IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Petitioner, v. JOHN WILLIAM McKELVEY III, Respondent.	)	Supreme Court No. S-17910

Trial Court Case No. 4FA-14-00040 CR
Alaska Court of Appeals No. A-12419

BRIEF OF RESPONDENT

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PETITION FOR HEARING FROM THE DECISION OF
THE ALASKA COURT OF APPEALS

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CONSTITUTIONAL PROVISIONS RELIED UPON

Alaska Constitution, Article I §14. Searches and Seizures
The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. 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.

Alaska Constitution, Article I, §22. Right of Privacy
The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

United States Constitution, Amendment IV
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.

STATEMENT OF THE ISSUES PRESENTED

1. Was John McKelvey's (McKelvey's) right to privacy under the Fourth Amendment to the United States Constitution violated when the police engaged in a targeted warrantless search of the curtilage of McKelvey's home by taking photographs of the curtilage with a high-powered telephoto-lens camera from an airplane flying above McKelvey's home?

2. Was McKelvey's right to privacy under Article I, §§14 and 22 of the Alaska Constitution violated when the police engaged in a targeted warrantless search of the curtilage of McKelvey's home by taking photographs of the curtilage with a high-powered telephoto-lens camera from an airplane flying above McKelvey's home, and moreover when the police engaged in any purposeful aerial surveillance of the curtilage of McKelvey's home?

STATEMENT OF THE CASE

This case arises from the execution of Search Warrant No. 4FA-12-352 SW.[1] On August 27, 2012, Alaska State Trooper Investigator Joshua Moore (Investigator Moore or Moore) applied for and received the warrant; it was executed the next day.[2]

In applying for the search warrant, Investigator Moore attested that he had received a phone call from an informant on August 22, 2012 at 1:09 p.m., during which

[1] Exc. 1-4.
[2] Exc. 1-4.

the informant stated that he or she had been to McKelvey's property and had seen a marijuana grow there.[3] Investigator Moore's affidavit continued:

> The informant stated that the plants were located in plastic five gallon buckets and were sitting in the sun. The informant also stated that McKelvey had greenhouses on the property where he would move the plants to at night. The informant estimated that there were 30 marijuana plants outside where the informant could see the plants.[4]

Two days later at 2:00 p.m., Investigator Moore had a Alaskan Wildlife Trooper fly him over McKelvey's property in an attempt to verify the informant's statements. As a result of the flyover Investigator Moore attested that he thought he could see "what appeared to be plants potted inside five gallon buckets located inside" a "partially see through" greenhouse.[5]

McKelvey moved to suppress all evidence arising from the flyover and thus from the search warrant itself.[6] McKelvey asserted, inter alia, that utilizing a high-powered telephoto-lens camera to take photographs of the curtilage of McKelvey's home from an airplane flying overhead is an illegal warrantless search that violated McKelvey's rights to privacy under the Fourth Amendment to the United States Constitution and Article I, §§14 and 22 of the Alaska Constitution.[7]

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[3] Exc. 8.
[4] Exc. 8.
[5] Exc. 8.
[6] Exc. 24-25.
[7] Exc. 26-29.

At the evidentiary hearing on McKelvey's motion, the pilot of the plane, Alaska Wildlife Trooper Lieutenant Justin Rodgers (Lieutenant Rodgers or Rodgers), testified that at no time when the plane was in the vicinity of McKelvey's property was it flying at less than 600 feet above the ground.[8] This was corroborated by the photographer on the plane, Investigator Moore, who estimated the plane to be flying even higher than 600 feet above the ground in the vicinity of McKelvey's property.[9]

Investigator Moore acknowledged that he used a Canon camera with a high-powered telephoto lens to take photographs of McKelvey's property during the flyover.[10] The camera magnified what one could see with the naked eye by approximately nine times.[11] Indeed, Investigator Moore did not make any naked-eye observations when flying above McKelvey's property but rather relied exclusively on the photographs themselves,[12] which coupled with the informant's statements triggered Investigator Moore to seek the warrant.[13]

In contrast to Lieutenant Rodgers and Investigator Moore, McKelvey testified that the plane flew much lower, approximately 300 to 400 feet above the ground. This was based upon McKelvey being home at the time of the flyover trying to get his vehicle

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[8] Exc. 66, 70, 95.
[9] Exc. 105-106, 156-157, 253-254.
[10] Exc. 124-125, 138-139.
[11] Exc. 46-47, 404-410; see Exc. 138-139.
[12] Exc. 136-137.
[13] Exc. 8. As part of the stipulated facts in this case, the parties have agreed that, "Prompted by what Investigator Moore observed on McKelvey's property during the flyover, combined with prior information from a confidential informant, Investigator Moore decided to seek a search warrant for McKelvey's property." Exc. 362.

started, which was corroborated by the aerial photographs of his vehicle with its hood open.[14]

McKelvey acknowledged that there is a small private airport a mile or so from his home at the end of the road.[15] However, planes from that airport have never flown near his home, and those planes he has seen flying to and from the Chena Hot Springs Resort have flown several times higher than the very loud plane that startled him that day in an unprecedented way.[16]

McKelvey also testified as to his actual expectation of privacy at his property located in a sparsely-populated area approximately twenty miles from Fairbanks. McKelvey posted numerous "No Trespassing" and "Keep Out" signs along his driveway and elsewhere on his property and had a gate he locked when he was away from the home.[17]

McKelvey's greenhouse where the marijuana was being grown was immediately behind his home, unobservable to anyone coming to visit his home and proceeding to the entry to the home at its front door.[18] Along with McKelvey's greenhouse was a shop behind the home, the entire area comprising part of the curtilage of McKelvey's home.[19]

Several weeks after the evidentiary hearing, the trial court rendered its decision denying McKelvey's motion to suppress evidence arising from the flyover.[20] The trial

[14] Exc. 235-237, 413.
[15] Exc. 237-238.
[16] Exc. 237-238, 413.
[17] Exc. 234-235, 412.
[18] Exc. 234-235, 412.
[19] Exc. 234-236, 239, 412.
[20] Exc. 321-338.

court found that the two Troopers flew over McKelvey's property to gather information to corroborate the statement of the confidential informant concerning a marijuana grow there.[21] The trial court found that in the course of so doing, the two never flew below 600 feet.[22] And as to the photography itself, the trial court found:

> During the flight, Rodgers flew near McKelvey's property but not directly over it, so that Moore could get a vantage point suitable for photographs of the property. While flying near the property, Moore took photographs with a Canon EOS 7D, with the lens set to 280mm magnification in the resulting photos.[23]

As to McKelvey's actual expectation of privacy, the trial court found that the greenhouse was approximately 10 to 15 feet behind the home in an area "surrounded by a natural sight-barrier of tall woods," and unobservable from the ground by anyone who proceeded to McKelvey's front door and otherwise heeded the "KEEP OUT" and "NO TRESPASSING" signs which were "all throughout the barrier to the property."[24] The trial court thus found that "the greenhouse is part of the curtilage and enjoys the same level of privacy and protection from warrantless searches and seizures as other parts of McKelvey's home would."[25]

In its legal analysis of McKelvey's claims, however, the trial court reasoned that "whether or not Mr. McKelvey's semi-opaque greenhouse was located in the curtilage is

[21] Exc. 321-322.
[22] Exc. 322.
[23] Exc. 322.
[24] Exc. 329.
[25] Exc. 329.

irrelevant."[26] In essence, the trial court concluded that McKelvey did not have a reasonable expectation of privacy under either the United States or the Alaska Constitution even though Investigator Moore used the telephoto-lens camera to magnify the greenhouse for the purposes of the police investigation.[27] Investigator "Moore's use of a telephoto lens to see objects on McKelvey's property more clearly is as an assisted plain view observation."[28]

In its Alaska constitutional analysis, the trial court also reasoned that it was relevant that in Alaska public use of small aircraft is commonplace, as is tourism-and-hunting-related aerial photography with visual magnification, and there are numerous small private airports such as the one approximately a mile from McKelvey's home.[29] Ultimately, the trial court then concluded that because Investigator Moore took the photographs from an area outside of McKelvey's curtilage and did so with a publicly-available camera, McKelvey did not have a reasonable expectation of privacy and thus no search occurred for either the purposes of the Fourth Amendment or the purposes of Article I, §§ 14 and 22 of the Alaska Constitution.[30]

Subsequently the parties appeared before the trial court for a trial on stipulated facts.[31] At that trial, based upon the evidence obtained via the execution of the search warrant Investigator Moore obtained, McKelvey was convicted of one count of possessing methamphetamine with intent to distribute and one count of possessing a

[26] Exc. 329.
[27] Exc. 329-338.
[28] Exc. 334.
[29] Exc. 336-337.
[30] Exc. 337-338.
[31] Exc. 340-341, 362-364.

firearm in furtherance of that crime.[32] McKelvey then appealed to the Alaska Court of Appeals.[33]

As to McKelvey's claim under the Fourth Amendment, the Court of Appeals did not render a definitive ruling.[34] Instead, the Court concluded:

> [I]t is unlikely that McKelvey would prevail under the Fourth Amendment. Perhaps the most that can be said is that the existing Supreme Court jurisprudence does not provide a definitive answer.[35]

However, the Court of Appeals did "conclude that the Alaska Constitution requires a warrant for the type of aerial surveillance in this case."[36] The Court held as follows:

> [W]hen an individual has taken reasonable steps to protect their house and curtilage from ground-level observation, that individual has a reasonable expectation that law enforcement officers will not use a telephoto lens or other visual enhancement technology to engage in aerial surveillance of the individual's residential property for the purpose of investigating criminal activity. In such circumstances, the aerial surveillance constitutes a "search" for purposes of Article I, Section 14 of the Alaska Constitution, and it requires a warrant unless there is an appliable exception to the warrant requirement.[37]

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[32] Exc. 340-346, 362-365.
[33] McKelvey v. State, 474 P.3d 16, 20 (Alaska App. 2020).
[34] Id. at 22-26.
[35] Id. at 26.
[36] Id. (italics omitted); see id. at 26-34.
[37] Id. at 33 (bracket added).

STANDARD OF REVIEW

Whether an individual's subjective expectation of privacy against a warrantless search of his or her person or property is objectively reasonable under the Fourth Amendment is arguably a question of fact.[38] In contrast, under Article I, §§14 and 22 of the Alaska Constitution the same question is certainly one of law which this Court will determine de novo, adopting the constitutional rule that is most persuasive guided by precedent, reason, and policy.[39]

ARGUMENT

I. McKelvey's Right To Privacy Under The Fourth Amendment To The United States Constitution Was Violated When The Police Engaged In A Targeted Warrantless Search Of The Curtilage Of McKelvey's Home By Taking Photographs Of The Curtilage With A High-Powered Telephoto-Lens Camera From An Airplane Flying Above McKelvey's Home.

In California v. Ciraolo, while flying at an altitude of 1000 feet in public airspace, law enforcement was able to "observe plants readily discernable to the naked eye as marijuana" in the defendant's outdoor, uncovered, marijuana garden.[40] The Court determined that the garden was indeed within the curtilage of the defendant's home[41] but stated, "What a person knowingly exposes to the public, even in his own home or office,

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[38] See id. at 24-27.

[39] Beltz v. State, 221 P.3d 328, 332 (Alaska 2009); Cowles v. State, 23 P.3d 1168, 1171 (Alaska 2001); McKelvey, 474 P.3d at 24-26.

[40] California v. Ciraolo, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

[41] Persons and property within the curtilage of one's home are entitled to the same constitutional protection as though they were within the home itself. Florida v. Jardines, 569 U.S. 1, 5-6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).

is not a subject of Fourth Amendment protection"[42] and that law enforcement is not "required to shield their eyes when passing by a home on public thoroughfares."[43]

The Court then determined that because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed," the defendant had not manifested an expectation of privacy that society was prepared to recognize as reasonable.[44] "The Fourth Amendment simply does not require the police traveling the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."[45]

The fact that the observations made by law enforcement were through the naked eye is key to the holding of Ciraolo. In his Opinion for the Court, Chief Justice Burger repeatedly states that the police observations were through the naked eye and also points out that the camera used by the police was "a standard 35mm camera."[46] Moreover, in concluding, Chief Justice Burger noted, "The State acknowledges that aerial observations of the curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens."[47]

The same day that the Court rendered its decision in Ciraolo, it also rendered its

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[42] Ciraolo, 476 U.S. 213 (quotations and citations omitted).
[43] Id.
[44] Id. at 213-14 (brackets added). Justice Powell, joined by Justices Brennan, Marshall, and Blackmun, filed a vigorous dissent. See Ciraolo, 476 U.S. at 215-26 (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).
[45] Id. at 215 (emphasis added).
[46] Id. at 209 (quotation and citation omitted).
[47] Id. at 215 n. 3 (quotation, citation, and brackets omitted).

decision in Dow Chemical.[48] The Court's decision upholding the aerial surveillance in Dow Chemical is premised on the fact that although the flyover did involve technologically-enhanced photography, the photography was not of the curtilage of one's home but was rather of a 2000-acre industrial complex.[49] The Court expressly emphasized that the case did not concern the curtilage:

> We find it important to note that this is not an area immediately adjacent to a private home where privacy expectations are most heightened.[50]

Three years following Ciraolo and Dow Chemical, the Court considered another case of flyover surveillance in Florida v. Riley. In Riley, both the four-Justice plurality[51] and Justice O'Connor's concurrence[52] relied upon the fact that the police observations were performed with the naked eye, and the plurality concluded that because the police remained within the publicly-navigable airspace, the case was controlled by Ciraolo.[53] In her deciding vote Justice O'Connor specifically stated "Riley's expectation that his curtiliage was protected from naked-eye aerial observation from that altitude was not a reasonable one."[54]

Toward the beginning of this Millennium, the Court was presented in Kyllo v. United States with a case that did not involve aerial police observations but rather

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[48] Dow Chemical Company v. United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).
[49] See Dow Chemical, 476 U.S. at 236-39.
[50] Id. at 237 n. 4 (emphasis in original).
[51] See Florida v. Riley, 488 U.S. 445, 448-49, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) (plurality opinion).
[52] See id. at 455 (O'Connor, J., concurring in the judgment).
[53] See id. at 449-52 (plurality opinion).
[54] Id. at 455 (O'Connor, J., concurring in the judgment) (emphasis added).

involved ground-level, public-street police observations using specialized technology not generally available to the public.[55] In rendering the Opinion of the Court, Justice Scalia was clear that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not have been obtained without physical intrusion into a constitutionally protected area constitutes a search -- at least where. . . the technology in question is not in general public use."[56] The Kyllo Court thus ruled that the police use of thermal-image scanning of the defendant's home was a search, for which a warrant was required.[57] Furthermore, the Court in Kyllo reiterated that the "enhanced aerial photography" in Dow Chemical was upheld because it did not involve the curtilage.[58] And the Kyllo Court likewise emphasized that the Court's focus on Ciraolo was "upon otherwise-imperceptibility, which is precisely the principle we vindicate today."[59]

Applying the holdings and principles of Ciraolo, Dow Chemical, Riley, and Kyllo, the police photography of McKelvey's curtilage from the airspace overhead using a high-powered telephoto-lens camera is a search requiring a warrant. This is true for two basic and simple reasons: The police photography involved McKelvey's curtilage and it revealed what was imperceptible to the naked eye from the airspace occupied by the police.

Even where police are otherwise authorized to intrude into the curtilage, Florida v. Jardines establishes that the purpose of the police intrusion does matter so that police may

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[55] See Kyllo v. United States, 533 U.S. 21, 29-30, 33-34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).
[56] Id., 533 U.S. at 34 (quotation and citation omitted) (ellipsis added).
[57] Id. at 40.
[58] Id. at 33.
[59] Id. at 38 n. 5.

not intrude into the curtilage if the purpose of the intrusion is to engage in a search or to otherwise take actions not explicitly or implicitly authorized by the homeowner.[60] While Jardines does recognize that law enforcement officers do not need to shield their eyes when occupying public thorough fares and thus may engage in "visual observation of the home" from pubic airspace, Jardines relies upon the naked-eye observation approved in Ciraolo as the basis for its conclusion.[61] In this context "visual" essentially means "perceptible by the sense of sight."[62] Thus, Jardines implicitly supports the proposition that what is perceived from the air only through the use of technology is indeed a Fourth Amendment search, at least where the curtilage is concerned.

More recently, the United States Supreme Court discussed the impact of developing technologies on Fourth Amendment safeguards in Riley v. California where the Court reasoned that the advent of technologies making far more information accessible to the police "does not make the information any less worthy of the protection for which the Founders fought."[63] The Court correspondingly held that searches of a person's cell phone are presumptively unreasonable unless conducted under the auspices of a search warrant.[64] As one commentator has explained:

> The principle of *Riley* is simple and logical: new technologies that augment the government's surveillance abilities justify changing or, at the very least, expanding existing Fourth Amendment doctrines to apply

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[60] Jardines, 569 U.S. at 5-10; see Kelley v. State, 347 P.3d 1012, 1017 (Alaska App. 2015) (Mannheimer, C.J., concurring) (discussing Jardines).
[61] Jardines, 569 U.S. at 7 (quoting Ciraolo, 476 U.S. at 213).
[62] www.dictionary.com/browse.visual.
[63] Riley v. California, 573 U.S. 373, 403, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).
[64] Id., 573 U.S. at 401.

> new circumstances to these new technologies.
>
> Such an expansion could be done with the aerial surveillance doctrine of *Ciraolo*. Therefore the doctrine expressed in *Ciraolo* should be expanded to differentiate between aerial surveillance seen by the naked eye with [sic] the surveillance observed via other technologies. This would not only be consistent with *Ciraolo*, but would build upon circumstances highlighted by the Court as key in adjudicating the case.[65]

At page 14 of its brief the State relies upon the United States Supreme Court's decision in Dunn.[66] Dunn, however, is inapposite as it does not concern police surveillance from an aerial vantage point but rather involves the police standing in "open fields" and from there engaging in their viewing:

> [T]he officers never entered the barn, nor did they enter any other structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn.[67]

Nor does Broadhurst[68] which is discussed at page 14 of the State's brief shed any light on the question presented. The Broadhurst Court merely applied the United States

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[65] J. Laperruque, "Preventing An Air Panopticon: A Proposal For Reasonable Legal Restrictions On Aerial Surveillance," 51 U. Rich. L. Rev. 705, 723 (2017) ("Preventing An Air Panopticon").
[66] United States v. Dunn, 480 U.S. 294, 107 S.Ct. 294, 94 L Ed.2d 326 (1987).
[67] Id., 480 U.S. at 304.
[68] United States v. Broadhurst, 805 F.2d 849 (9th Cir. 1986).

Supreme Court's then-recent decisions in Ciraolo and Dow.[69] In contrast to McKelvey's case, in Broadhurst "no more sophisticated technology was used than a small-engine fixed-wing aircraft."[70] Thus, Broadhurst "can hardly be said to approve of intrusive technological surveillance where the police could see no more than a casual observer."[71]

At page 16 of its brief the State unconvincingly relies upon Bassford.[72] The initial problem with Bassford is that it predates Ciraolo and Dow and thus fails to apply their framework for analysis.[73] Moreover, although photographs were taken in Bassford, there were no visual enhancement devices used.[74]

Another case, Allen,[75] upon the State repeatedly relies,[76] is unhelpful because it predates Ciraolo and Dow and thus fails to address the Fourth Amendment issue as framed in McKelvey's case. While the police in Allen did use a 70 mm to 230 mm telephoto lens to take aerial photographs of various vehicles parked on the grounds of the defendant's property, wide tracks leading from the defendant's barn, and the new extension built on the barn, it does not appear that the photographed areas in Allen were determined to be within the curtilage of the property, indeed, the Allen Court did not even undertake a curtilage inquiry.[77] In addition, Allen's property was along the Oregon coast where Coast Guard helicopters were well known to routinely patrol the adjoining

[69] Id. at 853-57.
[70] Id. at 856.
[71] Id.
[72] United States v. Bassford, 601 F.Supp. 1324 (D. Maine 1985), affirmed 812 F.2d 16 (1st Cir. 1987).
[73] Bassford, 601 F.Supp. at 1328-32.
[74] Id. at 1328.
[75] United States v. Allen, 675 F.2d 1373 (9th Cir. 1980).
[76] See Amended Opening Brief Of Petitioner at 16, 19, 39.
[77] Allen, 675 F.2d at 1380-81.

airspace conducting surveillance aided by sense-enhancing devices.[78]

Finally, a case relied upon by the State at page 20 of its brief, Van Damme,[79] succinctly frames the Fourth Amendment issue presented in McKelvey's case. In Van Damme, based on a citizen-informant's tip that Van Damme was growing marijuana in a fenced-off three-greenhouse compound approximately 200 feet from Van Damme's home, law enforcement flew over the greenhouses in a helicopter at more than 500 feet and through the view finder of a 600 mm telephoto lens identified marijuana growing in all three greenhouses.[80] Writing for the Court, Judge Kleinfeld explained that the Court did not need to determine whether the telephoto view from the air violated Van Damme's Fourth Amendment right to privacy because the trial court correctly found that the greenhouses were not within the curtilage.[81] Because the telephoto lens was technology generally available to the public and was not used to peer into the curtilage, the Court held a Fourth Amendment search did not occur.[82] McKelvey submits then that the use of technology (whether generally available to the public or not) to peer into the curtilage of one's home from the airspace overhead is a Fourth Amendment search and thus requires a warrant.

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[78] Id. at 1381.
[79] United States v. Van Damme, 48 F.3d 461 (9th Cir. 1995).
[80] See Van Damme, 48 F. 3d at 462-63.
[81] See id. at 463.
[82] See id.

II. McKelvey's Right To Privacy Under Article I, § §14 And 22 Of The Alaska Constitution Was Violated When The Police Engaged In A Targeted Warrantless Search Of The Curtilage Of McKelvey's Home By Taking Photographs Of The Curtilage With A High-Powered Telephoto-Lens Camera From An Airplane Flying Above McKelvey's Home, And Moreover When The Police Engaged In Any Purposeful Aerial Surveillance Of The Curtilage Of McKelvey's Home.

Early in Alaska's history as a State, this Court declared: "To look only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities."[83] As Justice Connor noted in Baker v. City of Fairbanks, Alaska's appellate courts are "under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage."[84] In Breese v. Smith, the Court added that while some of the terms in the Alaska Constitution parallel those of the United States Constitution, "we have repeatedly held that this court is not obliged to interpret our constitution in the same manner as the Supreme Court of the United States has construed parallel provision of the United States Constitution."[85]

Alaska's right to privacy may be "one of the most well-known indicators of Alaska's judicial independence."[86] Those who proposed and advocated for Article I, §22 saw the constitutional amendment as a way to ensure "that we have a possible defense to

[83] Roberts v. State, 458 P.2d 340, 342 (Alaska 1969).
[84] Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970).
[85] Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972).
[86] Ronald L. Nelson, "Welcome To The 'Last Frontier', Professor Gardener: Alaska's Independent Approach To State Constitutional Interpretation," 12 Alaska L. Rev. 1, 17 (1995).

invasion of privacy."[87] Article I, §22 advocates stated, "We are moving into an electronic age and this will give a measure of protection and would prevent excesses in this field."[88] Article I, §22 was proposed, passed, and adopted by the citizens of Alaska with the future interests of Alaskans in mind. The amendment serves as a pre-emptive check on the looming threat that advances in technology pose to Alaskans' sense of privacy.

This Court's decision in Cowles[89] compels affirmance of the Court of Appeals' decision. While the Cowles Court narrowly upheld warrantless overhead video recording of a public employee in her workplace, neither the three-Justice majority nor the two-Justice dissent in Cowles disputed the intrusiveness of the police recording visual images from an overhead vantage point.[90] Rather, the Court's decision in Cowles turned on the essentially-public nature of her workspace, the presence of numerous passersby, and the fiduciary nature of her employment involving handling financial transactions so that one's reasonable privacy expectations were minimal if any at all.[91] In contrast, the overhead recording of visual images in McKelvey's case concerns the core of privacy -- the curtilage of one's home -- plus the visual images here were enhanced by the telescopic,

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[87] Exc. 426 (Alaska House Judiciary Committee: Minutes Of The Meeting, May 30, 1972).
[88] Exc. 426 (Alaska House Judiciary Committee: Minutes Of The Meeting, May 30, 1972).
[89] Cowles v. State, 23 P.3d 1168 (Alaska 2001).
[90] Cf. State v. Page, 911 P.2d 513, 516-17 (Alaska App. 1996) (Alaska's Constitution protects Alaskans from warrantless "surreptitious photography or videotaping" of private activities because such governmental action has the same "corrosive impact on our sense of security" as the warrantless recording of conversations that was prohibited in State v. Glass, 583 P.2d 872 (Alaska 1978)), petition for hearing dismissed as improvidently granted, 832 P.2d 1297 (Alaska 1997).
[91] See Cowles, 23 P.3d at 1172-73.

zoom lens employed by the police.

The Court in Cowles made clear that the facts in Cowles's case differ dramatically from the paramount protection of privacy that exists where the curtilage of one's home is the object of police aerial surveillance. The Court stated:

> The desk was visible to members of the public through the ticket window and through the open office door and to co-workers and visitors to the office. The tape shows what the trial judge described as "an almost continuous flow of traffic about [Cowles's] desk."[92]

The Court then explained:

> The United States and Alaska Constitutions prohibit not only unreasonable physical searches but also unreasonable technological searches. Thus placing a hidden video camera in a house in order to record activities there without a warrant is prohibited just as is a warrantless entry to search for evidence. But not all technological monitoring of places or individuals is regarded as a search for constitutional purposes. Photographing a person as she walks in a public park does not raise constitutional concerns. But photographing a person in an enclosed public restroom stall is a search.[93]

While warrantless covert visual surveillance of a person as he or she moves about in public is thus not prohibited,[94] a technological intruding eye in the sky, and especially one that records images, poses grave constitutional concerns.[95]

When then making the "value judgment whether, if a particular form of

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[92] Id. at 1170 (brackets in Cowles).
[93] Id. (citations omitted).
[94] Id. at n.3.
[95] Id. at 1171 n.6.

surveillance practiced by the police is permitted to go unregulated by constitutional constraints, the amount privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society,"[96] the Court "identified the public nature of Cowles's office as the critical factor in answering this question."[97] While the Court acknowledged that government employees may have a reasonable expectation of privacy in the a private office, Cowles office space "was so open to fellow employees and to the view of the public"[98] "that no expectation of privacy is reasonable."[99]

"Given the clear view of Cowles' desk by members of the public and University employees,"[100] the Court concluded that the camera's overhead vantage point in the ceiling above was not a of dispositive importance."[101] The Court explained:

> Just as a person can have a reasonable expectation of privacy from surveillance by one particular *means* (but not another), she can have a reasonable expectation of privacy from surveillance from one particular *vantage point* (but not another).[102]

As that then applied to Cowles:

> Cowles activities were observable through the open ticket window and the office door and by co-employees circulating through the office. The fact that the video camera may have been

[96] Id. at 1171 (quotation, citation, and ellipsis omitted).
[97] Id.
[98] Id. at 1172.
[99] Id. (quoting O'Connor v. Ortega, 480 U.S. 709, 718, 107 S.Ct. 1492, 94 L.Ed 2d 714 (1987) (plurality opinion).
[100] Id. at 1172.
[101] Id.
[102] Id. (citation omitted).

> in an especially good position from which to view Cowles's acts of transferring money from the University money pouch to her desk and thence to her purse is not sufficient to create a reasonable expectation of privacy in an open and public setting where no such expectation could reasonably exist.[103]

McKelvey's case stands in stark contrast. It concerns the reasonable expectation of privacy in the curtilage of the home, the place where the protection of privacy has always been paramount, at its pinnacle.[104] Furthermore, the invasion of McKelvey's privacy was accomplished by a combination of means -- a high-powered telephoto-lens camera -- coupled with vantage point -- an airplane flying overhead. This is not either a "plain view" or an "open view" case as the State would discuss.[105] Instead, this a plane-view case. Plus there is intrusive technology to boot.

The Court in Cowles also discussed that Cowles' reasonable expectation of privacy was not violated by the fact the police conducted the videotape surveillance for the purpose of recording criminal conduct.[106] As McKelvey discussed previously, under Jardines purpose does matter when the police are investigating matters within the curtilage.[107] Furthermore, the State's arguments about "purpose"[108] are just red herrings. Law enforcement by definition acts "for the purpose of investigating criminal activity."[109] Thus, the real issue instead is the police conduct, "low-altitude surveillance targeted at a

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[103] Id.
[104] Jardines, 569 U.S. at 5-6; McKelvey, 474 P.3d at 22.
[105] See Amended Opening Brief Of Petitioner at 24-25, 40.
[106] Cowles, 23 P.3d at 1172-73.
[107] See Jardines, 569 U.S. at 5-10; Kelley, 347 P.3d at 1017 (Mannheimer, C.J., concurring).
[108] See Amended Opening Brief Of Petitioner at 37-41.
[109] McKelvey, 474 P.3d at 33.

specific location" that is "qualitatively different" from the conduct, "passing glimpses," that would be expected from private air travelers.[110]

In Cowles the Court did rely on two additional factors to determine whether Cowles's expectation of privacy was reasonable. The first was "the fact Cowles was entrusted with handling her employer's cash."[111] The second was that "Cowles worked in a fiduciary capacity in an office where members of the public exchanged money for tickets."[112] As the Court observed, it is commonplace in the private sector for there to be video surveillance overhead of persons similarly situated to Cowles, such as cashiers and bank tellers.[113]

In short, every aspect of Cowles favors McKelvey. Here the privacy expectation is at its highest and the intrusion is approaching the greatest.

Furthermore, in her Cowles dissent, Justice Fabe referred to a situation akin to that in McKelvey's case. Discussing People v. Romo,[114] Justice Fabe observed that one's right to privacy would be violated where law enforcement agents fly over a person's home "using electronic aids for observation."[115]

McKelvey testified that the police flyover of his property was unprecedented.[116]

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[110] Id. at 28 n.63.
[111] Cowles, 23 P.3d at 1173.
[112] Id.
[113] Id.
[114] People v. Romo, 243 Cal. Rptr. 801 (Cal. App. 1988); see id. at 805 ("Also, the plants were observed without any electronic aids.").
[115] Cowles, 23 P.3d at 1183 (Fabe, J., joined by Bryner, J., dissenting); cf. State v. Cord, 693 P.2d 81, 84 (Wash. 1985) (aerial surveillance from a lawful vantage point without visual enhancement devices is not a search under the Washington Constitution); State v. Wilson, 988 P.2d 463, 465-66 (Wash. App. 1999) (same).
[116] McKelvey, 474 P.3d at 25.

There is no evidence of previous similar flight activity over his property, and there is certainly no evidence that any tour operator offers "curtilage excursions." Rather, whether tourist or hunter, a person flying over the vast expanse of Alaska is seeking to view what are essentially open public lands -- the antithesis of an enclosed curtilage such as McKelvey's.

At page 26 through 30 and 46 through 47 of its brief the State emphasizes the abundance of small private aircraft in Alaska and then posits that the technologically-enhanced aerial observation and photography of McKelvey's curtilage is "no different" than the conduct of "[t]ourists and many others [who] routinely fly low and photograph Alaska natural wonders with high powered lenses" or that of "[b]iologists [who] conduct aerial surveys of animal populations with binoculars."[117] But those to whom the State would compare the police are private citizens, private citizens engaged in activities over public lands and occasionally open fields. It is only the police who engage in curtilage excursions.

Moreover, to the extent that the State suggests that the conduct of law enforcement in this case would be acceptable if it were instead the conduct of private citizens, the State is gravely mistaken. This Court has expressly recognized the common-law "right to be free from harassment and constant intrusion into one's daily affairs."[118] The Court has accordingly adopted the Restatement (Second) of Torts §652B which states: "One who intentionally intrudes, physical or otherwise, upon the solitude or seclusion of another or his private affair or concerns, is subject to liability to the other for invasion of his privacy,

[117] Amended Opening Brief Of Petitioner at 40 (brackets added).
[118] Wal-Mart, Inc. v. Stewart, 990 P.2d 626, 632 (Alaska 1999).

if the intrusion would be highly offensive to a reasonable person."[119] Offensive intrusion requires "either an unreasonable manner of intrusion, or intrusion for an unwarranted purpose."[120]

The warrantless, technology-enhanced police peering into and picture taking of McKelvey's curtilage from the airspace overhead is offensive in both its manner and its purpose, thus violating McKelvey's right to privacy under the Alaska Constitution.[121] In other words, if police conduct "constitutes an invasion of a common law right to privacy, such conduct obviously violates an expressed constitutional declaration of the right. In the absence of a search warrant, evidence so obtained should be held to be illegally acquired."[122]

Consistent with Cowles, with our civil, criminal, and constitutional protections of privacy, and with Alaska's independent tradition of ordered liberty, this Court should adopt the reasoning of the four dissenting Justices in Ciraolo. As Professor LaFave explains:

> [T]he most sensible way to apply the Katz justified-expectation-of-privacy test is to characterize police surveillance as a search unless it occurs from a "public vantage point" and uncovers what the person has not protected from scrutiny by the "curious passerby." Under that approach, the Ciraolo case should have come out the other

[119] Wal-Mart, 990 P.2d at 632 (quoting Restatement (Second) of Torts §652B (1997)) (emphasis added).
[120] Id. (quotation and citation omitted).
[121] Compare Greywolf v. Carroll, 151 P.3d 1234, 1244-46 (Alaska 2007). (police officer's interviewing of a patient in a hospital was not done in an unreasonable manner or for an unwarranted purpose where the officer was summoned to the hospital unit to investigate, the patient impliedly consented to the interview by not objecting to it, and there was no evidence of police intimidation or other unreasonable conduct).
[122] State v. Glass, 583 P.2d 872, 881 (Alaska 1978).

> way. The fact that the aircraft was in "public navigable airspace" does show that the surveillance occurred from a "public vantage point," but that is all. As the four Ciraolo dissenters correctly observed:
>
> > the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities and might connect those activities with particular people, is simply too trivial to protect against. ***
> >
> > ***The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance. But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the air space. Members of the public use the air space for travel, business, or pleasure, not just for the purpose of observing activities taking place within residential yards.[123]

In other words, the majority opinion in Ciraolo is a manifestation of what the Court of Appeals has referred to as the United States Supreme "Court's surreal and Orwellian view of personal security in contemporary America,"[124] while the dissenting Justices in Ciraolo embody the ordered liberty of The Last Frontier -- the Alaskan spirit and mindset

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[123] 1 Wayne R. LaFave, Search and Seizure, §2.3(g) at 839 (6th ed. 2020) (footnote omitted, brackets added); see Catherine Hancock, "Justice Powell's Garden: The *Ciraolo* Dissent And Fourth Amendment Protection For Curtilage-Home Privacy," 44 San Diego L.Rev. 551 (2007).

[124] Joseph v. State, 145 P.3d 595, 604 (Alaska App. 2006) (quotation and citation omitted).

manifested in Article I, §§14 and 22 of the Alaska Constitution.

In line with the Ciraolo dissent and with Alaska jurisprudence is the decision in People v. Cook, wherein the California Supreme Court determined that under the California Constitution "an individual has a reasonable expectation of privacy from purposeful police surveillance from the air."[125] Therefore, the Court held that "the warrantless aerial scrutiny of defendant's yard, for the purpose of detecting criminal activity by the occupants of the property, was forbidden by Article I, Section 13 of the California Constitution."[126]

At pages 36-37 of its brief the State posits that Cook no longer has continuing vitality in view of the people of California having amended their Constitution to prevent the application of the exclusionary rule to searches that violate the California Constitution but not the United States Constitution.[127] In response McKelvey would first observe that Cook still determines whether a search violates the California Constitution; thus, if the people of California were to undo the restrictive exclusionary-rule provision they adopted, Cook would allow for the suppression of such illegally-obtained evidence.[128] In any event, Cook was prophetic in its foresight and continues to provide a thoughtful and well-reasoned application of the paramount protections of privacy in the home and its curtilage in the face of an ever-increasing technological onslaught that would reduce

[125] People v. Cook, 710 P.2d 299, 305, 221 Cal. Rptr. 499, 505 (Cal. 1985).
[126] Id., 710 P.2d at 307, 221 Cal. Rptr. at 507.
[127] See People v. Mayoff, 729 P.2d 166, 178, 233 Cal. Rptr. 2, 14 (Cal. 1986) (Lucas, J., concurring). The State relies upon Mayoff at pages 40-41 & n.14 of its brief in an attempt to posit confusion in California law. But what the State omits to mention is that Mayoff does not involve the curtilage but is rather an "open fields" case. Id., 729 P.2d at 168, 233 Cal. Rptr. at 4.
[128] See Mayoff, 729 P.2d at 178, 233 Cal.Rptr. at 14 (Lucas, J., concurring).

privacy to seven letters.

This Court need not render a ruling as broad as that in Cook, though the broad and bedrock privacy protections of the Alaska Constitution would seem to require the same. Rather, the Court need merely rule that the enhanced visual observation and photo-recording by the police during the flyover of McKelvey's property is prohibited by Article I, § §14 and 22 of the Alaska Constitution.

Consistent with Cook is the decision in the Quiday case. There the Hawaii Supreme Court adopted the rule established by the California Supreme Court in Cook and held that "an individual has a reasonable expectation of privacy from government aerial surveillance of his or her curtilage and residence, when such aerial surveillance is conducted with the purpose of detecting criminal activity therein."[129] "Such purposeful aerial surveillance of an individual's residence and curtilage" constitutes a search under the Hawaii Constitution.[130] This Court should hold the same under the Alaska Constitution and thus require the police to obtain a warrant whenever they decide to peer -- with their eyes or their technologies -- into one's curtilage or home from the airspace overhead for the purpose of detecting criminal activity (as well as whenever they employ their technologies to peer into one's curtilage or home from the airspace overhead for any or no purpose at all).

One can choose the location of his or her property so as to minimize the ability of prying neighbors to observe one's curtilage; hence some cases have approved the use of

[129] State v. Quiday, 405 P.3d 552, 562 (Hawaii 2017).
[130] Id.

viewing devices to observe the curtilage from points on neighbors' properties.[131] But there is no escaping the prying eye in a plane overhead. When that eye is just a naked one, there is an inherent limitation on the ability to intrude upon one's privacy. When that eye is allowed to be enhanced by or replaced by technology, even the castle on the hilltop becomes a fancy fishbowl. One generation's telephoto lens is the next generation's drone. And what will the coming generations bring? Without meaningful constraints to curtail the warrantless use of technology in the airspace overhead, privacy will become but a word we use, spoken but not honored.

McKelvey's concerns are shared by the author of "Preventing An Air Panopticon." With drones bursting onto the scene and photo zoom and resolution technologies evolving at an exponential rate, we face the annihilation of privacy if we do not subject the aerial use of drones and other photo technologies to the warrant requirement.[132] As the author explains:

> Aerial surveillance possesses a number of unique features that create distinct risks to privacy as compared to other forms of government surveillance. First, aerial surveillance occurs from a vantage point that can view private property on a much larger scale than any form of traditional ground-level surveillance, more easily overcoming civilians' deliberate efforts to conceal private property. Second, aerial surveillance is mobile, presenting the ability to follow moving targets and easily redirect efforts to different targets in a way that stationary cameras, such as police "Blue Light" cameras and traffic cameras cannot. This enhanced mobility is augmented by the

[131] See McKelvey, 474 P.3d at 32 & nn. 81, 83.
[132] See "Preventing An Air Panopticon," 51 U. Rich. L. Rev. at 705-13.

> openness of airspace, giving aerial surveillance a higher degree of mobility than ground-level officers and vehicles, which are restrained by obstructions. Third, aerial surveillance is inconspicuous. Whereas individuals can regularly notice and develop comprehensive mapping of Blue Light cameras or even beat cops, aerial surveillance is a true panopticon, able to observe anywhere at any time without any notice or warning to those being monitored. Fourth, aerial surveillance can target a wide field, providing the ability to expand access and retain capabilities. While the ability to immediately monitor any point in a city requires an enormous allocation of manpower and technology, aerial surveillance encompasses an incredibly wide field of view with the capability to rapidly hone in on any area within it at a moment's notice.[133]

The author of "Preventing An Air Panopticon" then proposes the "Naked Eye Rule" to govern aerial surveillance by law enforcement:

> Here, the "Naked Eye Rule" would build upon *Ciraolo* in the following manner: *aerial surveillance cannot be used by law enforcement absent court approval, unless the surveillance is akin to the naked eye view of a human on the aircraft*. This would have two practical restrictions: first, it would limit unregulated aerial surveillance observations to those obtained at human eye resolution; and second, it would prohibit unregulated use of drones, and any observation that cannot be made by a human on an aircraft.[134]

McKelvey agrees that, at a minimum, the Naked Eye Rule is required under Article I,

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[133] Id. at 714-15 (footnotes and citations omitted); see also "Anchorage Police Want to Start Using Drones," https://www.adn.com/alaska-news/anchorage/2017/11/15/anchorage-police-want-to-start-using-drones/.

[134] "Preventing An Air Panopticon," 51 U. Rich. L. Rev. at 724 (italics in original).

§§14 and 22 of the Alaska Constitution. For McKelvey to then prevail, the Court need go only so far as to apply it to the curtilage of McKelvey's home.

CONCLUSION

The decision of the Alaska Court of Appeals has enunciated a narrow and precise standard that correctly addresses the technology-based constitutional violation that occurred in McKelvey's case and that provides ample guidance for law enforcement's use of technology in future instances. An army of drones may not be far away, but what the Court does today must say that army may not physically or technologically occupy our homes or the curtilage around without our consent or the judicial oversight provided by the constitutional requirement of a warrant.

To the extent that the Court determines that an even-brighter line is needed, the Court should adopt the standards employed by the Ciraolo dissent and by the Supreme Courts of California and Hawaii. That is what is necessary to provide the full protection of privacy required under the Alaska Constitution.

DATED: May 4, 2022.

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