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Adoue v. State, 408 So. 2d 567 (Fla. 1981)

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Criminal Law—"PLAIN VIEW" AND THE "PLAIN VIEW DOCTRINE"—*Adoue v. State*, 408 So. 2d 567 (Fla. 1981)

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."[1] This admonition by Justice Bradley nearly a century ago still has much relevance today. Indeed, the "plain view doctrine" in Florida seems to illustrate just such a practice. Confusion of the elements of the doctrine has resulted in its misapplication in many situations in Florida.[2] The Florida Supreme Court deemed it necessary to seize upon the opportunity presented in *Adoue v. State*[3] to clarify certain aspects of the "plain view doctrine." The significance of *Adoue*, therefore, is not in any new ground that was broken, but in the reconstruction and clarification of old ground—i.e., the correct application of the "plain view doctrine" and how it interrelates with the other exceptions to the search warrant requirement of the fourth amendment.[4]

The "plain view doctrine" evolved slowly into its present uncertain status in a long line of United States Supreme Court cases.[5] These cases culminated in the plurality opinion of *Coolidge v. New Hampshire*,[6] the leading exposition of the "plain view doctrine" to date.[7] Justice Stewart summarized the requirements of the doc-

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1. Boyd v. United States, 116 U.S. 616, 635 (1886).
2. *See* Ensor v. State, 403 So. 2d 349 (Fla. 1981).
3. 408 So. 2d 567 (Fla. 1981).
4. U.S. CONST. amend. IV provides:

   [T]he 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.

5. *See* Stanley v. Georgia, 394 U.S. 557, 571 (1969) (Stewart, J., concurring); Ker v. California, 374 U.S. 23 (1963); McDonald v. United States, 335 U.S. 451, 461 (1948) (Burton, J., dissenting); Trupiano v. United States, 334 U.S. 699, 714-15 (1948) (Vinson, C.J., dissenting); United States v. Lefkowitz, 285 U.S. 452 (1932); Marron v. United States, 275 U.S. 192 (1927); United States v. Lee, 274 U.S. 559 (1927).
6. 403 U.S. 443 (1971).
7. Technically, Justice Stewart's opinion is that of the Court. However, only Justices Douglas, Brennan and Marshall joined in his entire opinion. Justice Harlan concurred in the result, but wrote a separate opinion. Chief Justice Burger concurred in part and dissented from those parts of the opinion dealing with the plain view doctrine. Justices Black, Blackmun and White all dissented. There is some question as to whether Justice Harlan wholeheartedly affirmed Justice Stewart's plain view doctrine. *See* Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1048-49 (1975). For purposes of this case note, however, his opinion will be considered as supporting the plurality. Courts generally treat Part II of the Stewart opinion in

trine as follows: "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused."[8] Three essential elements of the doctrine are apparent: a prior justified intrusion; the inadvertent discovery of the evidence; and the apparent incriminating character of that evidence.[9] If these three requirements are satisfied, the officer may simply seize the incriminating evidence which he saw inadvertently while lawfully inside a constitutionally protected area without the necessity of obtaining a search warrant.

Following the *Coolidge* decision, the "plain view doctrine" came to be regarded as one of the recognized exceptions to the search warrant requirement.[10] This, however, only seems to add to the present confusion because a plain view seizure is, in fact, not a search,[11] and it can never justify a warrantless search unless one of the other search warrant exceptions is also operating.[12] The plain view doctrine merely justifies a seizure of evidence. The search of the area in which the evidence was found must already have been justified either by a valid search warrant or one of the other exceptions to the warrant requirement. Recognizing this, Justice Stewart stated that "plain view *alone* is never enough to justify the warrantless seizure of evidence."[13]

The major confusion seems to be—at least in Florida—not in the inadvertence requirement,[14] nor in the requirement that evidence seized must be obviously incriminating. The confusion is found in the first requirement—that of a prior justified intrusion. The confusion causing the misapplication of the "plain view doctrine" in Florida seems to stem from two things: the courts' careless reading of the *Coolidge* opinion itself[15] and some very unfortunate language in *Harris v. United States*,[16] a per curiam opinion of the

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Coolidge as "the law of the land." *See, e.g.*, United States v. Lisznyai, 470 F.2d 707, 709-10 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973).

8. 403 U.S. at 466.

9. 1 W. LAFAVE, SEARCH AND SEIZURE § 2.2(a) at 242 (1978).

10. *See, e.g.*, 403 U.S. at 472; Barrios v. State, 397 So. 2d 440 (Fla. Dist. Ct. App. 1981); Hurt v. State, 388 So. 2d 281 (Fla. Dist. Ct. App. 1980); Moylan, *supra* note 7, at 1050.

11. LAFAVE, *supra* note 9, at 241; 403 U.S. at 466.

12. 403 U.S. at 466.

13. *Id.* at 468.

14. *But see* Marshall v. State, 362 So. 2d 701 (Fla. Dist. Ct. App. 1978), where the court upheld a warrantless seizure of obscene photographs from an adult bookstore, apparently applying the "plain view doctrine."

15. *See, e.g.*, Derrickson v. State, 399 So. 2d 100 (Fla. Dist. Ct. App. 1981).

16. 390 U.S. 234 (1968).

United States Supreme Court handed down three years prior to *Coolidge*. In *Harris*, the Court dealt with an appropriate utilization of the "plain view doctrine." An officer lawfully intruded into the defendant's vehicle pursuant to a departmental regulation requiring a thorough search of all impounded vehicles. As the officer opened the front door on the passenger side, incriminating evidence was seen and constitutionally seized. Unfortunately, the Court summarized the situation by stating that "[i]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."[17]

One cannot quarrel with the result of *Harris*. However, the point of law for which it stands may be questioned. Such a statement—"that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure"[18]—is simply not true if it is left unqualified.[19] It is readily apparent that this language can be construed so as to totally disregard the "prior justified intrusion" requirement of the "plain view doctrine." For example, an officer can be legally outside a constitutionally protected area and see in plain view evidence inside the constitutionally protected area; yet the "plain view doctrine" will not justify an intrusion into that area. Nevertheless, some Florida courts have cited *Harris* for just such a proposition,[20] notwithstanding that this is precisely what Justice Stewart was warning against in *Coolidge*.[21]

It is, therefore, somewhat unsurprising that the test that has evolved in many Florida opinions to determine if the "plain view doctrine" will apply is just as indiscriminate as the unqualified language in *Harris*. The elements of the Florida test seem to be: (1) Was the officer lawfully where he had a right to be? (2) Was the discovery inadvertent, i.e., not incident to a search? (3) Was the incriminating nature of the contraband immediately apparent?[22] The second and third prongs of this test are in accordance with Justice Stewart's opinion in *Coolidge*. However, the first prong is

17. *Id.* at 236.

18. *Id.*

19. *See* Moylan, *supra* note 7, at 1069-70.

20. *See, e.g.*, 399 So. 2d at 102; State v. Melendez, 392 So. 2d 587, 590 (Fla. Dist. Ct. App. 1981); State v. Hall, 376 So. 2d 276, 277 (Fla. Dist. Ct. App. 1979).

21. *See supra* note 13 and accompanying text.

22. *See, e.g.*, 397 So. 2d at 442; Cobb v. State, 378 So. 2d 82, 83 (Fla. Dist. Ct. App. 1980); 376 So. 2d at 278.

misleading. If an officer is lawfully outside the constitutionally protected area, the "plain view doctrine" will not permit entry. Justice Stewart clearly stated that plain view cannot justify this intrusion.[23] Nonetheless, there is no mention of the "prior justified intrusion" requirement in the Florida test. Many courts are seemingly unaware of that requirement and therefore use plain view to justify the intrusion.[24]

Examples of misapplication of the "plain view doctrine" in Florida are in no short supply. In *Derrickson v. State*,[25] for example, police officers were called to investigate the clandestine landing of an airplane. While examining the airplane, each officer claimed to have seen, through the window of the airplane, a bag of marijuana. A warrantless search of the unoccupied airplane was conducted and more than 100 pounds of marijuana were seized. There was no question that the airplane was a constitutionally protected area, yet the court relied exclusively on the "plain view doctrine" to justify the seizure *and* the intrusion into the airplane. The significance of the opinion is that the court quotes virtually all of Justice Stewart's relevant language concerning the requirement of a prior justification for the intrusion.[26] The court answers Justice Stewart's clear warning against using plain view to justify the intrusion by stating that "[t]he officers . . . were legitimately present at the scene; they had been called to investigate the surreptitious landing of the airplane."[27] Thus the court disregards the obvious intent of Justice Stewart's language and asserts that since the officers had a legal right to be where they were when they saw the marijuana, the intrusion into the airplane and the seizure were valid.[28]

Another example is *Barrios v. State*,[29] where an officer went to the defendant's house and knocked on the front door. The defendant opened the door and the officer saw a manila envelope, a pipe and marijuana. The officer then stepped into the house, observed other contraband in plain view, and arrested the defendant. The trial court found "that the officer 'saw the pipe and the envelope and the marijuana' from outside the house where he had a right to

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23. *See supra* note 13 and accompanying text.

24. *E.g.*, 399 So. 2d 100; 397 So. 2d 440; 376 So. 2d 276; Segal v. State, 353 So. 2d 938 (Fla. Dist. Ct. App. 1978).

25. 399 So. 2d 100.

26. *Id.* at 101.

27. *Id.*

28. *Id.* at 102.

29. 397 So. 2d 440.

be, and that the seizure of the items was not in violation of the defendant's constitutional rights."[30] The Third District Court of Appeal accepted the trial court's finding of fact and then applied the "Florida Test"[31] concerning the "plain view doctrine." The court determined that since the officer made the plain view observation from where he had a legal right to be (from the outside of the house looking in), the seizure of the evidence inside the house was valid.[32] Again, this is a blatant disregard of Justice Stewart's warning that plain view can never justify an intrusion.[33] The "plain view doctrine" as explained by the United States Supreme Court is not the same doctrine that was being applied by Florida courts. *Adoue v. State* is an attempt by the Florida Supreme Court to clarify this situation.[34]

The facts of *Adoue* are commonplace. Police officers were called to investigate the clandestine landing of an airplane at the Gainesville Municipal Airport. Using a flashlight, the officers examined the plane and through its window observed a number of white plastic garbage bags inside the plane. The officers testified that they saw a tear in one of the bags located near the window which revealed a green, leafy substance which they believed, based on their law enforcement training and experience, to be marijuana. When additional officers arrived, they entered the airplane and seized a large cargo of marijuana. The trial court denied a motion to suppress the marijuana seized from the airplane on the basis of the plain view exception.

The Florida Supreme Court was quick to indicate that "[t]he 'plain view' exception, however, does not apply to the factual situation before us."[35] The court distinguished between what it called "plain view" and "open view,"[36] thus attempting to explain "the confusion engendered by the courts in their varying usages of the concept of plain view."[37] Summarizing the plain view exception to the warrant requirement as described in *Coolidge*, the court stated that it applies "where an officer observing contraband is legally inside, by warrant or warrant exception, a constitutionally protected

30. *Id.* at 441.
31. *See, supra* note 22 and accompanying text.
32. 397 So. 2d at 442.
33. *See, supra* note 13 and accompanying text.
34. 408 So. 2d 567.
35. *Id.* at 570.
36. *Id.*; *See, Developments in the Law of Warrantless Auto Searches*, 16 WILLAMETTE L. REV. 677, 680 (1980).
37. 408 So. 2d 570.

area when he inadvertently observes contraband within the protected area."[38] However, what is presented in the instant case is an "open view" situation, "where an officer is located outside a constitutionally protected area and is looking inside that area . . . . Either he must obtain a warrant or an exception to the warrant requirement must exist to justify his entry into the protected area and his seizure."[39] The court clearly recognizes that "plain view alone is never enough to justify the warrantless seizure of evidence."[40] The "open view" situation—where the officer is on the outside looking in—can only create probable cause for the search. Thus a warrant or warrant exception is also necessary.

Here, the court reasoned that the "automobile exception"[41] as applied to movable vehicles, can be applied to this airplane.[42] Thus the "open view" observation of the contraband created the probable cause necessary for the "automobile exception" to operate. The "auto exception" justified the intrusion into the airplane; the "open view" observation did not.[43]

Although he disagrees with the result reached in the majority opinion, Chief Justice Sundberg states in his dissenting opinion that "the majority at least recognized that [the plain view] exception is inapplicable here, [yet] I feel it necessary to clarify its ruminations in this area."[44] The Chief Justice then labels three factually distinct situations: (i) the non-intrusive situation; (ii) the prior valid intrusion situation; and (iii) the pre-intrusive situation.[45]

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38. *Id.*

39. *Id.* at 571.

40. *See, supra* note 13 and accompanying text.

41. The "automobile exception" is a recognized exception to the Fourth Amendment search warrant requirement as annunciated by the United States Supreme Court in Carroll v. United States, 267 U.S. 132 (1925). Simply stated, the Court held that if the police officer has probable cause to search a vehicle, the mobility of the vehicle makes it impracticable to secure a search warrant, and thus a warrantless search is legal. For a comprehensive update on the "automobile exception," see United States v. Ross, 50 U.S.L.W. 4580 (June 1, 1982).

42. It is not unusual for the "automobile exception" to be applied to airplanes, as the same rationale is applicable concerning the mobility of the vehicle. *See, e.g.*, Gross v. State, 362 So. 2d 394 (Fla. Dist. Ct. App. 1978).

43. *See* Colorado v. Bannister, 449 U.S. 1 (1980), a per curiam opinion where the United States Supreme Court used precisely such a rationale in upholding the seizure of evidence from within an automobile. The evidence was in the plain view of the officer while he was standing outside the car. Interestingly, the Court does not even mention the "plain view doctrine."

44. 408 So. 2d at 573. The thrust of Chief Justice Sundberg's dissent lies in his evaluation of the "automobile exception" and its application to the specific facts of this case. 408 So. 2d at 575-77. His analysis concerning the "automobile exception" is beyond the scope of this case note.

45. *Id.* at 573.

In essence, the non-intrusive situation exists when an officer is outside a constitutionally protected area (i.e., outside of a house, a car, etc.) and observes evidence which is also outside the constitutionallly protected area. In this situation, there is no warrant requirement because the evidence is not inside the protected area. Indeed, the fourth amendment does not come into play at all and no one can complain about its non-application.[46]

The prior valid intrusion situation is the classic plain view situation annunciated in *Coolidge*. This is where the officer has already lawfully intruded into a constitutionally protected area. He is already legally inside when he inadvertently observes incriminating evidence in plain view and seizes it.[47] In this situation the officer "has a prior justification for an intrusion,"[48] whether it be a search warrant or an exception to the warrant requirement. Therefore, he may legally seize any incriminating evidence he observes inadvertently.[49]

However, the pre-intrusive situation is the situation:

> which has fostered much confusion. In this situation, the police officer is on the outside of a vehicle or structure when he sees evidence of criminality inside that vehicle or structure. When the police officer stands outside a vehicle or structure and looks inside, his constitutionally permissible observation only gives rise to a basis for probable cause, which he can then utilize in securing a warrant. Some additional justification is needed for the officer to enter and seize the object without a warrant.[50]

Chief Justice Sundberg is describing precisely what the majority characterized as an "open view" situation, which is clearly distinguishable from a true "plain view" situation.[51] Considering both the majority and dissenting opinions, *Adoue* is a clear statement to the lower courts in Florida that the "plain view doctrine" is no longer to be used to justify an intrusion into a constitutionally protected area.[52]

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46. Moylan, *supra* note 7, at 1097.

47. *See* Grant v. State, 374 So. 2d 630 (Fla. Dist. Ct. App. 1979); Spinkellink v. State, 313 So. 2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976); Alford v. State, 307 So. 2d 433 (Fla. 1975).

48. 403 U.S. at 466.

49. *See, supra* notes 8 and 9 and accompanying text.

50. 408 So. 2d at 574.

51. *See, supra* notes 39-42 and accompanying text.

52. *See also* Washington v. Chrisman, 50 U.S.L.W. 4133 (U.S. Jan. 13, 1982) where the United States Supreme Court also apparently sees the need to clarify the prior valid intru-

There remains a potentially interesting question which has not been addressed, and should at least be recognized. The United States Supreme Court decision of *Katz v. United States*[53] stands for the proposition that:

> [T]he 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.[54]

Thus a person may have a constitutionally protected "reasonable expectation of privacy"[55] any place. In his concurring opinion in *Katz,* Justice Harlan understood the rule that had emerged to require two things: "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.' "[56] Interestingly, Justice Harlan goes on to state that "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."[57]

The "plain view" referred to by Justice Harlan is not the "plain view doctrine." He is talking about the threshold requirement of the fourth amendment, not an exception to the fourth amendment requirement of search warrant. In other words, if one has exposed something in plain view to the public, there is no reasonable expectation of privacy and, therefore, no fourth amendment protection concerning that object. Since the threshold requirement is not met, there is no need to consider the "plain view doctrine" as an exception to anything that the fourth amendment requires.[58]

For example, when Katz walked into his now famous telephone booth, he had a reasonable expectation of privacy concerning his telephone conversation. However, had he displayed incriminating

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sion concept of the "plain view doctrine." The court was clear in emphasizing that the "plain view doctrine" did not enable the officer to "cross the threshold" into the defendant's room.

53. 389 U.S. 347 (1967).

54. *Id.* at 351, 352 (citations omitted) (emphasis added).

55. *Id.* at 360 (Harlan, J., concurring).

56. *Id.* at 361.

57. *Id.*

58. *See generally* LAFAVE, *supra* note 10, at 240-45.

evidence in plain view to the public from within the phone booth, any police officer could have made a constitutional, warrantless seizure of it inside the booth. He would have had no reasonable expectation of privacy while displaying evidence of crime in a clear glass telephone booth. Indeed, the majority in *Katz* recognizes this by stating that "what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear."[59] Thus the seizure would be valid because the fourth amendment would give him no protection, *not* because of the plain view exception to the fourth amendment warrant requirement.[60]

The significance of the majority opinion in *Katz*, and in Justice Harlan's concurrence, is that both mention the home as an area where we might *not* be protected by the fourth amendment.[61] *Katz* apparently recognizes that there can be situations where, even in the security of our own home, if we expose evidence of crime to the public we lose our fourth amendment protection.[62] Surely if this is a possibility in our own home, it is even more of a possibilty in our car, plane or boat.[63]

The question which therefore arises is this: When an officer is in an open view[64]/pre-intrusive[65] situation (on the outside looking in), what is to determine whether what he sees in plain view is the "plain view" that Justice Harlan described as that which gives the defendant no Fourth Amendment protection,[66] or that which simply gives rise to probable cause to obtain a warrant or utilize some other exception to the warrant requirement?[67]

This question puts the hypothetical situation posed by Judge Moylan[68] in a little different perspective:

> Conjure up a policeman walking the beat. To his right is a row

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59. 389 U.S. at 352.

60. Hornblower v. State, 351 So. 2d 716, 718 n.1 (Fla. 1977).

61. 389 U.S. at 351, 361.

62. *See, e.g.*, United States v. Santana, 427 U.S. 38 (1976), where defendant, while standing inside the doorway of her house, was in a "public place" for purposes of the fourth amendment. Since she was exposed to public view, she was not in an area where she had any expectation of privacy.

63. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects . . . . It travels public thoroughfares where both its occupants and its contents are in plain view." Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

64. *See, supra* notes 36-42 and accompanying text.

65. *See, supra* note 50 and accompanying text.

66. *See, supra* notes 56-58 and accompanying text.

67. *See, supra* note 50 and accompanying text.

68. Associate Judge, Maryland Court of Special Appeals.

> of houses; to his left is a row of parked automobiles. Ever vigilant to the right and the left, he surveys the scene through transparent windowpanes. On coffee tables in living rooms in the houses to the right, he sees much evidence of crime. On back seats and window ledges of the automobiles to his left, he sees much evidence of crime. All of the evidence, to the right and the left, he has seen in open view (or, as some insist, in plain view). From his constitutionally sound vantage point of the public sidewalk, did he have the right to see what he saw? The answer is undeniably *yes*. Will he be permitted to seize what he has seen? The answer is maybe yes and maybe no. If the answer is yes, will the seizure be pursuant to the plain view doctrine? The answer is no; it will be pursuant to the *Carroll* doctrine.[69]

The answers to these questions may not be as simply obvious as Judge Moylan asserts them to be. The officer in the hypothetical situation was on the *public sidewalk* observing evidence of crime in *plain view* through open doors and open windows. He is, of course, correct that the plain view doctrine will not permit a seizure of this evidence from within the homes or cars. This is a pristine example of what the Florida Supreme Court is saying in *Adoue*. But to assert this sidesteps the threshold question. Does the fourth amendment itself even apply? Isn't this the situation alluded to in *Katz*, where one loses his fourth amendment protection?[70] Although courts would understandably be reluctant to hold that the people in this hypothetical really did not manifest an expectation of privacy in their own homes or cars, the language of *Katz* compels them to at least consider the possibility.

There is a subtle tension between the open-view/pre-intrusive situation and the *Katz* expectation of privacy test. To recklessly imply that in all open-view/pre-intrusive situations the *Katz* test is satisfied disregards the possibility of these situations overlapping into the area of no fourth amendment protection. This, of course, conveniently avoids the very demanding requirement to draw the line as to just where one sheds the cloak of the fourth amendment in the open-view/pre-intrusive situation. As Dean LaFave points out:

> [S]urely there comes a point where it can be said that a person has "justifiably relied" upon the privacy of his premises even though he has not taken the extraordinary step of sealing off

69. Moylan, *supra* note 5, at 1098.
70. *See, supra* notes 53-58 and accompanying text.

> every minute aperture in that structure. Precisely when that point is reached is a matter upon which reasonable minds might differ.[71]

Although reasonable minds may differ as to the exact location of that point, it is the existence of this point that must be recognized.

The Florida Supreme Court, in *Adoue*, has cleared the confusing status of the plain view doctrine and its correct application in the open-view/pre-intrusive situation. Yet this court, too, seems to have sidestepped the threshold question: Does the fourth amendment even apply in the open-view/pre-intrusive situation?[72]

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71. LAFAVE, *supra* note 9, at 253, 254.

72. State v. Rickard, 7 FLA. L.W. 193 (Apr. 29, 1982), illustrates that the Florida Supreme Court is less reluctant to address this situation in the invasion of privacy in a back yard. In this case, the officer spotted marijuana in open view in the defendant's back yard and, ultimately, seized the marijuana. The court recognized that this is a pre-intrusive situation and the "plain view doctrine" did not apply. The court then went on to show that the defendant did actually manifest an expectation of privacy in his own back yard and, therefore, the fourth amendment applied. *Id.* at 194. The language of *Katz* demands such a case-by-case analysis, which the Florida Supreme Court seems to recognize—if only in the context of a back yard. Whether this approach will be applied when considering homes and cars, for instance, is yet to be determined. For analysis of the "open fields" exception see Murphy v. State, 7 Fla. L.W. 1069 (May 14, 1982).