IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Petitioner, vs. JOHN MCKELVEY, III, Respondent.	Supreme Court No. S-17910

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

PETITION FOR HEARING FROM THE COURT OF APPEALS

AMENDED OPENING BRIEF OF PETITIONER

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AUTHORITIES RELIED UPON

United States Constitution, 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[.]

Alaska Constitution, article I, section 14 provides:

> **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.

Alaska Constitution, article I, section 22 provides:

> **Right of Privacy.**
>
> The right of the people to privacy is recognized and shall not be infringed.

14 Code of Federal Regulations §§ 91.119(c) and (d) provide:

> **Minimum safe altitudes: General.**
>
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> . . . .
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> (d) Helicopters, powered parachutes, and weight-shift-control aircraft. If the operation is conducted without hazard to persons or property on the surface—

(1) A helicopter may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section, provided each person operating the helicopter complies with any routes or altitudes specifically prescribed for helicopters by the FAA[.]

STATEMENT OF JURISDICTION

The trial court denied John McKelvey's motion to suppress aerial photographs of a greenhouse in which he was growing marijuana. The court of appeals reversed the trial court's order. *McKelvey v. State*, 474 P.3d 16 (Alaska App. 2021).

The State filed a petition for hearing, which this Court granted, ordering full briefing. This Court has jurisdiction under AS 22.05.010(d) and Appellate Rule 302(a).

ISSUE PRESENTED[1]

Under both federal and state law, an officer may, without a warrant, observe using a telephoto lens or binoculars from a place where he is permitted to be. Here, Trooper Joshua Moore flew non-intrusively in publicly navigable airspace approximately one-quarter to one-half a mile away from McKelvey's property, just as any private citizen could have done, and took photos of McKelvey's greenhouse using a publicly available telephoto lens camera.

Analyzed under both the Fourth Amendment and the Alaska Constitution, were the trooper's actions a permissible investigation from a lawful vantage point—public airspace—rather than a search?

[1] In its brief to this Court, the State purposefully limits itself to proposing a rule that resolves the issue before the Court, telephoto lens photography from a fixed-wing aircraft.

STATEMENT OF THE CASE

Factual background

In 2012, a confidential informant told Trooper Joshua Moore that he had observed a marijuana grow on John McKelvey's property outside of Fairbanks. *McKelvey v. State*, 474 P.3d 16, 19 (Alaska App. 2020). [Exc. 8, 71] The informant said that McKelvey had marijuana plants in five-gallon buckets, which McKelvey moved into his greenhouse at night. *McKelvey*, 474 P.3d at 19-20. [Exc. 8]

To confirm the informant's tip, Trooper Moore had another trooper fly him near McKelvey's property. *McKelvey*, 474 P.3d at 20. [Exc. 73, 79, 83, 322] In the early afternoon, they flew approximately one-quarter to one-half a mile away from McKelvey's property at an altitude of at least 600 feet, a height permitted by FAA regulations. [Exc. 29, 46-47, 51, 67, 83-85, 116, 119, 136-37, 322] Trooper Moore photographed McKelvey's property using a publicly available 35-millimeter camera equipped with a 75-300-millimeter zoom lens set to 280 millimeters. *McKelvey*, 474 P.3d at 20. [Exc. 29, 46-47, 51, 67, 83-85, 116, 119, 136-37, 322] The photos show a "partially see-through" visqueen-covered greenhouse. *McKelvey*, 474 P.3d at 20. [Exc. 8; Evidentiary Hearing Exhibits C-M (overflight photos)[2]] The greenhouse's contents are difficult to

[2] Attachment 1 is one of the clearest photographs.

ascertain; one can just make out what appear to be white buckets. *McKelvey*, 474 P.3d at 20. [Exc. 8; Evidentiary Hearing Exhibits C-M (overflight photos)]

Course of proceedings

Based on the tip and the aerial photographs, Trooper Moore obtained a search warrant for McKelvey's property. [Exc. 1-9] Troopers executed the warrant and found a marijuana grow, methamphetamine, opiates, drug scales, plastic bags to package drugs, over $18,000 in cash, and a loaded AK-47. [Exc. 4, 16, 363] McKelvey was indicted on six counts of misconduct involving a controlled substance, ranging from second-degree to fourth-degree, and one count of second-degree misconduct involving weapons. [Exc. 10-11]

McKelvey filed a motion to suppress, arguing that the flight and the photographs were an illegal search violating both the Fourth Amendment to the United States Constitution and Alaska Constitution article I, sections 14 and 22. *McKelvey*, 474 P.3d at 20. [Exc. 24-48]

After an evidentiary hearing, the trial court denied McKelvey's motion. *McKelvey*, 474 P.3d at 20. [Exc. 321-38] The court concluded that although McKelvey may have had a subjective expectation of privacy in the greenhouse, his expectation of privacy was not reasonable. *McKelvey*, 474 P.3d at 20. [Exc. 323-33] The court noted that air travel is essential in Alaska; it also found that an airstrip was located about a mile from McKelvey's property.

McKelvey, 474 P.3d at 20. [Exc. 71, 330-31, 336-37] The court found that the greenhouse's contents were open to public view from the navigable airspace above McKelvey's residence; it also found that McKelvey could not reasonably have believed that no one would fly over his property. *McKelvey*, 474 P.3d at 20. The court additionally held that taking photographs with a telephoto lens was not a search. [Exc. 329-37] Accordingly, the court rejected McKelvey's claims under both the federal and Alaska Constitutions. [Exc. 337-38]

McKelvey then reached an agreement with the State; the State agreed to dismiss five counts, and McKelvey agreed to a bench trial, under stipulated facts, on the remaining two counts (possessing methamphetamine with the intent to deliver and possessing a firearm while committing a drug offense). *McKelvey*, 474 P.3d at 20. [Exc. 365] The trial court found McKelvey guilty of both counts. *McKelvey*, 474 P.3d at 20. [Exc. 340-42, 346, 357, 365]

McKelvey appealed. *McKelvey*, 474 P.3d at 20. The court of appeals concluded that it was unlikely that McKelvey was entitled to relief under the Fourth Amendment. *Id.* at 22-26. But the court concluded that McKelvey was entitled to relief under the Alaska Constitution, reasoning that using the telephoto lens to photograph the greenhouse, in conjunction with the overflight, was a search. *Id.* at 26, 32.

The State filed a petition for hearing, which this Court granted.

STANDARD OF REVIEW

When evaluating the denial of a motion to suppress, this Court views the evidence "in the light most favorable to upholding the trial court's ruling." *State v. Wagar*, 79 P.3d 644, 650 (Alaska 2003). It reviews deferentially the trial court's findings of fact under the "clearly erroneous" standard. *Geczy v. LaChappelle*, 636 P.2d 604, 606 n.6 (Alaska 1981). Thus, the appellate court must accept the facts as found by the lower court unless, based on the record, it is left "'with a definite and firm conviction . . . that a mistake has been made'." *Id.* (quoting *Mathis v. Meyeres*, 574 P.2d 447, 449 (Alaska 1978)). As to disputed factual issues not expressly resolved by the trial court, this Court views the evidence in the record in the light most favorable to the prevailing party, here the State. *Hubert v. State*, 638 P.2d 677, 683 (Alaska App. 1981). It reviews de novo the trial court's application of the law to the facts. *Ross v. Bauman*, 353 P.3d 816, 823 (Alaska 2015).

This case focuses on the second prong of the reasonable-expectation-of-privacy test, *i.e.*, "'is that expectation one that society is prepared to recognize as reasonable?'" *Cowles v. State*, 23 P.3d 1168, 1170 (Alaska 2001). In general, this is a legal question. *Beltz v. State*, 221 P.3d 328, 332 (Alaska 2009). But it can also involve factual issues. The answer to this question "rests on constitutional intent and, ultimately, on a judgement concerning the proper balance to be struck between the rights of the individual and the authority

society exercises over individuals through the agency of government." *State v. Page*, 911 P.2d 513, 515-16 (Alaska App. 1996).

ARGUMENT

McKelvey contended below that both the United States and the Alaska Constitutions prohibited Trooper Moore's actions. [At. Br. 9-19] McKelvey's argument is unpersuasive because his expectation that his greenhouse would not be photographed from the air was not reasonable. Trooper Moore flew near McKelvey's property in a manner any citizen was permitted to fly and photographed it with a publicly available camera. Consequently, Trooper Moore's conduct was not a search. The State addresses first the federal components of McKelvey's argument and then his state constitutional claims.

I. TROOPER MOORE'S FLIGHT AND PHOTOGRAPHING OF MCKELVEY'S MARIJUANA GROW WERE NOT A SEARCH UNDER THE FOURTH AMENDMENT

Trooper Moore's overflight and his photographing of McKelvey's marijuana grow were permissible under the Federal Constitution. Simply put, the flight was not a search, and the photographing did not turn it into one.

A. Trooper Moore's flight—which complied with FAA regulations, occurred where overflight is not unexpected, and was nonintrusive—did not infringe on any reasonable expectation of privacy

The Fourth Amendment prohibits unreasonable searches. "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *California v.*

Ciraolo, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). This is "a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged" conduct? *Ciraolo*, 476 U.S. at 211. Second, is society willing to recognize that expectation as reasonable? *Id.*; *see also Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *Ciraolo*, 476 U.S. at 211) ("a Fourth Amendment search does *not* occur . . . unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable'").

The first prong is not disputed in this case. Based on the signs posted throughout the property and the sight-barrier of trees, the trial court correctly found that McKelvey had a subjective expectation of privacy in the greenhouse. [Exc. 327, 329] The State also agrees that McKelvey's greenhouse was within the home's curtilage and was, therefore, entitled to the same constitutional protections as the home, although the exposure of the marijuana to aerial view for an extended period is relevant. [Exc. 329] *See Hakala v. Atxam Corp.*, 753 P.2d 1144, 1149 n.8 (Alaska 1988); *Kelley v. State*, 347 P.3d 1012, 1013-14 (Alaska App. 2015); *see also United States v. Dunn*, 480 U.S. 294, 300 (1987) (stating that the Fourth Amendment protects a house's curtilage).

Thus, this case hinges on the second prong: is society, particularly Alaskan society—as discussed in Section II— willing to recognize McKelvey's

expectation of privacy as reasonable? As the trial court correctly found, the answer is no.

The Supreme Court has addressed this privacy question in several aerial observation cases, each time concluding that the defendant did not have a reasonable expectation of privacy. First, in *Ciraolo*, the Court held that officers were permitted to fly over the defendant's property, which was enclosed by a ten-foot fence, at 1,000 feet, and to photograph the marijuana growing in his yard with a standard 35-millimeter camera. 476 U.S. at 209-10. The Court held initially that the defendant satisfied the first prong of the *Katz* test, because he had a subjective expectation of privacy. *Id* at 211.

The Court then turned to the second inquiry under *Katz*: whether the defendant's expectation was reasonable. *Ciraolo*, 476 U.S. at 212. The Court explained that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.* at 213. This is because "'[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" *Id.* (quoting *Katz*, 389 U.S. at 351).

The observations in *Ciraolo*¸ like in McKelvey's case, "took place within public navigable airspace, in a physically nonintrusive manner[.]" *Ciraolo*, 476 U.S. at 213 (citation omitted); *see also* 14 C.F.R. § 91.119(c)

(requiring airplanes to maintain an altitude of at least 500 feet in non-congested areas). From their location, the police observed plants readily discernable to the naked eye as marijuana. *Ciraolo*, 476 U.S. at 213. "Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed," as could have a "power company mechanic on a pole overlooking the yard." *Id.* at 213-14, 214-15. The Court "readily" concluded that "[i]n an age where private and commercial flight in the public airways is routine," the defendant's "expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor." *Id.* at 214, 215. The Court concluded that the officers' actions were not a search. *Dow Chem. Co. v. United States*, 476 U.S. 227, 234-35 (1986) (summarizing *Ciraolo*).

Thus, nonintrusive observations into the curtilage from a vantage point outside it are generally permissible. *See Florida v. Riley*, 488 U.S. 445, 449 (1989) (summarizing *Ciraolo* as, "Our reasoning was that the home and its curtilage are not necessarily protected from inspection that involves no physical invasion.").

The Supreme Court again concluded that there was no search in *Riley*, where the officer circled twice over the defendant's property in a helicopter at 400 feet and observed, with his naked eye, marijuana in a greenhouse. 488 U.S. at 449. Summarizing *Ciraolo*, the four-member plurality stated that in general

the police may observe what may be seen from a public vantage point where the police have a right to be. *Riley*, 488 U.S. at 450. Applying this principle, the plurality explained that the defendant "could not reasonably have expected the contents of his greenhouse to be immune from examination" by an officer in a helicopter at an altitude of 400 feet. *Riley*, 488 U.S. at 450. First, this is because helicopters are generally permitted to fly at any safe altitude. *Id.* at 451; *see also* 14 C.F.R. § 91.119(d) (permitting helicopters fly at any safe altitude). Second, there was no indication that such flights were unheard of in that county. *Riley*, 488 U.S. at 450.

The plurality reasoned that "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more." *Riley*, 488 U.S. at 451. The plurality acknowledged that not every inspection of the curtilage from an aircraft will be permitted under the Fourth Amendment simply because the aircraft is within the navigable airspace permitted by law. *Id.* But there was "nothing in the record . . . to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to [Riley's] claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude." *Id.* at 451-52. Nor was there any intimation that the helicopter interfered with the defendant's normal use of the curtilage; "no intimate details connected with the use of the home or curtilage were

observed, and there was no undue noise, and no wind, dust, or threat of injury." *Id.* at 452. Thus, the Court in *Riley* considered factors in addition to altitude.

Justice O'Connor concurred that the police observation of Riley's greenhouse "did not violate an expectation of privacy 'that society is prepared to recognize as 'reasonable'.'" *Riley*, 488 U.S. at 452 (O'Connor, J., concurring) (quoting *Katz,* 389 U.S. at 361 (Harlan, J., concurring)). She wrote separately to clarify that in *Ciraolo* the defendant's "expectation of privacy was unreasonable . . . because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons . . . to expect that their curtilage will not be observed from the air at that altitude." *Id.* at 453. Justice O'Connor stated that "the defendant must bear the burden of proving that his expectation of privacy was a reasonable one[.]" *Id.* at 455 (citing *Jones v. United States*, 362 U.S. 257, 261 (1960) ("Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search . . . that he . . . establish . . . that he himself was the victim of an invasion of privacy")). Because "there is considerable public use of airspace at altitudes of 400 feet and above, and because Riley introduced no evidence to the contrary," Justice O'Connor concluded that "Riley's expectation that his curtilage was protected from naked-eye aerial observation from that altitude was not a reasonable one." *Id.*

Dunn is not an aerial observation case but is nevertheless instructive because, like McKelvey's case, it is about officers, who were in an area not protected by the Fourth Amendment, looking inside a structure. 480 U.S. at 297-98. In *Dunn*, officers entered the defendant's property, passed over fences, and shone a flashlight into a barn, where they saw a drug laboratory. *Id.* The Supreme Court held that even assuming the barn was within the home's curtilage, the area outside of it was not. *Id.* at 303-04. And because the officers stood "outside the curtilage of the house" and "peered into the barn's open front," their observation was lawful. *Id.* at 304.

The Ninth Circuit reached the same conclusion in *United States v. Broadhurst*, where the police flew three times over the defendant's greenhouse containing marijuana. 805 F.2d 849, 850 (9th Cir. 1986). Despite the signs and fence restricting ground level access and the defendant's painstaking efforts to conceal the greenhouse's contents, which indicated a subjective expectation of privacy, the court concluded that he had no reasonable expectation of privacy from aerial observations. *Id.* at 850, 855-56. "[T]he police saw, from public navigable airspace, what anyone else could have seen from that position[.]" *Id.* at 855. And "[w]hat a person knowingly exposes to public view is not protected by the Fourth Amendment." *Id.* at 856.

Based on these cases, McKelvey did not have an expectation of privacy—in the contents of his greenhouse from police overflights—that society

was willing to recognize as reasonable. When Trooper Moore flew near McKelvey's property at an altitude of at least 600 feet above ground level, he was above the FAA 500-foot altitude requirement. He was in "a public vantage point where he has a right to be." *Ciraolo*, 476 U.S. at 213. Anyone could have taken the trooper's flight path and "observed [McKelvey's] greenhouse. [Trooper Moore] did no more." *Riley*, 488 U.S. at 451.

Several other factors support the flight's lawfulness. Trooper Moore did not interfere with McKelvey's use of his curtilage. The trooper flew at about 70 miles per hour approximately one-quarter to one-half a mile south of McKelvey's property, not over it, and he passed it in just seconds. [Exc. 84, 116, 119, 135, 138, 159, 282, 307] The flight, which was conducted at a reasonable time in the early afternoon, did not create any wind, dust, threat of injury, or undue noise. Nor did the trooper observe intimate details connected with the use of the home or curtilage. Moreover, to take the pictures, he flew near McKelvey's property only once (he took no pictures on the return flight). [Exc. 123]

Additionally, like Ciraolo, McKelvey did not restrict aerial views of the greenhouse. That McKelvey took "measures to restrict some views of his activities [did not] preclude [Trooper Moore's] . . . observations from a public vantage point where he ha[d] a right to be and which render[ed] the activities clearly visible." *Ciraolo*, 476 U.S. at 213.

Importantly, McKelvey lived just over a mile away from one active airstrip, and there was a second one nearby. [Exc. 51, 59, 61, 71, 110-11, 114-15, 133-34] Trooper Moore testified that he had previously flown repeatedly over the road near which McKelvey lived, that he had participated in training at a nearby airstrip, and that there were several private airstrips "all up and down" the road. [Exc. 107-08, 128, 133]

Whatever McKelvey's subjective expectations about flights near his property might have been, the proximity of McKelvey's "greenhouse to a nearby airport further detracted from the reasonableness of the expectation that [his] greenhouse would remain free of aerial observation." *Broadhurst*, 805 F.2d at 856; *see also United States v. Bassford*, 601 F. Supp. 1324, 1331 (D. Me. 1985), *aff'd*, 812 F.2d 16 (1st Cir. 1987) (noting that there were several small airports near the defendant's property and taking "judicial notice of the common use of small planes in Maine"); *United States v. Allen*, 675 F.2d 1373, 1379, 1380 (9th Cir. 1980) (holding that the proximity of the defendants' property to federal land and airspace, which was routinely traversed by Coast Guard helicopters, made impossible a reasonable expectation of privacy from aerial, sense-enhanced observations). As the court of appeals noted, the trial "court found McKelvey's testimony [about the frequency of flights in that area at that altitude] . . . unpersuasive, in light of the frequency of air travel in Alaska generally and the presence of an air strip a mile from McKelvey's

property." *McKelvey*, 474 P.3d at 25. [Exc. 322, 330-31, 336-37] For the foregoing reasons, Trooper Moore's flight passed muster under the Fourth Amendment.

B. Trooper Moore's use of a publicly available telephoto lens to photograph McKelvey's greenhouse did not infringe on any reasonable expectation of privacy

Trooper Moore's use of a publicly available telephoto lens to take photographs of McKelvey's greenhouse that were not particularly detailed was not a search under the Fourth Amendment. In *Dow*, the Supreme Court permitted warrantless aerial photography much more precise than that here. 476 U.S. at 239. Although *Dow* differs in that the area photographed was a manufacturing complex, its discussion of enhanced photography is relevant. In *Dow*, the government employed an aerial photographer, using a floor-mounted, $54,000,[3] precision aerial mapping camera, to take pictures at altitudes ranging from 1,200 to 12,000 feet. *Id.* at 229; *id.* at 242 n.4 (Powell, J., concurring and dissenting). The camera was "the finest precision aerial camera available," "saw a great deal more than the human eye could ever see," and could take photographs that facilitated a type of examination that permits

[3] The camera cost $22,000 in 1986, which is equivalent to about $54,500 in 2021. https://www.in2013dollars.com/us/inflation/1986?amount=22000#:~:text=Value%20of%20%2422%2C000%20from%201986,cumulative%20price%20increase%20of%20147.90%25 (last visited Aug. 7, 2021).

depth perception. *Id.* at 242 n.4. The pictures were so detailed that simple magnification permitted identification of objects so small as wires half an inch in diameter contrasting with the snow-white background. *Id* at 238.

Despite the photographs' details, the four-member plurality opinion drew a distinction between "highly sophisticated surveillance equipment not generally available to the public, such as satellite technology," and a "precise, commercial camera commonly used in map-making." *Dow*, 476 U.S. at 238. The Court acknowledged that the photographs gave the government "more detailed information than naked-eye views, [but] they remain limited to an outline of the facility's buildings and equipment." *Id.*

In older cases, the Supreme Court similarly concluded that using a device to illuminate or magnify a distant object did not require a search warrant. For example, in *On Lee v. United States*, the Court noted that "[t]he use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions." 343 U.S. 747, 754 (1952). And in *United States v. Lee*, holding that no search had occurred where the boatswain on a patrol boat shone a searchlight onto a motorboat, the Court commented, "[s]uch use of a searchlight is comparable to the use of a marine glass or a field glass." 274 U.S. 559, 562 (1927); *see also* *Dunn*, 480 U.S. at 305 (holding that using a flashlight to shine into the

defendant's barn "did not transform [the officers'] observations into a unreasonable search"); *Texas v. Brown*, 460 U.S. 730, 740 (1983) (citing numerous cases for the proposition that "the use of artificial means to illuminate a darkened area simply does not constitute a search").

Other courts have similarly concluded that using various publicly available technology, like the telephoto lens Trooper Moore used, did not transform the conduct into a search. For example, in *L. R. Willson & Sons v. OSHRC*, the court held that the government could videotape a construction worksite from the roof of a nearby hotel with a camera lens that magnified sixteen times. 134 F.3d 1235, 1238-39 (4th Cir. 1998). The viewing from the hotel roof was not "an unreasonable intrusion into Willson's 'private space.'" *Id.* at 1238. Further, relying on *Dow*, the court concluded, "[t]hat this sustained view was enhanced by the use of a telephoto camera lens does not change this conclusion." *Id.* at 1238-39; *see also Allen*, 675 F.2d at 1380 (photographing from a helicopter using a camera with a 70-230-mm telephoto lens was not a search because "[s]uch equipment is widely available commercially"); *United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978) ("Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars . . . [and] . . . airplanes . . . contribute to surveillance without violation of the Fourth Amendment in the usual case."); *United States v. Wright*, 449 F.2d 1355, 1356-57 (D.C. Cir. 1971) (permitting

an officer to shine a flashlight through an opening in the door); 1 D. Rudstein, C. Erlinder, & S. Thomas, *Criminal Constitutional Law*, § 2.03[2][d], at 2-94 n.333 (Matthew Bender 2017) (collecting cases using 70-230-mm lens, 90-250-mm lens, 200-mm lens, 300-mm lens, and 600-mm lens); *cf. United States v. Van Damme*, 48 F.3d 461, 463 (9th Cir. 1995) (photographing with a publicly available 35-mm camera with a 600-mm lens was not a search).

In *Kyllo*, the Supreme Court discussed when an instrument converts conduct into a search. 533 U.S. at 40. In that case, the officer used a thermal-imaging device that determined temperatures inside a home by measuring the heat on its outer surfaces. *Id.* at 34. The Court concluded that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search'[.]" *Id.* at 40.

Under these standards, Trooper Moore's use of a telephoto lens set to 280 millimeters was not a search for Fourth Amendment purposes. First, as the trial court correctly found based on the trooper's testimony, the trooper's telephoto lens camera was publicly available. [Exc. 124, 334] His camera was far less sophisticated and expensive than the one used in *Dow*, where the Court nevertheless concluded that there was no search because, in part, the camera was commercially available. Second, the photographs are not particularly detailed, with the buckets somewhat difficult to make out and their contents

not visible. Unlike the thermal detection device in *Kyllo*, the lens did not permit the trooper to see "details . . . that would previously have been unknowable without physical intrusion[.]" 533 U.S. at 40. The lens simply enhanced one of the trooper's senses, his vision, and "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth" with certain instruments. *United States v. Knolls*, 460 U.S. 276, 282-83 (1983) (holding that the police could hide a radio transmitter inside a container to monitor its location). That Trooper Moore's "vision [was] enhanced somewhat, at least to the degree here, does not give rise to constitutional problems." *Dow*, 476 U.S. at 238.

In conclusion, Trooper Moore was permitted under the Fourth Amendment to fly about one-quarter to one-half a mile away from McKelvey's property at 600 feet, a height permitted by regulation and commonly utilized, and to photograph McKelvey's greenhouse with a publicly available telephoto lens. Even the court of appeals concluded that "it is unlikely that McKelvey would prevail under the Fourth Amendment." *McKelvey*, 474 P.3d at 26.

II. TROOPER MOORE'S FLIGHT AND PHOTOGRAPHING OF MCKELVEY'S MARIJUANA GROW WERE NOT A SEARCH UNDER THE ALASKA CONSTITUTION

Trooper Moore's actions were permissible also under the Alaska Constitution. Although this exact issue is one of first impression, there are

analogous cases. This Court should apply the reasonable expectation of privacy test and consider the totality of the circumstances, as it does in search and seizure contexts generally. *E.g.*, *Beltz*, 221 P.3d at 337 (considering the totality of the circumstances in evaluating reasonable suspicion). This promotes flexibility while providing guidance because these concepts are well established. Here, Trooper Moore did what any private citizen was permitted to do: he flew in publicly navigable airspace and took pictures, using a commercially available camera, that were not particularly detailed. Consequently, considering all the circumstances, Trooper Moore's conduct was not a search, and public policy reasons support this conclusion.

A. Trooper Moore's flight did not infringe on any expectation of privacy that Alaskans would find reasonable

Article I, Section 14 of the Alaska Constitution prohibits unreasonable searches. In evaluating search claims under the Alaska Constitution, Alaska courts use the federal two-part reasonable-expectation-of-privacy test. *Cowles*, 23 P.3d at 1170 ("(1) did the person harbor an actual (subjective) expectation of privacy, and, if so, (2) is that expectation one that society is prepared to recognize as reasonable"). Consistent with Justice O'Connor's position in *Riley*, described above, under Alaska law McKelvey has the initial burden to show that a search occurred, *i.e.*, that a reasonable expectation of privacy was

violated. *See Stamper v. State*, 402 P.3d 427, 430 (Alaska App. 2017) (recognizing that the defendant has the initial burden to show that a search occurred). The first prong is, again, not disputed.

The second prong "entails 'a value judgment . . . whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.'" *Cowles*, 23 P.3d at 1171 (quoting 1 Wayne R. LaFave, *Search and Seizure* § 2.1(d), at 391-92 (3d ed. 1996)) (alteration in *Cowles*). In resolving this value judgment, the court must assess "'the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct[.]'" *Id.* (quoting *United States v. White*, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting)).

Although Alaska courts are not bound by federal courts' interpretations of similar federal constitutional provisions, they turn to federal courts for guidance. *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982); *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972). Thus, the federal cases discussed above are instructive. Unlike the federal Constitution, the Alaska Constitution has an explicit right to privacy, so its protections are broader than those of the implied federal right to privacy. Article I, Section 22 ("The right of the people to privacy is recognized and shall not be infringed."); *Beltz*, 221 P.3d at 335.

But this clause does not create an independent ground to suppress evidence. *State v. Gibson*, 267 P.3d 645, 659 (Alaska 2012); *Municipality of Anchorage v. Ray*, 854 P.2d 740, 750-51 (Alaska App. 1993). Rather, it merely affects the court's interpretation of Article I, Section 14. *Gibson,* 267 P.3d at 659; *Ray,* 854 P.2d at 750. Thus, the court does not conduct a separate analysis under the privacy clause. *Ray*, 854 P.2d at 751.

Turning specifically to police observation of citizens' actions, this Court, like the federal courts, has held that "[a]ctivities that are open to public observation are not generally protected by the Fourth Amendment" or by the Alaska Constitution. *Cowles*, 23 P.3d at 1171 (rejecting the defendant's federal and state constitutional claims). The courts have coined the term "open view" to describe these kinds of observations.[4] Under the open view doctrine, an officer lawfully in an area not protected by the Fourth Amendment may observe what is open to her viewing without turning her observation into a search. *Anderson*, 444 P.3d at 243. For example, in *Pistro v. State*, this Court explained that an officer may observe whatever is in her view when she is "upon a part of surrounding property that has been expressly or impliedly open

[4] The term "plain view" is also sometimes used, but there is a distinction between the two (this distinction's relevance is discussed below). The plain view doctrine applies when an officer sees something while lawfully in a constitutionally protected area, such as a home during a warrant execution. *Anderson v. State*, 444 P.3d 239, 243 (Alaska App. 2019).

to the public[.]" 590 P.2d 884, 885, 887 (Alaska 1979). Thus, it held that the police could walk down a private driveway, which was impliedly open to the public, and from there observe the defendant in the garage. *Id.* at 886-87. A few years earlier, this Court similarly held that "[i]t is no search to observe that which is in the plain view of an officer who is rightfully in a position to have that view."[5] *Daygee v. State*, 514 P.2d 1159, 1162 (Alaska 1973); *see also Weltz v. State*, 431 P.2d 502, 505 (Alaska 1967) (quoting *Brown v. State*, 372 P.2d 785, 790 (Alaska 1962)) ("'[I]t is generally held that the mere looking at that which is open to view is not a 'search'.'").

Although Alaska appellate courts have not addressed police aerial observations, *Cowles* is analogous. In *Cowles*, this Court held that the police could covertly videorecord the defendant at her work desk. 23 P.3d at 1175. It explained that the defendant did not have a reasonable expectation of privacy there because customers and co-workers viewed it. *Id.* at 1172. Exercising the value judgment of the privacy test, it concluded that the secret recording "was not . . . inconsistent with the values of our free society." *Id.* at 1175.

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[5] Although this Court used the term "plain view," "open view" would have been more accurate because the officer was in an area open to the public. It is not uncommon for courts to use the term "plain view" to convey both concepts, and the term "open view" has been suggested to reduce confusion. *Anderson*, 444 P.3d at 243 & n.13.

Applying these principles here leads to the conclusion that Officer Moore could observe McKelvey's greenhouse from the airplane without a warrant. The initial analysis is like that in Section I.A and is only summarized here.

First, as *Cowles*, *Pistro*, and *Daygee* make clear, an officer is permitted to observe from a location where he is allowed to be. The trial court correctly found that Trooper Moore was in publicly navigable airspace. [Exc. 330] Thus, because Trooper Moore was lawfully in an area not protected by the Fourth Amendment when he observed McKelvey's property, the open view doctrine applies. Consequently, his viewing of the greenhouse was not a search. *See, e.g.*, *Anderson*, 444 P.3d at 243 (holding that it was not a search for the officer to see the defendant's incriminating clothes because he observed them while in a hospital room). Next, considering all the flight's circumstances, as did the Court in *Riley* and as is appropriate in aerial observation cases, Trooper Moore's flight was particularly unobtrusive. He flew once one-quarter to one-half a mile south of McKelvey's property.

Additionally, this Court should consider the abundance of small aircraft in Alaska. Small planes are commonly used for various kinds of pleasure trips (fishing, hunting, skiing, backpacking, sightseeing) as well as more essential ones. Often, planes are the only mechanized means of transport between communities off the road system and the rest of the state. Virtually

every community in Alaska has an airstrip, and Alaskans are used to mail planes, air taxis, and game guides flying over; it is part of the fabric of life in Alaska. This is also true in urban areas, where both large commercial planes and small private ones are taking off and landing every few minutes at the busier airports, particularly during the summer.[6] The number of enplanements (4.8 million) in Alaska is 6.5 times the state population compared to 2.4 times the United States population for all states.[7] In short, small planes are ubiquitous in Alaska like nowhere else in the country. As the trial court aptly observed:

> Alaska is a state where public use of small aircraft is very common, and it also is a state where photography and visual magnification from the air is very commonplace. In Alaska, wildlife viewing, hunting, and photography are all common pursuits, both by Alaska residents and by the many tourists who visit Alaska each year. Because of the nature of Alaska's geography and relative scarcity of roads and other modes for ground-travel, it is unsurprising that the best views of Alaska's wilderness and wildlife are often afforded via aircraft. Hunters often search for the presence of game with binoculars via aircraft in advance of a hunt, and Alaskan wildlife and nature photographers often take photos from airplanes flying over the

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[6] Alaska has 400 public use airports and about 750 total landing areas (private, public, and military). Pilots also land on many of the thousands of lakes and gravel bars across the state. Alaska has the most seaplane bases in the country. Lake Hood is the world's busiest seaplane base with almost 600 takeoffs and landings on peak summer days. In 2016, there were 7,933 active pilots and 9,346 registered aircraft in Alaska. FAA *Alaskan Region Aviation Fact Sheet* (January 2016), https://www.faa.gov/about /office_org/headquarters _offices/ato/service_units/air_traffic_services/artcc/anchorage/media/Alaska_Aviation_Fact_Sheet.pdf (last visited July 28, 2021).

[7] *Id.* There are more than 300 certified air carriers in Alaska. *Id.*

> subject of their photography. To say that the public uses a combination of low-flying aircraft and visual magnification on a regular basis in Alaska is certainly no exaggeration, considering that much of Alaska's tourism industry is built around this very practice.

[Exc. 336] Moreover, in addition to the two airstrips near McKelvey's property on Grange Hall Road, there were larger airports not far away. [Exc. 292] The largest, Fairbanks International Airport, where more than 550 airplanes are based, annually hosts about a million passengers and has more than 110,000 take-offs and landings.[8] In addition, Eielson Air Force Base is about a dozen miles south of McKelvey's property, and there are additional airports in the Chena area northeast of his property.[9] In summary, aircraft commonly fly over much of the state and especially over areas close to airstrips and airports, like McKelvey's property. An expectation for them not to do so is unreasonable.

Finally, most states, even though they lack the pervasive small aircraft presence characteristic of Alaska, nonetheless permit warrantless police overflights when the flight complies with FAA regulations and, in some jurisdictions, is not intrusive.[10]

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[8] https://en.wikipedia.org/wiki/Fairbanks_International_Airport; https://adip.faa.gov/agis/public/#/airportData/FAI; https://www.faa.gov/news/media_resources/atadsguide/#opsReportSingleAirport (last visited Aug. 13, 2021).

[9] https://maps.google.com (last visited Aug. 13, 2021).

[10] *E.g.*, *Henderson v. People*, 879 P.2d 383, 390-91 (Colo. 1994) (quoting *Hoffman v. People*, 780 P.2d 471, 474 (Colo. 1989) (permitting observations from a helicopter of marijuana in a defendant's yard and stating that "'a

This Court should also consider not only the trooper's actions but also McKelvey's. Although McKelvey limited ground-level access to his property, he did nothing to conceal the marijuana from aerial observation. As this Court remarked, "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)." *Cowles*, 23 P.3d at 1172 (emphasis in original). Even if McKelvey had a reasonable expectation of privacy that his greenhouse would be shielded from ground level view, this did not make his

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curtilage is not protected from observations that are lawfully made from outside its perimeter not involving physical intrusion'"); *Commonwealth v. One 1985 Ford Thunderbird Auto.*, 624 N.E.2d 547, 548-51 (Mass. 1993) (permitting aerial observations using binoculars of marijuana in the defendant's backyard); *State v. Rogers*, 673 P.2d 142, 142-44 (N.M. App. 1983) (permitting viewing with binoculars from a helicopter at an altitude of 100 to 200 feet marijuana in a greenhouse within the home's curtilage); *State v. Ainsworth*, 801 P.2d 749, 752 (Or. 1990) (upholding observations of marijuana because the officers were lawfully "in the air above defendant's land"); *Commonwealth v. Robbins*, 647 A.2d 555, 558-62 (Pa. Super. 1994) (holding that aerial observation from 500 feet was not a search); *State v. Roode*, 643 S.W.2d 651, 652-53 (Tenn. 1982) (permitting observation of marijuana from a helicopter at 200 feet); *State v. Wilson*, 988 P.2d 463, 465 (Wash. App. 1999) (holding that observing marijuana from 500 feet was not intrusive, thus not constituting a search, because the height complied with FAA regulations); *see also State v. Davis*, 360 P.3d 1161, 1167-72 (N.M. 2015) (stating that "unobtrusive" warrantless aerial observations are generally permitted but actions in this case violated FAA regulations and were intrusive); *Commonwealth v. Oglialoro*, 579 A.2d 1288, 1292 (Pa. 1990) (stating that "[a]s long as the police have the right to be where they are, and the activity is clear and visible, the fact that they are peering into curtilage is of no significance" but concluding that a helicopter hovering at 50 feet created a risk of harm).

expectation of privacy from aerial observation reasonable. *See Dow*, 476 U.S. at 238 n.4 (finding relevant that although Dow took extensive measures to protect against ground level observation, it took no precautions against aerial observation, even though the plant was near an airport). Second, because the greenhouse is translucent, McKelvey exposed, or at least, until it was taken down, was expecting to expose the marijuana to aerial views for the months that it takes to grow. It is more likely that something exposed to aerial view for months would be observed, whether by a power company mechanic, a neighbor flying to their remote cabin, or a trooper.

Considering these facts to answer the "value judgment" inherent in the second prong of the reasonable-expectation-of-privacy test yields the same conclusion as in *Cowles*. In our free and open Alaskan society, law enforcement is permitted to fly in the same manner as private citizens and to observe. Alaskans recognize that planes flying briefly over their properties at reasonable altitudes are an accepted part of life. Consequently, the trial court correctly found that "although McKelvey's expectation of privacy in the contents of his greenhouse to ground-level observation may have been objectively reasonable, his expectation of privacy from an aerial view was not." [Exc. 332] McKelvey failed to meet his burden of showing that a search occurred. *See Stamper*, 402 P.3d at 430 (placing the burden on the defendant to show that a search occurred).

As part of the value judgment in evaluating whether McKelvey's expectation of privacy was reasonable, this Court must also consider the police conduct's utility. *Cowles*, 23 P.3d at 1171. The court of appeals' ruling imposes significant costs because it prohibits an effective investigative method. While this case involved a marijuana grow, the next case could involve an abducted child. The court's ruling prohibits the police from using binoculars to observe backyards from the air for a missing child without a warrant or a warrant exception.

Although the court of appeals did not rule on the legality of the overflight alone—because it considered the telephoto lens in conjunction with it—in dicta the court rejected the federal view and that of most states on this issue. The court of appeals' approach is incorrect for at least two reasons. First, the court of appeals did not adequately acknowledge the presence of small aircraft in Alaska. Second, its prohibition of the conduct because it was done specifically to investigate a marijuana grow is contrary to Alaska law.

The court of appeals incorrectly found persuasive the dissents in *Ciraolo* and *Riley*. *McKelvey*, 474 P.3d at 23-25 (citing *Ciraolo*, 476 U.S. at 223-25 (Powell, J., dissenting) and *Riley*, 488 U.S. at 456-67 (Brennan, J., dissenting and Blackmun, J., dissenting)). In addition to these not being the law, these views do not apply in this case. The court of appeals' (and McKelvey's) reliance on the dissent in *Ciraolo* is misplaced because the

dissent's assumptions about flying do not apply in Alaska. The *Ciraolo* dissent's comment about "fleeting, anonymous, and nondiscriminating glimpse[s]" might apply to passengers flying at 600 miles per hour in a commercial jet at 30,000 feet. 476 U.S. at 223 (Powell, J., dissenting). But it does not apply to the uniquely Alaskan situations described previously. The dissent also asserted that "[a]s all of us know from personal experience, at least in passenger aircrafts, there rarely—if ever—is an opportunity for a practical observation and photographing of unlawful activity similar to that obtained by [the officer] in this case." *Id.* at 223 n.8. The personal experience of many Alaskans is very much the opposite. They have flown in, or have seen, small aircraft at relatively low altitude, where detailed observations and photographing are common.

Likewise, the court of appeals' reliance on the dissent in *Riley* is unpersuasive here. The dissent reasoned that an officer in a helicopter at 400 feet is not like an officer on a public road. *Riley*, 488 U.S. at 460 (Brennan, J., dissenting). The officer in the helicopter relied on "a very expensive and sophisticated piece of machinery to which few ordinary citizens have access." *Id.* But this is not true in McKelvey's case for several reasons. First, the troopers used a small airplane, not a helicopter, and small airplanes are much more common and affordable than helicopters. Second, as discussed above, Alaska is unique in that small airplane ownership and flights are much more

common than in other states. Thus, the dissent's underlying basis, the infrequency of helicopter travel, is inapplicable here.

Moreover, the court of appeals' position is in tension with this Court's precedent. This Court in *Cowles* repeatedly cited approvingly *Ciraolo* and Justice O'Connor's concurrence in *Riley* in holding that the defendant did not have a reasonable expectation of privacy at her work desk. *Cowles*, 23 P.3d at 1170 n.5, 1173 n.21. Notably, Justice Fabe in her dissent in *Cowles* explicitly referred to *Ciraolo* and *Riley* as holding "that defendants should reasonably expect overflight observation by law enforcement in airplanes or helicopters, *because it is routine for members of the public to see the same view during air travel*." *Cowles*, 23 P.3d at 1182 (Fabe, J., dissenting) (emphasis in *Cowles*) (citing *Riley*, 488 U.S. at 450-51, 452-55, and *Ciraolo*, 476 U.S. at 213-14). She also stated that under the federal standard, "sustained observation from close overhead is more likely to violate the Fourth Amendment than would the passing observation of a law enforcement officer in an aircraft." *Id.* at 1183. This indicates that the court of appeals' rejection, based on alleged state law grounds, of the majority opinion in *Ciraolo* and of the outcome in *Riley* is not supported by state law.

The court of appeals also relied on decisions from three states—Vermont, Hawaii, and California—that differ markedly from Alaska in terms of small aircraft travel. None has Alaska's massive size, sparse population,

limited roads, numerous communities off the road system, and routine use of small aircraft. While Hawaii consists of isolated islands, its land size is minuscule in comparison to Alaska's, and it has a larger population.[11] Thus, its inhabitants are not thinly spread out over vast distances, as are Alaska's. And even Hawaii, unlike Alaska, has an interstate highway.[12] The decisions are also individually distinguishable.

The court of appeals repeatedly cited the Vermont decision of *State v. Bryant*, 950 A.2d 467 (Vt. 2008), including for the proposition that a flight's compliance with FAA regulations is not determinative of its constitutionality. *McKelvey*, 474 P.3d at 28 n.61. As an initial matter, the State is not arguing that Trooper Moore's flight's compliance with FAA regulations is determinative; the totality of circumstances is relevant. Moreover, the flight in *Bryant* differed remarkably from the one here. In *Bryant*, the police flew in a helicopter at about 70 to 100 feet above ground and spent about half an hour to an hour around the defendant's property. 950 A.2d at 471. A witness "felt the 'concussion[-like]' feeling that is caused by air movement from a helicopter[.]" *Id.* The court found that the pilot violated state instructions—specifically instituted to protect privacy—to stay at least 500 feet above

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[11] Alaska is more than 100 times larger than Hawaii and has about half of its population. en.wikipedia.org (last visited Aug. 9, 2021).

[12] en.wikipedia.org/wiki/Hawaii (last visited Aug. 9, 2021).

ground. *Id.* at 480. The flight was "contrary to law and regulation." *Id.* The court in *Bryant* specifically found the flight "to be distinctly unlike" the flights in *Ciraolo* and *Riley*. *Id.* at 475. This kind of flight likely would not pass muster under *Ciraolo*, and it definitely would not pass under *Riley* and a totality of the circumstances test.

The court of appeals then relied on decisions from Hawaii—*State v. Quiday*, 405 P.3d 552 (Haw. 2017)—and California—*People v. Cook*, 710 P.2d 299 (Cal. 1985)—to reach its conclusion about what is a reasonable expectation of privacy. *McKelvey*, 474 P.3d at 31. But like *Bryant*, *Quiday* is distinguishable on its facts. In *Quiday*, the police flew directly over the defendant's property—which was surrounded by gates, walls, and fences—on three different occasions in a helicopter at 420 feet. 405 P.3d at 554. This contrasts with McKelvey's case, where the officer took a single pass at 600 feet one-quarter to one-half a mile away from a marijuana grow not surrounded by any fences.

The court of appeals' reliance on *Quiday* is also misplaced for legal reasons. *Quiday* does not stand for the proposition that police flights over yards are unlawful. Rather, the *Quiday* court pointed out that it had previously stated that police helicopter flights at reasonable heights are lawful when, based on a totality of the circumstances, the defendant did not have a reasonable expectation of privacy. 405 P.3d at 560 (citing *State v. Stachler*, 570 P.2d 1323, 1326-29 (Haw. 1977) (permitting viewing through binoculars from

a helicopter at 300 feet above ground of the defendant's marijuana grow, which was about 15 feet from his house, during a general observation flight for criminal activity), and *State v. Knight*, 621 P.2d 370, 373-74 (Haw. 1980) (employing a totality of the circumstances test and concluding that an aerial observation was permissible but a later ground observation was not)); *see also, e.g.*, *People v. Smith*, 225 Cal. Rptr. 348, 352 (Cal. App. 1986) (considering the totality of the circumstances in evaluating an aerial observation); *Bryant*, 950 A.2d at 478 (same); *id.* at 487 (Dooley, J., concurring in part and dissenting in part) (characterizing the majority as relying "upon the totality of the circumstances").

Next, like the court of appeals in this case, the *Quiday* court relied on the California Supreme Court's opinion in *Cook*, which is also distinguishable. *Quiday*, 405 P.3d at 560. Factually, it differs in that in *Cook* the marijuana was surrounded by a tall, solid fence on three sides and the house on the fourth, was covered with wood beams and chicken wire, and then surrounded again by another tall fence. 710 P.2d at 302. Thus, unlike McKelvey, Cook tried to conceal it from above, making his expectation of privacy more reasonable. And *Cook*, a 1983 case, predated the internet, so its assumptions about what is reasonable do not reflect the views of today's society.

Cook's legal distinctions are even more pronounced. First, after the events in that case took place but before the decision was issued, California

amended its constitution to preclude applying the exclusionary rule to evidence obtained in violation of the state constitution. *Cook*, 710 P.2d at 300. Consequently, the *Cook* decision had no prospective weight in California, and no California court has cited *Cook* to reach a decision in an aerial observation case in the last three decades. *Id.* at 308 n.1 (Lucas, J., dissenting); *see also Smith*, 225 Cal. Rptr. at 355 (holding that a defendant could no longer rely on the California Constitution to exclude evidence). Thus, the court of appeals in *McKelvey* relied on an opinion that retains no legal force. *See People v. Romo*, 243 Cal. Rptr. 801, 805 (Cal. App. 1988) (questioning what is left of *Cook* after *Ciraolo* and the amendment of the California Constitution).

Second, the court in *Cook* emphasized that the police were intentionally searching for criminal activity. 710 P.2d at 304, 307. The court of appeals in McKelvey's case, the court in *Quiday*, and, to some extent, the court in *Bryant*, all relied on this intentionality factor. *McKelvey*, 474 P.3d at 31 ("At least two high courts—the California Supreme Court and the Hawaii Supreme Court—have held that an individual has a reasonable expectation of privacy from governmental aerial surveillance . . . if the aerial surveillance is conducted for the purpose of detecting criminal activity."); *Quiday*, 405 P.3d at 562; *Bryant*, 950 A.2d at 473 (considering, among other factors, that the flight was "for the purpose of detecting contraband").

But in *Cowles*, this Court explicitly rejected this position. Specifically citing *Ciraolo* and *Riley*, this Court stated, "[i]f a person's activities are open to view by the public, . . . that they are actually observed [by the police] for the purpose of detecting misconduct does not affect the results of a" constitutional analysis. *Cowles*, 23 P.3d at 1173 (citing *Ciraolo*, 476 U.S. at 213-14 n.2, and quoting *Riley*, 488 U.S. at 453 (O'Connor, J., concurring in judgment) ("if person's activities can be observed from vantage point generally used by public, that person cannot reasonably expect privacy from observation of police"). The court of appeals in *McKelvey* acknowledged this holding of *Cowles* but disregarded it. *McKelvey*, 474 P.3d at 29.

The majority in *Ciraolo* also persuasively rejected the argument that a purposeful observation is somehow more intrusive than a casual one. "[W]e find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two planes pass overhead at identical altitudes, simply for different purposes." *Ciraolo*, 476 U.S. at 214 n.2. The Court noted, "a ground-level observation by police 'focused' on a particular place is not different from a 'focused' aerial observation under the Fourth Amendment." *Id.* Simply put, the officer's mental state "is irrelevant." *Id.*

Several other courts have also found this distinction irrelevant or have found the intentionality of the observation as a factor in favor of finding it constitutional. *Broadhurst*, 805 F.2d at 855 ("that their observation was

focused on defendants' greenhouse, rather than routine and unfocused, does not alter our conclusion"); *Allen*, 675 F.2d at 1381 ("If there is some justification for concentrating a surveillance on a particular place, as opposed to random investigation to discover criminal activity, that factor is weighed in the balance and contributes to justification for the surveillance."); *Rogers*, 673 P.2d at 144 (considering that the police were acting on a tip that the defendant was growing marijuana in his greenhouse "as one factor which tends to justify the" helicopter overflight); *Ainsworth*, 801 P.2d at 753 (noting that purposive police action does not transform a permissible observation into an unconstitutional search; the constitution "prohibits certain governmental conduct, not certain governmental states of mind").

Indeed, most law enforcement conduct is purposeful, and under Alaska law its legality generally does not turn on the officer's mental state. *E.g.*, *Yi v. Yang*, 282 P.3d 340, 347 (Alaska 2012) (citing cases) ("We . . . determine the existence of probable cause under an objective standard without regard to the officer's subjective intent."); *Beauvois v. State*, 837 P.2d 1118, 1122 n.1 (Alaska App. 1992) (quoting W. LaFave, *Search and Seizure* (2nd ed. 1987), § 3.2(b), Vol. 1, pp. 566-69, and § 9.3(a), Vol. 3, pp. 425) (emphasis in LaFave) (holding in an investigative stop context that the officer's "subjective intent when he stopped the car is irrelevant" because the test "'is *purely* objective'"); *Bruns v. State*, No. A-8374, 2003 WL 1878981, at *1 (Alaska App.

Apr. 16, 2003) (unpublished) (citing *Ebona v. State*, 577 P.2d 698, 701 (Alaska 1978)) (holding that "the legality of the stop does not depend on [the officer's] subjective reasons for making" it).

In addition, to scrutinize more closely an intentional observation than an unintentional one conflates the doctrines of plain view and open view. Under the plain view doctrine in Alaska, the officer's observation must be inadvertent.[13] *E.g.*, *Anderson*, 444 P.3d at 243. In contrast, under the open view doctrine, the observation need not be inadvertent. *E.g.*, *McGee v. State*, 614 P.2d 800, 806 n.12 (Alaska 1980); *Sumdum v. State*, 612 P.2d 1018, 1022 (Alaska 1980); *Anderson*, 444 P.3d at 243 & n.12. As explained above, the open view doctrine applies here. Consequently, that the trooper's observation was intentional is irrelevant.

Additionally, applying the court of appeals' distinction between aerial observations "conducted for the purpose of detecting criminal activity" versus aerial observations not for that purpose would be exceedingly difficult and lead to unintended public policy consequences. First, which specific conduct is evaluated? Would a flight when the officer is looking for marijuana generally, rather than at a specific location, be less invasive of privacy, as California courts, rather confusingly, have held? *E.g.*, *compare People v. Mayoff*, 729 P.2d

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[13] The federal plain view doctrine has done away with the inadvertence requirement. *Horton v. California*, 496 U.S. 128, 130 (1990).

166, 168, 172 (Cal. 1986) (permitting an observation flight done under a program to view properties at random) *with Cook*, 710 P.2d at 304, 307. Or would the actual observation of marijuana have to be unintentional, as when, for example, a fish and game trooper is looking for a moose but happens to observe marijuana? Or would the observation altogether have to be unintentional, as, for example, when a pilot on a search and rescue flight sees the marijuana out of the corner of her eye? And what would be the utility of permitting a marijuana observation made by a trooper on a search and rescue flight but not on a flight looking for a grow operation? The court of appeals adopted a position that is confusing and potentially promotes inefficiency. Even the courts in Hawaii and California have disregarded this distinction. The flight in *Stachler* was in search of criminal activity, even if not specifically at the defendant's property. And California courts have found lawful flights that were in search of marijuana. *See infra* footnote 14.

Finally, California courts have permitted aerial observations of marijuana in numerous cases both before and after *Cook*, revealing that sometimes the defendant did not have a reasonable expectation of privacy in the marijuana grow.[14]

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[14] *E.g.*, *Mayoff*, 729 P.2d at 172 (holding that the defendant had no reasonable expectation of privacy in his marijuana grow, from police aerial observation, and stating that the police should use magnifying devices to avoid flying at low, intrusive altitudes); *Romo*, 243 Cal. Rptr. at 805 (permitting a

B. Trooper Moore's use of a publicly available telephoto lens did not infringe on any expectation of privacy that Alaskans would find reasonable

Although Alaska state appellate courts have not addressed when law enforcement must obtain a warrant to photograph images with a telephoto lens, analogous cases and public policy indicate that no warrant was necessary here. In *Daygee*, an officer shined a flashlight into the rear of a car. 514 P.2d 1159, 1160 (Alaska 1973). This Court upheld the search and reasoned, "[t]hat the officer's view . . . was aided by a flashlight is irrelevant." *Id.* at 1162. Discussing *Daygee*, this Court later explained that this view "is taken by nearly

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helicopter overflight at 500 feet of the defendant's backyard marijuana grow based on a tip); *People v. Venghiattis*, 229 Cal. Rptr. 636, 638 (Cal. App. 1986) ("Venghiattis may not successfully assert a reasonable expectation of privacy from lawful aerial observations. His efforts at hiding the garden from passers-by do not serve to protect him from overflights."); *People v. Stanislawski*, 225 Cal. Rptr. 770, 771 (Cal. App. 1986) (holding that the defendant had no reasonable expectation of privacy in his marijuana grow); *Smith*, 225 Cal. Rptr. at 350 ("Smith's attempts to exhibit his expectation of privacy from passers-by does not serve to protect him from overflights."); *People v. Egan*, 190 Cal. Rptr. 546, 552 (Cal. App 1983) (citing cases) (permitting an overflight of a ranch prompted by rumors of marijuana cultivation because "[t]he appellate courts of this state have consistently upheld aerial surveillance from lawful altitudes over rural and relatively unpopulated property"); *People v. Joubert*, 173 Cal. Rptr. 428 (Cal. App 1981) (holding that police could use "seventeen power" binoculars to view the defendant's marijuana grow during a flight to investigate the defendant's property based on rumors of marijuana cultivation; "a binocular aided aerial examination from a lawful altitude does not infringe on a property holder's constitutional right of privacy"); *People v. St. Amour*, 163 Cal. Rptr. 187 (Cal. App. 1980) (holding that the defendants exhibited no reasonable expectation of privacy from a routine marijuana search flight at 1,000 to 1,500 feet and observations with binoculars).

all courts." *Anderson v. State*, 555 P.2d 251, 257 n.29 (Alaska 1976). It then went on to state, "[a]s with flashlight observations, courts have had little difficulty sustaining the warrantless seizure of items observed in plain view with the assistance of binoculars." *Id.* at 258 n.30 (citing cases).

What this Court recognized forty-five years ago has remained true. State courts in many jurisdictions have followed the federal standard and also concluded that an officer enhancing his view by using a lens to look into a defendant's house or curtilage, including from the air, was not a search.[15]

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[15] *E.g.*, *People v. Oynes*, 920 P.2d 880, 882-83 (Colo. App. 1996) (holding that an officer's observation of marijuana inside a home with binoculars from an open field was not a search); *Bernstiel v. State*, 416 So. 2d 827, 828 (Fla. Dist. App. 1982) (citation omitted) (holding that using binoculars to view marijuana in a greenhouse was not a search; "If the contraband had been observed solely by the naked eye, no search would have occurred. We now hold that the use of ordinary binoculars here does not alter this conclusion."); *People v. Hicks*, 364 N.E.2d 440, 442, 444 (Ill. App. 1977) (permitting using night binoculars to look into a hotel room window at 1:00 a.m.); *Rook v. State*, 679 N.E.2d 997, 999-1001 (Ind. App. 1997) (holding that the officer could use ordinary binoculars to observe the area behind the defendant's residence); *State v. Dickerson*, 313 N.W.2d 526, 530-32 (Iowa 1981) (permitting the police to enlarge photographs they took through the window of the defendant's front door because the enlargements "merely enabled the officers to see the exposed items in more detail"); *Rogers*, 673 P.2d 142 at 142-44 (permitting aerial viewing with binoculars of marijuana in the home's curtilage); *People v. Ward*, 308 N.W.2d 664, 667, 669 (Mich. App. 1981) (permitting an observation through a telephoto lens); *State v. Thompson*, 241 N.W.2d 511, 512-13 (Neb. 1976) (permitting using binoculars to look into a house window to see marijuana); *State v. Citta*, 625 A.2d 1162, 1163 (N.J. Super. 1990) ("Is the warrantless use of binoculars by a police officer to observe objects not visible to the naked eye an unreasonable search under the Fourth Amendment to the U.S. Constitution? We hold it is not."); *State v. Louis*, 672 P.2d 708, 709-10 (Or. 1983) (holding that photographing with a telephoto lens a person positioning

Analyzing the trooper's use of a telephoto lens under state law begins with the same principles as the analysis under federal law and is only summarized here. The trooper used a publicly available telephoto-lens-equipped camera. A magnifying lens is unsophisticated technology, much like a flashlight. It simply permits the observer to view more clearly what the naked eye can already see. The trial court correctly characterized the trooper's use of the lens "as an assisted plain view observation." [Exc. 334] And the pictures Trooper Moore took are limited in detail; they depict items visible without a "physical intrusion." *Kyllo*, 533 U.S. at 40. *Anderson* holds that using such an instrument does not transform a non-search into a search. 555 P.2d at 258 n.30.

This Court should also consider recent technological innovations because they are relevant in determining whether an expectation of privacy is

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himself at a window was not a search); *Commonwealth. v. Hernley*, 263 A.2d 904, 906 (Pa. Super. 1970) (permitting an officer to climb a ladder and to look inside a window using binoculars; "that the visual observation was made by the use of binoculars has not made it unreasonable"); *State v. Vogel*, 428 N.W.2d 272, 274-77 (S.D. 1988) (holding that the police could use during aerial observation a camera with a telephoto lens to photograph marijuana plants inside a residence because there was "no showing that the cameras and lenses used [were] 'sophisticated visual aids' or 'special equipment not generally in use'"); *State v. Manly*, 530 P.2d 306, 307, 309 (Wash. 1975) (permitting using binoculars to view marijuana inside a home); *State v. Lange*, 463 N.W.2d 390, 394-95 (Wis. App. 1990) (permitting aerial observation of marijuana within the defendant's curtilage using "standard binoculars and cameras equipped with generally available standard and zoom lenses").

reasonable. As Justice Scalia acknowledged, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo*, 533 U.S. at 33-34. Referring to, among other decisions, *Ciraolo*, he wrote, "the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private." *Kyllo*, 533 U.S. at 34. Similarly, flashlights were once recent innovations. But they became common, and, as stated above, the courts have permitted their use without a warrant.

Today, aerial photographs on the internet have become common, and their presence bolsters the conclusion that McKelvey did not have a reasonable expectation of privacy in his marijuana grow from Trooper Moore's pictures. Aerial photographs of yards, including McKelvey's, are available on the internet on websites like that of the Fairbanks North Star Borough, Google Maps, and Google Earth.[16] And the photographs are becoming more detailed:

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[16] Attachment 2 is an aerial photograph of McKelvey's property from the Fairbanks North Star Borough web site. https://gisportal.fnsb.us/enterprise/apps/webappviewer/index.html?id=fac2c97817994436a5fcb324ea839d65 (last visited Aug. 11, 2021). McKelvey's address is 397 North Grange Hall Road (tax lot 3345). [Exc. 207, 292]

"Google Earth is constantly working on gathering the highest resolution imagery possible."[17] [Exc. 62]

The cases the court of appeals cited in support of its conclusion regarding the telephoto lens are all 30 to 40 years old, predating the recent technological advancements discussed above, and, thus, are of limited relevance in assessing what is reasonable today. *McKelvey*, 474 P.3d at 32 n.83 (citing cases dating from 1980 to 1990).

Alaska's unique situation further compels the conclusion that McKelvey did not have a reasonable expectation of privacy in his marijuana grow and, thus, the trooper's use of the camera was not a search. Tourists and many others routinely fly low and photograph Alaska's natural wonders with high powered lenses. Biologists conduct aerial surveys of animal populations with binoculars. As quoted more extensively above, the trial court noted, "the public uses a combination of low-flying aircraft and visual magnification on a regular basis in Alaska[.]" [Exc. 336] Alaska residents have come to expect this kind of aerial observation and photography, and this affects what Alaskans think is reasonable. What Trooper Moore did with his commercially available camera was no different. To impose standards of a handful of other states

[17] One may easily search their own property at https://maps.google.com and https://earth.google.com. In urban and suburban area, the photographs are remarkably detailed.

would ill-serve Alaskans. Instead, considering Alaska's unique situation, the presence of technological innovations, and even the position of the majority of the states, Trooper Moore did not need a warrant to photograph McKelvey's marijuana grow with a telephoto lens.

The court of appeals' analysis regarding the lens is lacking. The court of appeals acknowledged that many courts have permitted photography with telephoto lenses but once again rejected the widely-held view and created a different rule: "an officer's use of vision-enhancing technology should be deemed a 'search' if the technology allows the officer to make observations that are significantly more detailed than what an unaided human eye would be able to see at the same distance." *McKelvey*, 474 P.3d at 32. Under this standard, it appears that a using binoculars would be a search. So an undercover officer, wishing to maintain his cover, watching from a distance a suspected drug deal in a public park would need a warrant. But an officer watching from nearby without binoculars would not. This disparate treatment is illogical and contrary to case law.[18] Crucially, this results-oriented approach ignores the

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[18] *E.g.*, *State v. Wong*, 708 P.2d 825, 827-28 (Haw. 1985) (holding that an officer could use binoculars to observe an exchange of marijuana in a car parked in a lot); *Commonwealth v. Ortiz*, 380 N.E.2d 669, 671-72 (Mass. 1978) (holding that "high-powered" binocular observation of the defendant in public was not a search); *State v. Barr*, 651 P.2d 649, 650-51 (Nev. 1982) (holding that it was not a search to see through binoculars what the defendant had in his hand in a public alleyway); *State v. Jones*, 653 P.2d 1369, 1370-71 (Wash. App.

officer's location, the reasonable expectation of privacy in the location being observed, and the extent to which the technology enhanced the officer's observation. The Ninth Circuit explicitly rejected a rule that the use of any aid that enhances the senses is a search. *United States v. Solis*, 536 F.2d 880, 882 (9th Cir. 1976). "[S]uch a rule would require the abandonment of a useful law enforcement tool which can be . . . utilized with minimal invasion of privacy in order to obtain evidence of probable cause for review by an impartial magistrate before any physical invasion of the protected area was undertaken." *Id.*

The court of appeals' ruling prohibits the police from flying and photographing in a way that citizens can and routinely do. This serves little purpose and places law enforcement in a technologically stunted position, precluding it from using, without a warrant, a valuable investigative tool, the equivalents of which are widely available to the public. There is no sound public policy reason to place law enforcement in a position inferior to the public when it comes to fixed-wing aircraft and photography.

The State is mindful that affirming the trial court could be viewed as imperiling Alaskans' privacy rights, but such a view is illusory. By applying the existing test for determining whether a person has a reasonable

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1982) (holding that it was not a search to use binoculars to view the defendants in a car in a lot open to the public).

expectation of privacy and considering all the relevant facts, the courts maintain citizens' rights. For example, a court could conclude that a flight that caused no undue noise, wind, dust, disturbance, or risk of harm still interfered with a reasonable expectation of privacy by, for example, circling a residence for an extended period, even if at a high altitude. The court remains the arbiter in determining whether the police conduct was lawful.

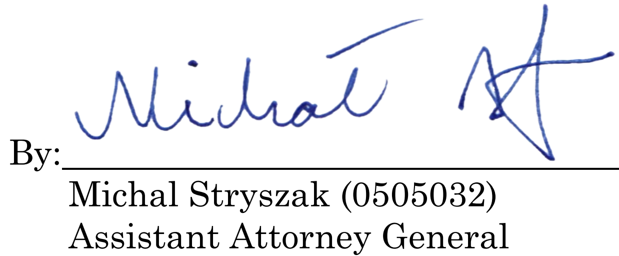
Here, the facts indicate that Trooper Moore did not infringe on any reasonable expectation of privacy. McKelvey, who lived close to an airstrip, exposed the marijuana in his greenhouse to aerial observation for an extended period and made no effort to conceal it from above. Trooper Moore flew in publicly navigable airspace and photographed the marijuana with a commercially available camera depicting items visible without a physical intrusion; the trooper did what any citizen was permitted to do. Therefore, McKelvey's expectation of privacy in his marijuana grow was unreasonable, and Trooper Moore needed no warrant to photograph it.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' decision and reinstate the trial court's order denying the motion to suppress.

DATED September 8, 2021.

TREG R. TAYLOR
ATTORNEY GENERAL



By:________________________________
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ATTACHMENTS

Attachment 1

Attachment 2
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