unreasonable searches-those undertaken without a warrant, as in this case, and without justification to forego a warrant.5 Discussions concerning whether Mr. Ruckman was a "trespasser" or whether the cave was a "house" are merely red herrings when they mask this essential inquiry.

The court assumes that Mr. Ruckman entertained a subjective expectation of privacy and states that the "real issue is whether such subjective expectation is reasonable." Maj. op. at 1472. I believe his expectation of privacy in his wilderness home was both reasonable and legitimate. It was perfectly legitimate for him to expect to be free from a warrantless search of the dwelling in which he lived continuously for eight months. He "took normal precautions to maintain his privacy," Rawlings, 448 U.S. at 105, by building a wall with a door of wooden boards and other materials, thereby sealing off the entrance to the cave. All his personal belongings were located therein. The cave was his sole living quarters in every sense, furnished with a bed and other crude furniture. This finding does not mean that Mr. Ruckman was entitled to live in this cave. It does not mean that the Government has no recourse to remove him; the Government is free to prosecute him for any laws he may have violated. It simply means that the Government may not search his dwelling without a search warrant, as prescribed by the fourth amendment, or without sufficient justification excusing the warrant. The fact that Mr. Ruckman may have violated a federal law by living in this cave (a fact not established by this record) simply does not strip him of all his constitutional rights-just as the camper who overstays his Golden Eagle Passport, and thus trespasses on federal land, does not thereby forfeit his right to be free from warrantless searches of his tent or recreational vehicle in the absence of an exception to the warrant requirement. If anything, I would expect the legitimacy of "trespassing" Mr. Ruckman's

expectation of privacy to be more clear-cut than that of the trespassing camper. The camper's residency in his tent would usually be extremely short term, unlike the eight months Mr. Ruckman spent living in the cave. Moreover, the camper concededly has another, primary residency, whereas Mr. Ruckman's sole living quarters were this cave.

I would, therefore, reverse.

2-9 MARULLO V. UNITED STATES, 328 F.2D 361 (5TH CIR. 1964)

328 F.2d 361

United States Court of Appeals Fifth Circuit.

Anthony Paul MARULLO, Appellant,

v.

UNITED STATES of America, Appellee.

No. 20756.Feb. 25, 1964.Rehearing Denied April 8, 1964.

Opinion

WISDOM, Circuit Judge.

In January 1962 five men broke into a post office in Florida and made off with the safe. Among the contents were a money order validating stamp and 681 blank money order forms. Anthony Marullo, the defendant-appellant, although not involved in the burglary, agreed to take a hundred of the money orders on consignment and to pay $25 for each one successfully negotiated. At the time, Marullo and Joseph Ricks were renting a room in the Pines Motel in Jefferson Parish near New Orleans. Ricks had the misfortune to ask his uncle, Jesse Krause, then managing the Playhouse Bar in New Orleans, to pass the money orders. Krause agreed to do so. Instead, however, he reported the whole story to the postal authorities who persuaded him to act as their agent in his transactions with Ricks and Marullo. Krause met the two men in the Playhouse Bar and paid Ricks $70 for a $90 money order. Shortly after this occurred, New Orleans police officers picked up Ricks and Krause and took them to the First District police station. Marullo, who had left the Bar just as the police officers approached, was picked up later and also taken to the station. While Ricks was in custody and still under the impression that Krause was a co-conspirator, Ricks told Krause that the money orders were under the cabin at the Pines Motel. He asked him to obtain them and destroy them, should Krause not be booked.

Krause was released after he had been in custody about fifteen minutes. Then Krause, with a postal inspector and police officers, drove out to the Pines Motel, where they were met by Jefferson Parish officers. They went into the room where Ricks and Marullo had been staying. There they found one of the stolen money orders in 'somebody's' trousers. After the officers searched the room, Krause went outside and crawled under the cabin, which rested on brick pillars and was about one to two feet off the ground. He removed from the top of one of the pillars a paper bag. Inside the bag were stamp pads, ink, date stamps,

validating stamps and, needless to say, a number of the missing money orders.

It is undisputed that the search was conducted without a warrant. Both Ricks and Marullo were then in custody.

At the trial the money order extracted from 'somebody's' trousers was excluded by the court. The articles in the paper bag were admitted over objections of counsel and after a hearing on a motion to suppress, granted under Rule 41(e), C.F.Crim.P.

Marullo was indicted for conspiring, in violation of 18 U.S.C.A. § 371, to steal, convert, receive, and conceal stolen Government property, consisting of postage stamps, cash, and money orders, and for the false making of the money orders so obtained.

*363 He was tried alone before a jury. Upon the jury's verdict of guilty, and after denial of his motion for a new trial, he was adjudged guilty and sentenced to the custody of the Attorney General for three years. This appeal, taken in forma pauperis, followed.

The able and resourceful attorney for the appellant contends that the area under a house is within the curtilage and is therefore protected from unreasonable searches by the Fourth Amendment. This is a persuasive argument. It would be more persuasive if the validity of searches and seizure turned only on 'curtilage'. Webster's New Third International Dictionary (1962) defines it as a 'yard, courtyard, or other piece of ground included within the fence surrounding a dwelling house'. But the Constitution does not speak of curtilage. It speaks of the people's right to be secure in their 'houses' against unreasonable searches and seizures. Carroll v. United States, U.S. 1925, (cite omitted.) The Fourth Amendment provides:

'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

This case is controlled by Giacona v. United States, 5 Cir. 1958, (cite omitted). In Giacona a narcotics agent, acting on reliable information, found marijuana in tobacco cans in a paper bag hidden on foundation blocks supporting the building in which the defendant ran a grocery store. He opened the bag, examined the contents, and restored it to its hiding place. The next morning a fellow agent secured a warrant to search the premises. That evening the agent saw the defendant throw something under the house, and arrested him. They recovered the bag and, later, it was admitted in evidence. At the trial the defendant objected to both searches. Since there was no warrant in the instant case, only the Giacona holding on the first search is relevant.

In Giacona this Court upheld the reasonableness of the search, pointing out that the 'preliminary search did not extend to the inside of the store building, but was confined to the top of a foundation block, only a foot or two removed from the 'open fields' which are not within the protection of the Fourth Amendment'; what 'may be unreasonable in a search of a man's house, may be entirely reasonable in a search of his place of business.'

Here too the search which is under attack was limited to a specific area under the house. (The money order seized in the search of the room was excluded.)

A private home is quite different from a place of business or from a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings, and also the area under his home. But a transient occupant of a motel must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home.

As Judge Burger, dissenting, said in Work v. United States, U.S. S.Ct. 1957, (cite omitted): 'The Fourth Amendment was designed to safeguard the individual's right of privacy in his home and in his personal effects against arbitrary intrusion by government officials. I cannot find a fundamental constitutional right to privacy in the garbage or trash pail of a rooming house where the receptacle is located out of doors in sight from the street and where there is an admitted constant invitation to the public authorities of the District to remove the contents as refuse.'

*364 Nor can we find a motel occupant's right to privacy in the top of a brick pillar supporting the motel cabin so that there is just about enough room for a man to crawl on the ground under the cabin.

The judgment is affirmed.

2-10 CALIFORNIA V. GREENWOOD, 108 S.CT. 1625 (1988)

108 S.Ct. 1625

Supreme Court of the United States

CALIFORNIA, Petitioner

v.

Billy GREENWOOD and Dyanne Van Houten.

No. 86-684. Argued Jan. 11, 1988.Decided May 16, 1988.

*37 Justice WHITE delivered the opinion of the Court.

The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not.

In early 1984, Investigator Jenny Stracner of the Laguna Beach Police Department received information indicating that respondent Greenwood might be engaged in narcotics trafficking. Stracner learned that a criminal suspect had informed a federal drug enforcement agent in February 1984 that a truck filled with illegal drugs was en route to the Laguna Beach address at which Greenwood resided. In addition, a neighbor complained of heavy vehicular traffic late at night in front of Greenwood's single-family home. The neighbor reported that the vehicles remained at Greenwood's house for only a few minutes.Stracner sought to investigate this information by conducting a surveillance of Greenwood's home. She observed several vehicles make brief stops at the house during the late-night and early morning hours, and she followed a truck from the house to a residence that had previously been under investigation as a narcotics-trafficking location.On April 6, 1984, Stracner asked the neighborhood's regular trash collector to pick up the plastic garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses. The trash collector cleaned his truck bin of other refuse, collected the garbage bags from the street in front of Greenwood's house, and turned the bags over to Stracner. The officer searched through the rubbish *38 and found items indicative of narcotics use. She recited the information that she had gleaned from the trash search in an affidavit in support of a warrant to search Greenwood's home.

Police officers encountered both respondents at the house later that day when they arrived to execute

the warrant. The police discovered quantities of cocaine and hashish during their search of the house. Respondents were arrested on felony narcotics charges. They subsequently posted bail.

The police continued to receive reports of many late-night visitors to the Greenwood house. On May 4, Investigator Robert Rahaeuser obtained Greenwood's garbage from the regular trash collector in the same manner as had Stracner. The garbage again contained evidence of narcotics use.

Rahaeuser secured another search warrant for Greenwood's home based on the information from the second trash search. The police found more narcotics and evidence of narcotics trafficking when they **1628 executed the warrant. Greenwood was again arrested.

The Superior Court dismissed the charges against respondents on the authority of People v. Krivda, 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971), which held that warrantless trash searches violate the Fourth Amendment and the California Constitution. The court found that the police would not have had probable cause to search the Greenwood home without the evidence obtained from the trash searches.

The Court of Appeal affirmed. 182 Cal.App.3d 729, 227 Cal.Rptr. 539 (1986). The court noted at the outset that the fruits of warrantless trash searches could no longer be suppressed if Krivda were based only on the California Constitution, because since 1982 the State has barred the suppression of evidence seized in violation of California law but not federal law. (cite omitted). But Krivda, a decision binding on the Court of Appeal, also held that the fruits of warrantless trash searches were to be excluded under federal *39 law. Hence, the Superior Court was correct in dismissing the charges against respondents. (cite omitted).

The California Supreme Court denied the State's petition for review of the Court of Appeal's decision. We granted certiorari, 483 U.S. 1019, 107 S.Ct. 3260, 97 L.Ed.2d 760 and now reverse.The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable. (cite omitted). Respondents do not disagree with this standard. They assert, however, that they had, and exhibited, an expectation of privacy with respect to the trash that was searched by the police: The trash, which was placed on the street for collection at a fixed time, was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others, and deposit at the garbage dump. The trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone.

It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, *40 however, unless society is prepared to accept that expectation as objectively reasonable.

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, FN2 children, scavengers,**1629 FN3 snoops,FN4 and other members of the public. (cite omitted) Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for *41 public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," (cite omitted), respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

FN2. For example, State v. Ronngren, 361 N.W.2d 224 (N.D.1985), involved the search of a garbage bag that a dog, acting "at the behest of no one," id., at 228, had dragged from the defendants' yard into the yard of a neighbor. The neighbor deposited the bag in his own trash can, which he later permitted the police to search. The North Dakota Supreme Court held that the search of the garbage bag did not violate the defendants' Fourth Amendment rights.

FN3. It is not only the homeless of the Nation's cities who make use of others' refuse. For example, a nationally syndicated consumer columnist has suggested that apartment dwellers obtain cents-off coupons by "mak[ing] friends with the fellow who handles the trash" in their buildings, and has recounted the tale of "the 'Rich lady' from Westmont who once a week puts on rubber gloves and hip boots and wades into the town garbage dump looking for labels and other proofs of purchase" needed to obtain manufacturers' refunds. M. Sloane, "The Supermarket Shopper's" 1980 Guide to Coupons and Refunds 74, 161 (1980).

FN4. Even the refuse of prominent Americans has not been invulnerable. In 1975, for example, a reporter for a weekly tabloid seized five bags of garbage from the sidewalk outside the home of Secretary of State Henry Kissinger. Washington Post, July 9, 1975, p. A1, col. 8. A newspaper editorial criticizing this journalistic "trash-picking" observed that "[e]vidently ... 'everybody does it.' " Washington Post, July 10, 1975, p. A18, col. 1. We of course do not, as the dissent implies, "bas[e] [our] conclusion" that individuals have no reasonable expectation of privacy in their garbage on this "sole incident." Post, at 1634.

Furthermore, as we have held, the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, (cite omitted). We held in Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), for example, that the police did not violate the Fourth Amendment by causing a pen register to be installed at the telephone company's offices to record the telephone numbers dialed by a criminal suspect. An individual has no legitimate expectation of privacy in the numbers dialed on his telephone, we reasoned, because he voluntarily conveys those numbers to the telephone company when he uses the telephone. Again, we observed that "a person has no legitimate expectation of privacy in

information he voluntarily turns over to third parties." (cite omitted).

Similarly, we held in California v. Ciraolo, supra, that the police were not required by the Fourth Amendment to obtain a warrant before conducting surveillance of the respondent's fenced backyard from a private plane flying at an altitude of 1,000 feet. We concluded that the respondent's expectation that his yard was protected from such surveillance was unreasonable because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." (cite omitted).

Our conclusion that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeals. (cite omitted). In addition, of those state appellate courts that have considered the issue, the vast majority have held that the police may conduct warrantless searches and seizures of garbage discarded in public areas. (cite omitted).

The judgment of the California Court of Appeal is therefore reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

2-11 KROEHLER V. SCOTT, 391 F.SUPP 1114 (1975)

Kroehler v. Scott

Civ. A. No. 74-1175.

United States District Court, E. D. Pennsylvania.

March 13, 1975.

MEMORANDUM AND ORDER

TROUTMAN, District Judge.

In this action under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985(3), plaintiffs seek an injunction prohibiting certain surveillance practices undertaken by defendants and a declaratory judgment that such surveillance deprived them of their constitutional right to privacy under the Fourth Amendment. By Memorandum and Order on August 2, 1974, this Court granted certification under F.R.Civ.P. 23(a) and (b)(2) of a class action.[1] Since the parties have filed a set of stipulations and exhibits, attached hereto as an Appendix, there are no outstanding factual issues which bar a decision on the merits.

These stipulations establish, inter alia, the following briefly stated salient facts. Certain of the defendants, in response to complaints of drug-related activity occurring in the public men's room at the Penn Central Railroad Station and at Long Park, both in Lancaster, initiated a program of surveillance designed to enable the defendants to apprehend persons involved in these criminal activities. As part of *1116 this program, holes were drilled in the ceilings directly above the toilet stalls to allow the defendants to peer covertly into the stall below and observe, unnoticed, whatever transpired. These clandestine observations were conducted intermittently during the period from January 10, 1974, to May 13, 1974 (Penn Central Station) and from August 3, 1973, to April 1, 1974 (Long Park) at times of most frequent use for a duration of one to two hours, but up to as much as seven hours. Defendants never sought a warrant or obtained judicial authorization prior to conducting any of this surveillance, which has resulted in approximately twenty arrests. The named plaintiffs have, on occasion, used the toilet facilities between August 3, 1973, and May 13, 1974. The total number of innocent persons covertly observed by defendants is unknown, as is their identity.

. . .

On the stipulated facts, the plaintiffs contend that they are entitled to a reasonable expectation of privacy

while using public toilet stalls and, as such, these expectations trigger the protections of the Fourth Amendment. Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1969); People v. Triggs, 8 Cal. 3d 884, 106 Cal. Rptr. 408, 506 P.2d 232 (1973). These protections, they argue, prohibit the defendants from covertly peering through a hole placed in the ceiling and into the toilet stalls without first obtaining a search warrant based upon a showing of probable cause that criminal activity was taking place therein or demonstrating at least the exigent circumstances which suspend the requirement of a warrant. Defendants counter with the assertion that persons using public toilet stalls are not entitled to the protections of the Fourth Amendment since no expectation of privacy is reasonably and properly generated in the use of such public facilities. Defendants point to the circumstances which gave rise to the surveillance — namely, numerous complaints of criminal activities . . . and conclude that the surveillance in question was constitutionally proper, prompted by the threat thus posed to the innocent public of which plaintiffs are members. Defendants rely heavily upon Smayda v. United States, 352 F.2d 251 (9th Cir.) cert. denied 382 U.S. 981, 86 S. Ct. 555, 15 L. Ed. 2d 471 (1966).

The crucial inquiry is whether a person utilizing a public toilet stall is entitled to be free from governmental intrusion in the form of clandestine observation absent a preliminary demonstration of probable cause warranting the conclusion that criminal activity is occurring. Stated differently, and more simply, the issue is whether the Fourth Amendment protects a person who temporarily occupies a toilet stall in a public restroom from observation through small ceiling vents designed exclusively for that purpose in search of suspected criminal activity of a drug-related or sexually-oriented nature. We look first to Katz v. United States, supra, which articulated the appropriate test to be utilized under the Fourth Amendment. In Katz, the Supreme Court held inadmissible, *1117 in a criminal prosecution, evidence which was procured by a warrantless electronic surveillance of a defendant's conversation in a telephone booth, despite the fact that the booth was designed for public use. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures". 389 U.S. 359, 88 S.Ct. at 515. Concluding that the absence of physical intrusion was not determinative, the Court held:

". . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. at 351-352, 88 S.Ct. at 511.

Justice Harlan observed:

". . . there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as `reasonable'.

. . . . . .

"The critical fact in this case is that `[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted. . . . The point is . . . that it is a temporarily private place whose momentary occupant's expectations are recognized as reasonable." Id. 361, 88 S. Ct. 517.

Once it has been determined that the circumstances justify an expectation of privacy which is subjectively and objectively reasonable, the Fourth Amendment requires that the detached restraint of a neutral official be interposed between the individual and the governmental intrusion.

"Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes', United States v. Jeffers, 342 U.S. 48, 51, 72 S. Ct. 93, 95, 96 L. Ed. 59, 64, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." [footnotes omitted] 389 U.S. 357, 88 S. Ct. 514.

In applying the expectation of privacy test to the facts and circumstances in question, we are persuaded that plaintiffs harbored reasonable expectations of privacy which are generally recognized as subjectively and objectively reasonable, and are thus entitled to Fourth Amendment protections.[3] It is uncontested that the defendants failed to procure a warrant prior to the commencement of the surveillance in question. See Stipulation 14. As such, we conclude the search was unreasonable per se. Katz, supra.

In reaching this conclusion, we have carefully analyzed the cases which have involved covert police observation of activities undertaken in toilet stalls in public restrooms. In People v. Trigg, supra, the Court held inadmissible evidence obtained by a police officer who had sequestered himself in a plumbing access area behind a toilet stall. The state argued that his visual observations did not constitute a "search" within the *1118 ambit of the Fourth Amendment since the toilet stall under surveillance had no door.[4] The police officer testified that even though the defendant had done nothing suspicious, the officer nevertheless sneaked into his observation post "in case there was a crime committed" as he had done approximately fifty times before. In holding the search illegal, the Court concluded:

"This would permit the police to make it a routine practice to observe from hidden vantage points the restroom conduct of the public whenever such activities do not occur within fully enclosed toilet stalls and would permit spying on the `innocent and guilty alike'. Most persons using public restrooms have no reason to suspect that a hidden agent of the state will observe them. The expectation of privacy a person has when he enters a restroom is reasonable and is not diminished or destroyed because the toilet stall being used lacks a door." 106 Cal. Rptr. 412, 506 P.2d 236.

In addition, it was noted that the rights of innocent persons to such privacy were concomitantly violated.

"In seeking to honor reasonable expectations of privacy throughout application of search and seizure law, we must consider the expectations of the innocent as well as the guilty. When innocent people are subjected to illegal searches — including when, as here, they do not even know their private parts and bodily functions are being exposed to the gaze of the law — their rights are violated even though such searches turn up no evidence of guilt." Id. 106 Cal.Rptr. 413-14, 506 P.2d 237-238.

. . .

We believe that defendants' reliance on Smayda v. United States, supra, People v. Young, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492 (1962) and People v. Norton, 209 Cal. App. 2d 73, 25 Cal. Rptr. 676 (1963) is misplaced. Smayda preceded Katz, and the Norton and Young cases were questioned in People v. Triggs, supra. Moreover, these cases are not binding on this Court and we decline to follow them.

*1119 We are neither unmindful of the numerous complaints of criminal activity which properly spurred the defendants to act expeditiously nor critical of police motivations aimed at ridding the community of criminal activity. However, we are compelled to safeguard zealously the fundamental guarantees embodied in the Constitution, particularly as they pertain to innocent and law-abiding citizens properly using public facilities. Therefore, we cannot ignore the fact that these surveillances swept into the gaze of the government not only those involved in criminal activity, but also countless innocent and unknowing persons who reasonably expected and were properly entitled to a modicum of privacy. The Fourth Amendment requires, at a minimum, the determination by a detached official that there is probable cause warranting a search prior to its commencement, or at least the presence of those rare exigent circumstances which justify a warrantless search. The warrantless and nonselective search of all individuals who happen to be in the area cannot be justified under the circumstances here involved.

In thus concluding, we recognize circumstances in which such surveillance practices might well satisfy Constitutional requirements. For example, should a law enforcement officer observe an individual enter the stall with drug-related paraphernalia or what appears to be such, his immediate surveillance of the stall in the manner here followed appears warranted. An appropriate order will be entered.

THE DECISION ON APPEAL FROM THE LOWER COURT

227 SE.3rd 234

Court of Appeals of Virginia,

Western Circuit.

The Commonwealth of VIRGINIA, Appellant,

v.

Raylynn A. STEVENS, Appellee.

No. 17-1234. Nov. 5, 2021.

Judge Armga, joined by Judge Legg, delivered the opinion of the Court:

This case comes before the court on appeal from the Lynchburg trial court. The Commonwealth challenges the trial judge's decision that the Defendant-Appellee, Stevens, had a subjective expectation of privacy in a duffel bag that was located under a freeway on-ramp and that the warrantless search of the duffel bag was unreasonable under the Fourth and, by extension, Fourteenth Amendment of the U.S. Constitution. The Commonwealth's argument is well taken and we reverse the decision of the lower court, finding that the contents of the duffel bag were not obtained in violation of the Fourth Amendment and are admissible in a trial against Appellee Stevens.

It is without question that the Appellee has rights afforded to her under the Fourth and Fourteenth Amendments. However, those rights are not absolute and hinge upon two threshold questions: First, whether the Appellee had a subjective expectation of privacy in her duffel bag and, second, whether society is prepared to recognize that expectation as reasonable. See Katz v. U.S. 389 U.S. 347, 361 (1967). For the following reasons, we find the Appellee did not have a subjective expectation of privacy her duffel bag and, that even if she did, it was not one which society would recognize as reasonable under the circumstances. The opinion of the trial court is reversed.

[Statement of Fact omitted for brevity]

Appellee Stevens contends she had a subjective expectation of privacy in her duffel bag and other personal items stored under the bridge, but the available facts before us in the record suggest otherwise. In both her

own statement and the statement of her friend, Sheila Davis, we see that the Appellee had recruited another person to watch over her belongings in her absence--and that would, logically, be assuming that a person can only watch over something if they are present and up for the task. First, it would seem Appellee has a hard time maintaining her belongings are private at the same time she admits that she had recruited another to watch over them in her absence. Second, society does not reasonably accept the fact that belongings that are left openly and in the care of another, for instance, are reasonably private. These circumstances, however, raise a larger question of privacy than what actually happened during this search. The police encountered an unhidden, unguarded, and un-private duffel bag.

We fail to see how duffel bag is different, in kind, from personal refuse one places out at the curb. See California v. Greenwood 486 U.S. 35 (1988). It also is unwatched, publicly open, yet subject to retrieval by the original owner of the refuse. It is sealed in bags that have to first be opened to reveal their contents and the Supreme Court has refused to grant the contents of those bags protection under the Fourth Amendment. Id. at 40. Similarly, here, the Appellee's bag was equally "accessible to animals, children, scavengers, snoops, and other members of the public." See Id. We would add the police to that list. In her statement, the Appellee admits that she's aware of their regular presence in the area--the propriety of their sweeps is irrelevant as it only matters whether Appellee would subjectively feel the contents of her bag would be private.

In the matter of these sweeps, Appellee acknowledges that she is unlawfully on public property and that she might be moved or relocated at any time by the acts of law enforcement. Thus, we also subscribe to the court's rationale in U.S. v. Ruckman 806 F.2d 1471 (10th Cir. 1986) finding that a trespasser on federal lands could not reasonably expect privacy in his illegal dwelling at the same time he knew of his own status as a trespasser and the looming prospect of removal by law enforcement.

Nor are we persuaded, even assuming she had an expectation of privacy, that her expectation of privacy would be one which society would recognize to be reasonable. Appellee might argue that her dwelling area was sufficiently protected by the ramp overhead and the dense brush to the sides to afford her privacy in the area she claimed for herself. This is the same rationale that the Supreme Court rejected and reversed in Oliver v. United States 446 U.S. 170, 173-174 (1984). There, the Supreme Court decided that the government's intrusion into an open field, even an open field on private property, was not an unreasonable search. Id. at 177. The Court ultimately held that an expectation of privacy about any items in an open field was "not an expectation that 'society recognizes as reasonable.'" Id. at 179. It can only follow from there that any opening of these public materials was a reasonable search—thus, the warrantless search of the bag is of no constitutional concern. Opening the bag to simply find out who it belonged to, even if performed by police personnel, is as reasonable as any other act performed with the bag given its location and apparent state of abandonment. It's as reasonable as Appellee expecting it could be stolen or torn into by wild animals, large or small. This opening by police, to which Appellee objects, is not fundamentally different in kind. In an open field, it's no more unreasonable to expect a bear to tear into the duffel bag than it is to

expect someone other than Stephens to find it and open it.

Therefore, Appellee Stevens had no Fourth Amendment right at issue and the warrantless search was both reasonable and lawful. The decision of the lower court is reversed.

Judge Rost, dissenting

I cannot, either by the force of law or conscience, join my learned colleagues in the decision they reach today. The majority's decision is not merely misguided by its reliance on inapplicable precedent, it's wholly out of step with the very text of the constitutional amendment it purports to interpret.

The text of the Fourth Amendment is necessary to repeat here, not simply because of its conspicuous absence from the majority's opinion, but because of the clear import of its terms. ***"The right of the people*** to be secure in their persons, houses, papers, ***and effects,*** against unreasonable searches and seizures ***shall not be violated...***" [Emphasis added.] The majority opinion seems to suggest that because Ms. Stevens's duffel bag was not in a house that it cannot find any protection under the law. The duffel bag, it says, was out in public, in an open field, and subject to scavengers and snoops. "If only the duffel bag had a home!" is the majority's unstated lament. The majority's persistent focus on the location of the bag virtually ignores the Fourth Amendment's proclamation that the right of privacy belongs to Ms. Stevens and it belongs to her to the extent she has a home, papers, or effects. To tie the protections of the amendment solely to the nature of the area surrounding Ms. Stevens or her effects is to disregard Supreme Court precedent and to effectively remove any claim of privacy from any homeless person anywhere in Virginia.

When a defendant and the government prosecuting him squabbled over whether a person in a glass phone booth was in a "constitutionally protected area" the Supreme Court corrected the mistaken focus of both parties, saying, "...this effort to decide whether or not a given 'area,' [is protected by the Constitution] deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places." Katz v. United States 88 S. Ct. 507, 511 (1967). Thus, as the Court considered whether the defendant would have had a subjective and reasonable expectation of privacy in the contents of his phone conversation, the Court focused on the fact that the conversation itself was closed into the booth by Katz's conscious choice to close the phone booth's door in order to exclude all listening ears. Id. at 511-512. I fail to see how the contents of Ms. Stevens's bag are any different from the contents of Mr. Katz's conversation. While the contents of each were "out" in public, they were still both hidden from the public's ear and the public's eye. Like Katz, Ms. Stevens did everything that was within her power to do to conceal the contents of the bag. As she is destitute and homeless, it is decidedly unreasonable to ask Ms. Stevens to secure herself a home in order to protect her bag further.

Furthermore, it could just as easily be argued that Ms. Stevens had established a legally recognized place of residence under the bridge. See Collier v. Menzel 176 Cal. App. 3d 24 (1985). Her personal statement

shows 6 months of continued presence under the ramp and reveals her intention to stay there for "as long as [she] could." [Citation omitted.] When dealing with the privacy rights of squatters on government lands, the Hawaii Supreme Court held that the squatter's had reasonable expectations of privacy given the government's long-standing unwillingness to evict them. Hawaii v. Dias 609 P.2d 637 (1980). Here, Ms. Stevens says in her statement that the police had never tried to evict her from under the ramp, though she'd already encountered them twice in the six months she'd lived under the ramp. [Citation omitted.]

The majority's reliance on U.S. v. Ruckman is misguided for two, key reasons. The first is obvious: it's not binding on this Court. Secondly, Ruckman guts the essence of the clear language of the Fourth Amendment and the Supreme Court's decision in Katz by effectively removing all privacy rights at all times from any homeless person. After all, there is not a single location, public or private, from which a homeless person cannot be evicted by virtue of some owner's superior right to the location. If you own nothing, you live in a world owned entirely by someone or something other than you. By the majority's reliance on Ruckman, it too holds that the ability of the government to remove someone from its land somehow also means that the person to be removed has no privacy while still on that land—as if it were not bad enough to effectively label every homeless United States citizen a trespasser.

The majority's invocation of the open fields doctrine from Oliver is equally mistaken. It ought to be evident that Ms. Stevens's zipped and sealed duffel bag, enclosing most of what she owns, is more like a tool shed that sits next to an open field rather than the marijuana that is openly growing in it. Thus, the Oliver analogy simply doesn't fit here.

A homeless person cannot be forced to surrender their Fourth Amendment rights as the circumstances or misfortunes of life force them out onto the streets or up under the shelter of a freeway on-ramp. Because that is the practical and miserable effect of the majority's decision today,

I dissent.