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

PETITIONER'S EXCERPT OF RECORD
VOLUME 1 OF 1

TREG R. TAYLOR
ATTORNEY GENERAL

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Filed in the Supreme Court of the
State of Alaska
September _____, 2021

MEREDITH MONTGOMERY
CLERK, APPELLATE COURTS

_____
Deputy Clerk

VRA CERTIFICATION: I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

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Return to Court

ORIGINAL

Case Number: AK12230666

Exempt from VRA while sealed
Screen for VRA when public

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA
AT Fairbanks

FILED in the Trial Courts
State of Alaska, Fourth District

SEP 14 2012

By: _____ Deputy

SEARCH WARRANT
NO. 4 FA -12- 352 SW

Relates to case number(s):

TO: Any Peace Officer

Having received information under oath from **Investigator Joshua Moore**,
given ☐ in person ☐ by telephone ☒ by original affidavit ☐ by faxed affidavit

I find probable cause to believe that

☒ on the person of **John William McKelvey III**

☒ on the premises known as **431 Grange Hall Road, Fairbanks, AK 99712, the fourth driveway on the right hand side of Grange Hall Road. To include all greenhouses, out building, vehicles and curtilage.** at **Fairbanks**, Alaska, there is now being concealed property, namely:

Items relating to the possession, manufacture, and/or sale of controlled substances, particularly marijuana. Items included in attachment "A" Marijuana. Forensic examination of digital media to include but not limited to electronic storage devices, cell phones, computers. Items listed in attachment "B" electronic devices.

EXHIBIT A Page 1 of 4

SEARCH WARRANT NO. 4 FA_____SW.

and that such property (see AS 12.35.020)

[X] 1. is evidence of the particular crime(s) of **MICS 4 AS 11.71.040-060**.

[X] 2. tends to show that ___ **John William McKelvey III** ___ committed the particular crime(s) of **MICS 4 AS 11.71.040-060**.

[ ] 3. is stolen or embezzled property.

[ ] 4. was used as a means of committing a crime.

[ ] 5. is in the possession of a person who intends to use it as a means of committing a crime.

[ ] 6. is one of the above types of property and is in the possession of , to whom delivered it to conceal it.

[ ] 7. is evidence of health and safety violations

YOU ARE HEREBY COMMANDED to search the person or premises named for the property specified, serving this warrant, and if the property be found there, to seize it, holding it secure pending further order of the court, leaving a copy of this warrant, and all supporting affidavits, and a receipt of property taken. You shall also prepare a written inventory of any property seized as a result of the search pursuant to or in conjunction with the warrant. You shall make the inventory in the presence of the applicant for the warrant and the person from whose possession or premises the property is taken, if they are present, or in the presence of at least one credible person other than the warrant applicant or person from whose possession or premises said property is taken. You shall sign the inventory and return it and the warrant within 10 days after this date to any judge as required by law.

YOU SHALL SERVE THIS WARRANT:

[ ] between the hours of 7:00 a.m. and 10:00 p.m.

[ ] between the hours of [ ] a.m. [ ] p.m.

and [ ] a.m. [ ] p.m.

[X] at any time of the day or night.

EXHIBIT A Page 2 of 4

SEARCH WARRANT NO. 4 FA_____SW.

YOU SHALL MAKE THE SEARCH:

☐ immediately.

☐ within _____ ☐ days ☐ hours

☒ within 30 days.

☐ contingent upon the happening of the events expected to occur as set forth in the supporting testimony, specifically: .

From the information provided in the application for the warrant, I find compelling reasons to postpone delivery of this notice beyond the time set in Criminal Rule 37(b).[1] Therefore, this notice must be given:

☐ immediately upon seizure of the property.

☒ within a reasonable period, not to exceed 90 days from this date.

☐ within _____ days, which I have determined to be a reasonable time in this case.

If you cannot deliver the notice within this time limit, you must apply to the court for an extension of the time limit. Your sworn application must show good cause for the extension.

(SEAL)

August 27, 2012
Date

Judge/Magistrate

11:30 ☒ a.m. ☐ p.m.

M. MacDonald
Type or Print Name

TELEPHONIC SEARCH WARRANTS. If this search warrant was issued by telephone, the judicial officer named above has orally authorized the applicant for this warrant to sign the judicial officer's name. AS 12.35.015(d)

Time Warrant Served: _____

[1] *Jones v. State*, P .2d 243, 249 (Alaska App. 1982). Reasons for postponement include, but are not limited to: avoiding jeopardizing a confidential informant's safety, avoiding impairing the informant's investigative efforts in other cases, and allowing time for follow-up investigations in this case.

SEARCH WARRANT NO. 4 FA_____SW.

RECEIPT AND INVENTORY OF PROPERTY SEIZED

ATTACHED INVENTORY

FILED in the Trial Courts
State of Alaska, Fourth District
SEP 14 2012
By: _____ Deputy

FORENSIC EXAM

38 MJ PLANTS

PROCESSED MJ

RETURN

I received the attached search warrant on 8/27, 20 12, and have executed it as follows:

On 8/28, 20 12, at _____ a.m./p.m., I searched ☒ the person ☒ the premises described in the warrant, and I left a copy of the warrant ☒ with ☐ at MCKELVEY.
(person warrant was left with or place warrant left)

The above inventory of property taken pursuant to the warrant was made in the presence of INV BELL and of INV MOON.

I swear that this inventory is a true and detailed account of all property taken by me on the authority of this warrant.

INV.
Name and Title

Signed and sworn to before me on September 14, 2012.

Rebecca Wilson
Judge/Magistrate Notary

Rebecca Wilson
Type or Print Name

(SEAL) REBECCA WILSON NOTARY PUBLIC STATE OF ALASKA

Case Number: AK12230666
Exempt from VRA while sealed
Screen fro VRA when public

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA

AT Fairbanks

FILED in the Trial Courts
State of Alaska, Fourth District
AUG 27 2012
By _____ Deputy

Search Warrant No. 4 FA -12- 358 SW.

Affiant -- List all related court case numbers, if any:

_____

AFFIDAVIT FOR SEARCH WARRANT

NOTE: Before completing this affidavit, read the following points which should be addressed in your statement of the facts. A search warrant may not be issued until probable cause for the search has been shown. You should explain:

1. Who was observed (give names or other identifying information).

2. When did the observations take place (date, time, and sequence of events).

3. Who made the observations.

4. Why were the observations made. If, for example, the information came from an informant, the informant's reason for making the observations should be specified, and reasons for relying on the informant's information should be set out.

5. What was observed. Include a full description of events relevant to establish probable cause.

6. Where did the observations take place. Describe the location of the observers and the persons or objects observed. The description must be as specific as the circumstances will allow.

7. How were the observations made. For example, was an informant used, was there an undercover officer, was electronic surveillance involved, etc.

8. All other relevant information.

Being duly sworn, I state that I have reason to believe that:

[X] on the person of **John William McKelvey III**

[X] on the premises known as: **431 Grange Hall Road, Fairbanks, AK 99712, the fourth driveway on the right hand side of Grange Hall Road. To include all greenhouses, out building, vehicles and curtilage.** at **Fairbanks**, Alaska,

there is now being concealed property, namely:

Items relating to the possession, manufacture, and/or sale of controlled substances, particularly marijuana. Items included in attachment "A" Marijuana. Forensic examination and search of digital media to include but not limited to electronic storage devices, cell phones, computers and all items listed in attachment "B" electronic devices.

which (see AS 12.35.020)

[X] 1. is evidence of the particular crime(s) of **MICS 4 AS 11.71.040-060**.

[X] 2. tends to show that ___ **John William McKelvey III** ___ committed the particular crime(s) of **MICS 4 AS 11.71.040-060**.

[ ] 3. is stolen or embezzled property.

[ ] 4. was used as a means of committing a crime.

[ ] 5. is in the possession of a person who intends to use it as a means of committing a crime.

[ ] 6. is one of the above types of property and is in the possession of , to whom delivered it to conceal it.

[ ] 7. is evidence of health and safety violations

and the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

I (Inv Moore) have been an Alaska State Trooper since April 2007. Prior to my becoming an Alaska State Trooper, I worked as an Airport Police and Fire Officer at the Anchorage International Airport and Fairbanks International Airport. I have been a police officer since August 2004. After graduating from the 15 week police academy, I completed an additional 12 week field training program in Fairbanks. While employed at the Fairbanks International Airport I was a member of the Alcohol Interdiction Team, which focused on the investigation of drug and alcohol destined for remote villages in Alaska. In February 2008, I was assigned to the Alaska Bureau of Alcohol and Drug Enforcement in Fairbanks. I have investigated numerous commercial marijuana grow operations, illicit drug trafficking cases, controlled drug deliveries and clandestine methamphetamine labs. I have functioned as a case officer, which entails the supervision of specific investigations and acted as a control officer for confidential informants while they worked undercover purchasing controlled substances.

I have received training on search and seizure laws, narcotic identification, evidence seizure and handling. I have attended and completed numerous drug investigation and training courses to include: the 80-hour, DEA Basic Drug Investigations course, 40-hour Clandestine Lab School, 24-hour Anti-Money Laundering, 16-hour Tactical Narcotic Debriefing, and 16-hour Informant Development and Management.

I have completed 24 hours the Reid Technique of Interviewing and Interrogation Course, hazardous materials awareness class.

I have received my Intermediate Police Officer Certificate. I have conducted instruction in various forums concerning drug awareness and recognition for police officers, EMS, firefighters, social workers, school teachers, parents and students.

I have completed a two-day course on Investigating Indoor Marijuana Grow Operations.

Since 2008, I have located or investigated numerous commercial marijuana grow operations primarily in the Fairbanks area. Based on the climate of Fairbanks, the indoor method of cultivating marijuana is the primary method. Many of these grows have been located by smelling the odor of cultivating or recently harvested marijuana on the outside air, either while driving or walking past the suspect location or during contact or attempted contact with the suspects at their residence. By determining wind direction and proximity to structures, I am usually able to locate and isolate the source of the odor of marijuana smelled on the outside air.

These grow operations have ranged in size from 5 plants to over 600 plants. I know that the average marijuana plant yields approximately ½ pound of marijuana, but can yield more than one pound of processed marijuana. Based upon my training and experience, I can recognize marijuana by sight and smell. I have used aerial surveillance to investigate as well as located numerous marijuana grows.

Through the subsequent investigations and by talking with other investigators and defendants, I have increased my knowledge about marijuana grows and their detection.

I also have assisted in the investigation of numerous cocaine distribution cases. These cases have resulted in the seizure of several thousand dollars and quantities of cocaine up to over two kilos. I have also assisted in two controlled delivery cases containing cocaine and controlled prescriptions.

I am also a Clandestine Lab Site Safety Supervisor and have assisted in dismantling six methamphetamine labs since 2008.

As of June 4, 2010, I am a certified K-9 handler in charge of K-9 "Marley". I have passed a four week Detection Canine Academy as well as the certification.

TURNING TO THE SPECIFICS OF THIS CASE:

On 8/22/12 at approximately 1309 hours, I received a telephone call from informant AMB1-12-04. The informant stated that they had personally been to the property of "Bill McKelvey" on Grange Hall Road. The informant stated that they saw a marijuana grow on the property. 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. The informant also speculated that there were more marijuana plants on the property located in other greenhouses and inside some of the buildings. The informant further stated that while they were on the property they overheard a conversation where McKelvey was attempting to purchase a firearm. I know based on my training and experience that one plant can yield approximately four ounces to one pound of harvested marijuana. Based on my training and experience I know that 30 marijuana plants is a distribution quantity of marijuana.

This informant was used in one prior unrelated purchase of controlled substances and the informant in that case was deemed credible. Information from the informant about dealers of controlled substance in the Fairbanks Area has also been deemed to be credible by law enforcement independent of the informant. The informant has numerous crimes of dishonestly which have been attached to the affidavit. The informant is currently working in conjunction with law enforcement for consideration on pending charges.

I know John William McKelvey III through previous case involvement. In 2009, reference AST case 09 -21364, the Fairbanks Drug Unit served a warrant on McKelvey's property and found 76 marijuana plants in various stages of growth on the same property described by AMB1-12-04 in 2012. The warrant in 2009 was served in March. The plants were located in a shop on McKelvey's property. Also found during the service of that warrant were numerous firearms. I know that McKelvey is a felon resulting out of previous cases.

A check in APSIN revealed that McKelvey lists a Grange Hall Road address as the fourth driveway on the right hand side. The check in APSIN also revealed that McKelvey has an active $250 Fairbanks AST warrant for an outstanding FASAP PTR.

On 8/24/12 at approximately 1400 hours, I requested the assistance of AWT to fly me over McKelvey's property on Grange Hall Road. While flying over the property I saw and photographed the property. There were two greenhouses on the property. One greenhouse was partially see through. I could only discern that there were what appeared to be plants potted inside five gallon buckets located inside the greenhouse. I could also see a second greenhouse on the property as well as a portable car port which are also commonly used for greenhouses. The information provided by the informant was consistent with what was viewed from the fly over of the property. The door to the shop on the property was also open; however, I did not see any individuals. Photos of the property have been attached to the affidavit.

I am requesting the courts permission to search the previously mentioned property for items relating to the possession, manufacture, and/or sale of controlled substances, particularly marijuana. Items included in attachment "A" Marijuana. Forensic examination and search of digital media to include but not limited to electronic storage devices, cell phones, computers and all items listed in attachment "B" electronic devices.

In addition, I believe there are compelling reasons for postponing service of notice of the search warrant. Postponing service of the notice of the search warrant may:

- [x] avoid jeopardizing a confidential informant's safety.
- [x] avoid impairing the informant's investigative efforts in other cases.
- [x] allow time for follow-up investigations in this case.

INVESTIGATOR
Title

JOSHUA MOORE
Signature

Subscribed and sworn to or affirmed before me on August 27, 2012, at Anchorage, Alaska

(SEAL)

Clerk of Court, Notary Public, or other person authorized to administer oaths.
My commission expires: _____

☐ Additional testimony relating to this affidavit was recorded on Tape/CD # _____, begining log # _____, ending log # _____.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA, Plaintiff, vs. JOHN WILLIAM MCKELVEY, III, DOB: 8/29/1973 APSIN ID: 6975247 DMV NO. 6959058 AK ATN: 112-600-773 RES: 431 GRANGE HALL RD FAIRBANKS, AK 99712 Defendant.	FILED in the Trial Courts State of Alaska Fourth District JAN 10 2014 By_____Deputy

Case No. 4FA-13-00040 CR

INDICTMENT

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The following counts do not charge a crime involving DOMESTIC VIOLENCE as defined in AS 18.66.990:

Count I - AS 11.71.020(a)(1)
Second Degree Misconduct Involving A Controlled Substance
John William Mckelvey III - 003

Count II - AS 11.71.030(a)(1)
Third Degree Misconduct Involving A Controlled Substance
John William Mckelvey III - 001

Count III - AS 11.61.195(a)(1)
Misconduct Involving Weapons In The Second Degree
John William Mckelvey III - 004

Count IV - AS 11.71.040(a)(3)(G)
Fourth Degree Misconduct Involving A Controlled Substance
John William Mckelvey III - 002

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Count V - AS 11.71.040(a)(2)
Fourth Degree Misconduct Involving A Controlled Substance
John William Mckelvey III - 005

Count VI - AS 11.71.040(a)(3)(F)
Misconduct Involving A Controlled Substance In The Fourth Degree
John William Mckelvey III - 006

Count VII - AS 11.71.040(a)(5)
Fourth Degree Misconduct Involving A Controlled Substance
John William Mckelvey III - 007

THE GRAND JURY CHARGES:

Count I

That on or about the 24th day of August, 2012, at or near Fairbanks in the Fourth Judicial District, State of Alaska, JOHN WILLIAM MCKELVEY III, knowingly possessed with intent to manufacture or deliver a schedule IA controlled substance, Morphine.

All of which is a class A felony offense being contrary to and in violation of AS 11.71.020(a)(1) and against the peace and dignity of the State of Alaska.

Count II

That on or about August 24, 2012, at or near Fairbanks in the Fourth Judicial District, State of Alaska, JOHN WILLIAM MCKELVEY III, knowingly possessed with intent to deliver any amount of a schedule IIA or IIIA controlled substance, Methamphetamine.

All of which is a class B felony offense being contrary to and in violation of AS 11.71.030(a)(1) and against the peace and dignity of the State of Alaska.

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Count III

That on or about August 24, 2012, at or near Fairbanks in the Fourth Judicial District, State of Alaska, JOHN WILLIAM MCKELVEY III, knowingly possessed a firearm during the commission of an offense under AS 11.71.010 – 11.71.040.

All of which is a class B felony offense being contrary to and in violation of AS 11.61.195(a)(1) and against the peace and dignity of the State of Alaska.

Count IV

That on or about August 24, 2012, at or near Fairbanks in the Fourth Judicial District, State of Alaska, JOHN WILLIAM MCKELVEY III, knowingly possessed 25 or more plants of the genus cannabis.

All of which is a class C felony offense being contrary to and in violation of AS 11.71.040(a)(3)(G) and against the peace and dignity of the State of Alaska.

Count V

That on or about 24th day of August, 2012, at or near Fairbanks in the Fourth Judicial District, State of Alaska, JOHN WILLIAM MCKELVEY III, knowingly manufactured or delivered or possessed with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance, marijuana.

All of which is a class C felony offense being contrary to and in violation of AS 11.71.040(a)(2) and against the peace and dignity of the State of Alaska.

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Count VI

That on or about 24th day of August, 2012, at or near Fairbanks in the Fourth Judicial District, State of Alaska, JOHN WILLIAM MCKELVEY III, knowingly possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of four ounces or more containing a schedule VIA controlled substance, marijuana.

All of which is a class C felony offense being contrary to and in violation of AS 11.71.040(a)(3)(F) and against the peace and dignity of the State of Alaska.

Count VII

That on or about August 24, 2012, at or near Fairbanks in the Fourth Judicial District, State of Alaska, JOHN WILLIAM MCKELVEY III, knowingly kept or maintained any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place which was used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30.

All of which is a class C felony offense being contrary to and in violation of AS 11.71.040(a)(5) and against the peace and dignity of the State of Alaska.

DATED this 9 day of January, 2014 at Fairbanks, Alaska.

A true bill

Grand Jury Foreperson

Elizabeth Crail
Assistant District Attorney, No. 0211057

4FA-12-00352 SW

WITNESSES EXAMINED BEFORE THE GRAND JURY:
Albert Bell

BAIL SET AT No Bail
DATED 1/10/14
MacDonald
JUDGE

ACCEPTED FOR FILING 1/10/14
Amy Hagen
DEPUTY CLERK

DISTRICT ATTORNEY, STATE OF ALASKA
510 SECOND AVENUE, SUITE 200
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA, Plaintiff, vs. JOHN WILLIAM MCKELVEY III, Defendant.	FILED in the Trial Court State of Alaska, Fourth Distric JUN 23 2014 By_____ Depu

Case No. 4FA-14-00040 CR.

OPPOSITON TO MOTION TO SUPPRESS EVIDENCE

VRA CERTIFICATION
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

COMES NOW, the State of Alaska, by and through undersigned counsel, and hereby opposes Defendant's Motion to Suppress Evidence and moves this court for an order denying the motion. This opposition is supported by the attached memorandum of law.

Dated at Fairbanks, Alaska, this 23 day of June, 2014.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By Sean Billingsted 1102059 For
Elizabeth F. Crail
ABA No. 0211057
Assistant District Attorney

This is to certify that a copy of the foregoing is being delivered via courier service to the following attorneys or parties of record: R. John A. Kerr 6/23/14
Name Date

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA,	)	
Plaintiff,	)	FILED in the Trial Court State of Alaska Fourth Dist. JUN 23 2014 By_____ Dep.
vs.	)	
JOHN WILLIAM MCKELVEY III,	)	
Defendant.	)	

Case No. 4FA-14-00040 CR.

MEMORANDUM IN OPPOSITON TO MOTION TO SUPPRESS EVIDENCE

VRA CERTIFICATION
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

INTRODUCTION

The defendant has moved that the court suppress all evidence seized from his home alleging deficiencies in the warrant. The search warrant in this case was sufficiently specific and supported by probable cause, and was not based on stale information; Aguilar-Spinelli was sufficiently met, and therefore, State accordingly requests that the court deny the defendant's motion to suppress evidence.

FACTS

The State relies on the facts as presented in the search warrant affidavit in the case, a copy of which was attached as Exhibit B to Defendant's motion. However, a brief review of the facts follows below.

On August 22, 2012, Alaska State Trooper Investigator Joshua Moore received a call from a confidential informant who was actively working for the Statewide Drug Enforcement

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Unit, that the CI had been out at John William McKelvey's residence on Grange Hall Road and had observed approximately 30 marijuana plants outside in the sun, and believed there are more in the greenhouses on the property. The CI advised Inv. Moore that McKelvey would move the plants in and out of the greenhouses at night or during the day.

Inv. Moore was aware of McKelvey's prior history with a marijuana grow, and aware of the CI's previous successful work for the drug unit. Inv. Moore contacted a trooper pilot and arranged to fly over McKelvey's property a couple days after this report. Inv. Moore observed information consistent with the CI's information; although he did not observe plants outdoors, the rest of the information was consistent with the report.

Based on this evidence and on Investigator Moore's affidavit – which he prepared and signed in the light of his substantial experience as an investigator for the Alaska Bureau of Alcohol and Drug Enforcement – the court issued a search warrant for McKelvey's property. The warrant authorized law enforcement officers to search the premises for marijuana and numerous related items. The warrant was executed and the troopers seized a marijuana grow, opiates, methamphetamine, a large quantity of cash and an AK-47 rifle, resulting in the charges presently before this court.

ARGUMENT

I. EVIDENCE OBTAINED FROM THE SEARCH OF DEFENDANT'S PROPERTY ON GRANGE HALL ROAD SHOULD NOT BE SUPPRESSED; THE WARRANT WAS SUFFICIENTLY SPECIFIC AND SUPPORTED BY PROBABLE CAUSE.

a. The search warrant for the Grange Hall Road property was sufficiently supported by probable cause and was not stale.

The defendant argues that the evidence in support of the warrant was stale at the

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time the warrant was issued. As he correctly notes, a warrant is only appropriate where there is probable cause to believe that evidence will be present at the residence at the time of search. *Burrece v. State*, 976 P.2d 241 (Alaska App. 1999). However, the facts clearly indicate that probable cause *did* exist here and that it was supported by evidence reaching back as far as 2009.

In 2009, the defendant's property was searched pursuant to a warrant and 76 marijuana plants were found, located in a shop on the property. Several firearms were also located. With the CI information, this history shows continuing criminal activity over the three year period. Furthermore, it is known that growing marijuana is a continuing activity (a person cannot grow marijuana for an hour or two, and then grow again a week or two or a month or two later - just as growing any plant, the activity is a several month endeavor). Offenses involving commercial distribution of controlled substances are "typically ongoing in nature and that this factor may properly be considered by the issuing magistrate in determining the existence of probable cause." *Lewis v. State*, 862 P.2d 181, 187 (Alaska App 1993); *see, e.g., Morrow v. State,* 704 P.2d 226, 230 (Alaska App.1985).

In the same vein, the Ninth Circuit United States Court of Appeals has previously held that two-year-old evidence of marijuana growing activity at defendant's residence was not too stale to support a search warrant. This evidence was an informant's statement that he had remodeled the defendant's home to allow the defendant to grow marijuana, and because marijuana growing was ongoing criminal business of long-term nature, greater lapses of time were permitted when affidavit evidence showed probable existence of activity at an earlier time. *U.S. v. Greany*, 929 F. 2d 523, 525 (9th Cir. 1991).Whether the information was a day old or two years old, "the mere lapse of substantial amounts of time is not controlling in a question of staleness" in cases involving growing

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and distribution of controlled substances. *U.S. v. Dozier*, 844 F.2d 701, 707 (9th Cir. 1988).

As to the present information, although the search warrant does not specifically state that the CI's information was recent, given the context of the report – the affiant investigator was very specific about the time and date of the CI's call to him – together with the specific follow-up the investigator did – doing a flyover only two days later to try to corroborate the information – it is a reasonable inference that the CI's information was from something that happened that same day that he/she reported it to the investigator and that the investigator intended that date and time to relate to the observations as well. The issuing judge or magistrate may make reasonable inferences based on the information provided in the warrant application.

Furthermore, the court is well within its rights to consider evidence from as far back as 2009 to establish a pattern of sustained criminal activity. As the court stated in *Snyder v. State*, "Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *Snyder v. State*, 661 P.2d 638, 647 (Alaska App. 1983) (citing *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972)). This evidence taken together with the more recent report is sufficient to indicate that the defendant followed an established pattern of behavior as a grower of large quantities of marijuana, and that the defendant was still growing marijuana in quantities that would exceed the four ounce limit in August of 2012.

b. Aguilar-Spinelli

It is clear from the case law and the facts, that the warrant is legally sufficient. "[A] magistrate's decision to issue a search warrant may be reversed only when clearly erroneous."

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Carter v. State, 910 P.2d 619, 625 (Alaska App. 1996).

Defendant relies on the *Aguilar-Spinelli* test with respect to the statements made by the confidential informant in this case. "When the State relies on informant hearsay to establish probable cause for a search warrant, a magistrate considering the application must apply the two-prong *Aguilar-Spinelli* test. Under this test, the applicant for the search warrant must provide the magistrate with sufficient information to independently evaluate both the basis of knowledge and veracity prongs of the test." *Ivanoff v. State*, 9 P.3d 294, 297-98 (Alaska App. 2000), *citing State v. Jones*, 706 P.2d 317, 324 (Alaska 1985).

Applying the *Aguilar-Spinelli* test, per *Jacobs v. State*, 953 P.2d 527, 533 (Alaska App. 1998), the statements of the CI were clearly detailed enough to show "basis of knowledge" and were clearly based on personal knowledge and experience. "To establish the informant's basis of knowledge, the information must be based on the informant's personal observations, not his suspicions or beliefs." *Jones*, at 324. *Jones* also held that "[i]f the affidavit lacks an affirmative allegation of the informant's personal knowledge, the facts supplied must be so detailed as to support an inference of personal knowledge." *Id.* Specific details were provided in the warrant affidavit, specifying the CI's personal knowledge, including the fact that he/she had personally been to the residence, and implying, although not stating outright, that the visit had been recent. The first prong of *Aguilar-Spinelli* is met, therefore, because the subject was not relying on rumor, but on their own personal (and recent) observations.

The second "veracity" prong is also met. The Alaska Supreme Court has explained that "[a]n informant's veracity may be established by demonstrating his past reliability, or by independent police corroboration of detailed facts in the informant's story." *Jones*, at 325. In

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Rynearson v. State, 950 P.2d 147, 150 (Alaska App.1997), the Court of Appeals held that "[t]here are basically three ways in which an informant can be shown to be trustworthy: by evidence that the same informant has proved reliable in the past, by evidence that independently corroborates the informant's present tip, or by evidence that the informant is among the class of people presumptively deemed credible, such as the 'citizen informants.'" In the present case, Inv. Moore's affidavit used both of the first two methods, although only one is necessary. Inv. Moore described the CI's past reliability, and although he did not go into a great deal of detail, the previous successful controlled buy would be sufficient alone, and adding the general statement that the police had corroborated other information provided by the informant only adds to the credibility prong. Inv. Moore then made an effort to supply independent corroboration by doing the flyover, which corroborated much of what the informant had said. *Rynearson* does not require that all three ways be used, only that one of them be present.

Although information corroborating a confidential informant's tip need not be independently incriminatory, it must relate to the tip in some way that lends credibility to the report of illegality. *Schmid v. State*, 615 P.2d 565, 577 (Alaska 1980), Clark v. State, 704 P.2d 799, 804 (Alaska App.1985). Corroboration of public facts or wholly innocuous details will not suffice. See, *e.g.*, *State v. Young*, 123 Wash.2d 173, 867 P.2d 593, 604 (1994) (en banc) and *Carter v. State*, 910 P.2d 619, 624 (Alaska App. 1996). Consequently if all Inv. Moore had done was to confirm that McKelvey owned (or lived at) the property on Grange Hall Road, for instance, that would have been insufficient. Although the details observed during the flyover were not "independently incriminatory," as noted above, that is not required. The details

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related to the greenhouses and the presence of the growing plants – although due to the height of the flyover and the lack of completely transparent covering to the greenhouse, Inv. Moore was unable positively to identify the plants – all relate to the tip in a way that lends credibility to the report of illegality, particularly in light of the investigator's past information and experience related to the prior marijuana grow on the same property. The details given by the CI, corroborated by Inv. Moore, were enough to establish probable cause of illegal activity; "because an informant is right about some things, he is more probably right about other facts...." *Spinelli v. United States*, 393 U.S. 410, 427 (1969) (White, J., concurring).

With the additional information gained from Inv. Moore's flyover of the property together with the known past involvement of the defendant in a substantial sized marijuana grow on that same property, these facts make it clear that the magistrate issuing the warrant could know that he was "relying on something more substantial than a casual rumor circulating in the underworld, or an accusation based merely on an individual's general reputation." (*Schmid v. State*, 615 P.2d 565, 574 (Alaska 1980).

In short, the *Aguilar-Spinelli* standard has been met with regard to statements of the informant.

II. CONCLUSION

Defendant mistakes the definition of probable cause. Probable cause does not require any level of certainty that a crime has been committed, but merely a reasonable belief that a crime has been committed. The search warrant affidavit read as a whole is clearly sufficient to support probable cause. Defendant's argument, although ostensibly focused on the probable cause determination, really is looking for evidence beyond a reasonable doubt. The proper level of proof

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for the issuance of a search warrant is probable cause. "Probable cause" is defined as "reasonably trustworthy information ••• sufficient ••• to warrant a person of reasonable caution in the belief that an offense has been or is being committed." *State v. Grier*, 791 P.2d 627, 631 (Alaska App.1990). The test for probable cause does not require the officer to have knowledge of facts that would be sufficient to sustain a conviction. *McCoy v. State*, 491 P.2d 127, 130 (Alaska 1971). Indeed, probable cause can exist "even though the facts known to the officer [can] also be reconciled with [the suspect's] innocence." *Grier*, 791 P.2d at 632 n. 3. For purposes of a search warrant, probable cause is defined as "reliable information [that] is set forth in sufficient detail to warrant a reasonably prudent [person] in believing that a crime has been or was being committed." *Badoino v. State*, 785 P.2d 39, 41 (Alaska App.1990) (*quoting Harrelson v. State*, 516 P.2d 390, 396 (Alaska 1973)). All of these factors are clearly met when reviewing the search warrant affidavit as a whole.

The evidence provided in support of the search warrant was sufficient to support probable cause of a marijuana grow on Grange Hall Road, as it was both timely and substantial. The warrant sufficiently met the *Aguilar-Spinelli* standards for the informant information. The warrant was therefore valid, and the court should deny the defendant's motion to suppress the evidence seized during that search.

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RESPECTFULLY SUBMITTED this 23 day of June, 2014, at Fairbanks, Alaska.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By Sean Billingsted 1100059 for
Elizabeth F. Crail
ABA No. 0211057
Assistant District Attorney

This is to certify that a copy of the foregoing is being delivered via courier service to the following attorneys or parties of record: R. John A. Kerr 6/23/14
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IN THE SUPERIOR COURT OF THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA Plaintiff, vs. JOHN WILLIAM McKELVEY III, Defendant.	)

FILED in the Trial Courts
State of Alaska Fourth District

AUG 15 2014

By_____Deputy

LT 8/25

Case No. 4FA-14-00040 CR

MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH ILLEGAL AERIAL SEARCH OF MR. McKELVEY'S HOME AND CURTILAGE

VRA Certification

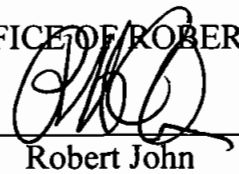
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in A.S. 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

John McKelvey hereby moves to suppress all evidence obtained through the illegal aerial search of his home and the curtilage thereof.

The motion is supported by the accompanying memorandum and the affidavit of Mr. McKelvey, and an appropriate order granting the motion is lodged herewith.

RESPECTFULLY SUBMITTED this 15th day of August, 2014.

LAW OFFICE OF ROBERT JOHN



Robert John
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Certificate of Service
I hereby certify that a true copy of
the above document was hand-delivered to:

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IN THE SUPERIOR COURT OF THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

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FILED in the Trial Courts
State of Alaska Fourth District
AUG 15 2014
By _____ Deputy

Case No. 4FA-14-00040 CR

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH ILLEGAL AERIAL SEARCH OF MR. McKELVEY'S HOME AND CURTILAGE

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I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in A.S. 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

INTRODUCTION

The primary evidence providing a foundation for probable cause to issue a search warrant in this case was obtained through warrantless aerial police surveillance in violation of the Fourth Amendment of the United States Constitution and Article I §§ 14

and 22 of the Alaska State Constitution. As a matter of constitutional integrity, all evidence obtained from and as a result of the police surveillance must be suppressed.

STATEMENT OF FACTS[1]

Mr. McKelvey maintains a secluded residence in the isolated outskirts of Fairbanks. On Mr. McKelvey's property, in the curtilage of his home, he keeps a shop, multiple vehicles, a carport, a hot tub, a motor home, and a few greenhouses. One of Mr. McKelvey's fully-enclosed greenhouses is opaque. Visitors who enter Mr. McKelvey's property through his gravel driveway are greeted from the left with signs reading: Private Property, KEEP OUT, and NO TRESPASSING. The right side of the driveway reiterates the admonition: Private Property, KEEP OUT, and NO TRESPASSING. A visitor who approached Mr. McKelvey's home from one of the two tree lines surrounding his property would inevitably run into one of the many signs posted to the trees reading "POSTED PRIVATE PROPERTY HUNTING, FISHING, TRAPPING OR TRESPASSING FOR ANY PURPOSE IS STRICTLY FORBIDDEN VIOLATORS WILL BE PROSECUTED."

Mr. McKelvey enjoys his privacy. He has always had the actual expectation of privacy that planes would not be flying over his property for the purpose of observing and taking photographs of his home and its curtilage and that persons legally flying overhead would have at most a nondescript passing glance at his home and its curtilage.

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[1] The stated facts are from Mr. McKelvey's accompanying affidavit unless indicated otherwise.

Prior to the afternoon Trooper Moore flew over his property Mr. McKelvey had never observed an airplane fly directly over his property. Mr. McKelvey had seen airplanes in the area en route to or from Chena Hot Springs. The passenger airplanes never flew directly over his property, and were several times higher than the one he saw fly over his home toward the end of August in 2012. At that time Mr. McKelvey observed a dark-colored plane fly over his home. The plane was about one-hundred to two-hundred feet above his tree-line and thus approximately three-hundred to four-hundred feet above his home. From the doorway of his shop, Mr. McKelvey looked up, and observed a face in the window of the plane peering back down at him and his home. Mr. McKelvey believes that Trooper Moore was in the plane he observed fly over his home.

Trooper Moore recruited an Alaska State Trooper Super Cub for the specific purpose of flying him over Mr. McKelvey's home.[2] Trooper Moore did not maintain any flight plans or flight logs, nor are there any GPS records of the flight.[3] As there are no flight logs, altimeter records are unattainable as to the height from which Trooper Moore observed Mr. McKelvey's home. The State estimates that the observations were made from about six hundred feet to a thousand feet in the air.[4] In the course of performing aerial surveillance of Mr. McKelvey's home Trooper Moore claimed to have spotted "what appeared to be plants potted inside five gallon buckets located inside the

[2] See Exhibit A (April 4, 2014 Email from Assistant District Attorney Elizabeth Crail to Robert John); Exhibit B (Page 4 of Search Warrant Application).
[3] See Exhibit A.
[4] See Exhibit A.

greenhouse."[5] Throughout the course of the flyover Trooper Moore photographed Mr. McKelvey's home with a Canon EF 75-300mm lens. The digital copies of the photographs show that all eleven photographs were taken with a Canon EOS 7D with the lens set to 280mm.[6]

As a result of the aerial surveillance performed by Trooper Moore, a warrant was issued to search Mr. McKelvey's home and multiple items were seized from his property. In ruling on Mr. McKelvey's prior motion to suppress, the Court held that but for the evidence obtained via the aerial surveillance, that search warrant lacked probable cause. This motion to suppress follows.

LEGAL ARGUMENT

1. THE WARRANTLESS AERIAL SEARCH PERFORMED BY TROOPER MOORE DESECRATED MR. MCKELVEY'S FOURTH AMENDMENT PRIVACY RIGHTS.

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[7] Two primary cases guide Fourth Amendment analysis of the issue of warrantless observations of a citizen's home through aerial surveillance: *California v. Ciraolo* and *Florida v. Riley*.

In *California v. Ciraolo* while flying at an altitude of 1000 feet in public navigable airspace, law enforcement were able to "observe plants readily discernible to the naked

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[5] See Exhibit B.
[6] See Exhibit C (DVD of Aerial Photographs) (Properties).
[7] *Fla. v. Riley*, 488 U.S. 445, 462, 109 S.Ct. 693, 703, 102 L. Ed. 2d 835, 849 (1989) (Brennan, J., joined by Marshall and Stevens, JJ., dissenting) (citing *Schmerber v. Cal.*, 384 U.S. 757, 767, 86 S. Ct 1826, 1834, 16 L. Ed. 2d 908, 917 (1966)).

eye as marijuana" in the defendant's outdoor un-covered marijuana garden.[8] The Court determined that the garden was in the defendant's curtilage. However, the Court noted, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"[9] and that law enforcement is not "required to shield their eyes when passing by a home on pubic thoroughfares."[10] As a result, the Court determined the defendant had not manifested an expectation of privacy that society was prepared to recognize as reasonable because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed."[11] Thus, it follows from *Ciraolo* that law enforcement can, consistent with the Fourth Amendment, aerially observe a citizen's home within the limits of the naked-eye from the altitude of 1000 feet or higher.

Three years following *Ciraolo* the Court narrowed law enforcement's ability to aerially observe a citizen's home from an altitude of less than 1,000 feet in *Florida v. Riley*. In *Riley* law enforcement flew over the defendant's home at the altitude of 400 feet and observed marijuana inside a partially-open greenhouse. The four-Justice plurality in *Riley* applied *Ciraolo's* public-airways analysis, specifically that the helicopter was flying within the Federal Aviation Administration (FAA) guidelines, to

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[8] *Cal. v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 1813, 90 L. Ed. 2d 210, 217 (1986).
[9] *Id.* (quotation and citations omitted).
[10] *Id.*
[11] *Id.* at 213-14

determine that the defendant did not have a reasonable expectation of privacy from aerial observations of his home.[12]

The *Riley* plurality's analysis on the issue of a reasonable expectation of privacy is simply not controlling for purposes of the Fourth Amendment. As Justice Brennan pointed out in his three-Justice dissent, "A majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet."[13] Justice Blackmun reaffirmed in his dissent that in determining whether a search occurred, a majority of the *Riley* Justices believed that "answering this question depends upon whether Riley has a reasonable expectation of privacy that no such surveillance would occur, and does not depend upon the fact that the helicopter was flying at an altitude under FAA regulations."[14]

Justice O'Connor's concurrence in *Riley* scolded the plurality's opinion as placing the scope of the Fourth Amendment's protections too heavily within the regulatory power of the FAA, stating "there is no reason to assume that compliance with FAA regulations alone determines whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."[15] Justice O'Connor is clear in her concurrence: when determining whether a citizen's reasonable expectation of privacy

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[12] *Riley*, 488 U.S. at 696-98 (plurality opinion).
[13] *Riley*, 488 U.S. at 464-65 (Brennan, J., joined by Marshall and Stevens, JJ., dissenting).
[14] *Id.* at 467 (Blackmun, J., dissenting).
[15] *Id.* at 453 (O'Connor, J., concurring in the judgment) (quotation and citations omitted).

includes the airspace above his or her home, the relevant inquiry is whether the contested observations were made from "the public airways at an altitude at which members of the public travel with sufficient regularity...."[16] In essence, if members of the public "rarely if ever, travel overhead"[17] at the altitude which law enforcement traveled, the citizen has a reasonable expectation of privacy because they have not knowingly exposed their home to public view.

The primary issue separating Justice O'Connor from *Riley's* dissenters was simply who bore the burden of proof in showing that the expectation of privacy was reasonable. Justice O'Connor found that the defendant must bear the burden of showing his expectation of privacy was reasonable. As a result of the defendant's failure to introduce evidence contrary to assertion that "there is considerable public use of airspace at altitude of 400 feet and above,"[18] Justice O'Connor found the defendant did not meet his burden of showing that "his curtilage was protected from naked-eye observation from that altitude."[19]

In contrast, Justices Brennan, Marshall, and Stevens took issue with the empirical data presented to the Court concerning the public's use of airspace at the altitude of 400 feet. The three Justices concluded that the burden of proof should lie on the prosecution, as "the coercive power of the State ought not be brought to bear in cases in which it is

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[16] *Id.* at 454.
[17] *Id.* at 455.
[18] *Id.*
[19] *Id.*

unclear whether the prosecution is a product of an unconstitutional warrantless search."[20] Justice Blackmun addresses the issue of the burden of proof by pointing out that "none of our prior decisions tells us who has the burden of proving whether Riley's expectation of privacy was reasonable"[21] and would utilize judicial estimation to determine the public's use of the airspace. As a result of Blackmun's determination that "private helicopters rarely fly over curtilage at an altitude of 400 feet,"[22] Blackmun placed the burden of proof on the prosecution to show that Riley lacked a reasonable expectation of privacy.[23]

Justice O'Connor's concurrence, Justice Blackmun's dissent, and Justice Brennan's dissent all focus on the standard for determining an expectation of privacy as set forth in *Katz v. United States*: "What a person knowingly exposes to the public, even in his own home or office, is not a subject to Fourth Amendment protection. But what he seeks to preserve as private, even in area accessible to the public, may be constitutionally protected."[24] Thus, the fact that the public *could* legally fly over a home does not result in a whisking away of the Fourth Amendment if the citizen is in a place where he or she has sought privacy and the expectation is reasonable. In the realm of aerial surveillance performed below 1000 feet, reasonableness is not measured by altitude but rather by the extent of the public's previous presence in the area which the citizen has manifested an expectation of privacy. Under *Katz* a search has occurred for the purpose of the Fourth

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[20] *Id.* at 465 (Brennan J., joined by Marshall and Stevens, JJ., dissenting).
[21] *Id.* at 467 (Blackmun, J., dissenting).
[22] *Id.* at 468.
[23] *Id.*
[24] *Katz v. United States*, 389 U.S. 347, 352, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967) (quotation and citations omitted).

Amendment if (1) a person has exhibited an actual expectation of privacy, and (2) the expectation of privacy is one that society is prepared to recognize as reasonable.[25]

As the multiple No Trespassing and Private Property signs encompassing Mr. McKelvey's property show, Mr. McKelvey has an expectation of privacy in his property. He also has an actual expectation that planes would not be flying over his property for the purpose of observing his home and curtilage and taking pictures thereof via a high-powered telephoto lens. Mr. McKelvey contends that his expectation of privacy reasonably includes the expectation to be free from warrantless spying and surveillance, in the airspace of 1000 feet or lower, above his home. What this Court must decide is whether said expectation is reasonable.

Mr. McKelvey's expectation of privacy is reasonable. While Trooper Moore might have been flying at an elevation within FAA regulations, as the *Riley* Court made clear, FAA regulations are not in themselves sufficient to show that a search was lawful when observations are observed from less than 1000 feet. Mr. McKelvey lives in the countryside away from high-traffic airports. There is minimal air-traffic in the area along Chena Hot Springs road; however, these airplanes do not flyover directly above Mr. McKelvey's home and they do fly at an altitude above 1000 feet. Mr. McKelvey reasonably expects that persons in airplanes in the area would "obtain at most a fleeting,

[25] *Id.*, 389 U.S. at 361 (Harlan, J., concurring).

anonymous, and nondiscriminating glimpse" of his property flying at an altitude well beyond 1000 feet.[26]

As our present Chief Justice noted in applying *Katz* and its progeny in her *Cowles v. State* dissent: "Where the defendant should reasonably expect public observation, the government may engage in observation of that sort. But the presence of public observers does not give the government unlimited license to pursue more intrusive modes of surveillance."[27] The aerial surveillance performed by Trooper Moore in Mr. McKelvey's case was undoubtedly more intrusive than that which Mr. McKelvey could expect from members of the general public. As such, Trooper Moore should have obtained a warrant before engaging in such a search.

In sum, the warrantless, targeted, aerial police surveillance of Mr. McKelvey's home, performed beneath the altitude of 1000 feet, cannot be deemed reasonable. As a result, the surveillance and observations obtained by Trooper Moore from the flyover are the fruit of an illegal search of Mr. McKelvey's home for purposes of the Fourth Amendment. All evidence obtained from and as a result of the illegal search must be suppressed.

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[26] *Ciraolo*, 476 U.S. at 223 (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).
[27] *Cowles v. State*, 23 P.3d 1168, 1181 (Alaska 2001) (Fabe, J., dissenting).

2. THE WARRANTLESS AERIAL SEARCH PERFORMED BY TROOPER MOORE IS A GROSS VIOLATION OF ARTICLE I §§ 14 AND 22 OF ALASKA'S CONSTITUTION.

A. The warrantless aerial police surveillance of Mr. McKelvey's home is contrary to the purpose and application of Article I §§ 14 and 22.

Article I § 22 of the Alaska State Constitution specifically enumerates privacy as a right and was "intended to give recognition and protection to the home."[28] "Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution."[29] The primary purpose of the Article 1 § 14 is "the protection of personal privacy and dignity against unwarranted intrusion by the State."[30] Article I §§ 14 and 22 embody the spirit of Alaskans as a people who prize their individuality and who have chosen to live here "in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states."[31]

In determining whether a form of law enforcement's surveillance constitutes a search Alaska's courts utilize the expectation-of-privacy test.[32] Thus, this Court must ask

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[28] *Ravin v. State*, 537 P.2d 494, 503-04 (Alaska 1975).
[29] *Id.* at 514-15 (Boochever, J., concurring); *see also Beltz v. State,* 221 P.3d 328, 335 & n. 32 (Alaska 2009).
[30] *Weltz v. State*, 431 P.2d 502, 506 (Alaska 1967) (quotation and citation omitted).
[31] *Ravin*, 537 P.2d at 504.
[32] *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?"[33] The question of whether an expectation of privacy is reasonable is value judgment; it asks "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."[34] In the words of Justice Brennan: "The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not."[35]

In *State v. Glass* the Court determined that Art. I § 22 "prohibits secret electronic monitoring of conversations."[36] *Glass* recognized that "the contours of Alaska's right to privacy are not yet firmly established"[37] and noted that the privacy protection has at times been defined as "the right to be let alone."[38]

The Court of Appeals further extended Alaskans' privacy protections in *State v. Page*.[39] In *Page* law enforcement rigged an apartment with video-surveillance equipment

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[33] *Id.* (quotation and citations omitted).
[34] *Id.* at 1171 (quotation and citation omitted).
[35] *Riley*, 488 U.S. at 464 (Brennan, J., joined by Marshall and Stevens, JJ., dissenting) (quotation and citation omitted).
[36] *State v. Glass*, 583 P.2d 872, 879 (Alaska 1978)
[37] *Id.*
[38] *Id.* at 880 (quotation and citation omitted).
[39] *State v. Page*, 911 P.2d 513, 517 (Alaska App. 1996), *petition dismissed as improvidently granted*, 932 P.2d 1297 (Alaska 1997).

and soundlessly video-taped the defendant and another person in what the Court of Appeals described as "a location where Page could reasonably expect that his activities would not be observed by anyone except those onlookers whose presence he was aware of."[40] The *Page* Court determined that Alaska's Constitution protects her citizens from warrantless "surreptitious photography or video-taping" of private activities because such state action has the same "corrosive impact on our sense of security" as the warrantless recording of conversations did in *Glass*.[41]

In extending Article I §§ 14 and 22 to include the prohibition of "warrantless administrative searches" of a business premises[42] the *Woods & Rohde, Inc.* Court noted that when judicial review via the warrant process is absent, "far too much discretion is lodged in the official in the field."[43] While the Alaska Court Supreme Court and Court of Appeals have never ruled on the precise issue of whether warrantless, targeted, aerial surveillance of Alaskan citizens is a violation of the Alaska Constitution,[44] the Vermont Supreme Court has provided persuasive guidance on the issue in its recent decision in *State v. Bryant.*

The *Bryant* Court found that "Vermont citizens have a constitutional right to privacy that ascends into the airspace above their homes and property."[45] Applying the

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[40] *Id.*
[41] *Id.* at 516-17.
[42] *Beltz*, 221 P.3d at 335.
[43] *Woods & Rohde, Inc. v. Department of Labor*, 565 P.2d 138, 151 (Alaska 1977).
[44] *See Thiel v. State*, 762 P.2d 478, 484 (Alaska App. 1988) (noting but not deciding the issue).
[45] *State v. Bryant*, 950 A.2d 467, 470 (Vermont 2008).

Katz two-step privacy test, the *Bryant* Court determined that "we think it is also likely that Vermonters expect – at least at a private, rural residence on posted land – that they will be free from intrusions that interrupt their use of their property, expose their intimate actives, or create undue noise, wind or dust."[46] Thus, where the defendant had demonstrated his expectation of privacy by posting his land and communicating to a local forest official that trespassers were not allowed on his land, police observation obtained through targeted aerial surveillance was deemed to be a "patent violation of defendant's legitimate expectations of privacy."[47]

In the same vein, the New Mexico Court of Appeals recently decided that the express privacy protection embedded in its State Constitution "includes an interest in freedom from visual intrusion from targeted, warrantless police aerial surveillance."[48] Thus, the *Davis* Court determined that information obtained through targeted aerial surveillance of a home or its curtilage that could not have been otherwise "obtained without physical intrusion into that area" is a search under the New Mexico State Constitution.[49]

Trooper Moore's use of targeted aerial surveillance to ascertain information about Mr. McKelvey's home, curtilage, and private property is a gross deviation from the privacy standards that Alaskans demand. In light of Alaska's heightened protection of

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[46] *Id.* at 478.
[47] *Id.* at 479.
[48] *State v. Davis*, 321 P.3d 955, 961 (N.M. App 2014), *cert. granted,* 324 P.3d 376 (N.M. 2014).
[49] *Id.*, 321 P.3d at 961

personal privacy from unwarranted intrusion by the government, it is illogical and unsound to conclude that law enforcement's use of airspace to gather personal information from Alaskan homes (information which cannot be legally ascertained from the ground) is a practice that can be tolerated as constitutional. While law enforcement is not required to shield their eyes when passing by a home, Trooper Moore was not passing by Mr. McKelvey's home. Trooper Moore specifically targeted Mr. McKelvey's property, recruited an airplane to take him over the property, and brought with him a camera to gather evidence. The entire purpose of the flight was to search Mr. McKelvey's home and curtilage.

Trooper Moore's behavior would not be condoned if he had instead entered Mr. McKelvey's property on foot and photographed his greenhouse from a vantage point where his feet were on the ground. He should not be entitled to spy on citizens from the sky merely because it is a different vantage point; Mr. McKelvey maintains his expectation of privacy from both the ground and the air. Given the ease in accessibility to aerial surveillance which law enforcement has, such an unchecked practice of police surveillance would leave little privacy and freedom remaining for Alaska's citizens. Upholding targeted aerial surveillance by law enforcement would be antithetical to the aims of free and open society, as law enforcement would be free to spy on any Alaskan of its choosing. A privacy standard requiring Alaskans to draw their blinds in their homes or enclose their curtilage under an impenetrable dome for fear of government surveillance

is irreconcilable with the primary aims of Article I §§ 14 and 22 of the Alaska Constitution.

Mr. McKelvey lives in an area of Alaska where it is reasonable to expect that his property would not be viewed by anyone other than the onlookers he was aware of: those who enter his property from the ground. While the surveillance performed by Trooper Moore was not necessarily as surreptitious as that in *Glass* and *Page*, its corrosive impact on Alaskans' sense of security is at least as toxic: the government can spy on Alaskans from the sky and Alaskans are powerless to stop them.

The consequence of allowing warrantless, targeted, aerial police surveillance is that law enforcement would be left entirely to its own discretion in determining when, where, why, and whom they can search from the air. Such discretion is entirely inconsistent with the very purpose of the warrant requirement: "to prevent the police from hasty, ill-advised, or unreasonable actions in the often competitive enterprise of ferreting out crime."[50]

It is entirely consistent to conclude that if Article I §§ 14 and 22 require a warrant in order for administrative inspections of a business premises, then a warrant should also be required to search a private citizens home and curtilage from the sky, as the "the privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home."[51] Given the Alaska Constitution's special protection of the privacy of the home, the *Bryant* and *Davis* Courts are on point with the expectation of

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[50] *Keller v. State*, 543 P.2d 1211, 1219 (Alaska 1975) (quotation and citations omitted).
[51] *Ravin*, 537 P.2d at 503-04.

privacy Alaskans deserve and require: "freedom from visual intrusion from targeted warrantless police aerial surveillance."[52]

B. The aerial surveillance of Mr. McKelvey's home violated Mr. McKelvey's common law right to privacy and thus his corresponding constitutional right.

The Alaska Supreme Court has recognized that Alaskans are entitled to the common law "right to be free from harassment and constant intrusion into one's daily affairs."[53] The *Wal-Mart* Court confirmed that such a right is delineated in the Restatement (Second) of Torts which states: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[54] Offensive intrusion requires "either an unreasonable manner of intrusion, or intrusion for an unwarranted purpose."[55] The *Glass* Court noted that if, for the purposes of civil litigation, conduct violates the 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."[56]

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[52] *Davis,* 321 P.3d at 961.
[53] *Wal-Mart, Inc. v. Stewart,* 990 P.2d 626, 632 (Alaska 1999).
[54] *Id.* (quoting Restatement (Second) of Torts §652B (1977)).
[55] *Id.* (quotation and citation omitted).
[56] *Glass*, 583 P.2d at 881.

In *Greywolf v. Carroll* the Court examined the issue of whether law enforcement conduct violated a citizen's common-law right to privacy.[57] In *Greywolf* the citizen asserted that the act of law enforcement interviewing her inside a hospital violated her right to privacy as a patient.[58] The Court found that the citizen had "impliedly consented to the interview" by not objecting to the interview, that there was no evidence of officer intimidation or unreasonable officer conduct, and that the officer had been summoned to the unit for the purpose of the investigation.[59] The Court found that, "As a matter of law, the orderly performance of the police officers' duties in this case does not constitute an unreasonable manner of intrusion nor an intrusion for an unwarranted purpose."[60]

The aerial surveillance in Mr. McKelvey's case, if performed by a citizen, would constitute an invasion of privacy. The intrusion over Mr. McKelvey's property was inarguably intentional. The intrusion was loud and interfered with the Mr. McKelvey's solitude and seclusion on his private property. Pictures were taken of Mr. McKelvey's property, further invading the privacy he holds in his home. In order to get around Mr. McKelvey's clearly marked No Trespassing and Private Property signs, the intrusion on Mr. McKelvey's property was done from airspace, deeming it an intrusion done in an unreasonable manner. The only purpose of the intrusion was to take pictures of Mr. McKelvey's home and search his property for specific items, and as such was an intrusion for an unwarranted purpose.

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[57] *Greywolf v. Carroll*, 151 P.3d 1234, 1244-46 (Alaska 2007).
[58] *Id.* at 1245.
[59] *Id.*
[60] *Id.* (emphasis added).

It is hard to imagine a reasonable person who upon hearing of a private citizen acting in the manner Trooper Moore did would not find that the flyover invaded Mr. McKelvey's privacy. The fact the Trooper Moore was acting under the flag of the police power does not cure the invasion of privacy. Unlike the officers in *Greywolf*, Trooper Moore was not summoned but rather consciously chose to fly directly over Mr. McKelvey's home and take pictures of his private property, home, and curtilage. At no time did Mr. McKelvey consent to Trooper Moore's presence. Trooper Moore was not responding to a citizen's call for help; he was gathering evidence for an investigation and did so in an unreasonable manner for an unwarranted purpose. Because Trooper Moore's conduct violated Mr. McKelvey's common law right to privacy, the evidence acquired from the violation was illegally obtained.

Alaskans demand a greater standard of privacy than that which would allow law enforcement free reign to spy on their homes from the window of an investigating plane. The warrantless, targeted, aerial police surveillance cannot be reconciled with the cherished constitutional protections enumerated to Alaska's citizens in Article I §§ 14 and 22. To rule otherwise would be to deny the citizens of Alaska the promises of the Constitution which the Judiciary has been entrusted with safeguarding since our State's birth. Accordingly, the aerial flyover in this case must be deemed illegal and all evidence obtained from and as a result of the flyover must be suppressed.

3. THE OBSERVATIONS FROM THE FLYOVER CONSTITUTE AN ILLEGAL SEARCH BECAUSE TROOPER MOORE DID NOT OBSERVE MR. McKELVEY'S HOME WITH HIS NAKED EYE.

In upholding an aerial search occurring from 1000 feet the *Ciraolo* majority concluded, "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is *visible to the naked eye.*"[61] The fact that the observations made by law enforcement were through the naked eye are key to the holding of *Ciraolo*. Justice Burger reiterates the fact that the police observations were through the "naked eye" multiple times throughout his opinion and goes so far as to point out that the camera used was "a standard 35mm camera."[62] Furthermore, in concluding the Opinion of the Court, Justice Burger notes, "The State acknowledges that aerial observations of 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."[63] In *Riley* both the plurality and Justice O'Connor noted that the observations of law enforcement were performed with the naked eye.[64]

In contrast to the naked-eye standard of *Ciraolo* and *Riley,* in *Kyllo* Justice Scalia was clear that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search – at least where… the

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[61] *Ciraolo*, 476 U.S. at 215 (italics added).
[62] *Id.* at 209 (quotation and citation omitted).
[63] *Id* at 215 n. 3 (quotation, citation, and brackets omitted).
[64] *See Riley*, 488 U.S. at 448; *id.* at 455 (O'Connor, J., concurring in the judgment).

technology in question is not in general public use."[65] Thus, in *Kyllo* the Court ruled that the use of thermal image scanning of the defendant's home from a public street was a search.[66]

Though not addressing the issue of enhanced vision through photography, in *State v. Boceski* the Alaska Court of Appeals did address the issue of law enforcement eavesdropping on private conversations. The Court determined that such officer conduct was acceptable if they are in a place where they had the right to be, "use only their unaided, natural senses," and are somewhere the speaker could anticipate being overheard.[67]

According to Trooper Moore, while flying over Mr. McKelvey's property he "saw and photographed the property."[68] The photographs were taken with a lens set to 280mm. While a typical 50mm lens is comparable to what one would observe with his or her naked eye, a 280mm lens enhances what is visible to the naked eye to be approximately 5.6 times greater than what one would observe with his or her natural senses.[69] However, the Canon camera at issue has a multiplying factor of 1.6 so that what one observes through that lens is more or less nine times greater than what one

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[65] *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 2043, 150 L.Ed. 2d 94, 102 (2001) (quotation and citation omitted) (ellipsis added).
[66] *Id.*, 533 U.S. at 40.
[67] *State v. Boceski*, 53 P.3d 622, 625 (Alaska App. 2002).
[68] Exhibit B.
[69] See Exhibit D (www.dpreview.com/glossary/optical/focal-length).

observes through the naked eye.[70] Thus, observations obtained through a 280mm lens are not obtained through the naked eye; nor can they be said to be unaided and solely a result of one's natural senses as a 280mm lens is in fact "sense-enhancing technology." The use of a sophisticated sense-enhancing lens, paired with an on-demand airplane, is simply not a use of technology that is of general public use. This simple inference is reaffirmed by the fact that both the *Riley* and *Ciraolo* Courts emphasize the fact that law enforcement's observations were made with the naked eye.

As a result of the flyover, Trooper Moore claimed that there "appeared to be plants potted in five gallon buckets located inside the greenhouse."[71] The greenhouse is in the curtilage of Mr. McKelvey's home and as such is entitled to the same constitutional protections as the home.[72] Law enforcement's use of sense-enhancing technology to peer inside a constitutionally-protected area, as a method to ascertain the contents of the constitutionally-protected area, is a search and requires a warrant. That is precisely what Trooper Moore did in Mr. McKelvey's case -- without a warrant.

Trooper Moore, without a warrant, used sense-enhancing technology to peer inside Mr. McKelvey's greenhouse and included his observations in his affidavit for a search warrant. Because Trooper Moore's observations were obtained unlawfully, "all evidence obtained as a direct or indirect result of this constitutional violation must be

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[70] See Exhibit E at 4 (www.digitalcameraworld.com/2012/09/07/what-is-focal-length-definition-comparison-every-question-answered/); Exhibit F (specifications from Canon website).
[71] Exhibit B.
[72] *Florida v. Jardines*, _____ U.S. _____, _____, 133 S.Ct. 1409, 1414, 185 L.Ed. 2d 495 (2013).

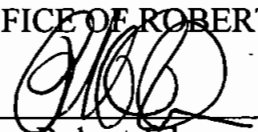
suppressed unless the state can show an attenuation between the unconstitutional conduct and the incriminating evidence."[73] Thus, since Trooper Moore's observations are a direct result of illegal conduct, any and all evidence obtained as a result of said observations must be suppressed.

CONCLUSION

For the reasons stated, Trooper Moore's conduct in performing warrantless, targeted, aerial police surveillance of Mr. McKelvey's home violated Mr. McKelvey's constitutionally-protected privacy rights under the Fourth Amendment and Article I §§ 14 and 22 of the Alaska Constitution. Constitutional principle requires that this Court suppress all evidence obtained from and as a result of Trooper Moore's lawless police aerial surveillance. Mr. McKelvey humbly prays that this Court so order.

RESPECTFULLY SUBMITTED this 15th day of August, 2014.

LAW OFFICE OF ROBERT JOHN



Robert John
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I hereby certify that a true copy of
the above document was hand-delivered to:

Elizabeth F. Crail
District Attorney's Office
this 15th day of August, 2014.
Law Office of Robert John
By:

[73] *Waring v. State*, 670 P.2d 357, 366-67 (Alaska 1983) (quotation and citation omitted).

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA Plaintiff, vs. JOHN WILLIAM MCKELVEY III, Defendant.	FILED in the Trial Courts State of Alaska Fourth District AUG 29 2014 By_____Deputy FILED in the Trial Courts State of Alaska Fourth District SEP 03 2014 By_____Deputy
Case No. 4FA-14-00040 Cr.	

OPPOSITION TO MCKELVEY'S SECOND MOTION TO SUPPRESS EVIDENCE

VRA CERTIFICATION
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

CT 9/11

COMES NOW, the State of Alaska, by and through Assistant District Attorney Elizabeth Crail, and hereby opposes Defendant's Second Motion to Suppress Evidence in this case. The State moves the court to deny defendant's motion. This opposition is supported by the attached memorandum of law.

Dated at Fairbanks, Alaska, this 29th day of August, 2014.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By William C. Bain
for Elizabeth F. Crail, ABA 0211057
Assistant District Attorney 9312090

This is to certify that a copy of the foregoing is being delivered via mail service to the following attorneys or parties of record:
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA Plaintiff, vs. JOHN WILLIAM MCKELVEY III, Defendant.	

Case No. 4FA-14-00040 Cr.

FILED in the Trial Courts
State of Alaska Fourth District
AUG 29 2014
By_____Deputy

FILED in the Trial Courts
State of Alaska Fourth District
SEP 03 2014
By_____Deputy

MEMORANDUM OF LAW IN SUPPORT OF OPPOSITION TO SECOND MOTION TO SUPPRESS EVIDENCE

VRA CERTIFICATION
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

INTRODUCTION

The State opposes Defendant's second motion to suppress evidence.

I. FACTS

An evidentiary hearing may be needed, as there are factual disputes.

On August 24, 2012, Inv. Joshua Moore requested the assistance of AWT (Alaska Wildlife Troopers) to fly him over Defendant's property at 631 Grange Hall Road in the Two Rivers area, in order to corroborate information provided by an informant regarding Defendant's marijuana growing operation. Inv. Moore estimated the flight altitude at 600-1000 feet. His observations are contained in the search warrant affidavit, which was the subject of the earlier motion. The State refers the Court back to that motion

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and related hearings. According to the photograph properties, Inv. Moore used a Canon EOS 7D camera with a focal length of 280 mm to photograph the property from the Super Cub airplane.

A review of the property from an aerial view using GoogleEarth shows that Defendant's property is not far off either Chena Hot Springs Road or Grange Hall Road. This review also reveals an airstrip almost exactly one mile from Defendant's property with two planes on the ground in the GoogleEarth image. See Exhibits 1-3.[1]

II. LAW AND ARGUMENT

It appears to be undisputed that Inv. Moore made his observations in plain view from the airplane. The Defendant's argument focuses on whether Inv. Moore was permitted to fly over the property, at a relatively low altitude, and make the observations he did – in other words, was he in a lawful vantage point when he made his plain view observations?

There does not appear to be any Alaska law directly on point. The sole case which even mentions aerial surveillance is *Thiel v. State*, 762 P.2d 478 (Alaska App. 1988), but the Court of Appeals declined to rule on the issue, stating that even if there had been error, it would have been harmless.

Accordingly, Defendant is correct that we must look to federal law, and potentially to out-of-state law, to determine this issue. However, there is very definitive

[1] Exhibit 1 shows the overview, with Defendant's property and the airstrip pinned and the aerial distance measured at 1.09 miles; Exhibit 2 shows a closeup of Defendant's property; Exhibit 3 shows a closeup of the airstrip, and the two planes.

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federal law on the subject. Defendant correctly cited to the two seminal U.S. Supreme Court cases on the issue: *Florida v. Riley*, 488 U.S. 445 (1989) and *California v. Ciraolo*, 476 U.S. 207 (1986). However, Defendant relies solely on the dissenting opinions and the dissenting portion of the concurring opinion in *Florida v. Riley*, which, no matter how much Defendant prefers the dissenters' point of view, is not the controlling law. *Ciraolo* also does not stand for the proposition that the police must be at least 1000 feet in the air for their observations to be legal. *Ciraolo* holds that the police flying in navigable airspace (which in that case happened to be 1000 feet) may view property visible from the air, (*Id.*, at 213-14) regardless of any given person's subjective expectation of privacy (*Id.*, at 213).

Contrary to Defendant's argument, in *Florida v. Riley*, decided three years after *Ciraolo*, the U.S. Supreme Court did not narrow the ruling, but if anything expanded it to clarify that the 1000 foot altitude discussed in *Ciraolo* was not a lower altitude limit. Instead, the Supreme Court reiterated the holding in *Ciraolo*, and applied it to a helicopter based observation made only 400 feet above the property in question. The Supreme Court pointed out that fixed wing aircraft could legally fly as low as 500 feet, but noted that rotary wing aircraft were not restricted to the 500 foot limit, such that the 400 foot vantage point was entirely legal for the police just as it would be for a private person. The Supreme Court further pointed out that the use of helicopters, (and other aircraft), both as "private and commercial flights... is 'routine' in this country," (*Id.*, at 697), and that there was no evidence it was "unheard of" in the defendant's county. Clearly, it is common knowledge

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that aircraft, both commercial and private, to include small planes and ultralights are extremely common in Alaska – far more so than the rest of the country, due to our unique topography and relative scarcity of roads. It is telling that, as noted in the attached exhibits (1-3), there is a private airstrip almost exactly one mile from Defendant's property.

Florida v. Riley remains the law of the land, as it has done for the past 25 years. Therefore, Defendant's lengthy argument attempting to create new law by relying on the arguments of the dissenters is simply irrelevant. Defendant's personal expectation of privacy from low-flying aircraft is simply irrelevant under *Riley* and *Ciraolo*.

Defendant then attempts to apply entirely unrelated Alaska law to his argument, by analogizing the *Glass* warrant requirement to these observations. The problem with his argument is that, unlike aerial observations, ordinary conversations, by telephone or in person, are still expected to be private and not recorded.[2] Aerial observations, of course, since the advent of GoogleEarth and other commercial satellite photography, are easily accessible to the general public, none of which was available when *Riley* and *Ciraolo* were decided. Furthermore, the prevalence of small, low-flying aircraft has also proliferated in the years since the Supreme Court decided those cases, to include ultralight aircraft and powered hang gliders and similar aircraft, making everyone's property easily visible from the air, and from very low altitudes. As noted in Riley, the defendant's subjective expectation of privacy – and even the frequency of such flyovers – is not

[2] Although in modern times, with the prevalence of mobile devices with simple audio and video recording capability, and the frequency of persons posting photographs, and audio and video recording of other people online through social media, even that expectation of privacy may

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relevant: the question is whether this is "practically unheard of" and even back in the 1980's the Supreme Court found that in the United States in general, it is "routine."

Consequently, the warrant requirement in *Glass* is entirely unrelated to observations made from a public space, using nothing more than a telephoto lens to enhance the otherwise plain view vision.

Defendant also attempts to rely on Vermont and New Mexico law. However, neither is controlling in Alaska, and it is equally reasonable to rely on law from other states, including California and Florida, where the US Supreme Court has stepped in, in the past, and held that such aerial surveillance is entirely legal under the Fourth Amendment. The law regarding the lack of applicability of the Fourth Amendment to open fields dates back nearly 100 years. In *Oliver v. United States*, 466 U.S. 170 (1984), the United States Supreme Court sustained the continuing vitality of the "open fields" doctrine first announced in *Hester v. United States*, 265 U.S. 57 (1924). The Supreme Court held that the Fourth Amendment to the United States Constitution specifically provides no protection to open fields - it protects only persons, houses, papers, and effects. One has no reasonable expectation of privacy in open areas beyond the curtilage of a dwelling. Thus, any area outside the house and beyond curtilage may lawfully be viewed by police officers even if they trespass on fenced or posted property. The Court also noted such lands could lawfully be surveyed from the air by police. (*Oliver v. United States*, at 179, fn. 9.) Of course, once the Supreme Court ruled in *Riley* and *Ciraolo*, it was clear that even the curtilage area was

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become outdated. However, that is not the issue in the present case.

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not protected from aerial surveillance. The use of infrared or radar technology to view what would be under a roof is a separate question (and generally prohibited absent a warrant), but naked eye observations, even enhanced by binoculars, are entirely legal.

Alaska law is consistent with the controlling federal law on this issue. Recently in *Martin v. State*, 297 P.3d 896 (Alaska App. 2013), our Court of Appeals upheld a trooper's view inside a residence through gaps in the window blinds from the deck of a multi-unit rental property. If a trooper can look through a gap in the blinds to the most protected area – a person's residence – from a space accessible to the public, he can certainly observe items in the open or through transparent coverings of a greenhouse from the air. Defendant's citation to a civil tort case involving Walmart searching a person's bags and discussing personal embarrassment based on the manner of the search, has no bearing on a law enforcement aerial observation.

Whether Inv. Moore used a telephoto lens in his observations is also manifestly irrelevant. Although the question of using binoculars to assist in plain view observations is not the subject of substantial case law in Alaska, that is because the law on the issue of assisted plain view observations is so clearly drawn. See *e.g. Anderson v. State*, 555 P.2d 251 (Alaska 1976), where the Alaska Supreme Court, in a footnote, references the law on the issue by saying "[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.*, FN 30) and citing various other federal and state authorities for this well

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known proposition: *United States v. Lee*, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927); *Johnson v. State*, 2 Md.App. 300, 234 A.2d 464 (1967); *Commonwealth v. Hernley*, 216 Pa.Super. 177, 263 A.2d 904 (1970); *People v. Ciochon*, 23 Ill.App.3d 363, 319 N.E.2d 332 (1974); and *People v. Vermouth*, 42 Cal.App.3d 353, 116 Cal.Rptr. 675 (1974).

Despite Defendant's bootstrapping attempt, the Supreme Court's decision in *Kyllo v. United States*, 533 U.S. 27 (2001), does not lead to a different result. *Kyllo* involved thermal imaging of a home – detecting through special technology what would not be visible from outside the residence. *Kyllo* also reiterates several times that it is also the fact that the thermal imaging was done of the interior of a home, with enhanced privacy interests, which further differentiates it from *Dow Chemical Co. v. United States*, 476 U.S. 227, 234–235, 239, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986), which upheld "enhanced aerial photography of an industrial complex." *Kyllo*, at 33. *Kyllo* also limited its holding to circumstances where "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." *Id.*, at 40. It is painfully obvious that telephoto lenses and binoculars are (and have been for well over 100 years) in general public use, and are not specialized devices which permit a person to see through walls.

In short, Inv. Moore travelled through lawful airspace, in a State where flying is extremely common, in an area with at least one private airstrip in close proximity, and used only a fairly low level telephoto lens to photograph Defendant's property clearly

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visible from the air, in full compliance with the U.S. Supreme Court's rulings on aerial surveillance by law enforcement.

Accordingly, the defendant's motion to suppress evidence should be DENIED.

RESPECTFULLY SUBMITTED this 29th day of August, 2014, at Fairbanks, Alaska.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By _____
Elizabeth F. Crail, ABA 0211057
Assistant District Attorney
9312040

This is to certify that a copy of the foregoing is being delivered via mail service to the following attorneys or parties of record: Robert John

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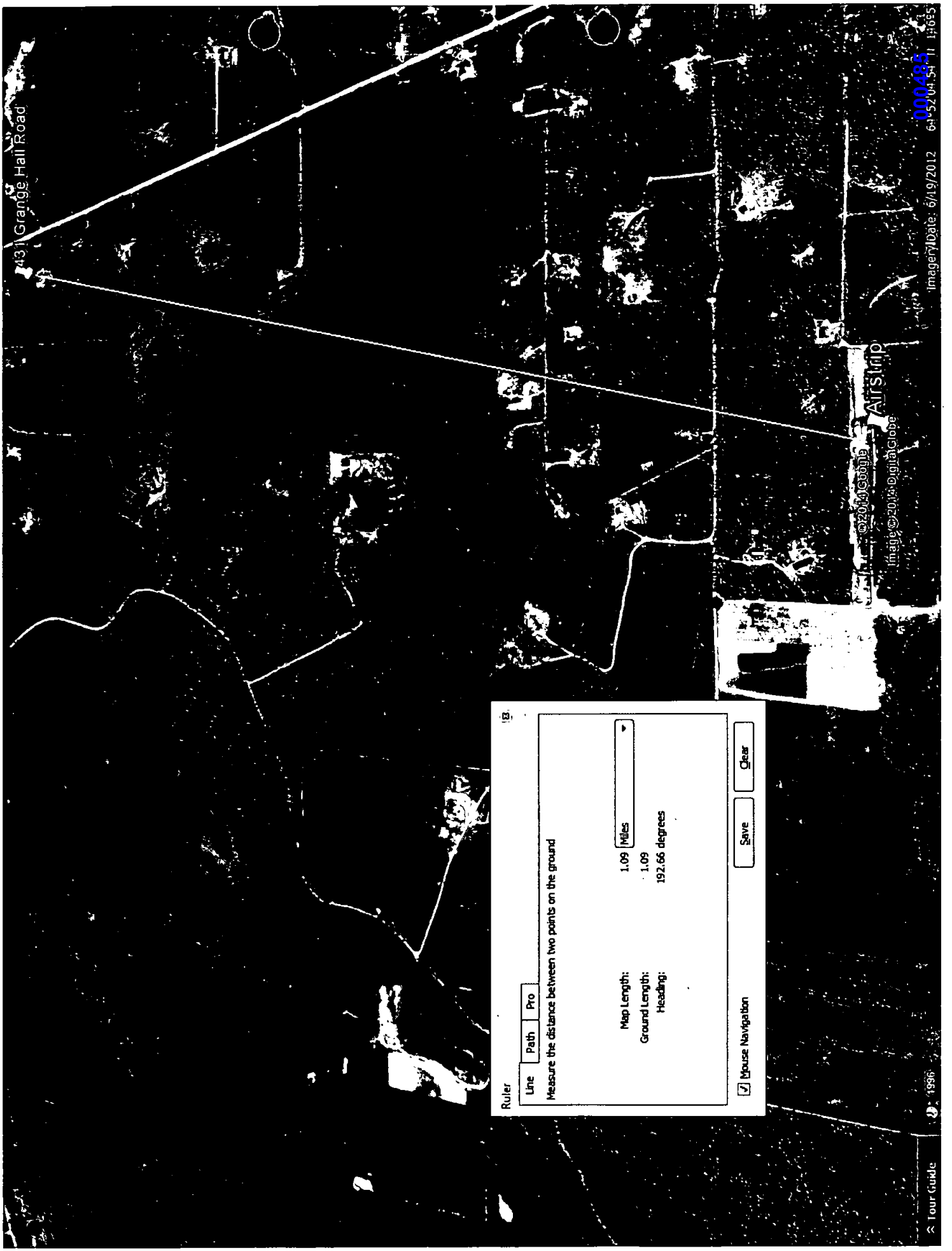
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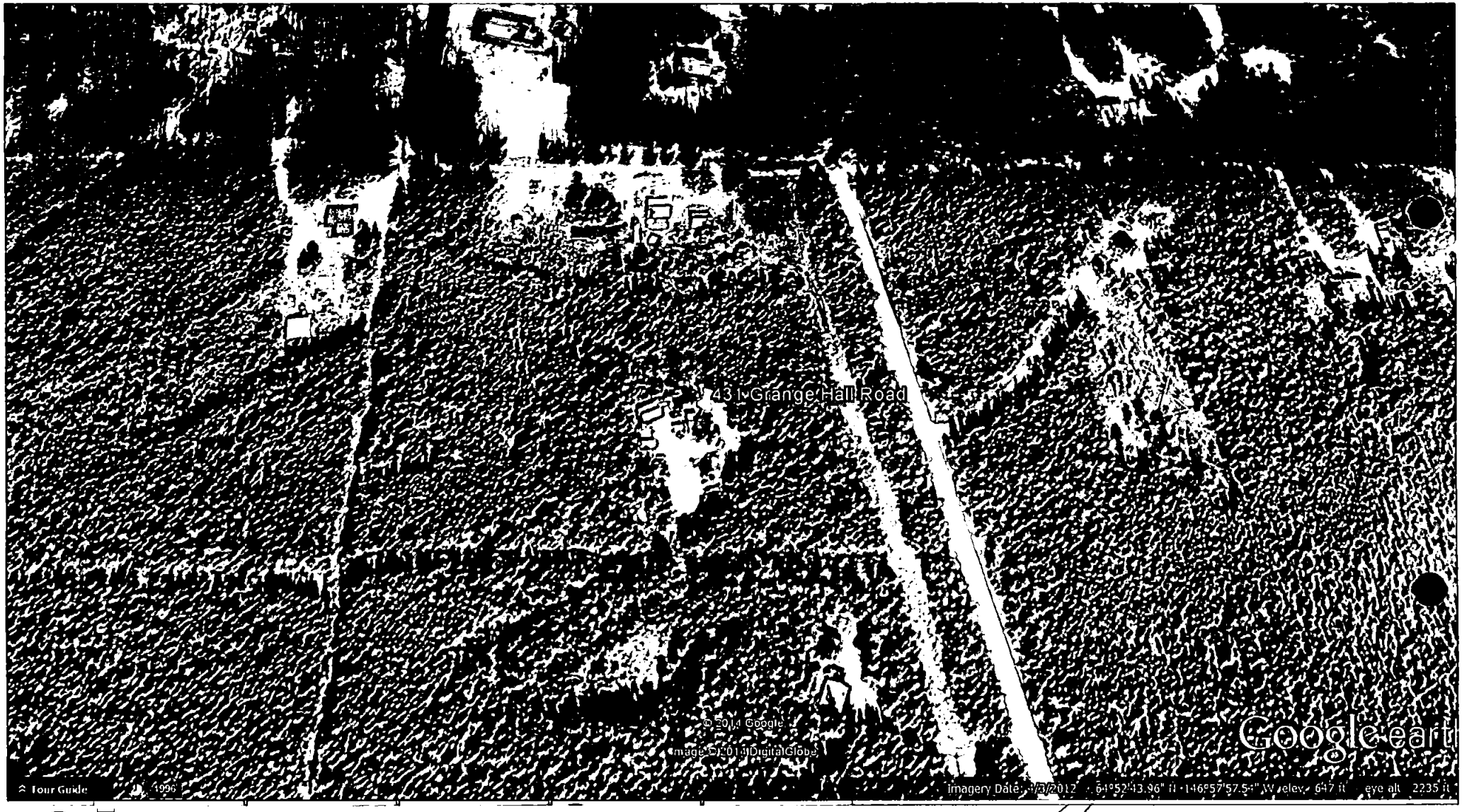
(Exhibit 1)



FLT PATH
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Excerpt
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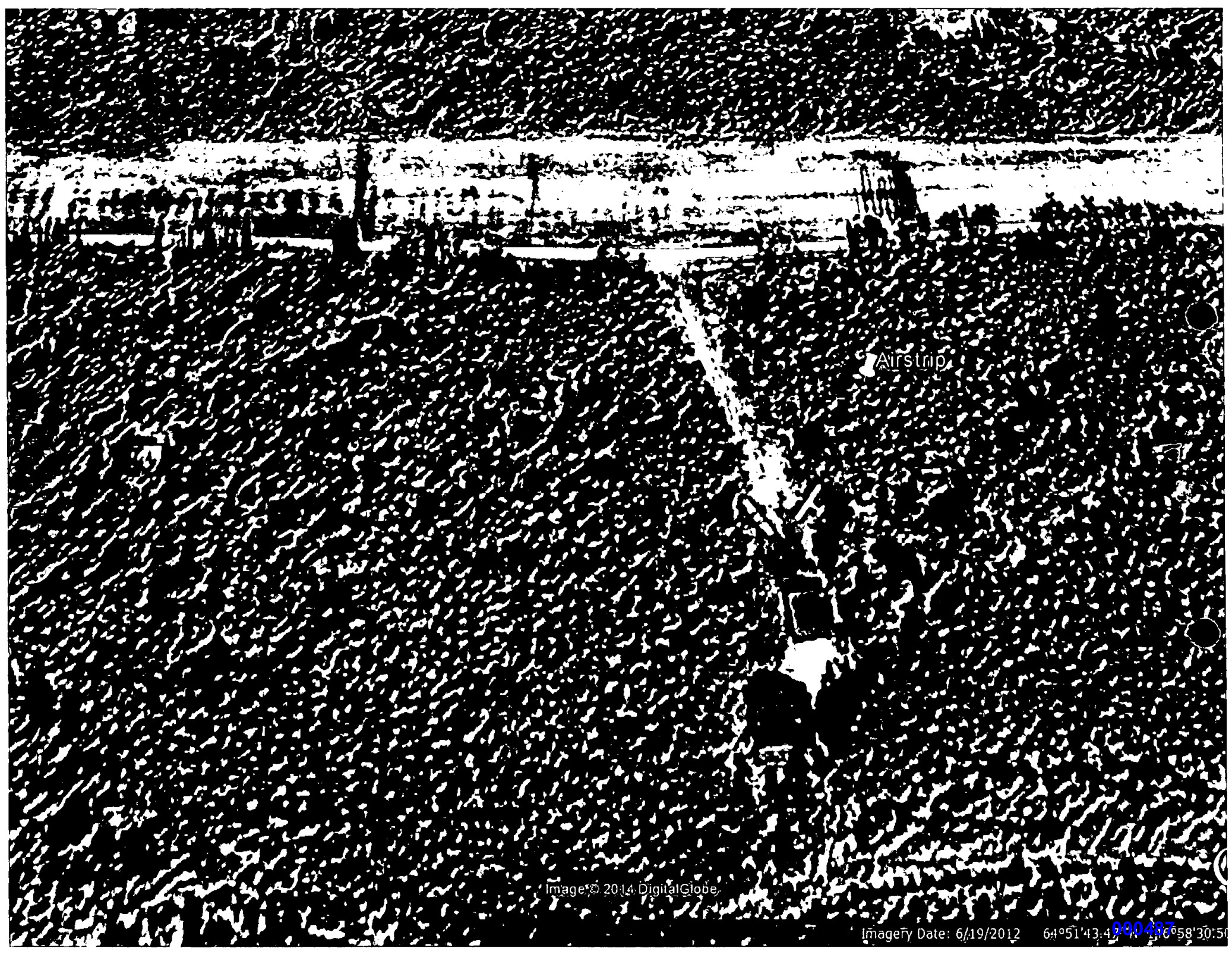
(Exhibit 2)


Airstrip
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Google

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Policy

Use of images

Blur or update a Street View image

Imagery sources

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EXHIBIT I Page 1 of 1

000469

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6
EVIDENTIARY HEARING RE: MOTION TO SUPPRESS
7 BEFORE THE HONORABLE BETHANY HARBISON
Superior Court Judge
8
Fairbanks, Alaska
9 December 11, 2014
1:36 p.m.
10
APPEARANCES:
11
FOR THE PLAINTIFF: ELIZABETH F. CRAIL
12 District Attorney's Office
455 Third Avenue
13 Suite 150
Fairbanks, Alaska 99701
14
FOR THE DEFENDANT: ROBERT JOHN
15 Attorney at Law
P.O. Box 73570
16 Fairbanks, Alaska 99707
17
18
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25

P R O C E E D I N G S

Ctrm: 402

01:36:55

THE CLERK: On record.

THE COURT: On record. State versus John McKelvey, 4FA-14-40. Mr. McKelvey is here in custody represented by Mr. John, who is here. Ms. Crail for the state. We're here for an evidentiary hearing on a motion to suppress.

Ms. Crail, who is the first witness?

MS. CRAIL: Lieutenant Justin Rodgers, please, Your Honor.

THE COURT: Okay. Lieutenant Rodgers, you're being called as a witness. Please come forward to the witness box. Once you get there, please remain standing and then raise your right hand so that madam clerk can administer the oath.

(Oath administered)

MR. RODGERS: I do.

THE CLERK: Thank you. You may be seated.

JUSTIN RODGERS

called as a witness on behalf of the plaintiff, testified as follows on:

DIRECT EXAMINATION

THE CLERK: And, for the record, would you please state your full name and spell first and last.

A Justin Rodgers, J-u-s-t-i-n R-o-d-g-e-r-s.

THE CLERK: Thank you.

THE COURT: Ms. Crail, you may inquire.

MS. CRAIL: Oh, thank you, Your Honor.

THE COURT: You're welcome.

MS. CRAIL: I was going to ask if the court would object if I remain seated for this.

THE COURT: I wouldn't. That's just fine.

MS. CRAIL: I appreciate it, Your Honor. That helps with the paperwork.

THE COURT: Yeah, I think it does.

BY MS. CRAIL:

Q So, Lieutenant Rodgers, you're an Alaska State Trooper, is that correct?

A Yes, ma'am.

Q And how long have you been in law enforcement?

A Seventeen -- a little over 17 years.

Q And what's your -- what has been your primary area of duty as a state trooper?

A I've been assigned to the Division of Alaska Wildlife Troopers for my whole career with the troopers.

Q Now, do you have any special skills or capabilities that you've had while acting as am state trooper there? And I guess I'm going to focus on flying issues.

A Yes, I'm a -- I've been a state pilot for about 15 years.

Q So it sounds like most of the time you've been a trooper

then?
A Yes, ma'am.
Q All right. And, as a state pilot, is that flying for the troopers or is there some other flying done as well?
A No, it's -- it's for the Alaska State Troopers.
Q Okay. Now, as a trooper pilot, will you assist in other troopers' investigations as well as your own Fish and Wildlife -- or, I'm sorry, AWT business?
A Yes, ma'am.
Q Okay.
A As well as search and rescues, and things of that nature.
Q So wide variety of --
A Of all the department's business.
Q Now, Lieutenant Rodgers, are you familiar then with -- I guess with the aircraft that you're using as a trooper pilot and any internal rules or anything like that that you would have to deal with?
A Yes, I actually fly a variety of aircraft for the state, but I'm familiar with them and their operations, if that's what you're asking.
Q Okay. So let's focus in on this particular case then. Back in August of 2012, were you working in the same capacity?
A Yes, ma'am.
Q And did you get a request from, I guess, then

Investigator Joshua Moore to assist him with -- I guess with flying over some property in the Fairbanks area?

A Yes, ma'am.

Q Okay. And what kind of an aircraft did -- well actually, I should back up one step. Did you agree to do so?

A Yes, ma'am, I did.

Q Okay. What kind of an aircraft were you going to use on that day?

A A Piper PA 18, commonly referred to as a Super Cub.

Q And how many hours have you had in that aircraft? Well, not necessarily that specific aircraft, but in the Super Cubs in general.

A More than 4,000 -- 4,500 maybe.

Q Now, the aircraft that you used on that particular date, was that a marked aircraft?

A Yes, it was.

Q And I guess when I'm saying marked, I'm not referring to the tail number I guess that every aircraft might have, but with respect to it being a trooper aircraft.

A Yes. I mean, marked as in state tro -- typically, state trooper colors, blue and white with yellow trim, a badge on the side of the fuselage. I can't recall if it has "State Trooper" under the wings. I don't -- if it did in 2012, I'm not sure.

Q Okay. But those are standard things that you would

expect on the troopers' Super Cub?

A On our marked aircraft, yes.

Q And is that the type you used in this case?

A It is.

Q Now, what was the request by then Investigator Moore as far as what he wanted you to do on that day?

A Well, he asked if I was available to assist him in an overflight in an area northeast of Fairbanks. I was very new to the area, but -- and I understood he was going to make some observations, potentially take some photographs from the airplane. That was the nature of the request.

Q Okay. And have you assisted in similar requests --

A Yes, I have.

Q -- from other troopers? Okay. Now, is this -- does this kind of a flight require you to file a flight plan?

A No.

Q And do you -- would there be any reason for you to record flight data in some fashion?

A Not -- not necessarily. We do at times, but I don't recall on this flight doing that.

Q Okay. I was asking, I guess, for this type of a flight, would there be any special reason for you to, as basically just an in-and-out in the Fairbanks area, to record those -- that information?

A No. There'd be no --

Q And to the best of your recollection, did you record any flight data with respect to this case?

A No.

Q So what information would you have had with respect to taking the plane out on that date?

A I mean, I know the -- the airplane N number, I know what time I took off, and I know what time I returned. I know in hindsight now my route of flight. I was unfamiliar at the time we took off. And probably I told our dispatchers what I was doing, generally, you know, that I expect to be gone so long and come back, but--

Q Okay. Now, so, Lieutenant Rodgers, this particular flight -- and I understand you said you were unfamiliar at the time. Are you more familiar with the Fairbanks area since that date?

A I'm more familiar. Not extremely familiar, but I am generally more familiar.

Q Okay. Are you familiar enough to know the area or to be able to refer to and recollect the -- or define the area that you were flying over in this case?

A I believe so.

Q Okay.

A I mean, to the best of my recollection.

Q So let me just narrow it down. Was it out in the Chena Hot Springs Road area?

A It was.
Q And have you had an opportunity to -- prior to this hearing, to take a look at Google Maps or Google Earth aerial photography to take a look and be able to say, yeah, that's the area we were in?
A Yes.
Q Okay. Now, if -- do you recollect this specific case as far as what you were doing in doing the fly-over, whether you flew over once or twice or how all that worked?
A Well, I can remember the flight and I -- I remember we just flew in a straight line path over this property. I don't recall circling. It's possible we turned around and flew over it again on the way back, but I don't recall that specifically, either. I essentially recall a one-way pass over this property and then I -- you know, we did some other business out there, unassociated with this case, and then returned to Fairbanks.
Q Now, Lieutenant Rodgers, did you keep an eye on your altimeter, how high you were flying through this area and specifically with respect to this fly-over?
A I did -- I did, yes.
Q And do you remember how low you got?
A I remember -- I remember thinking that I conducted the whole flight certainly above 500 feet. My recollection was between 600 and 1,000 feet. I remember being a

1 little higher, descending, and climbing back up, and I
2 remember referring to a map for topography to determine
3 how high I was above the ground because I was unfamiliar
4 with the area. And, in fact, I think Sergeant Moore and
5 I discussed the altitude on this flight probably shortly
6 after, but --
7 Q Okay. And the area in question, are you aware of whether
8 there's any airstrips or anything in the same general
9 vicinity?
10 A I'm aware now.
11 Q Okay.
12 A You know, it's -- now I'm aware that there's an airstrip
13 within a mile of the property we flew by and it's
14 possible it was pointed out that day, but I don't recall.
15 Q Okay. And to your -- this was in August, as I understand
16 it, correct?
17 A August of 2012.
18 Q So there would have been leaves on the trees, everything
19 else?
20 A Yes, ma'am.
21 Q In looking at the Google Earth overshot, did that look
22 similar to what you were looking at flying over that day?
23 A Yes, it looks familiar to me.
24 Q Okay. All right.
25 MS. CRAIL: Judge, I was just double-checking myself, but

I believe that's all I needed from Lieutenant Rodgers at this point.

THE COURT: Okay.

MS. CRAIL: I think everything else can come through Sergeant Moore.

THE COURT: Thank you. Mr. John?

JUSTIN RODGERS

testified as follows on:

CROSS-EXAMINATION

BY MR. JOHN:

Q Good afternoon.

A Good afternoon, sir.

Q So how many days before this flight did Investigator Moore first contact you about doing it?

A I don't -- I recollect it was earlier the same day.

Q Okay. Okay. And in your time as a trooper, how many such flights have you undertaken?

A I guess such flights as associated with this type of alleged conduct?

Q Yes, look -- yeah, looking for marijuana grows.

A Very few. I'm trying to think if I've done other observation-related things, but I can't think of another specifically one with this same type of conduct.

Q Okay. Now, you indicated that you remember -- well, you just seem to remember the one-way pass --

A Uh-huh.
Q -- and then doing some other business, right?
A Uh-huh.
Q And did you not come upon another marijuana grow that day as you were flying?
A Well, I know we -- we did and I believe -- I can't remember for sure which one was first. I know we were looking at two properties that day.
Q Okay.
A One -- yes, I know for sure that.
Q Okay. And were you aware ahead of time about the other marijuana grow?
A I knew we were going to two places in essentially the same location, but, for clarity, I had never been on Chena Hot Springs Road --
Q Okay.
A -- in my life, I don't believe at that point.
Q Okay. And you were coming from Fairbanks you said, correct?
A Yes, sir. Took off in Fairbanks, yes, sir.
Q Okay. And do you recall how close the other marijuana grow was to the one on Mr. McKelvey's property?
A Within a few miles, but, no, not exactly.
Q So did you basically deal with those back-to-back? In other words, one trip, checked them both out, and

returned?

A Yeah, as I recall, we were outbound, you know, probably 30 minutes or so. We approached one, flew by that one. I don't recall doing any significant turning or circling, and kept going and flew by another one. And I can't honestly remember which one is in which order, but --

Q Okay. So you would have gone to the -- to one closest to town first probably and then --

A That's my recollection, yes, and --

Q Okay. And then did you then turn around after looking at the second one and come back?

A That's what I believe, yes, sir.

Q Okay. And did you follow the same route back that you followed out?

A It would have been generally a similar route, but certainly not the same just by nature of contours or whatever, but --

Q Okay. Do you recall whether you came over or near Mr. McKelvey's property on the return trip?

A Not with certainty, sir, I don't.

Q Okay. Now, you talked about your plane, it basically has trooper colors on it. Is that it, the plane?

A Yes, I mean, it's blue and -- blue with white and yellow trim and a badge on it and --

Q Okay. And is it the darker color blue on your uniform or

what --

A It's -- it's more similar to the dark than the light, yes, but it's -- I don't think it's quite as dark as this.

Q Okay.

A Similar in blue, though.

Q Okay. Now, have you ever been given any training or -- in relation to any constitutional constraints about flying over people's property?

A No. It's been a matter of discussion, but I can't remember specific training about aerial observation.

Q And when you say a matter of discussion, who was that discussion with?

A With other troopers. I guess -- I'm trying to think here. In regards to constitutionality, it's been a recent discussion because of this hearing.

Q Okay. But you've never had discussions with the district attorney prior to this issue coming up in this case?

A Not about constitutionality, no.

Q Did she meet with you and prepare you for this hearing, Ms. Crail or another district attorney?

A We met briefly before this hearing, yes.

Q Okay. What did you talk about?

A What did she talk about?

Q Yeah.

1 MS. CRAIL: Your Honor, I'm going to object to what I
2 talked about. I think certainly he can talk about whether he
3 made any other statements prior to this that would affect his
4 testimony, but I'm entitled to do witness preparation. It's
5 considered work product.
6 THE COURT: It's not work product. How would it be work
7 product?
8 MS. CRAIL: The -- there's case law on point that a
9 prosecutor is entitled to prepare witnesses for trial or for
10 other hearings without providing everything that goes on in
11 that conversation. If there's additional information that was
12 not previously presented in the -- in discovery or otherwise,
13 then that would be discoverable, so that raises issues. But if
14 there's -- if it's basically just going over the same things
15 that's already been presented, we're not required to turn that
16 over. That's witness preparation, work product.
17 THE COURT: Well, that's witness preparation, but whether
18 it's work product is an entirely different matter.
19 MR. JOHN: I've asked this kind of question in civil and
20 criminal matters routinely, Your Honor. It's just --
21 THE COURT: I've had this come up before and it seemed
22 like it was very obvious from the court rule. So it's a
23 privilege you're invoking?
24 MS. CRAIL: Correct. Basically, it's the work product
25 privilege, but it's the prosecutorial -- I mean, I'm not

1 suggesting I've got anything specific to hide, but I don't
2 think he gets to go through, you know, what exactly did Ms.
3 Crail go through, you know, in every step of it.
4 THE COURT: It's not attorney/client privilege.
5 MS. CRAIL: There's also --
6 THE COURT: Your thoughts about the case that you keep to
7 yourself, they don't have to be discovered. But this isn't
8 about strategy, this is --
9 MS. CRAIL: Except that his question is very general. I
10 mean, my discussion with Lieutenant Rodgers may have included
11 strategy, it may have included specific things -- you know,
12 questions that I was going to ask him. I think he can ask about
13 the questions that -- you know, the area, but I don't think he
14 can talk, for instance, about my case strategy issues or
15 anything else that I may have brought up.
16 THE COURT: Well, if you talk about them outside your
17 office, haven't you waived any privilege about that
18 strategizing?
19 MS. CRAIL: I think in prep -- in witness preparation
20 with a trooper, I think I can explain to them what's going on,
21 background about the case, a little bit of the motions practice
22 and so forth.
23 THE COURT: I don't see how any of that would be
24 privileged.
25 MS. CRAIL: I don't think that's --

1 THE COURT: If there's a case, I'm not aware of it. I
2 mean, it seems like a straightforward evidence rule and it
3 doesn't seem like there's any privilege about that. Am I
4 missing something?
5 MS. CRAIL: I mean, I guess -- I think -- well, I mean I
6 still stand on that, Judge, but I will also add to it. There's
7 also an issue of relevance. Certainly, if he wants to ask
8 about the questions I sent, my issue here is the general
9 element of the question.
10 THE COURT: How is it relevant? I agree with that. How
11 is that relevant?
12 MR. JOHN: Well, as to the questions he's going to be
13 answering, what type of preparation, if she's told him to give
14 any particular responses, I'm --
15 THE COURT: That's not the question you're asking,
16 though. You're just generally fishing.
17 MR. JOHN: Well, that was the general question to lead --
18 THE COURT: As to relevance, it's sustained. As to
19 privilege, it's overruled. If you ask something more narrow,
20 it may be relevant.
21 MR. JOHN: Okay.
22 Q Did Ms. Crail give you any advice or instructions on how
23 to answer specific questions that were asked of you by
24 her or me?
25 A No, sir.

Q Okay. Did you go over any materials, visual, audio, written, in preparation for this proceeding?
A Did I personally?
Q Yes.
A Or with Ms. Crail?
Q Well, first, personally. Did you personally go through anything to prepare --
A I read -- I read Sergeant Moore's portion of his report. I looked at my notebook to check the date and time. I looked -- I read some motions. I believe they were defense motions and maybe the state's response to a motion. I'm not very familiar with this case, obviously. And I think that's -- that's what I've done, personally, in my presence.
Q You said you've looked at your notebook. I have not received any discovery about your notebook. The first question is, from your notebook, what date and time did it indicate that you had been out there?
A On October -- on August 24th, I put that we went 10-8 at 1450 and back -- 10-6 in Fairbanks at 1555, and then I have that case number written down that Sergeant Moore would have provided me.
Q Okay. So 1450 would be the take-off moment, more or less, and --
A Yeah, basically, when you're operating the airplane, but

take off fairly imminently after, yes, sir.

Q Okay. And then landing, when you stopped operating the plane --

A Exactly.

Q -- was 1455, so --

A 1555, yeah.

Q 1555.

A Yeah. I mean, essentially, ten till 3:00 until five till 4:00. Hour and five minute flight.

Q Okay. Hour and five minute. Okay.

A And that was just to refresh my recollection about the date and time of --

Q Okay. Do you have any -- do you have other notes about this besides the date and time?

A No, sir, I don't.

Q That's all that's in your notebook?

A That's all that's in there.

Q Do you have your notebook with you?

A It's in -- it's in my vehicle.

Q Okay.

MR. JOHN: I'd like to get a copy of that page in discovery at least before this proceeding is over to just take a look at and confirm. We don't need to stop just to get it right now, but if during a break perhaps he can get that page and we can get a copy.

1 MS. CRAIL: I --
2 THE COURT: Ms. Crail is agreeing.
3 MS. CRAIL: Right. I don't have an issue with that,
4 Judge. I hadn't seen it before, either. Before the hearing
5 was the first time that I was advised there was any note at
6 all. His description of the note seems to be minimal enough
7 that I wasn't deeply concerned, but I certainly don't object to
8 providing it, so --
9 THE COURT: Great.
10 Q So let's set the scene a little bit here, Trooper
11 Rodgers. You're flying and the plane -- which side of
12 the plane is the pilot's seat on?
13 A This is a -- it's called a tandem airplane, front and
14 rear seats. So I was in the front seat.
15 Q Okay. And Trooper Moore was in the rear? Investigator
16 Moore.
17 A Yes, sir.
18 Q All right. So are you paying attention to him at all
19 while you're flying?
20 A Paying attention to what he's saying because I don't know
21 where I'm going and he's asking --
22 Q Okay.
23 A -- he's telling me a little right, a little left.
24 Q Okay.
25 A But not -- I can't -- he's not in my normal field of

1 view.
2 Q You're listening to him?
3 A I'm listening to him.
4 Q Are you listening through headsets or just --
5 A Yes, sir.
6 Q Okay. Because there's enough noise that --
7 A You could holler, but typically a common air --
8 Q Okay. Okay.
9 A Yeah, has a headset.
10 Q So you're communicating through a headset.
11 A Yes, sir.
12 Q Okay. And that's not recorded, is it?
13 A No, sir.
14 Q Okay. So as you were approaching Mr. McKelvey's
15 property, what did Investigator Moore tell you?
16 A That we were at the -- at an appropriate heading for what
17 he needed to do and an appropriate altitude for the
18 observations he was going to try to make.
19 Q Okay. And did you -- were you able to observe what he
20 did as you were flying over the property?
21 A No.
22 Q Okay.
23 A Like I said, he's behind me --
24 Q Right.
25 A -- in a fairly narrow cockpit airplane. I didn't turn

around and look at him, no.

Q Okay. So when you went out there, did he tell you anything about what his intent was to do when they [[sic] passed over the property?

A I knew he was going to try to take pictures.

Q Okay. Okay. And that was at both properties?

A I -- that was my understanding, yes.

Q Okay. And how long a period of time do you think your plane was physically over Mr. McKelvey's property?

A Well, could you describe -- over the house or over five acres? I'm not sure what you're asking. I don't even know how big --

Q Were you aware of how big his property was?

A No, sir, I'm not.

Q Okay. Okay. When you were flying, did you look down and see structures and a house and the like that you were flying over?

A I remember a house and if -- I remember what was a shed or a greenhouse. And if you're asking how long we were over it, I don't think we were ever over it. We were beside it. We were never -- I mean, over, you couldn't see under the airplane or --

Q Okay. So you want to be a little bit of a -- you might have been at the far side of the property, but you were trying to get a view of the structures?

A Sure. You know, and I'm not trying to be hesitant, but I don't know how big this property -- if we're considering the acreage, I don't know.

Q Okay.

A So it's possible we were on -- you know, over somebody else's property looking at his. I'm not sure.

Q Okay. So --

A But -- but a few moments.

Q A minute or so or less perhaps?

A Less, I would say.

Q Okay.

A Yeah.

Q What speed were you flying the plane that day?

A Probably about -- about 70 miles an hour, I would say. 65 or 70 or so.

Q Okay.

A At that time.

Q And was that at that point when you left town and were getting there, were you flying a bit faster to get there?

A Yes. Yes.

Q Okay.

A In cruise flight, basically, right.

Q And that would be at what speed?

A Well, it's 80 knots; 95 miles an hour, roughly, or something like that. I usually use knots, but something

similar to 90, 95 miles an hour.

Q As Investigator Moore was taking pictures, was he communicating with you about what he was seeing?

A No, sir.

Q Okay. Did he communicate with you at all that day about what he observed or thought he observed on Mr. McKelvey's property?

A On Mr. McKelvey's? I knew he had taken pictures. I -- I don't think in the flight, but maybe after the flight and he had a chance to review the pictures, he communicated with me that he -- what he saw.

Q Okay. Okay. So it was your understanding he was basically looking through the camera and taking pictures with the camera?

A That was my understanding, sir.

Q Okay. So he wasn't doing a naked-eye observation; he was using the camera and then going back and looking at the pictures?

A Yes. Whether he did that review in the aircraft or back on the ground, I'm -- I can't say with certainty.

Q Okay. Did he communicate with you about the other marijuana grow that day?

A The outdoor one?

Q Yes.

A Yes. Yes.

Q Okay. Did he talk to you about that at the time?
A Well, yes, and I could see -- I mean, I remember -- we're not necessarily talking about that case, but I could plainly see stuff there, but honestly I didn't know what it was until I asked him.
Q Okay.
A So -- and he said, well, that's what this is and I said, huh. I didn't know.
Q Okay. Okay. Now, I had served you with a subpoena to come testify today and bring paperwork. Did you bring any paperwork with you?
A I brought -- my notebook is in my truck. Like I said, I brought some copies of printed motions that I had reviewed. I do have some paperwork with me.
Q Okay.
A Or not with me; it's in the vehicle.
MR. JOHN: Could we take a break now, perhaps, and let him get that, and I'll take a look at it. And maybe I don't have any more questions and -- or maybe I do, I don't know.
THE COURT: Sure. Sounds good. We'll take a -- what, 10 minutes would be sufficient?
MR. JOHN: Is that enough time?
THE COURT: Where is your vehicle?
A It's over by the DA's office. Not very far, just a short walk.

1 MS. CRAIL: Across the block -- I mean, across the
2 street, so --
3 THE COURT: So, yeah, 10 or 15 minutes, huh?
4 MR. JOHN: Okay. Yeah, that should be ample time.
5 A Ten minutes would probably be plenty I would --
6 THE COURT: Ten? Okay. So 2:15. We'll be off record.
7 (Off record)
8 THE COURT: Back on record. Everything sorted out then
9 with regards to the paperwork?
10 MR. JOHN: Yes.
11 THE COURT: Okay. And did you want to continue
12 inquiring, Mr. John?
13 MR. JOHN: Yeah, just I think a few more questions, Your
14 Honor.
15 THE COURT: Okay.
16 Q Lieutenant Rodgers, you've given me one page here from
17 your notes of that day.
18 A Yes, sir.
19 Q And it appears starting time of -- can we go -- it says
20 1450, which is what you talked about, right?
21 A Uh-huh. Yes, sir.
22 Q And what is -- what did you write next to that on the --
23 A 10-8 means in service.
24 Q In service. Okay.
25 A Yeah.

Q And what is the AK-12230666?
A I think that's the case number for this case. It is. Should be unless --
Q Okay.
A -- I miswrote it there, but --
Q Okay. And then --
A 15 --
Q Okay. Yeah, go through it.
A Do you mind? 1555, 10-6, FAI stands for Fairbanks.
Q Okay.
A 441.1 is just the tachometer time in the airplane.
Q Okay. And that -- the tachometer time is 441 from zero or from another level or --
A From the previous tach time which was 440.1.
Q Oh, that's the amount of time in the air for --
A It was a one-hour flight.
Q Amount of time in the engine and the plane.
A Exactly.
Q Okay.
A One -- one hour is on the -- yeah, on a --
Q Okay.
A -- sensor, yeah, which corresponds with basically from just before 3:00 to just before 4:00, one hour of being in the air and one hour on the tachometer.
Q Okay. I want to make sure I understood your testimony

previously. When you were getting near the property, did Investigator Moore tell you about the -- anything about the altimeter or the altitude or --

A No, he didn't tell me. I remember querying him. Like I said, I didn't know where I was going.

Q Okay.

A And I was, you know, right? Left? Or is this good? Yep, this is about right. Is this a good altitude for you? Yep, this is just fine.

Q Okay.

A He might have said a little up, a little down, but --

Q Okay.

A And then once I knew I was at an altitude, I stayed at, you know, whatever level. That's when I confirmed with my altimeter to -- just for my own knowledge of how high am I.

Q Yeah.

A So --

Q So it is quite loud inside the plane, is it not?

A Without a headset on?

Q Yeah.

A Yeah. I mean, it used to be and then you use headsets and you talk -- hollered back and forth, but -- but it is loud, yes.

Q Okay.

A Usually, you use hearing protection, yeah.
Q Okay. So it's that loud, huh?
A Yeah. I don't know how many decibels, but --
Q Okay. Yeah, that was going to be my next question, but you -- I don't have to answer [[sic] that -- ask that one.
A Yeah. Different airplanes, there are different noises, of course, but --
Q Okay. And what year was this airplane from, do you know?
A No, sir, I don't without asking the state about the maintenance records. We have a fleet of Super Cubs ranging in years, so --
Q Okay. And this particular Super Cub, has this been the one you've used exclusively or do you get --
A No, sir.
Q -- various planes?
A Use various planes.
Q Okay. Okay. It's not -- okay. You said you were always above 500 feet. Is that your recollection?
A I have not testified that I'm always above 500, no, sir.
Q No, no, on this flight.
A Oh.
Q When you were around Mr. McKelvey's property.
A I mean, when you departed, you would have started from below 500 feet AGL, obviously.

Q Yeah.
A And when you arrive. But in the flight out over the Chena Hot Springs Road, Chena River Valley, I believe I was always over 500 feet.
Q Were you checking the altimeter as closely then or --
A Well, that's when I did pay attention to it because there's a particular interest to me, you know. I was just curious myself, how high am I, and I checked the altimeter --
Q Yeah.
A -- looked at a map and determined how high I was.
Q Are you aware of any regulations as to certain height levels that you should be flying?
A Are you talking about Federal Aviation regs?
Q Yeah.
A I'm aware.
Q Okay. That 500 feet is kind of a magic number?
A It can be. It's one number, yes.
Q Okay.
MR. JOHN: I have no further questions of Lieutenant Rodgers. Thank you.
A You're welcome, sir.
THE COURT: I do, and then I'll let you inquire, Ms. Crail.
VOIR DIRE BY THE COURT:

Q So I've flown in a lot of small airplanes, but I don't really understand them. So the federal aviation regulations about flying, why is 500 feet a magic number?

A Well, it's a -- it's a -- if you're over other than a congested area, you're supposed to -- you can conduct flight, you're supposed to be over 500 feet or more above ground level and within people or property on the ground, and other -- there's kind of three levels: a congested area, other than a congested area, or a sparsely populated area. So --

Q So like in Alaska, I guess the urban areas like Fairbanks are considered these congested areas?

A That would be my understanding, yes.

Q Okay. And then what is a tachometer?

A It's an engine instrument that basically measures revolutions of the engine. Certain -- certain engines have a maintenance requirement after so many hours of operation, like race cars, for example, really high-speed engines and airplane engines. So you have to track -- you have to track how long the engine has been operating, basically.

Q So the tachometer just tells you the flight time?

A In essence, it does. But, for example, it's kind of a matter of semantics; you could run the airplane all day on the ground and your tachometer is still working. So

it's generally synonymous with flight time

Q I get it.

A -- but it could vary slightly --

Q Okay.

A -- depending on how long you taxied and warmed up and things like that.

Q Okay. And then I don't understand, I thought an altimeter measured how -- what your altitude is, like how far you are above the ground?

A It actually is mean sea level, so --

Q That's why you needed the map?

A Exactly, because, for example, the field elevation at Fairbanks airport is about 450 feet from memory. It might be 439 or something. And then you'd look for similar topography where you are to determine if that's -- that's the only way to know above ground level unless you had a ground radar, which our aircraft don't have.

Q Right. My next question was going to be why did you need the map, but now I get it.

A Yeah.

Q Okay.

A That's why. To orient yourself on that.

Q Okay. Thanks.

THE COURT: Ms. Crail?

MS. CRAIL: I don't think anything from that. I think

the court's clarified what I was going to ask.

THE COURT: Oh, okay.

MS. CRAIL: So, yeah.

THE COURT: All right. Great. Thanks. You're excused then as a witness, Lieutenant Rodgers.

MR. JOHN: I -- Your Honor, it caused me to --

THE COURT: Oh, from my questions?

MR. JOHN: Yeah, it caused me to --

THE COURT: Yeah, go ahead.

CROSS-EXAMINATION CONTINUED

BY MR. JOHN:

Q So the altimeter, when you're saying how much you are above the ground, are you basing that upon the map as to the elevation of the land underneath you and then you're looking at a device which is telling you your actual altitudes above sea level?

A Yes, sir.

Q Okay.

A In general, yes.

Q Okay. Okay.

A So if the field elevation is, say, 500 feet, at 1,500 feet MSL on your altimeter, you're 1,000 feet above the ground.

Q Okay.

A And that's in essence how you do it.

Q Okay. And you had the maps for the flight on these day -- on this day?

A Yes, sir. Although, I believe I reviewed that map probably on my return. I -- the only time I use a map normally in flight is if it's -- there's some hazard or something that I'm trying to really pay attention to.

Q So what did the map indicate that the elevation was on -- in Mr. McKelvey's property area?

A It was similar to Fairbanks. It was within a -- there's a -- for example, I don't think if we found his exact property on that map I was looking at, it wouldn't have an elevation. What you have to do is look at Fairbanks and look at the topography and there are some other elevation marks and I just noted that the Chena River Valley, that valley floor was similar in elevation to Fairbanks.

Q Okay.

A Which is why I say about -- you know, I had a buffer about six -- or I think anywhere from 600 to 1,000 feet. I was in that range, but I don't think I was lower than that and I -- so, anyway, that's how I did it.

Q Okay. When you say the topography of that valley is similar to Fairbanks, are you talking about plus or minus 50 feet, or why -- what are you talking about when you use the word "similar"?

A I would have to look at a more -- I'd have to study a map to answer that question, but I would say plus or minus 100 feet maybe, 50 feet, 100 feet. And, obviously, Chena Ridge is a higher topography, right?

Q Right.

A And -- but -- but most of Fairbanks proper would be of the same altitude. It might have varied 10 or 20 feet, sure.

Q Uh-huh.

A And when I looked at the map, my perception was that valley -- the -- not the hills around the Chena River --

Q Right.

A -- but the Chena down near the road was similar in altitude.

Q Okay. You were looking at basically the altitude where the Chena River flows?

A Well, and you, of course, see -- can see Chena Hot Springs Road depicted --

Q Right.

A -- on there.

Q Yeah.

A It's all pretty --

Q Yeah.

A Pretty close in there, but --

Q Okay.

A The valley floor, I guess, is what was --
Q The valley floor is what you were basing --
A That was what is important to me.
Q Okay.
A Not -- not the terrain either side of the valley, obviously.
Q Okay.
A And--
Q All right. Now, do you have a GPS in your plane at this point in time?
A On that flight or now?
Q I guess on that flight did you?
A I -- honestly, I don't know. Typically, I do. I cannot remember with certainty if I did. My normal practice is to have one, though.
Q Okay. So would -- if you have one, you would have activated it, correct?
A Most -- most likely, yes, I would. If it's on board, then, yes, you use it.
Q Okay. So would that give us data as to the level at which you were flying?
A Not -- no, sir. I mean, not -- not data that I know about. It -- the one I use is a moving map one, so it's valuable to me to orient myself in areas, for example, around Fairbanks. If I was using it, the important thing

would have been the controlled use areas around Fairbanks; for example, Eielson and Fort Wainwright and stuff and Fairbanks. But there's -- there is a feature that will tell you the altitude, but I normally don't have it on that page, if that makes sense. I have it on the map page --

Q Okay.

A -- so there's no indication to me in a normal flight without some reason --

Q Okay. So the altitude it would tell you is at the same altitude above sea level that it tells you or --

A Yes, it is.

Q Okay.

A It knows through all the satellites and calculates your altitude, yes.

Q So that generates that data whether or not you have it on that page, correct?

A I believe so, yes, sir.

Q Okay. So do you still have that data?

A Do I have that data?

Q Yeah, from that flight on that device?

A I -- you know, you'd have to ask a GPS expert. I think I possess the same GPS. Whether it stores flight information from over two years ago, I couldn't tell you. My belief would be it rolls over, but --

Q Okay.
A It's not readily retrievable to me.
Q Okay. So it may -- okay. It may or may not be on there yet. And it was certainly on there that day, but --
A Yeah. You're -- you're kind of asking me a GPS --
Q Right.
A -- specific expert question.
Q Right.
A I mean, I can tell you what's available to me, the pilot.
Q Right.
A What that machine stores --
Q Okay.
A -- is kind of beyond the scope of my knowledge. I know about waypoints and if I save a waypoint, then it will store that kind of information, but I didn't save any waypoints.
Q Right.
A I didn't have a reason to.
Q Okay. So one would have to look in your machine to see what its storage specifications were and --
A I would suppose.
Q -- and what -- and whether anything is still there at this point in time?
A I -- one -- if some trained expert -- and I can tell you the make and model of this GPS if you want to look it up,

but --

Q Yeah, if we could, that'd be good.

A It's -- I'm not trying to be evasive, sir. I'm just not an expert.

Q No, no. I'm -- no, I'm just trying to -- I'm trying to learn.

A Yeah.

Q I don't know --

A Yeah.

Q -- I mean much about this and you know more than me, but there's people who know more than both of us.

A Yeah, I do up to a point. Yeah, it's called a Garmin 296 GPS. And, you know, I can certainly talk a lot about how I use it and what it shows me. What that machine stores and retains is -- other than waypoints. I know what -- obviously, I know that, but --

Q When you say waypoints, what do you mean by that?

A If I want to mark a location.

Q Okay.

A If I choose to mark a location in my work, like a kill site or a hunting camp or something like that --

Q Okay.

A -- if I expect to return there or something.

Q Uh-huh.

A Landing strip, maybe.

1 Q Okay.
2 A But I don't -- didn't mark any locations that -- on that
3 flight, so --
4 Q Okay.
5 A I'm trying to think. I don't know how -- how to better
6 explain it.
7 Q Okay. Thank you, Lieutenant Rodgers.
8 MR. JOHN: I have no further questions right now. Thank
9 you.
10 THE COURT: Anything from that, Ms. Crail?
11 MS. CRAIL: I think he's covered everything, Judge.
12 THE COURT: Okay. Thank you, Lieutenant Rodgers, you're
13 excused.
14 A Okay.
15 (Witness excused)
16 THE COURT: Your next witness, Ms. Crail.
17 MS. CRAIL: Your Honor --
18 MR. RODGERS: Am I subject to recall?
19 THE COURT: I'm sorry? Are you subject to recall? No,
20 you're good.
21 MR. RODGERS: No? Okay. I don't want to leave if I --
22 MS. CRAIL: I'm ready to call Sergeant Moore.
23 THE COURT: Yeah, you're really excused. You're free to
24 go.
25 MR. RODGERS: Thank you.

THE COURT: Yes, you're welcome. Thanks for asking, though.

MS. CRAIL: I was calling Sergeant Moore next, Your Honor.

THE COURT: Okay.

MS. CRAIL: But I did want to check as to -- I saw that there's other people in the courtroom, and find out if they were witnesses or not.

THE COURT: I see one other person. Are you a witness in this case, sir?

UNIDENTIFIED VOICE: No.

THE COURT: No? Okay.

MS. CRAIL: Okay. That's fine, Judge.

THE COURT: Okay. Sergeant Moore, once you get there, please remain standing and then please raise your right hand when madam clerk is ready to administer the oath.

(Oath administered)

MR. MOORE: Yes, ma'am.

THE CLERK: Thank you.

JOSHUA MOORE

called as a witness on behalf of the plaintiff, testified as follows on:

DIRECT EXAMINATION

THE CLERK: For the record, would you please state your full name and spell first and last.

A Joshua Michael Moore. Joshua is spelled J-o-s-h-u-a, Moore is spelled M-o-o-r-e.

THE CLERK: Thank you.

THE COURT: Ms. Crail, you may inquire.

MS. CRAIL: Okay. Thank you, Your Honor. And, again, may I remain seated?

THE COURT: Yes.

MS. CRAIL: Okay. I appreciate that, Your Honor.

BY MS. CRAIL:

Q Sergeant Moore, you're an Alaska State Trooper; is that correct?

A Yes, ma'am.

Q How long have you been in law enforcement?

A Been in law enforcement since August of 2004.

Q And you're presently assigned to the statewide drug enforcement unit?

A Yes, ma'am.

Q How long have you been with that unit?

A I've been with the statewide drug enforcement unit since February of 2008, I believe.

Q Okay. And you're now the sergeant in charge of that unit?

A I am.

Q And how long have you held that position?

A Since May of 2013.

Q So about a little over a year and a half then?
A Yes, ma'am.
Q So in August of 2012, you were an investigator with that unit?
A Yes, ma'am.
Q Now, did you ask Lieutenant Rodgers back on -- around the 24th, then, to do a fly-over of some property out Chena Hot Springs Road, specifically Mr. McKelvey's property?
A I did.
Q And you've already testified, of course, in this case regarding your observations and so forth. Do you recollect that?
A It's been a while, yes. I can't remember the exact date, but --
Q Recollect the event of testifying, but not --
A I recollect testifying, but it's been a while.
Q So I just want to focus at this point then on the fly-over portion itself. Did you direct where the flight would be going and kind of the up, down, left, right sort of a thing?
A Lieutenant Rodgers, then Sergeant Rodgers at the time, wasn't familiar with the area so, yes, I did direct the route of travel to get to where I needed to start taking the photos.
Q Okay. And were you familiar then with the area and knew

where you were going, where you wanted him to fly?
A Yes, ma'am.
Q Did you actually talk to him about your altitude, one way or the other --
A We --
Q -- at that time?
A We didn't specifically, you know, set a ceiling or a limit or anything like that. But, yes, I did generally talk to him about, you know, hey, this is up or down or -- once we got closer to the area, I really have no interest, as long as we're in cruise flight, I'll let Sergeant Rodgers fly the airplane.
Q Okay. So I guess my question would be in your report or at least in your affidavit for the search warrant, I believe you had estimated your height, or was that later?
A I think it was later that I actually estimated the --
Q Okay. Was your estimation based on your own estimation or was it based on a conversation with Lieutenant Rodgers?
A It was based on my own estimation. I did have a conversation about Lieutenant -- with Lieutenant Rodgers about the fly-over. We -- I think this has been going on for some time and there's -- it seems to be quite the hot topic now especially with the request for the Super Cub.
Q Okay.

A So --
Q So it -- backing up, though, when you made your estimate of height, that was based on your own personal estimate, not based on what he told you?
A Yes, ma'am.
Q Okay. And what was your estimate?
A I think I said somewhere in the range of six to eight hundred feet.
Q Okay. And are you -- you've lived in the Fairbanks area for awhile, I take it?
A Since 2000.
Q So are you familiar then with the Chena Hot Springs Road area?
A Yes, ma'am.
Q All right. And to your knowledge, the river valley area, is that about the same height above sea level as the Fairbanks area?
A It's -- it's roughly. I mean, the way I kind of judge, I'm a pilot at this point, but more or less the way I judge, you know, elevation levels, especially in a river valley is how fast the river flows. And the Chena River is not a very fast-moving river. It's kind of one of those that meanders back and forth. Of course, there's parts that do have rapar -- rapids, but it just kind of flows back and forth, and you can kind of see it, you

1 know, when you're flying over the top. It -- a lot of
2 people raft it. It's kind of a family thing. There's a
3 lot of people that get on the river.
4 Q Okay. So focusing back to this fly-over, Sergeant Moore,
5 have you had a chance to look at the Google Earth
6 overviews, specifically the ones I provided to the court?
7 Have you had a chance to look at those?
8 A I have the -- well, I guess I haven't specifically seen
9 the ones -- I mean, I may have in looking at the -- are
10 we talking about the motions practice?
11 Q Uh-huh.
12 A Yes, I've viewed those.
13 Q Okay. And let me just ask: Did you and I have a
14 conversation around the time I was responding to the
15 motion about that area and what area I should be looking
16 at in actually attaching anything to that motion?
17 A Yes. Yes, we did.
18 Q Okay. So, in short, this kind of came from you anyway.
19 Is that fair to say?
20 A Yes. I --
21 Q All right.
22 A I believe it's part of the motions -- I mean, I'm getting
23 confused with which motion has been filed in what because
24 I think there's been several in this case, but I think
25 there was something said in regards to "I've never seen a

plane fly so low" or something along those lines. And I know Chena Hot Springs Road and I've flown over it before and I know that there are several private airstrips all up and down Chena Hot Springs Road. So it would be confusing to me why someone would say that someone doesn't fly low over the Chena Hot Springs area.

Q Okay. In fact, on that note, did you locate the airstrip at issue that we focused on in making the copies --

A Yes.

Q -- for this case? Okay. So --

MS. CRAIL: And, Your Honor, for the record, I'm referring to the exhibits -- I believe I just marked them as Exhibits 1, 2, and 3 to the -- to my opposition to the motion.

THE COURT: Let's see here. Yep, I see Exhibits 1, 2, and 3. 1 has a notation about airstrip and the yellow line, two little thumb ticks.

MS. CRAIL: Your Honor, perhaps if I could approach the witness --

THE COURT: Yeah.

MS. CRAIL: -- so we can look at the same thing.

A Yes, ma'am. All right. I'm messing up all your papers here.

Q So just -- Sergeant Moore, then, for the record, then that top one, that's the -- is that an overview between the airstrip and the defendant's property?

A Yes, ma'am.
Q Okay. And then the other two would just be close-ups, the one of the defendant's property?
A One close-up of the defendant's property and then there's another one that's a close-up up of the --
Q Airstrip?
A -- airstrip.
Q Okay. Just so we can see what they look like with that.
A Yes, ma'am.
Q And are you familiar with Google Earth, generally speaking?
A I'm familiar enough. I'm no computer expert --
Q Okay.
A -- by any means, but I can find an address on Google Earth, I suppose.
Q Okay. So as in, for instance, things like measure the distance between two points kind of a thing that Google Earth --
A Yeah, I've used it in the past in different cases where certain feet between structures or school grounds and whatnot become important. So I've used Google Earth as a crude, I guess, measurement of distance.
Q Okay. So the --
THE COURT: Does it measure as the crow flies or across the ground?

A Yes, as the -- as the crow flies. If you like, I can approach Your Honor and I can --

THE COURT: Okay.

A Similar to what -- Your Honor, what I would do is draw out one point there and the other point at that location and then you can draw a distance in between and you can --

THE COURT: See what he's doing, Mr. John?

MR. JOHN: Okay.

A There you go, Mr. John. So you can see. You can draw -- basically, I'll take my cursor from the center of one to the center of the other and it'll give a map link, then it will allow you to go from miles to feet to centimeters and all sorts of stuff, but I just went with miles. And in this case, the center of that airstrip is approximately 1.09 miles from -- as the crow flies from the defendant's property.

THE COURT: Okay.

MR. JOHN: Okay. Okay. Got it.

Q And, Sergeant Moore, it looks like on -- near the Airstrip, it looks like there's a couple planes visible on the ground. Is that --

A Yes, ma'am.

Q What -- so down --

A I couldn't tell you what kind of planes those are, but --

1 Q Sure. But they appear to be fixed wing as opposed to
2 helicopters?
3 A Yes.
4 Q Okay. And that's --
5 MS. CRAIL: Just for the record, that would be the
6 airstrip --
7 A There may even be more --
8 MS. CRAIL: -- (indiscernible - simultaneous speech)
9 aerial across the top.
10 A If you look over in the corner, there's a -- it looks
11 like there's a hangar --
12 Q Okay.
13 A -- right at the end of the strip.
14 Q Okay. Again, for -- potentially, for the record, can you
15 point out for the court where on this (inaudible - away
16 from microphone) on Exhibit 3.
17 A Sorry, Mr. John.
18 MR. JOHN: Hey, no problem.
19 A All right. From this, there appears to be two planes off
20 of the center of the strip, Your Honor, just right there
21 and there. And then there also appears to be a separate
22 hangar and then there appears to be another aircraft
23 right there off to --
24 THE COURT: It looks like they're like -- is that just
25 the way the photograph came or did you -- I mean, can you point

to something and make it -- make the picture -- enhance it at all or --

A This is -- as you zoom in on Google Earth, it depends on the area that you're in. Like the unpopulated areas, like if you're in the middle of, you know, between, say, here and Chandalar Pass, you'd zoom in on an area and it would become fuzzy and blurred as you came in closer, but the urban areas, they appear to take better pictures of. You know, for street -- Google Street Maps and whatnot, they --

MR. JOHN: The resolution isn't as good.

A The resolution isn't as good in the outer lying areas; whereas Google Earth, you can zoom in until it actually will convert into a street view and then it will show you specific houses on a street.

THE COURT: Okay.

Q This will be -- would this fall more into the --

A This isn't anything that we've enhanced by -- in -- by any means.

THE COURT: Okay.

A It's just Google Earth. You can download it (indiscernible - simultaneous speech).

MR. JOHN: Is that -- have you zoomed in on that or that's at a --

A That's just taking your cursor and zooming in closer and

closer and closer.

MR. JOHN: Okay.

A There's nothing that I'm doing other than what Google Earth has allowed.

MR. JOHN: Okay. Okay. Right, right. Okay.

MS. CRAIL: And, Your Honor, I did bring that actually so that we could do that on the other computer. This was the hard copy versions, but I wanted --

THE COURT: Right.

MS. CRAIL: -- to be able to show where we're at. In fact, this might be a good time if the court is wanting --

THE COURT: Okay. So why don't I come down by Mr. McKelvey and then I'll see here. Will this work, Officer Jonas? Right here? Okay.

MS. CRAIL: I hope. It's -- again, it's been off for -- oh, there he goes. It's coming up. It was looking really good just a second ago. I -- it was up there when we started, Judge. I'm not sure why it's suddenly not --

THE COURT: Maybe the WiFi connection faded or something.

MS. CRAIL: Let me check here. Nope. It says -- it even says very good. Let me reopen it.

A There we go.

Q Okay. So, Sergeant Moore, with respect to this, can you tell which is actually the property at issue in this case? And I can zoom in if you need.

A The property is right here.
Q Okay. So actually the little dot right there is not the same property. Is that correct?
A That's true. It --
Q Up here?
A It appears half the time with Google. You kind of have to know what the property looks like and the layout, too.
Q Okay. So now on that other one --
A Sometimes it's really, really accurate; other times it's not.
Q Okay. So this space right here is the correct one?
A Yes, I believe it is.
Q All right. And I believe that -- in focusing in on the -- I'll just --
MS. CRAIL: For the record, I was just going to show the Exhibit 2 to show that we marked it from the one that he's been showing there rather than --
THE COURT: I see. Yep. Uh-huh.
MS. CRAIL: Okay.
Q And, Sergeant Moore, then, I guess we went further down to the --
A It'd probably be easier if you zoomed out.
Q One second. All right. Hang on. Here we go. This is the airstrip here?
A Yes, ma'am. So you can see the two aircraft there that I

1 was pointing out before. The third over here and then
2 the hangar at the end of the strip.
3 Q And I'm doing --
4 MS. CRAIL: And, Your Honor, just for the record, I'm
5 doing the focus in just so the court and counsel can see as far
6 as any -- it gets bigger, but not necessarily any clearer, if
7 that's helpful at all.
8 Q Sergeant Moore, then, I guess the other piece -- I should
9 go back to that again -- that I wanted to ask you while
10 we had this up, is, would you be able to give us an idea
11 of your approximate flight path over the -- or in the
12 area of the defendant's property that led to your
13 observations in this case?
14 A Well, if you take a look at the search warrant photo, the
15 one that was attached, you can see that --
16 MS. CRAIL: And I believe that would have been -- we
17 provided that in the previous case or the previous evidentiary
18 hearing, I think, Your Honor, as part of the record.
19 A Your Honor, if I could --
20 THE COURT: Yeah.
21 MR. JOHN: Yeah, that was attached to the search warrant
22 application.
23 A This is the document that I brought here, this one, Your
24 Honor.
25 THE COURT: Okay.

1 MR. JOHN: Okay. That was the one from the search
2 warrant application.
3 A This is -- this is the one from the fly-over that day --
4 MR. JOHN: Okay.
5 A -- which was attached to a search warrant application.
6 It coincides with my recollection of the flight, that we
7 weren't directly over the top of Mr. McKelvey's property.
8 It wouldn't have made sense to me to instruct or direct
9 Sergeant Rodgers at the time to fly directly over the top
10 of a property because if we fly over the top of it, it's
11 difficult to take the photo from down -- underneath, you
12 know, the aircraft. So we would have had to fly off to
13 the side of the property and then take a photo from that
14 angle.
15 So my recollection, probably somewhere in this range,
16 was our path of flight. I'm not exactly sure how far we
17 were off the property, but we certainly weren't flying
18 directly over the top of the defendant's property.
19 Q So, Sergeant Moore, again for the record, if we're
20 looking at the -- and this would be essentially the same
21 as that Exhibit 2, which had this property marked.
22 You've just drawn a line -- there's kind of a line. Is
23 that like a power-line line between the trees there,
24 roughly speaking --
25 A I'm not exac --

Q -- right below the property?
A This -- if I remember correctly for Grange Hall Road, you can see, there's a definitive line here from the highway that kind of runs parallel to Grange Hall Road. That's typically your power line and --
Q Okay.
A -- that's what I recall as -- for supplying power to the area residents of Grange Hall Road.
Q Okay. So, Sergeant Moore, I guess what I was trying to do is for purposes of identifying where you just drew your line with the pointer --
A It would have been perpendicular to that line, but there's -- property lines, typically, are cut when they're surveying the property lines, but then they get overgrown. But from air and from Google Earth, from really high up, you still can see where property lines were originally cut and it would have been --
Q So this looks like --
A -- to the southeast of that property or what would have been, you know, the edge of at least one of the property lines there.
Q So, Sergeant Moore, for the record and for ease in identifying where you're pointing, is there sort of what looks like a line through the trees just to the south of the clearing?

A It does appear to be a line through the trees.
Q Okay. So that line through the trees, just this side of the clearing that you've described as Mr. McKelvey's property, you're referring to drawing your line of your flight --
A Somewhere southeast of that one.
Q -- as something south of that like over that other clearing to the -- that doesn't appear to have any buildings in it?
A Yes, somewhere in that range.
Q Just to the south? Okay.
A And, like I said, I don't know how far south of the property, but I know that we weren't flying directly over the property.
MS. CRAIL: And, Your Honor, is that sufficient clarification for the record as far as where he's marked the line?
THE COURT: It's -- I think so. I mean, he's not completely clear either.
A It -- it's -- it's --
THE COURT: He knows he was south of the property.
A I --
MS. CRAIL: Another option, Your Honor, and that's what I was going to ask is he could also potentially draw an estimated line on the court's exhibit, if that would be helpful. I just

1 was trying to keep the record clear.
2 THE COURT: Sure, if he's able to get that close to where
3 (inaudible - away from microphone).
4 Q And understanding -- well, understanding for the record,
5 I guess, that's an approximate route. Is that fair to
6 say?
7 A Yes, it's an approximate route.
8 Q Okay.
9 A Honest -- you know, I can't say for -- I can say for
10 certain that I wasn't flying directly over the
11 defendant's property, but I can't say for certain, you
12 know, whether or not I was two miles to the south or I
13 wouldn't -- obviously, I wouldn't say that I was more
14 than -- that I was a mile away from his property. I
15 would say somewhere within, you know, possibly a -- you
16 know, a quarter mile, you know, south of his property to
17 a half a mile south of his property, somewhere in that
18 range.
19 Q And --
20 THE COURT: Okay. And I'm going to show Sergeant Moore
21 Exhibit 2 that was attached to the opposition. And maybe -- do
22 you want to use -- use one of those.
23 A I can use a highlighter, which might --
24 THE COURT: Okay.
25 A Yes. So, Mr. John, if you want to come up to the -- I

1 would estimate that -- that as far as our actual flight
2 plath -- path as it would be, you'd see it all on the
3 ground, we would probably be right along the edge of the
4 map here as you'd see it. So somewhere in here as we
5 flew along.
6 MR. JOHN: Okay.
7 Q Okay. And so then for the record, that's in yellow at
8 the bottom of the -- is that --
9 A And then I'll -- so, Your Honor, I initialed the --
10 THE COURT: Yep.
11 A And then I put -- I highlighted a portion and wrote
12 "flight path" and then "estimate." So --
13 THE COURT: Okay. And the record should reflect I'm
14 going to keep this with the op because I don't want it to get
15 spirited off to an evidence locker when I'm trying to look at
16 this later. So we're just going to keep it and we're going to
17 note that it was altered in court today and everyone knows
18 that. Okay.
19 Q Okay. So, Sergeant Moore, the angle that you're talking
20 about from your photograph would be consistent then with
21 looking at it from the lower part of the screen then up
22 toward the property. Is that what you're describing?
23 A Yes.
24 Q So from this direction back this way?
25 A Yes, ma'am.

Q Okay. All right. And so, Sergeant Moore, I'm just asking, was it your understanding or belief that these lines, these sort of faint lines through the trees are old property line markers?

A That's my belief.

Q Okay. With respect to the airplane itself, Lieutenant Rodgers' description, was that similar to your recollection of the aircraft?

A Yes, ma'am. Marked Super Cub. It had blue -- blue paint on the fuselage, wings. I can't remember if it actually said State Trooper.

Typically, with a lot of marked Cubs, it will have in paint under -- on that bottom side of the wing so if you're flying over the top of someone, they can look up and say, oh, that's state trooper plane because it says it on the underside of the wing. So otherwise if you're looking at it from the side, you wouldn't be able to see that, but you'd probably be able -- if you were to see someone's face in the window, you could probably see the large badge that's probably about at least one feet -- foot tall on the back side of the aircraft.

Q So, I'm sorry, you were giving a --

A A visual estimation of probably about a foot, you know, and that's how big the badge is on the back of the airplane, if I remember correctly.

1 Q Okay.
2 THE COURT: I think his hands were two feet apart, Ms.
3 Crail, so you're looking like that, too.
4 MS. CRAIL: I was just going to say, I was looking at him
5 a little odd because I would have estimated differently, too,
6 yeah.
7 A Okay.
8 THE COURT: Yeah, I would have said that's a couple feet,
9 his distance between his hands, but --
10 A All right. I apologize. I --
11 MS. CRAIL: Somewhere between mid chest and above his
12 head, in any event was where the -- okay.
13 THE COURT: Okay. It seemed like a couple feet to me.
14 MS. CRAIL: Okay. All right. Let me just double-check,
15 Your Honor. I think I'm just about out of questions for
16 Sergeant Moore.
17 Q Oh, Sergeant Moore, do you recollect, did you fly over
18 more than once?
19 A Well, the way I recollect the flight path is --
20 Q I'm sorry, you probably might want to turn your --
21 A Oh, I'm sorry. I apologize.
22 Q Thank you.
23 A If you could zoom out, the way I recollect the flight
24 path is we -- this is the first property that we
25 encountered for the flight path -- or for the -- for

1 looking for these marijuana grows.
2 So we flew by this property and we took photos as we
3 went by and then we went and took photos of the other
4 property and then we left the area. I want to say -- I
5 may be confusing this with another flight that I took at
6 a different time, but I want to say that we were on the
7 other side of the highway at that point, but I couldn't
8 be for certain.
9 THE COURT: On your way back, you mean?
10 A Yeah, on our way back. But we weren't -- we wanted to be
11 somewhat -- I mean, we were flying in a marked state
12 trooper Cub so we didn't want to circle anything, I mean,
13 because that would kind of give anybody who we're looking
14 at or surveilling, you know, an obvious indication that
15 law enforcement was on to their activities.
16 So we flew past just like a normal AWT mission where
17 they would be flying out to go see a kill site or
18 something like that. So they'd fly past and then you'd
19 might see them, you know, fly -- fly back again. But we
20 weren't -- from what I recollect, we were taking photos
21 the one time.
22 Q Okay. Not on the way back; just on the way out?
23 A Not on the way back.
24 Q Okay. I'm sorry, you wanted me to zoom out. I wasn't
25 sure how far out you wanted me to zoom to explain that.

A No, it's -- it's fine. I think I articulated well enough.

Q Okay. All right. And then last -- and, Sergeant Moore, just so we're clear about the camera you used, what sort of a -- was this like a high-speed NASA-type telephoto lens where you can pick up ants?

A Well, it's not like Babel telescope, but it's -- it's a high -- it's a high-end camera. It's something that you can go down to, you know, one of the camera stores, I believe, and buy because I believe, if I remember correctly, when we were purchasing the camera, I did go and price it out, I think, at a local camera shop. But it's not a cheap camera by any means and the lens that's on there, I would have to review the motions practice and whatnot to know exactly what lens it was. But the lens -- none of the lenses are cheap by any means and, you know, it is a zoom lens. I believe it does give you a -- you can zoom in on a property. It's not like -- I don't -- we have one lens that I think is like a 450 millimeter, whatever that means, but all I know is that I can look closer at stuff.

Q So it's like if you had been -- had a good pair of binoculars?

A Good pair of binoculars. I mean, then you -- it's also -- you also can -- you know, it's just like Google Earth,

you know, you take a picture and it's a certain megapixel, so you can -- you can zoom in and look at things from the picture that you took originally.

Q Okay. Well, like this is presumably a satellite image, so this would have been a better camera than yours?

A I would imagine so.

Q Okay.

THE COURT: But taken from outer space?

MR. JOHN: Yeah.

A Right.

MR. JOHN: Yeah, I was going to say, a better camera than --

THE COURT: Just to be clear for the record.

Q But we're talking about different loc -- starting locations and so different qualities of camera.

MR. JOHN: Yeah. Oh, yeah, there you go. Location, location, location.

MS. CRAIL: Right, okay. All right. Okay. I think those are the questions I have for the --

THE COURT: Okay. Anything else for him, Mr. John?

MR. JOHN: Yeah, I have some questions for him.

THE COURT: Okay. Go ahead.

JOSHUA MOORE

testified as follows on:

CROSS-EXAMINATION

BY MR. JOHN:

Q So let's kind of set the scene here. When you first communicated with Lieutenant Rodgers about this flight, do you know what date that was?

A I believe it was the same day --

Q Okay.

A -- that we flew. I called him up and asked him if he was available.

Q Okay. And is that standard procedure to just see -- check that day?

A Sometimes it is; sometimes it isn't. I mean, I guess there's no standard procedure as to how we request a fly-over. If I was going to fly and take the asset out of, say, this area of Fairbanks for several hours, like, you know, four to five, if I was to fly -- ask him to fly to Bettles for something like that, that's something I would have to ask a little bit in advance and make sure that he -- I wasn't messing with his whole day. But in a flight for an hour out of his day, that's -- it's not as if we couldn't be redirected to a search and rescue or something along those lines if something like that popped up.

So I guess to answer your question, if we're going to be using a large amount of time with the aircraft and

sending it over a long distance, then I would probably pre-plan with Lieutenant Rodgers. But if I'm going to be doing an area flight where he could be recalled back, then, no, a same-day notification probably would work.

Q Okay. So do you recall what you told him that you were going to go do?

A I believe I asked him if he was available to do a fly-over for a couple marijuana grows on Chena Hot Springs Road.

Q Okay. So you were going not just to investigate Mr. McKelvey but another gentleman?

A I may have just asked him -- told him about the one and then while we were on the flight, I probably said, hey, just fly another, you know, two or three miles down the road, let's look at this other one, and then we can go home.

Q Okay. Was that gentleman's name Mr. Hines ((ph)? Was that his -- his case?

A Yes.

Q Okay. So when you were flying, where were you seated?

A Behind him.

Q Okay. And is it a single seat?

A Yes, Super Cub tandem seats, so the pilot sits in the front so he's got the best view and then the passenger sits behind him.

Q Okay.
A It's relatively cramped.
Q Okay. Could you see the altimeter from where you were at?
A No. I would have to -- I don't even think it's possible, but if I could, you would have to kind of lift up and peer over the top of him and with the safety belt on and the -- I forget if his plane had the chest harness or not, but typically they do and it would -- you'd have to kind of take everything off to be able to look over his shoulder.
Q Okay. Had you ever flown over Mr. McKelvey's property before?
A I may have in the past. I've flown, I don't know, I think probably three or four times as a state trooper along that part of the high -- or part of Chena Hot Springs Road.
Q Now, in your experience as a trooper, how many times have you been up in a plane did you fly over looking for a marijuana grow?
A I think I started flying looking for marijuana grows in 2009 and usually up until the point where I was -- took the supervisor position and in the summertime, I'd usually fly probably two or three times a summer, if not more. It all depends on tips that we would have come in

and whatnot and, you know, people who had grown marijuana in the past or whatnot, we'd possibly fly over the top of their houses and whatnot. But it depends.

Q Okay. So the first -- is the first place you came to Mr. McKelvey's on this trip of the two?

A Yes.

Q Okay. And then you went -- could you get up -- show me on the Google Earth where this other place was?

MS. CRAIL: I'll have to pull it back up again.

MR. JOHN: Okay.

MS. CRAIL: I had closed it down.

MR. JOHN: Yeah, if you could keep it up in case I have any questions about it because he was examined about it.

MS. CRAIL: It keeps wanting to close out when I change it over there.

Q Okay. So could you point out Mr. McKelvey's property again, just for starters, so we can see -- kind of get a notion of the two places.

A I believe we're right here. There's McKelvey's property. It kind of comes down at the highway and his little -- where the marijuana grow is right in this building and then out the back side of his residence.

Q Okay. You were to the south of that property as you approached, correct?

A Yes, somewhere along in this -- this region right there.

Q Okay. And could you show your -- could you kind of detail us on that Google Earth your flight path then to the other property, if you can use it for that?

A If you can kind of zoom out. I mean, I'm going to have probably a little bit of trouble --

MR. JOHN: If you could zoom out to get the other property in and then --

A I'm going to have a little bit of trouble finding this other --

Q Oh, okay.

A -- property. It's been awhile. It's somewhere over by Pleasant Valley Store. So I mean as far as -- Your Honor, again, it'll be just a view. There was -- there's several properties that we would have flown over in this area because, for whatever reason, this area has quite a few marijuana grows through the past.

And so we probably would have been flying somewhere along here and then it was behind Pleasant Valley Store, somewhere by these fields, if I remember correctly. So we would have been flying somewhere around here and I think we would -- back over by this -- if I remember correctly, it -- if I'm thinking of the same flight, we went all the way back by the gravel pits and then came back -- I recall coming back over the top on that side of the highway, but I couldn't be for certain, Your Honor.

Q When you say coming back, coming back --
A Back to Fairbanks.
Q Back to Fairbanks. Okay. Okay. So did you return to Fairbanks basically after going over the property and just circle back?
A Yes.
Q Okay. So you -- there wasn't a third location or any other activity you did out there that day?
A I -- basically, I was flying over from, I think -- I'm trying to remember the actual mile markers, but I think Mr. McKelvey's property is like at 21 or 22 Mile to -- I think Pleasant Valley Store is like at 24 or 25 Mile.
Q Uh-huh.
A So it was kind of that area of Chena Hot Springs Road that we were flying out to so we kind of flew by and then looped back around and then came back --
Q Okay.
A -- to Fairbanks.
Q Okay. Now, you're familiar with that road pretty much along Chena Hot Springs there, that area?
A I'm familiar with the highway.
Q Yeah.
A I guess I wouldn't say I'm familiar with --
Q Is there not a cell phone towler [sic] -- tower on the other side of the road there?

A Yes, there is a cell phone tower. I mean, if you go -- or it's a tower. I'm not sure what kind of tower it is. But if you go -- Grange Hall Road kind of cuts, you know, just slightly off from a perpendicular angle from Chena Hot Springs Road.

Q Uh-huh.

A And if you go kind of straight, just off your right-hand side, there's a hill that kind of goes up above there.

Q And that's where the tower is, right?

A Yes, sir.

Q Okay. And you wouldn't be flying by that on the way -- on the way out or the way back, right?

A Well, we wouldn't be -- if we were, we'd be flying a great deal higher than the tower.

Q Okay. Okay. So you showed us a picture of a private airstrip in -- a mile or so from Mr. McKelvey's.

A Yes.

Q So that's about as far from here to Alaskaland or Pioneer Park?

A I guess it would maybe be from here to -- maybe here to the package stores like the -- or --

Q But as the crow flies --

A -- like Home Depot maybe, you know. From here to Home Depot. I guess that would probably be about the same line and sight distance.

Q Okay. Okay.
A I'm just trying to --
Q Whatever. A mile --
A Yeah.
Q A mile --
A Yeah.
Q -- or a little more? Okay. Now, you've never landed at that airstrip by Mr. McKelvey's place, correct?
A No, I've never landed on Chena Hot Springs Road.
Q Okay. You don't really have any familiarity with that airstrip other than to see it on Google Earth, right?
A I'm -- not that airstrip. I mean I've been on an airstrip just kind of to the southeast of that property. We did a SERT exercise over there where there's another airstrip there and then this field -- Your Honor, if I can point it out. There's -- I've flown over in the past this field right here. The back side of Pleasant Valley, there's a big agricultural area back there. I've seen ultralight aircraft on this field before.
MS. CRAIL: Your Honor, could we just have him specify for the record, maybe compare it to the words Pleasant Valley --
A For the record, behind -- it's behind Pleasant Valley where it is on Google Earth, or Pleasant Valley Store. There's baseball fields and whatnot over there, but

1 further back behind towards the river, there is an actual
2 field that I've seen ultralight aircraft at, if I
3 remember correctly.
4 THE COURT: The field halfway between the words Pleasant
5 Valley and that obstacle in the river there.
6 A Halfway between, yeah, the Pleasant Valley Store and the
7 river, roughly.
8 MS. CRAIL: Right. And, Your Honor, what I can do is I
9 can screen-shot this and print it and file a note -- or file it
10 with the court just to keep the record clear.
11 THE COURT: Okay.
12 Q So you're a pilot now, aren't you, Sergeant Moore?
13 A Yes.
14 Q Okay. How long have you been a pilot?
15 A Oh, since I think September of 2012.
16 Q Okay. Now, when you fly a plane, do you use a GPS in
17 your plane?
18 A Periodically. I have kind of a dumbed-down version of
19 the sergeant's -- or the lieutenant's. I have a 196 GPS,
20 but if I'm flying in close proximity to Fairbanks
21 International Airport, I don't put it in the plane
22 because it would be just more cumbersome to look at, I
23 guess. I can see the airport, so I don't need a GPS to
24 find my way back.
25 Q So he said he has a Garmin 296. You've got the 196.

A He's got the color version of mine.
Q Okay. Okay. So that's -- okay. Good. So how fast do you figure you were flying as you passed by Mr. McKelvey's property?
A I would say -- obviously, he's flying the airplane, so he's -- he can see his air speed, so he probably has a better indication than I do. So he was saying, what, 65 to 70 miles an hour?
Q I believe he might have said 80 or 90, I think.
A I think that was for cruise flight.
THE COURT: It was. He said --
Q Okay. So 65. Okay. 65 or 70. Okay. So you took -- you presented one picture with the search warrant, right, but you took a series of pictures?
A I don't remember. I would imagine I would have submitted -- I honest -- I -- possibly. I mean, if I did -- it's been quite a while since I've looked at this case, so --
Q Okay. So do you --
A I mean, I would have to look in what was submitted to you.
Q Okay. So I -- if I showed you pictures, you could look at them and refresh your recollection, see if you could identify them?
A Yes.
Q Okay. Okay. But you had not looked at the CD of

pictures that the state gave me?
A I have not. I doubt --
Q Okay. Okay.
A More or less was concerned about, I think, with the motion practice, the altitude and whatnot.
Q Okay.
A Not so much the --
Q So as you're getting near Mr. McKelvey's property, like you're getting your camera out, getting ready to shoot. Is that it?
A I probably would have had my camera out already. I probably would have had the lens on. It probably would have been turned on. What I was probably doing at -- as we neared the property, was making sure that -- I was probably sliding the side window open on the Super Cub because, if I remember correctly, you get out on the right-hand side. On the left-hand side of the aircraft, the window kind of slides open and you can kind of peek your head out the window.

And I was probably taking the camera strap and wrapping it several times around my hand so I didn't drop the very expensive camera out the window when I was taking the photos. And then I would have made sure that I could see his property and snap the photos as I was --
Q So as you were passing through his property, you're

1 looking through the camera, snapping the photos.
2 A I think we were -- like I said before, we weren't passing
3 through his property. We were passing over --
4 Q Passing by, however close --
5 A -- south -- south of the property.
6 Q -- that may or may not be.
7 A Yeah.
8 Q So, basically, you've got the camera, you're taking your
9 pictures, and then you're past his property and you put
10 the camera away?
11 A I -- yes. Well, I probably would have kept it out since
12 I'm flying --
13 Q Okay.
14 A -- past him --
15 Q Okay.
16 A -- that way.
17 Q Okay. Okay. So your observations of the property were
18 through the camera, correct?
19 A Yeah.
20 Q Okay.
21 A I would have seen the property as I flew up to it, but as
22 far as the relevancy of the search warrant, I would say
23 that it was viewed through the camera, yes.
24 Q Okay. And did you look at those photos as you were going
25 toward the other property? When was the first time you

1 looked at the photos you took of Mr. McKelvey's property,
2 if you recall?
3 A I don't -- I would say, based on my own curiosity, I
4 probably viewed the photos on the way back to Fairbanks,
5 but I can't -- that's not a whole lot of distance to
6 travel to start viewing photos between there -- I mean,
7 as 70 -- 66, 70 miles an hour, that's not a whole lot of
8 time to start pulling up photos and viewing them before
9 you go and look at another property.
10 I probably would have curbed my curiosity until we
11 had taken the other set of photos and then flew back to
12 Fairbanks. But I would reason to bet that I probably
13 viewed the photos on my way back to Fairbanks. In fact,
14 I'm almost certain I did.
15 Q Okay. Now, if I represent to you that the metadata or
16 the properties on the digital evidence I have of the
17 photos indicates you're shooting with a 280 millimeter
18 Canon EO7. Is that the type of camera you have, a Canon?
19 Was it a Canon?
20 A It was and I think we went over this in the last hearing.
21 Obviously, you know way more about photo -- or the
22 cameras than I do. I mean, I can tell you that it was
23 probab -- it was a 7D camera, it was a Canon. I want --
24 I'm not even -- I wouldn't be wanting to be real specific
25 about the megapixels on it and I don't even remember if

it was a Canon lens or not.

Q Okay. So you had --

A But --

Q -- no reason to dispute --

A I have --

Q -- the data on the camera --

A It -- yes.

Q -- as to what --

A As far as the --

Q -- it is. Okay. Okay.

MR. JOHN: I think I'd just like to just go over Trooper Moore's pictures with him showed here and have -- it's probably easier to give them all to him at once and a copy to everyone. We'll just go through them. If we could just pause for a second. I'll make a pile for everyone and --

THE COURT: Okay. We can pause the recording.

THE CLERK: Off record.

(Off record)

THE CLERK: On record.

THE COURT: We're back on record. Go ahead, Mr. John.

MR. JOHN: Yes.

Q Sergeant Moore, I've handed you a series of exhibits, C through M. If you could take a cha -- take a minute or so to look at them to see if you can identify them or if they seem to be something you recall in relation to this

case.

I'll represent they're the 11 photos I received on the disk from the state that were supposedly the pictures you took. They might be slightly cropped on the side.

A Yes, these all look like the --

Q Okay.

A -- photos I took.

Q Okay. Okay. So just -- well, let's just go through them briefly there. I guess Exhibit C, that looks like one of your photos, correct? Would you agree it's one of your photos?

A Yes.

Q Okay. Little bit blurry, so kind of hard to --

A Little bit blurry.

Q I see there. That was the first one. Just -- were you shooting that you had to click yourself each time or was it on an auto shoot? How were you doing the shooting if you recall?

A I -- I don't honestly -- I can't remember whether or not I would -- it very well may have been on a multi functioning where if you held it -- the -- I don't typ -- I try and snap the photos, but sometimes with that function, it'll -- it'll take two photos at once and that's why it can be blurry, but --

Q Okay. Okay. Now, the next one if we could look at it

there, Exhibit D.
A Yes.
Q Would you agree that's quite a bit more than one could see from Google Earth?
A Yes.
Q Okay. Exhibit E, same thing?
A Yes.
Q Now, in Exhibit E there, you can kind of see on the right-hand side, that's Mr. McKelvey's house, is it not? So just --
A Yes, it is.
Q -- to put things in perspective there, that's his house. So if you continue to the right, you'd be continuing toward Grange Hall Road, correct?
A Yes.
Q Okay. Exhibit F, another one of your pictures, correct?
A Yes.
Q And Exhibit G, we kind of see probably a better picture of the house and the whole -- the living area of the property there, correct?
A I -- yes, this is the property.
Q On G, yeah, yeah. But you can see the house and --
A You can see the house. You can see --
Q Yeah, the front of the house, the little drive coming in there.

A Little dri -- little dri -- I mean, it's -- you can't hardly see the drive coming in, but you can see, you know, another trailer in that vicinity. You can see the -- kind of the shack -- or the garage out back, if you want to call it that and the two greenhouses or three greenhouses.

Q Okay. Exhibit H, another picture you took, correct?

A Yeah. This one's a little bit blurrier, but, yeah.

Q Uh-huh. Exhibit I, another picture?

A Yes, sir.

Q Exhibit J.

A Yes, sir.

Q Okay. Exhibit K, another picture you took?

A Yes, sir.

Q Now, this is just toward the end. Is this -- so you're shooting out the left side of the plane, is that correct?

A I believe that would -- yes.

Q As you're facing forward, you're looking out --

A You're facing -- you're facing forward, so I'd be flying -- and we're on the south side of the property, so, yes, I would be shooting out.

Q Okay. So now you're -- at this point in time, you're moving away down -- you're moving toward the east, would it be?

A Yes, sir.

Q Exhibit L --
A Yes, sir.
Q -- another picture, and Exhibit M, correct?
A Yes.
Q Those are all the pictures you took. Okay.
MR. JOHN: I'd move to admit the Exhibits C through M, Your Honor.
THE COURT: Any objection?
MS. CRAIL: I don't have any objection, Your Honor.
THE COURT: C through M are admitted.
(Defendant's Exhibits C through M admitted)
MR. JOHN: Okay.
Q Now, at that -- at the point in time of the fly-over, had you ever been on Mr. McKelvey's property physically?
A Yes, I -- I had been there before.
Q Okay. Okay.
A Before the fly-over is what you're asking?
Q Yeah, okay.
A Yes.
Q Let me -- I'm going to hand you a few more exhibits there, if you could just take a look at that. I've handed you Exhibit A, Sergeant Moore, if you could just take a gander at that.
A Okay.
Q Okay. It's a series of four pictures. Are any of those

pictures familiar to you or --
A I don't -- I don't recall taking these.
Q No, but I just -- is that, from your rec -- does that look like the entrance to Mr. McKelvey's property --
A Yes.
Q -- from your recollection?
A Yes.
Q Okay. And from your trip there, you're aware of his many No Trespassing and Keep Out and other signs --
A Yes, sir.
Q -- on the property? And I guess that Exhibit A is reflective of some of those signs, is it not?
A Yes. I couldn't say that I've seen every single No Trespassing sign on his property, but I believe there's several if I remember correctly.
Q Yeah, lots of them, correct?
A (No audible response)
Q Yeah. Now, have you walked down his power lines at all or away from the driveway? Have you just gone in through his driveway?
A I've walked -- I think I walked towards the north side of his property and I walked towards the rear of his property, which would be the west side of his property, but I guess I can't say that I walked far enough to go back to any power line, you know, that's on either side

of his property. It wasn't as if I was looking at all the trails.

Q Okay. Okay.

MR. JOHN: I'd move to admit Exhibit A, Your Honor.

THE COURT: Any objection?

MS. CRAIL: Not to A, Judge.

THE COURT: A is admitted.

(Defendant's Exhibit A admitted)

Q Now, when you're talking about the power line on his property, is that power line right on the front of the first page of Exhibit A there? Is that where the power line runs?

A I believe so. If you look on Exhibit A, you can see like the telephone communication line. Usually a low -- low-lying line as you go along that driveway there.

Q Okay.

MS. CRAIL: Hang on. Let me back up, Your Honor. With respect to A, there's a photo on top that's marked as A, but it does look like there's a whole stack of stuff underneath it, which was not testified to. So I don't object to the top photograph.

MR. JOHN: I --

THE COURT: I think generally speaking, he was asking about No Trespassing signs.

MS. CRAIL: Right, but the rest of this --

1 THE COURT: And then whether Sergeant Moore
2 recognizes these signs as --
3 MS. CRAIL: Yeah, he wasn't asked about that. So I was -
4 - I want to be clear, what I wasn't objecting to was the top
5 one. I thought the other ones were additional exhibits.
6 THE COURT: You can inquire further, Mr. John.
7 MR. JOHN: Yeah, I thought I had asked Sergeant Moore if
8 the other ones were the signs --
9 THE COURT: You did. Type of signs.
10 MR. JOHN: That -- indicative of the signs that you would
11 see on Mr. McKelvey's property --
12 MS. CRAIL: Well, this is the type of signs, but if
13 he's --
14 MR. JOHN: -- whether -- he said, they are, I don't know
15 if I saw those specific signs or not. If I -- I think --
16 A I believe you're correct.
17 MS. CRAIL: So from that perspective, Your Honor, I don't
18 object to the top one. The other ones, though, have not been
19 identified as other than being potentially similar to what may
20 have been on Mr. McKelvey's property. It doesn't say that
21 these are the signs on his property and I just want to be --
22 THE COURT: They're not admitted for that purpose.
23 They're admitted as demonstrative of the type of signs on the
24 property and the first page is admitted as actually being the
25 property.

1 MS. CRAIL: All right.
2 THE COURT: So A is admitted with that understanding.
3 Thanks for the clarification, Ms. Crail.
4 MS. CRAIL: Okay.
5 MR. JOHN: Okay. Thank you. Yeah, and I can -- you
6 know, let's see. Anyway.
7 Q Sergeant Moore, I've handed you Exhibit B there. If you
8 could take a moment. It's another four-picture exhibit.
9 Have you had a chance to look at that?
10 A Yes, sir.
11 Q Are you -- have you seen that -- the site on the first
12 page of Exhibit B there?
13 A Yes.
14 Q And is that --
15 A I believe this continues on. It's somewhat of a closer
16 shot of something that would have been shown in the
17 Exhibit B.
18 Q It's the driveway into Mr. McKelvey's home --
19 A Yes.
20 Q -- correct? Okay. And --
21 MS. CRAIL: And, Judge, I think at this point, though,
22 I'm going to start objecting as to cumulative. I mean, Mr.
23 John has indicated that -- through this witness that there is
24 numerous No Trespassing signs on the property. Beyond that,
25 that's a very -- that's a narrow issue with respect to this

1 whole motion. I don't -- I think, at a minimum, it's
2 cumulative and beyond that it becomes -- the relevance becomes
3 extremely thin down to --
4 MR. JOHN: This is my last exhibit on this, Your Honor.
5 So we're not going to be going through anything more than this.
6 It's just -- it's additional signs. I'm trying to show that,
7 you know, the expectation of privacy that Mr. McKelvey has
8 demonstrated that people are aware of.
9 THE COURT: The first page of B certainly is not
10 cumulative. I think what stands out from A and B is the sheer
11 number of signs. There's an awful lot of them.
12 MS. CRAIL: Your Honor, though, I don't think that it
13 makes any difference legally whether a person has one sign or
14 20 signs as far as expectation -- or no signs. Expectation of
15 privacy is a Fourth Amendment issue, not a how many signs can I
16 plaster on my property.
17 Either the troopers are in a place they're entitled to be
18 when they observe the property or they're not is the issue, not
19 whether Mr. McKelvey plasters his entire property and puts one
20 on every tree.
21 THE COURT: I think what a person's expectation of
22 privacy is, as regard to the people coming onto their property,
23 there's case law about chains over the driveway and signs and
24 such, so I think it's relevant and I'll allow it. Certainly --
25 I don't know about the pages of B that are just more of the

signs that apparently Sergeant Moore can't -- well, I guess maybe the second page you can say for sure are Mr. McKelvey's property. I don't know if the one from the last two pages has anything --

MR. JOHN: I'll ultimately ask Mr. McKelvey about these most likely, Your Honor, so -- in specifics, but I'm just going to go over these briefly --

MS. CRAIL: Well, in that case --

MR. JOHN: I think we'd probably be done with these by now.

MS. CRAIL: Right, but in that case I --

MR. JOHN: We've spent more time arguing -- yeah.

MS. CRAIL: I definitely object to going through this with Sergeant Moore.

THE COURT: He can ask Sergeant Moore about them.

MS. CRAIL: He's been asked if he's aware of these No Trespassing signs. If he's going to put his client on to go into all the No Trespassing signs, that's extremely cumulative at that point. So I'm objecting to, honestly, waste of time at this point. If he's got questions --

THE COURT: What's wasting my time is arguing about it.

MS. CRAIL: And he's way --

THE COURT: Keep asking --

MS. CRAIL: And he's way out of the realm of the -- of direct examination at this point as well, Judge. I mean way

1 out of the scope.
2 THE COURT: That he is.
3 MS. CRAIL: So I object on that grounds as well at this
4 stage.
5 THE COURT: Okay. Well, to get this done --
6 MR. JOHN: Just let me -- let's --
7 THE COURT: -- he can call them out of order instead of
8 recalling them. Go ahead, Mr. John.
9 Q Let's see if we can briefly do this, Sergeant Moore. So
10 I believe you indicated the first page of Exhibit B you
11 recognize as being a closer shot down Mr. McKelvey's
12 driveway, correct?
13 A Yes.
14 Q And is the second page -- does that look like an even
15 closer shot to you, or what is that? Is that
16 something --
17 A It -- it looks like -- yes, you're taking more pictures
18 of a Beware of Dog sign and then I can't tell --
19 Q Okay.
20 A -- what the other signs say.
21 Q And the last two pages, to reiterate the question I asked
22 you about the last exhibit, are those indicative of the
23 type of signs you've seen posted around Mr. McKelvey's
24 property?
25 A I can't say that I've seen the posted Private Property,

1 and Hunting, Fishing, Trapping, or any of those signs. I
2 can't -- I don't recall those signs on the property.
3 Q Okay. Okay.
4 MR. JOHN: Your Honor, I'd move to admit Exhibit B to the
5 extent the officer testified and for that purpose now only for
6 the -- you know, to show Mr. McKelvey's -- you know, he
7 testified in -- you know, about the first two pages, certainly,
8 so --
9 THE COURT: You can admit those two or I can leave the
10 exhibit out, but the second two have nothing to do with nothing
11 at this point.
12 MR. JOHN: Maybe I could move --
13 THE COURT: So do you want me to admit the first two
14 pages of --
15 MR. JOHN: Well, let's admit the first two subject to
16 admitting the other two later. I'd rather not make another
17 exhibit up.
18 THE COURT: Okay. Over Ms. Crail's objection, the first
19 two pages of B are admitted.
20 (Defendant's Exhibit B admitted)
21 Q Can we go back to that Google Earth there where you had
22 Mr. McKelvey's property and show me where you flew.
23 A Where I stood?
24 Q Where you flew.
25 A Oh.

1 Q In other words, you -- yeah, you showed me, I guess,
2 where you flew in relation to Mr. McKelvey's property
3 that day.
4 MS. CRAIL: Judge, I guess at the moment, that's asked
5 and answered about five times at this point.
6 MR. JOHN: Well, I was going to ask him --
7 THE COURT: It is, but he's just trying to --
8 MR. JOHN: -- a question about that. I'm not going to
9 ask him, you know --
10 THE COURT: Show him again, if you would, please. It is
11 asked and answered, but I think he's just trying to get
12 somewhere else.
13 A So I believe, Your Honor, this is Mr. McKelvey's
14 property. This is the garage that you can see in the
15 photos that were given over, and then that kind of --
16 THE COURT: Roughly over that lower clearing.
17 A Roughly over this field, somewhere to the bottom of the
18 property.
19 THE COURT: Yeah, that's what I remember.
20 Q Okay. Okay. But there appears to be a residence in that
21 -- right by that field there, too, does there not?
22 A There -- there may be. I don't recall ever having been
23 on that property and we probably -- like I said, the
24 reason why we fly to the side of the property is so we're
25 not taking photos underneath the airplane.

Q Okay. I mean, do you know where Mr. McKelvey's property starts and ends?

A I would have probably at the time that we were flying it and I probably could do, since we have Internet, I could pull up a G -- or the borough property --

Q Yeah.

A -- which is what I typically go off for determining property bounds and whatnot. But right now I guess I couldn't say for certain how far on either side of the house it goes.

Q Okay. That was my question. We don't need to go into that now. So I believe that Lieutenant Rodgers testified about using a map for ascertaining his altitude. Did you have a map that day as well?

A I don't believe that I used a map --

Q Okay.

A -- in making the flight. I've been over this area several times, so I didn't need to --

Q Okay. Did you --

A And I wasn't flying, so --

Q When you're flying these days, do you use a map as a pilot to --

A I use an aeronautical chart.

Q Which is what?

A It's an aviation map that gives you all sorts of

information. It gives you altitudes, it gives you navigation points, waypoints, you know, FAA waypoints that they've specifically set in there. It gives you air spaces. It gives -- I mean, there's just a -- there's a lot of information on an aeronautical chart. So, yes, when I fly I like to review it before I take off. It's kind of a prudent way of flying.

Q Now, you had indicated when we were talking earlier that you had used a game camera in relation to that -- the other property that we've been talking about on this fly-over.

A Yes.

Q Okay. And did you use that game camera before or after this day?

A I believe -- I believe --

MS. CRAIL: Your Honor, I'm going to object to relevance of use of a camera with respect to an entirely different case.

THE COURT: Sustained.

Q Well, let's go -- then, did you use any game camera in relation to Mr. McKelvey's property?

A No, sir.

Q Okay. So what was the closest game camera you're aware of that was posted to Mr. McKelvey's property?

A I -- it was over on the other property.

Q Okay. That was the closest one? Okay. So that's what

I'm saying. There was no closer game camera --

A We -- I never put a -- like I said before, I never put a game camera on Mr. McKelvey's property, so --

Q Okay. And that's a camera you use to kind --

A I --

Q -- of look up and over things or what --

A You can --

Q Could you describe exactly what you --

A A game camera, hunters use them, sometimes property owners use them to surveil their property. Hunters use them to -- typically, down south they use them a lot in bait stands. You know, bear hunters use them for bait stands. So they'll put bait in a specific area, they'll put a game camera and it -- the game camera will take photos of whatever trips the laser beam and it'll take a photo of what it is so that hunters can know what time to come back -- what times the animals will be there and what kind of animals will be there.

So if there's a bunch of -- say you were hunting in a buck only area and you saw, you know, 50 does go and, you know, eat the corn off of your bait stand down in Nebraska or something like that, you probably wouldn't go to that bait stand. Maybe your buddy has one that there are some bucks at to shoot.

Q Okay.

MR. JOHN: I have no further questions of Sergeant Moore.

THE COURT: Ms. Crail, anything else for him?

MS. CRAIL: Just very brief -- a very brief follow-up, if I may, Your Honor.

JOSHUA MOORE

testified as follows on:

REDIRECT EXAMINATION

BY MS. CRAIL:

Q Sergeant Moore, you said that you're a pilot, also. Do you do visual estimates of height besides using an altimeter?

A Yes.

Q Okay. So are you familiar with and accustomed to doing that?

A To the extent, you know, for flying and whatnot. I mean, you're -- you're using -- you're flying off your altimeter, but everything has error, so you're obviously -- as you're coming in, you know, for landing and whatnot, you're going to be doing a visual estimate -- estimation, you know, of depth perception and the rest. You don't want to crash.

Q I guess what I'm looking for is, you made a visual -- you made an estimate without looking at the altimeter of 600 to 800 feet. Is that what you're --

A Yes, ma'am.

Q -- going with? Okay. And that was based on your familiarity with --

A It's a lot of different things -- factors that go into it. You could -- certain -- you know, the road widths will give you an estimation. You know, you can be looking at certain houses, telephone poles, cars. You know, there's -- as you get higher up, things get smaller. So you just go off of what you've seen in the past when you're in your airplane flying and that's -- you know, if you're flying at 1500 feet above the ground and the cars look so big or the highway looks so big, you give yourself a visual estimation --

Q Okay.

A -- just as you're flying so that your -- you have another tool to use, so to say.

Q Okay. So basically -- let me just ask it this way. Would this be akin to a trooper's estimation -- visual estimation of speed when you're looking -- when you're driving on the ground and you're looking at other vehicles? I mean, as far as, you know, you're -- is it based on training and experience in how you do that or --

A It -- I guess estimations of speed would be different. I guess in some cases, your estimation of speed can be based on, you know, how fast the car is moving in

relation to fixed objects versus, you know, other, you know, vehicles traveling the same, you know, speed on your radar or whatnot. But I guess I would have it more akin to, you know, hunting in that you can go to a range and you can say that this is a 100-yard range and you can sight your rifle in for a 100-yard range, but then when you're out shooting, you would say, well, I can stick so many 100-yard ranges between me and the animal, so that you know how far or how high to hold above because your bullet drops as it gets out further.

So it's more along the lines of visual estimations for shooting, I guess I would say.

Q All right. And I guess my question would be, then, are you familiar with all of those, then? That type of visual estimations.

A Yes, ma'am.

Q Okay. And do you find them helpful in getting an approximate estimate of distance in those cases?

A Approximate.

Q Okay. And then the last thing is, with respect to the photographs Mr. John provided in C through M, those are your photographs, correct?

A Yes, I believe so.

Q Now, just looking at them, a quick visual, it looks like they're all taken from very close to the same angle. Is

that a correct statement?

A Yes, ma'am.

Q Okay. So with respect to that, how much time did you -- would you have -- how much of a delay between photographs would you say there was -- would have been?

A I honest -- it -- I couldn't say. It would probably -- if there's metadata about my lens, there's probably metadata about a time. But I honestly -- I wouldn't say that it was very much. I mean, 70 -- 65, 70 miles an hour on a fixed object on the highway, even if you're able to look at it, that's not a whole lot of time when you're traveling that fast.

Q So it -- so just to (indiscernible) these are all taken on the same passover?

A From what I recollect, yes.

Q Okay. So what -- am I reading it correctly? You're saying it pretty much had to have been snap, snap, snap, snap, snap?

A Yes.

Q Something along those lines?

A Something along those lines.

Q Okay. In order to get it all from approximately the same angle here --

A Yes, ma'am.

Q -- of that number of shots?

A Yes, ma'am.

Q Okay.

A Probably why some of them are blurry.

MS. CRAIL: All right. That's all I've got, Judge.

THE COURT: Anything else, Mr. John?

JOSHUA MOORE

testified as follows on:

RECROSS EXAMINATION

BY MR. JOHN:

Q When did you say the date you got your pilot's license again?

A That was September of 2012.

Q Okay. So --

A Shortly after this.

Q Okay. So you were not a pilot at the time of this fly-over?

A Yep.

Q Okay.

A I was a student pilot, if you want to call it that. There's a -- there's a designation for it.

MR. JOHN: No further questions of Sergeant Moore right now.

THE COURT: Thank you. You're excused as a witness. Any other wit --

A Your Honor, would you like me to provide both -- all of

these to the court or do you have copies?

THE COURT: I have them. I have A, B and --

MR. JOHN: Yeah, those are the copies. The originals --

THE COURT: -- C through L.

MR. JOHN: Yeah. The originals of the --

A I just noted that these are all --

MR. JOHN: The originals of the photographs are actual photographs. The copies are on paper. At least of the -- of Sergeant Moore's photos.

A I just -- I saw that you had exhibits numbers or exhibit letters.

MR. JOHN: Yeah, yeah. Yeah.

THE COURT: Mine have exhibit -- do you have the actual stickers?

MR. JOHN: Yeah, those are the stickers --

THE COURT: Oh, all right.

MR. JOHN: Yeah, yeah. Yeah, I know I -- it can be confusing, but --

THE COURT: I thought mine had actual stickers. Sorry. I --

MR. JOHN: You know, it --

THE CLERK: Your Honor, should I take off the other two on B?

THE COURT: Yes, please, and return them to Mr. John.

MR. JOHN: Yeah. If I'm going to introduce those, I

guess I'll give them --

THE COURT: Just remark them or something, yeah.

MR. JOHN: That's fine.

(Witness excused)

MS. CRAIL: And I don't have any further witnesses at this point, Your Honor.

THE COURT: And if this sign thing becomes a deal, counsel, it's Michael versus State, 961 P2d 436. Basically, it talks about the type of signs being relevant and what the signs were intended to do, who they're intended to deter. And so it strikes me as relevant one way or the other maybe depending on how the case goes. So that's why I let it in, but -- and if you want to argue about it further, that's the case that I'm --

MR. JOHN: Okay.

THE COURT: -- I was thinking of and that I was relying on in thinking that these are relevant. Okay. So, Ms. Crail, no more witnesses?

MS. CRAIL: I believe that's all the state has at this point, Your Honor.

THE COURT: Okay. And, Mr. John?

MR. JOHN: I may be calling Mr. McKelvey. If we could take a break till 4:00 o'clock, I'd like to just confer with him briefly and then --

THE COURT: That's fair.

MR. JOHN: -- think about things a little bit.

1 THE COURT: Sure. We'll take a break till then. At 4:00
2 o'clock we'll go back on record.
3 ` THE CLERK: Off record.
4 (Off record)
5 THE CLERK: On record.
6 THE COURT: On record, State versus Mr. McKelvey,
7 4FA-14-40. Parties are back. And, Mr. John?
8 MR. JOHN: Your Honor, what I've been talking over with
9 Mr. McKelvey and my inclination right now is to continue this
10 hearing to look into some matters that have arisen from the
11 testimony of the one trooper. We had asked for GPS discovery
12 and, as I understood the state's response, and I don't have the
13 exact response in front of me, there never was any GPS used in
14 this case, but it turns out from the testimony today there was
15 a GPS and that data existed at least at that time. And whether
16 it exists or not or can be accessed now or not, we don't know.
17 And if it could have been accessed, but it's been destroyed,
18 that's another issue that is certainly pertinent to the
19 resolution of this motion.
20 THE COURT: I thought Lieutenant Rodgers said he didn't
21 use the GPS.
22 MR. JOHN: Well, I asked him and he said, well, no, I
23 didn't have it set to look at the GPS. He said the machine
24 generated GPS data on its own, is what he -- I understood him
25 to say.

THE COURT: I don't think so. I think he said sometimes he puts in waypoints, like if he's got a kill site he wants to --

MR. JOHN: He can save specific things on specific days, but he -- and I don't know, I mean, you know, I just heard about the Garmin and I can look into this type of Garmin, but if, in fact -- as I understood him to say is that, you know, like you have various things in your computer, you look at screens at a given time to see what's there, but that doesn't mean there isn't other data that exists or is being generated. I understood him to say that his GPS, his -- would have generated altitude information. He wouldn't have looked at it, but it was generated that day in the machine, whether it's there now --

THE COURT: I don't remember him saying that, but I suppose I could be wrong.

MS. CRAIL: I was just asking Sergeant Moore. He's not recollecting it being that way either. I mean --

MR. JOHN: It was one of the things I asked, if you want to listen back to his testimony, because that actually would deal with this motion, but if it this data, it would deal with this motion about the plane because I don't need to fly a plane if we have some actual data.

THE COURT: I thought he said he doesn't really know what the GPS does, except that he can enter his waypoints.

MS. CRAIL: Uh-huh. That was my -- what my understanding of his testimony was.

MR. JOHN: Well, that -- we were talking about that at the end, but before that --

04:05:31

(Audio played)

04:05:49

MR. JOHN: I think it's before this.

04:05:15

(Audio played)

04:06:35

MR. JOHN: Okay. That's --

THE COURT: I think you skipped past where he says, but what it stores I have no idea.

MR. JOHN: Yeah.

04:06:37

(Audio played)

04:07:07

THE CLERK: That's where he was --

THE COURT: Okay. That's what I remember.

MR. JOHN: Yeah. When he -- but his response made me think, though, he said, I didn't have it on that page. In other words, he didn't have that feature up for him to look at, but that doesn't mean that the feature --

THE COURT: It doesn't mean it does anything, though.

MR. JOHN: Well, generally --

THE COURT: He didn't say anything about it storing data, Mr. John.

MR. JOHN: Well, he said he doesn't know.

THE COURT: Correct.

MR. JOHN: And I guess that's what I'm trying to find out and I --

THE COURT: Well, you could have found out before today.

MR. JOHN: Well, I was under the impression that there was no GPS used and now I'm finding out there was one used. I -- one used and --

THE COURT: What else besides this GPS issue do you think you want to continue this for?

MR. JOHN: Well, I'm also somewhat wanting to ascertain -- and I think this is pertinent to the flight level, is the trooper testified that he was basing his readings upon the Tanana Valley floor.

THE COURT: Chena.

MR. JOHN: Excuse me, Chena Valley floor and if -- I would like to figure out, and maybe if I can get someone to see how much higher Mr. McKelvey's property is from the Chena Valley floor. If it's 50 feet, that's one thing. If it's a few hundred feet --

04:08:15

(Audio played)

04:08:18

THE CLERK: Oh, I'm sorry.

MR. JOHN: -- that's obviously going to be -- impact how high he was flying. Because if he thought, you know -- because he -- I didn't understand, and this is probably what one learns in this. I thought when these things gave an absolute reading of how far you were above the ground, but I've learned today they give a reading of how far you are above sea level, which is quite a --

THE COURT: It makes me understand a little better why people fly into mountains than I understood beforehand.

MR. JOHN: Yeah. So I mean what we're doing is we're trying to back down from his readings and if he's backing down and making these estimates based upon the level of the Tanana Valley floor, well --

THE COURT: Chena.

MR. JOHN: Chena. Yes, Your Honor, thank you. The Chena Valley floor. I don't know why I'm there today, but the Chena Valley floor, that the difference in elevation between Mr. McKelvey's flight [sic] and the Chena River is certainly --

THE COURT: Okay. So you might have witnesses about the GPS or the -- that --

MR. JOHN: The two --

THE COURT: But what about -- are you calling Mr. McKelvey or not?

1 MR. JOHN: I'd like to call him, but I'd like to call him
2 after I have these other things. So I would generally call him
3 last after we flesh the record out and the like and it --
4 THE COURT: When do you want to come back?
5 MR. JOHN: I don't know, I guess I'm curious of Ms.
6 Crail, if the state is able to ascer -- can tell me what they
7 did or didn't do in relation to the GPS and if they can find
8 out if that information exists. I can try and get a hold of
9 Garmin, but I mean this is the type of stuff that does take
10 some time, Your Honor, and --
11 THE COURT: I don't think there's anything with the GPS.
12 It's --
13 MS. CRAIL: Well, we've had the testimony, Judge. I
14 mean, that's what I would do, is go and ask Lieutenant Rodgers
15 what does he do with his GPS and Mr. John has just had an
16 opportunity to do that.
17 THE COURT: Mr. John can do that, yeah.
18 MS. CRAIL: Well, he's just done so under oath, for that
19 matter. So --
20 MR. JOHN: Well, I don't know anything about Garmins and
21 I'd need to want to look --
22 THE COURT: Nor does Sergeant Rodgers -- or Lieutenant
23 Rodgers.
24 MR. JOHN: Yeah. So if I know more about the Garmin, I
25 can perhaps ask some questions.

THE COURT: Well, he didn't know. I mean, he was quite clear that he really doesn't know anything about it.

MR. JOHN: I mean, I can probably call Investigator Rodgers and talk to him, talk with Garmin and the like and maybe get someone to do an elevation thing. But, realistically, with the holidays, a month, Your Honor to do this?

THE COURT: A month. Okay. Well, realistically, with my calendar, it'd be much further out than a month.

MR. JOHN: Hmm. Well --

THE COURT: We can go to January -- well, I have about an hour and a half on January 27th.

MR. JOHN: That would probably work, Your Honor. I have a calendar call in a Nenana case at 2:45 that day. But what time does the court have?

THE COURT: 3:00 o'clock.

MR. JOHN: So that should work. I could probably do that, come here, and I think we can probably finish it up in an hour and a half or nearly done, if not, but try and do it so --

MS. CRAIL: I would say -- I would have said that we should have been able to get through these two witnesses in a lot less than three hours or close to it.

THE COURT: I would have thought.

MS. CRAIL: So I'm -- as I'm not quite as sanguine about that. As far as the new date, Your Honor, as best as I can

1 tell, it's not a problem for me. I'm having Sergeant Moore
2 check, since he's my case officer here.
3 THE COURT: Okay.
4 MR. JOHN: I mean, if for some reason we have this data
5 now, it would resol -- it would help with the other motion as
6 well. That's why I'm thinking if --
7 THE COURT: It sounds like that's what you're thinking.
8 MR. JOHN: That's another issue, yeah, too. So --
9 MS. CRAIL: You said January 27th, Judge?
10 THE COURT: January 27th at 3:00 o'clock.
11 MS. CRAIL: As of now, it looks like that's okay with
12 both of us, Judge.
13 THE COURT: Okay. Continue the evidentiary hearing, 3:00
14 p.m., Tuesday, January 27th and --
15 MR. JOHN: If Your Honor -- I don't know what I'm going
16 to be asking in relation to that other motion for an
17 evidentiary hearing, but could we take that up at that same
18 time?
19 THE COURT: Take up scheduling it?
20 MR. JOHN: No, take up either conducting in relation
21 to -- I mean, I guess we could schedule it at that time or kind
22 of work it in there, if there's issues related to it.
23 THE COURT: Is that now ripe for decision? I don't see a
24 reply, so --
25 MR. JOHN: No. I guess that's why I was going to talk

with the court. The state's -- my response to the state's opposition is due on Monday and -- but then the state AG out of Anchorage filed an opposition on behalf of the troopers, apparently, saying I needed to have served the troopers on this as well, and that's due this -- that's due next Friday.

THE COURT: I don't have that yet.

MR. JOHN: Okay. That --

MS. CRAIL: But I was served with it -- well, I was served with it electronically by Mr. Novak. I advised him of the situation since he represents DPS. I also noted in mine that I believe Mr. John should have served him since he's talking about using DPS resources, not merely an ordinary criminal matter, and obviously I said a lot more than that. But I made it -- I noted that piece, too, and advised Mr. Novak, who decided not to wait to be served, but to file something anyway, so --

THE COURT: Okay.

MR. JOHN: So I'd like to just respond to both of them by next Friday and if we have evidentiary hearing issues related to that, we can deal with it at the January 27th hearing because the two are kind of interrelated.

THE COURT: But do you think -- the way this is going, you're not going to have time to do evidentiary hearings on both in an hour and a half.

MR. JOHN: No.

1 MS. CRAIL: I'm not sure how we get an evidentiary
2 hearing on a motion to compel discovery in any event. That
3 sounds more like oral argument.
4 THE COURT: I'm not sure either. Would there be a
5 disputed fact?
6 MR. JOHN: I guess Mr. McKelvey -- if the state
7 doesn't --
8 THE COURT: Except the oral argument on that --
9 MR. JOHN: -- dispute Mr. McKelvey's indigency, that's
10 probably -- you know, I mean, it's pretty much what -- yeah, I
11 mean, that's --
12 THE COURT: Oral argument --
13 MS. CRAIL: Well, he's got private counsel, so I guess
14 he's going to have to do it --
15 THE COURT: Oral argument --
16 MR. JOHN: Well, yeah.
17 MS. CRAIL: Yeah.
18 THE COURT: -- on the motion to compel production of the
19 airplane and the camera, 3:30, Thursday, January 8th.
20 MS. CRAIL: Your Honor, I might ask if --
21 MR. JOHN: Okay. That will work.
22 MS. CRAIL: -- Mr. Novak can appear separately for
23 that --
24 MR. JOHN: Oh, let's see.
25 MS. CRAIL: -- DPS.

THE COURT: Yeah, I would --

MS. CRAIL: On his behalf. I -- since he's not involved in this hearing.

THE COURT: I assume he'll appear, too.

MS. CRAIL: Okay.

MR. JOHN: I have --

THE COURT: Won't he? I mean, I would assume if he's weighing in, he's going to appear at the hearing.

MS. CRAIL: Well, right. No, I was just asking for -- to make sure there was permission for him to do that as well. So I'll pass that on.

THE COURT: Oh. Yeah.

MR. JOHN: I have oral argument before the Court of Appeals in Anchorage that day, Your Honor, on the 8th. That's --

THE COURT: Okay. The 9th?

MR. JOHN: The 9th. Sure, the 9th works. Afternoon?

THE COURT: The 9th at 3:30.

MR. JOHN: Okay. Is that for half an hour then or what --

THE COURT: For half an hour.

MR. JOHN: Okay.

MS. CRAIL: As far as I can tell, I'm good with that, Judge, as you're talking about afternoon. I do have something scheduled in the morning, but afternoon is fine. You said

3:30?

THE COURT: 3:30.

MS. CRAIL: On the 9th of January.

THE COURT: Yes.

MS. CRAIL: Got it. And I will pass that to Mr. Novak as well.

THE COURT: All right. Well, yeah, actually, that's a good point that you're making, Ms. Crail. Well, if you don't mind letting him know, then I won't have to worry about it.

MS. CRAIL: I will pass that on. It might be -- once the court gets the -- it wouldn't hurt to have an official notice, but I'll send it to him. I'll let him know it's there.

THE COURT: All right. We'll issue a written notice and we'll serve -- what office is he with?

MS. CRAIL: He is with -- he's with the Department of Law, but he's a -- I believe, but he's assigned to represent the Department of Public Safety.

THE COURT: So is he AGO in Anchorage?

MS. CRAIL: Yes.

THE COURT: His pleading paper would tell us, wouldn't it?

MS. CRAIL: That's correct.

THE COURT: Okay. So we'll get it off the pleading paper. All right. Anything else today?

MR. JOHN: So we have 3:30 on Friday, the 9th, and when

is the evidentiary hearing again? On which date?

THE CLERK: January 27th.

MR. JOHN: Got it. Okay. Thank you. Got it.

THE COURT: Okay. We're off record.

MR. JOHN: Thank you, Your Honor.

THE COURT: Thank you.

THE CLERK: Off record.

(Off record)

04:16:55

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8 CONTINUED EVIDENTIARY HEARING: MOTION TO SUPPRESS
BEFORE THE HONORABLE BETHANY HARBISON
9 Superior Court Judge
10 Fairbanks, Alaska
January 27, 2015
11 3:24 p.m.
12 APPEARANCES:
13 FOR THE PLAINTIFF: ELIZABETH F. CRAIL
District Attorney's Office
14 455 Third Avenue
Suite 150
15 Fairbanks, Alaska 99701
16 FOR THE DEFENDANT: ROBERT JOHN
Attorney at Law
17 PO Box 73570
Fairbanks, Alaska 99707
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S
2 3:24:12
3 THE CLERK: We're on record.
4 THE COURT: We're on record, State of Alaska versus John
5 McKelvey, 4FA-14-40. Mr. McKelvey is here in custody. He's
6 represented by Mr. John who's here; Ms. Crail for the state.
7 We're here for continued evidentiary hearing. We were last
8 here, it looks like December 11th, and there was some question
9 about, I think, additional witnesses being called, but that was
10 a little vague. What's the situation today?
11 MS. CRAIL: To the best of my recollection, Your Honor,
12 the state had completed its evidence with Sergeant Moore and
13 Lieutenant Rodgers and it had turned over to Mr. John's case.
14 THE COURT: Okay. So Mr. John --
15 MS. CRAIL: That's my recollection.
16 THE COURT: That sounds right. I see that --
17 MR. JOHN: Yeah. We're going to get into some GPS
18 matters, probably not for too long a period today, and then
19 I'll call a couple witnesses. And I expect we'll be able to
20 argue it and be done.
21 THE COURT: Okay. So who is your first witness?
22 MR. JOHN: We call back to the stand Lieutenant Rodgers.
23 THE COURT: Okay. Lieutenant Rodgers, you're back on the
24 stand. I'll just remind you, you're still under oath rather
25 than having you take the oath again.

1 MR. RODGERS: Okay.
2 THE COURT: Go ahead and have a seat.
3 MS. CRAIL: Your Honor, just want to make sure that the
4 witness exclusion is --
5 MR. JOHN: Yeah.
6 THE COURT: If anyone is here and is going to be -- okay.
7 Mr. John is taking care of it.
8 MR. JOHN: Yeah.
9 THE COURT: That's Erickson (indiscernible) and his third
10 party. They're here for a 4:15 hearing. Okay. So go ahead
11 and have a seat. You're still under oath.
12 A Yes, ma'am.
13 THE COURT: You don't need to be sworn again. And, Mr.
14 John, you can ask questions when you're ready.
15 MR. JOHN: Okay.
16 THE COURT: Oh, yeah, you need to know his name. It's
17 Justin Rodgers, right?
18 A Yes, ma'am.
19 THE COURT: Justin Rodgers, R-o-d if I remember
20 correct --
21 A Yes, ma'am.
22 THE COURT: -- g-e-r-s.
23 THE CLERK: Thank you.
24 THE COURT: You're welcome.
25 MR. JOHN: I have an exhibit, Your Honor, but I'm not

sure where we left off on exhibits.

THE COURT: I think we excused all the witnesses and you were calling people back, right?

MR. JOHN: Yeah, but I had introduced some exhibits.

THE COURT: Oh.

MR. JOHN: And I guess we can just label it the next one. I won't put -- I don't --

THE COURT: Let's see, we have defendant's A, B, C.

MS. CRAIL: It's quite a few, if I remember correctly.

THE COURT: Looks like that's it. We've got defendant's A, B, and C, so I think we left off with -- oh, no, wait. I, J, K, L --

MR. JOHN: I had --

THE COURT: -- M. We left off with M.

MR. JOHN: So N would be the next one.

THE COURT: So N as in nut.

MR. JOHN: Okay. There we go.

THE COURT: Okay.

MR. JOHN: I'm going to approach the witness with exhibits, Your Honor.

THE COURT: Okay.

MR. JOHN: Copy for the court of what I'll be referring to.

THE COURT: Thank you.

MR. JOHN: You're welcome. Here you go.

1 THE COURT: Perfect. Thanks, Barb.
2 JUSTIN RODGERS
3 previously sworn, called as a witness on behalf of the
4 defendant, testified as follows on:
5 DIRECT EXAMINATION
6 BY MR. JOHN:
7 Q Good afternoon, Lieutenant Rodgers, I've handed you
8 what's been labeled defendant's Exhibit N. And you have
9 that in front of you?
10 A Yes, sir.
11 Q Okay. And I had also asked you, when I subpoenaed you,
12 to bring your actual pilot's book for your Garmin GPS
13 296.
14 A Yes, sir.
15 Q And before court, I gave you my exhibit and you compared
16 it to your book. And as far as the pages, at least that
17 we've looked at and that I'll go over with you, they're
18 in substance the same, correct?
19 A Yes. They appear to be.
20 Q Okay. So if we could look first at page 39 of the book
21 there. There's two pages to a page.
22 MS. CRAIL: Just for the record, I just want to make
23 sure, is the numbered 39?
24 Q Yeah, numbered 39. It's a little 39 in the right corner.
25 39 and 40 are -- comprise one page. So have you had a

chance to look at that?
A Yes, sir, I'm looking at it.
Q Okay. Now, when you were testifying last time, you talked about your GPS not being open to a particular page. Is that the page you were referring to, that -- something that looks like what we see on page 39 there?
A Well, actually, yeah. The page I was referring to, to the best of my recollection, I -- I testified that I generally have it on what I call the map page.
Q Right.
A This would be the panel page. But the map page, we could probably find a view of that in here, but it -- it's -- well, it's different -- different one than that, so I don't know what your question is about the panel.
Q Have you -- it is a --
A I -- I recognize this, but --
Q It is a page that you can pull up --
A Yes, sir. It is --
Q -- on your Garmin?
A It is a page that you can pull up, yes, sir.
Q So as far as you know, whenever your Garmin is on, whether you pull up that page or not, it's still there generating data, correct?
A Yes. You could select through and look at different pages, yes.

Q Okay. So they're all there. It's just you look at whatever one you want to at a given moment?

MS. CRAIL: I -- Judge, I'm going to object to the nature of the question, because what Mr. John asked was, as far as he knows, was it still there and generating data? First of all, that's a multiple-part question, and secondly, it's leading. This is his witness at this point.

THE COURT: Sustained as to compound; overruled as to leading. It's maybe his witness, but let's get real.

MS. CRAIL: Well, my concern is, is that he's pla -- he's putting a lot of pieces in there that Lieutenant is not really having an -- an opportunity to say --

THE COURT: No, I sustained --

MS. CRAIL: -- whether he knows, yeah.

THE COURT: -- as to compound.

MS. CRAIL: Okay.

THE COURT: Absolutely. Yeah, you need to break it down.

MR. JOHN: Okay.

Q So I -- is there anything like what we see on page 39 on your Garmin?

A Yes.

Q Okay. And is that what you would refer to as a particular page when you're referring to a page in your testimony last time?

A Sure. This appears to be -- it's labeled the panel page.

Q Okay. Okay. Now, I also gave you -- let's -- I think we're looking here -- so go to what's -- looks to be page 82, Managing Your Tracks.

A Yes, sir. I'm there now.

Q Now, when you -- so with your Garmin that day, do you know what setting you had it on as far as Managing Your Tracks?

MS. CRAIL: Again, Your Honor, the question is -- it assumes facts not in evidence. I don't believe Lieutenant Rodgers testified that he definitely had the Garmin with him that day, only that he sometimes has it with him.

THE COURT: Did you have it with you?

A I testified, Your Honor, that I -- I can't recall whether I had it with me or not that particular day.

MR. JOHN: He testified that he probably had it with him, because it was his practice. I can get out -- I have a transcript of it if --

THE COURT: I don't remember. Did you usually have it, but you just aren't sure this particular day or do you remember what --

A For -- do you mind if I explain?

THE COURT: No, I don't at all.

A Okay. So the -- my recollection is that, yes, I generally use a GPS in an airplane, no doubt about it. That particular day, I was in an airplane that I don't

normally fly in an area I'd never been before with a person that was going to tell me where I went. And I don't have any specific knowledge if I used a GPS that -- my GPS that day in that airplane. You know, could have; could not have.

Q Okay.

A That's what I recall, sir.

Q Okay. Have you gone back to look at your GPS to see if there's data from that day on it?

A What kind of data?

Q Well, any data from that day. I had requested in discovery, data from your flight of -- to Mr. McKelvey's and back. And the state originally indicated there was no data. So have you ever gone and looked at your GPS to see whether, in fact, it has data from that day --

A Okay.

Q -- on it right now or not?

A Part of our problem is, we're talking from a different source of knowledge here. My knowledge of GPS and you're -- you're asking about any data. If you'd like to specify, for example, have I reviewed to see if there's a waypoint? Yes, there is none.

Q Okay.

A Track log. You want to ask me -- I mean, I'll just let you --

Q Yeah, okay.
A -- ask the questions.
Q Yeah. So have you reviewed for -- we're looking there at Managing your Tracks on page -- it's on pages 80 --
A Uh-huh.
Q -- and it goes onto -- for the next few pages.
A Yes, sir.
Q Do you, when you fly, ordinarily save tracks?
A No.
Q You don't?
A No.
Q Okay.
A Don't ordinarily turn the track log on.
Q Okay. Okay.
A And had I had it that day, I wouldn't have had it on, so --
Q Okay.
A -- I -- I don't know for sure, as I've testified, that I did or didn't have it, but that's not the kind of circumstance when I would have turned the track log on anyway.
Q Okay.
A And so --
Q So when you have the track log on -- you've used your track log?

A Yes, sir, I have.

Q And what does it -- what would it all say on the track log if you have it on?

A If I -- if I had a reason to turn it on for a variety reasons, but it's a little bread crumb. It -- it looks -- well, there's pictures of it in here, but it -- it just shows a tiny little dashed line, basically, where you're coming -- where your route of flight is. That's what it -- what it does.

Q Okay. Does it provide you any other data from that flight?

A Not to my knowledge. It -- it shows back and forth and back and -- you know, wherever you happen to be going, your route of flight.

Q And now did you look on your GPS to see if there was any data still on it from your flight to Mr. McKelvey's and back?

MS. CRAIL: Judge, I'm going to object to the question at this point, because Lieutenant has just testified that he didn't save anything and he's checked it to be sure that there were no waypoints. He doesn't remember having any and he didn't -- and he checked; there weren't any saved, and that he didn't turn the track log on. There's no track log saved for that. So at this point, now, he's asking about --

THE COURT: Well, he wants to know if there's any other

1 kind of data that Lieutenant Rodgers is aware that a GPS can
2 keep, did he look for it.
3 Q Other than what you've already said, is there anything
4 else --
5 THE COURT: Right. I think that's an okay question.
6 Q -- on there?
7 MS. CRAIL: I don't think that's exactly what he asked,
8 but for that narr -- for that specific question, then I don't
9 have an objection.
10 THE COURT: Okay. So I guess it --
11 A So -- so who wants to --
12 THE COURT: Mr. John, you're rephrasing to my question --
13 A -- repeat the question for me?
14 Q Okay. So, well, let's just go through this in a couple
15 steps here. You've reviewed this here from pages 82
16 through 85 about managing and saving tracks, correct?
17 A I have.
18 Q And that's the procedures and -- that you would follow if
19 you did save tracks?
20 A Yes.
21 Q Okay. Now, you indicated you didn't save any, what you
22 call -- was it data points? Was that the term you used?
23 A I used the term, waypoint.
24 Q Waypoint.
25 A Yeah.

Q Okay.
A There -- there's descriptions of user waypoints and saving user waypoints, things like that in here.
Q Okay. And could you describe for us what a waypoint is?
A Well, I can tell you what I think a waypoint is. We could maybe find a definition in here, but if you want to record the location of some -- something of interest, whether -- in this case, I guess it would have been a house, you can hold the button on the GPS, the enter button until it saves a waypoint; gives it an automatic numeric number, and it will tell you the latitude/longitude coordinates of that. And it tells you the time you saved it. It tells you the -- I think it tells you the elevation you're at when you saved it. For example, if you're standing on the ground, it would be that or if you're in the air, it would tell you that. I'm trying to think of anything else it tells. I can't think of anything else off the top of my head. I mean, we -- we can review that page in the manual if you'd like, but --
Q If you want, I'll let us just take a quick look at it there.
A I don't know.
Q I believe that the index indicates waypoints are on 15 and 58 to 60, and 139. So probably 58.

THE COURT: He said he didn't keep one, Mr. John. Why are we spending time on it?

A I think your question is for me to describe what a way -- or tell you what a waypoint is.

MS. CRAIL: Your Honor, I'm going to --

Q Yeah, okay, so --

MS. CRAIL: Yeah.

Q So -- okay, so let's go on. We don't need to go further with that. So you indicated you went back and looked at your Garmin. When did you go back and look at your Garmin?

A I -- I think it was prior to the first hearing. I looked at that to make -- to look at that area of Chena Hot Springs Road and see if I had any waypoints saved that could be the defendant's and -- and I didn't --

Q Okay.

A -- just to double-check, because I sure as heck don't remember saving any waypoints anyway, so --

Q Okay. So you did actually look at it?

A Yes.

Q Okay. And that was before the hearing in December?

A I -- I believe so, sir, yeah.

Q Okay. Okay. Now, do you have FlightBook software on your Garmin?

A I -- I'm not sure what that is. FlightBook software --

Q You --
A I don't utilize it normally, so --
Q Okay. If -- okay.
A I guess I could read about it if you tell me where.
That's -- that's not a term I'm normally familiar with.
Q Let's just -- it's on 45 and 146.
A Okay. Let me look here. 45. Oh, flight log. So I know
what a flight log is and I -- and I've read about that.
And what -- why --
Q So FlightBook is a software.
A That's 146. Let me look real quick here. So I go to
144, then I skip to 150. I don't think I have -- I need
to see if I have page 146 here somewhere. Looks like my
pages are -- they appear to be sequential up to 144 and
then they skip to 150, so --
THE COURT: Mine, too.
Q Yeah, okay. Well, I guess that didn't get --
A But --
Q Okay.
A I --
Q But to look back at page 45 there just --
A Yeah.
Q -- one more time --
A Uh-huh.
Q -- and the third little paragraph down at -- it starts,

an optional FlightBook software package.

A Third paragraph, optional -- yeah, I'm not fam -- I don't --

Q Okay.

A -- utilize that.

Q As far as you know, you don't have it or you don't use it if you do?

A I -- I don't use that.

Q Okay.

A So -- I -- software -- it's unclear to me if that's something you would use on your computer to -- or if that's something you would add to your GPS, I'm -- but that's not -- the flight log, I'm familiar with. That automatically generates -- tells when you take off and, you know, you can review it. I think it said it stores up to 50 flights, and it talks about what is a flight, things like that. And I've, in passing, noticed that on my GPS and so I'm aware of that. It's not something I utilize necessarily, but -- but it automatically says you did a 40-minute flight from here to here and you did a 32-minute flight from here to here or whatever.

Q Okay.

A So --

Q When you look at your Garmin, did you see any information on there relating to your flight over Mr. McKelvey's

1 property?
2 A No, sir.
3 Q Okay.
4 A No.
5 MR. JOHN: I have no further questions of Lieutenant
6 Rodgers.
7 THE COURT: Any other questions for him, Ms. Crail?
8 JUSTIN RODGERS
9 testified as follows on:
10 CROSS-EXAMINATION
11 BY MS. CRAIL:
12 Q Just a clarification. The --
13 MS. CRAIL: If I may, Your Honor.
14 Q The -- Lieutenant Rodgers, the flight log -- you're a
15 pilot, is that correct?
16 A Yes, ma'am.
17 Q So how many flights do you do in any given year?
18 A Well, the way I understand this --
19 Q Right, by that definition.
20 A -- by this definition, hundreds and hundreds and
21 hundreds.
22 Q Okay.
23 A I -- I mean, lo -- I'm just trying to think. Probably do
24 as many as 20 flights in a day sometimes by this
25 definition of starting and stopping, starting and

stopping.

Q And just so we're clear, the nature of the flight log, does that actually show waypoints or does that just show desti -- or basically starting and destination airports and the general path between or whatever?

A It -- it's just like -- like I said, I don't utilize it much, but I've seen it. It -- it would show, for example, Fairbanks to Nenana if you happen to go from -- it's smart enough to know, if you leave from Fairbanks and land in Nenana, and I think it -- it will know user waypoints, but I land in a lot of places that are just arbitrary places where people might be hunting or fishing.

Q Uh-huh.

A And it's still starts -- it might say Fairbanks to -- I can't remember what word it uses. Maybe it says, map, because it's a map location. I don't --

Q Does it actually show you your route --

A No, no.

Q -- for instance, if you say exactly (indiscernible - simultaneous speech).

A It just -- it's a record -- it is what it says, a flight log that you made this 37-minute flight, then you made a 45-minute flight, and a 10-minute flight from, you know, Fairbanks to Nenana, Nenana to Healy, Healy back to

Fairbanks or whatever the case is.

Q So if you are on an out-and-back flight like this one, would it just simply say, Fairbanks to Fairbanks?

A That's exactly what it would say.

Q Say 30 minutes?

A Well, however long the duration was, I think.

Q As a -- I mean -- throwing out a number, yeah.

A Yes, yes. That's exactly -- without meeting these parameters below 30 knots, which you wouldn't normally be on a routine flight and without stopping, yes, it would be -- that would have been one flight, Fairbanks to Fairbanks, 1.1 or something like that.

Q Okay. And then it would have just put whatever the time -- that that time lapse was, Fairbanks to Fairbanks?

A Yeah, that's --

Q Okay.

A -- how it works and it -- it probably has a date of that flight I'm sure. And that would have been, you know, number 1, then sequentially, it would have went to number 2, number 3, eventually. By the time you did 50 more flights, it would have rolled over again.

Q Okay.

A Yeah.

Q Now with respect to that, is that something -- or that you're familiar with that's able to be downloaded,

generally, or not?

A This flight log?

Q Yeah.

A I've never -- never tried to download it. I don't know.

Q And you said it's -- basically, it's on a loop -- as you say, basically, a loop recorder; once it hits 51, then it's basically recording back over the number 1?

A That's how I understand it.

Q Okay. So unless you were to go back and make a point of picking out some particular flight, if you could figure out a way to download it, it's just not something that would be retained?

A No. I mean, it would just naturally over -- overfill itself or overwrap.

Q Okay.

A I -- I've never tried to glean much information from that, other than -- any information.

Q It's basically just a -- I went this date, this time, this length (indiscernible - simultaneous speech) --

A Well, it might be useful --

Q -- this place.

A -- if you're a commercial operator or something and you needed to review and, you know, what -- how many times did I go to a certain place that day or something that might have some value to somebody, but not in the nature

of work I do.

Q And as far as any location markers, those are things, if I understood your testimony correctly, that would require either you turning on the track log function or putting in manual waypoints, is that correct?

A So, yes. I mean, if you -- if you want to save a location and be able to refer to it, recreate it, whatever, then it is a -- an overt act on your part to save a location in the GPS. The track log, if you turn it on, automatically, basically, tracks your route and it's a bread crumb thing. And both those require that you turn them on to util -- I mean, one to save a waypoint, the other to turn it on to -- and I -- anyway, that -- does that answer your question?

Q Basically. So with respect to either one of those, would there need to be a mission-specific reason for you to want to turn those on?

A Normally, yes. I mean, I would save a waypoint for some particular reason, investigative or otherwise, navigation or whatever. And if I had a reason to turn my track log on -- I mean, I can think of a couple of reasons I've done that, but not -- not for this scenario.

Q And so if -- so those are the only two that you're aware of that would actually track where the -- physically, where you'd been as far as your round of flight and --

A Sure.
Q -- where --
A I mean, that's the only information I know of. And even the track log, I -- I don't -- I mean, I think it shows your route acro -- I think it -- you know, it show you went from this -- you know, where you've been, but I -- I don't know that it shows, you know, speed and height and altitude, things like that. I -- it's just a recreation of where you've been is what I understand.
Q Okay. So even that's just -- it's just sort of a map trail, not an altitude or a speed trail?
A Well, there's nothing that I've seen on the GPS that leads me to believe it's more than a map trail. And -- and that's -- that's the way I've used it. It's to tell where you've been.
Q Okay.
A And to turn around and go back down your track if you had a navigation reason to or something.
Q Okay. And just so I'm abundantly clear, then, in this case, to the best of your knowledge, you did not have either one of those -- well, you checked the waypoints and it's not there.
A It's not there.
Q And you -- and there's no track log for this case either.
A No.

Q And you wouldn't normally turn it on.
A No. That is correct.
Q Okay.
MS. CRAIL: I think that's all I have.
THE COURT: Mr. John?
MR. JOHN: Yes.

JUSTIN RODGERS

testified as follows on:

REDIRECT EXAMINATION

BY MR. JOHN:
Q You indicated that you didn't think saving a track log or waypoint was pertinent for your purposes, but it would be pertinent for the purposes that we're here today, would it not, of ascertaining how high you were flying?
MS. CRAIL: Judge, I'm going to object. For one thing, he just said that that doesn't track altitude, only map. And secondly, the state is not required to create evidence under the rules, only to retain evidence that has actually been --
THE COURT: Your objection is relevance?
MS. CRAIL: Yes.
THE COURT: Sustained.
MS. CRAIL: Yes, Judge.
Q Well, you did indicate, I believe, that if you did a waypoint, that would indicate the elevation or the altitude, correct?

A Yes, sir.

Q Okay.

MR. JOHN: No further questions, Your Honor.

THE COURT: Anything from that, Ms. Crail?

MS. CRAIL: No, thank you, Judge.

THE COURT: Thank you, Lieutenant. You're excused as a witness.

A Okay. Should I remain, Your Honor, or --

THE COURT: You're free to go.

MR. JOHN: I move to admit the GPS manual there.

MS. CRAIL: Judge, I don't object to the pages that were discussed, but the entire manual, it's -- is exactly that, it's a manual, but we have nobody from Garmin or anyone to testify as to the accuracy or usability of any of those points. The portions that Lieutenant Rodgers was able to testify to, I don't object to, however.

THE COURT: If you --

MR. JOHN: Lieutenant Rodgers had indicated was the same as his manual, the -- my exhibit substantially, so --

MS. CRAIL: But his manual wouldn't be admissible as evidence either, absent either relevance or -- I mean, it's hearsay.

MR. JOHN: It's a business record.

MS. CRAIL: It's (indiscernible).

THE COURT: It's not overruled; sustained. But without

1 objection, the pages will be admitted. So --
2 A I remember some of them.
3 THE COURT: As far as overruled and sustained, to make
4 the record more clear, Ms. Crail is correct; it is hearsay.
5 Mr. John is mistaken; it's no foundation for a business record
6 at all. The pages that Lieutenant Rodgers referred to which
7 we -- I don't really remember which ones they were. 45 and --
8 A 35.
9 THE COURT: -- maybe 35 or something will be admitted
10 without objection.
11 A I thought there were some in the 80s.
12 MR. JOHN: There's 82 to 85, I believe. And then there
13 was 39 --
14 THE COURT: 82 to 85, 39 and 45 --
15 MR. JOHN: And then what was the other one?
16 THE COURT: -- was it?
17 MS. CRAIL: I know we worked --
18 MR. JOHN: Just figure them out now, then we have them.
19 THE COURT: And then that -- those pages --
20 MR. JOHN: 30 and 39.
21 THE COURT: -- will be marked as N, I think.
22 MR. JOHN: Yeah.
23 THE COURT: Right?
24 MR. JOHN: Yeah.
25 THE COURT: N as in nut and be admitted without

1 objection.
2 MR. JOHN: Okay.
3 MS. CRAIL: That's fine, Judge. He's testified related
4 to those pictures.
5 THE CLERK: (Indiscernible - simultaneous speech) page
6 numbers again?
7 THE COURT: Okay. Page numbers again would be 39, 45, 82
8 to 85?
9 MR. JOHN: Yes.
10 MS. CRAIL: I got it.
11 THE COURT: I think that was it, right, Mr. John? Do I
12 have them all?
13 MR. JOHN: Yeah. That was the ones I talked --
14 THE COURT: Okay.
15 MR. JOHN: -- about, Your Honor.
16 THE COURT: So all of those will now be the new
17 defendant's N and will be admitted without objection as
18 demonstrative of this witness's testimony.
19 MS. CRAIL: That's fine, Judge.
20 MR. JOHN: Yeah.
21 A Give them to you or to Mr. John or --
22 MR. JOHN: I guess --
23 THE COURT: I'll take it, thanks.
24 A Confirm I've got the right pages.
25 THE COURT: Yeah, I'll check for you. Okay. Thank you.

A And the rest of this? This has the exhibit number on it.

THE COURT: Okay. The court has 39 --

MR. JOHN: Oh, you should put the cover on it, probably, because it's got the exhibit number.

THE COURT: Yeah, I'll take it, the cover -- unless you object, Ms. Crail, to the cover page.

MS. CRAIL: I -- the cover is fine, Judge.

THE COURT: Okay.

MS. CRAIL: It looks like it just is an identifying --

MR. JOHN: Thank you.

THE COURT: Okay. So I do have the cover page. I have 39 which happens to have 40 on the same page. I have 45 which has 46 on the same page. 82 also has 81 as it turns out, then 83, 84, 85, and 86. Those are all admitted now without objection.

(Defendant's Exhibit N admitted)

THE COURT: Lieutenant, you're excused. Thank you.

A Okay.

THE COURT: Let me grab the exhibit. Okay. Mr. John, who's next?

MR. JOHN: Yes, Ralph Mathews, Your Honor. I'll go get him.

THE COURT: Okay.

THE COURT: Got it? It's complete now. And this is Mr. Mathews?

MR. JOHN: Yes.

THE COURT: Okay. Mr. Mathews, you're being called as a witness in this case. Once you -- yeah, settle in however you want. You can leave your belongings there or you can bring them with you up here, whichever is better for you.

MR. MATHEWS: No, this is fine.

THE COURT: Okay. So what I'm going to ask you to do, Mr. Mathews, if you could come forward. This is where you'll be testifying here at the witness box. And if you just put your paperwork on the desk, the bench, please remain standing because madam clerk is going to be administering the oath.

MR. MATHEWS: Sure.

THE COURT: Thank you.

THE CLERK: Raise your right hand, sir.

(Oath administered)

MR. MATHEWS: I do.

THE CLERK: Thank you. You may be seated.

RALPH MATHEWS

called as a witness on behalf of the defendant, testified As follows on:

DIRECT EXAMINATION

THE CLERK: For the record, could you state your first and last name and spell both, and you may be seated.

A Okay. Thank you. My name is Ralph C. Mathews, spelled with one T.

THE COURT: Okay.

THE CLERK: Could you spell the last name?

A M-a-t-h-e-w-s.

THE CLERK: Thank you.

THE COURT: Thanks, Mr. Mathews.

A Sure.

THE COURT: Mr. John, you may inquire.

MR. JOHN: Yes, mi --

MS. CRAIL: Your Honor, before he does, could I just ask what his paperwork is up there?

THE COURT: Sure.

A Yes. This is a copy of what is called an OPUS solution. I set up a GPS receiver and that data goes into the National Geodetic Survey totally via computer, and then I get back the data that gives the precise latitude and longitude and orthometric height, the elevation of the position.

MS. CRAIL: So, Judge, I --

A And you -- you're welcome to one. I brought two.

MS. CRAIL: Okay. That was what I was going to ask, is if the witness is looking at something up there, a physical document, then I think the state needs to have a copy of it.

THE COURT: Sure. Any problem with that?

A Oh, sure.

MR. JOHN: No problem, no problem.

THE COURT: Okay.

A Absolutely.

MR. JOHN: Give one to me. I'll get one -- I'll get it.

A Here.

THE COURT: Let's spread it around, actually. Do we need to make copies? I'd like to have one.

MR. JOHN: Yeah, why don't you --

THE COURT: Mr. John, you should have one.

MR. JOHN: Yeah.

THE COURT: Ms. Crail should have one, and Mr. Mathews will need --

MR. JOHN: I think --

THE COURT: -- to retain one.

MR. JOHN: Probably, what, three copies.

THE COURT: Sounds like it.

MR. JOHN: Okay. Great. Make three --

THE COURT: Thank you. I think two. One for Mr. John, one for me, and we'll give one of those to Ms. Crail and one --

MR. JOHN: Oh, he's going to take two. Okay.

THE COURT: Yeah.

MR. JOHN: Okay.

THE COURT: -- one back to Mr. Mathews. You kept one, Mr. Mathews?

A Yes, ma'am.

THE COURT: Okay.

THE CLERK: Here's the original.

THE COURT: I think Ms. Crail got one. I'm the one who's missing it, I think at this point.

MS. CRAIL: This looks like the original one.

THE COURT: I think that's mine.

A The original, Judge?

THE COURT: Sure. We'll sort it all out. Okay. I think we've all got it. Mr. John, you may inquire.

BY MR. JOHN:

Q Yes, Mr. Mathews, how long have you lived in Fairbanks?

A 74 years.

Q Okay. And what is your current occupation?

A I'm a registered land surveyor, State of Alaska.

Q Okay. And how long have you been in that capacity?

A 22 years.

Q Okay. And have you surveyed in many places outside Alaska?

A Some in the lower United States and in Venezuela and Northwestern Russia.

Q Okay. And you still do most of your surveying in the Fairbanks area?

A I do.

Q Okay. Okay. Now, in the course of doing your surveying, is one thing that you do is ascertain the altitude or elevation of a given piece of property?

A Yes. It comes up -- it comes up pretty often on what are known as elevation certificates for flood mapping projects, and that's -- and occasionally, you get something where you have to have a precise elevation for some other reason.

Q Okay. Now, did I ask you to do something along those lines in relation to Mr. McKelvey's property?

A Yes, that's correct.

Q Okay. Could you -- and when did you do that?

A This last weekend.

Q Okay. Could you describe to us what you did and what your conclusions were?

A Sure. The property -- I -- I didn't bring my mapping, but I believe it's Tax Lot 3345 off Grange Hall Road. And so the first thing I looked at was the -- where the -- where the property sat in terms of the contour mapping of a couple of different contour mappings that had been done to see what kind of an elevation I would expect in that area. And -- and it's between contours, so depending on how close you wanted, it's going to be a guess from the mapping.

And so I took a survey grade like a Series 530 GPS receiver out and set it up for a three-hour occupation time at -- at a point there in the yard, approximately 15 to 16 feet away from this greenhouse that's been

discussed, I guess.

Q Okay. And did you get that data back?

A Yes. That -- that's what you have here. This is -- this is the -- an -- what's called an OPUS report. The way this works, and it's easier to explain if you -- if you look at the second page, you can see that there are four CORS stations shown there. One is CENA; one is the -- University of Fairbanks, and the other is out at Gilmore Creek. CORS stations are -- what that stands for is Continuously Operating Receiver Station. So NGS, National Geodetic Survey has over most of the country, these CORS stations. And they are continuously operating, continuously interrogating whatever satellites are going by, so --

MS. CRAIL: Judge, I'm going to interrupt just briefly here. It sounds as if Mr. Mathews is being called as an expert witness.

THE COURT: It does.

MS. CRAIL: And I don't have any notice.

MR. JOHN: He's being called to testify as to an observation he's made on Mr. McKelvey's property.

MS. CRAIL: Right now, he's going over what sounds like expert testimony. I mean, if he's testifying about a single observation, even that, if it's not something that an ordinary lay person can do, that becomes expert testimony such as a --

1 an example, a criminalist running a GCMS instrument is
2 testifying as to his observations as to how all that went
3 through, but ultimately he's al -- he's resulting in an opinion
4 that the substance was X drug. In this case, it's going to
5 result in -- it sounds like Mr. Mathews' opinion, based on all
6 of his various instruments and everything else, that the
7 elevation was X amount. I don't see a difference there.
8 THE COURT: Yeah, I think he is an expert. He is
9 providing expert testimony.
10 MR. JOHN: I don't think there's a rule that says you
11 have to give notice of an expert.
12 THE COURT: Yeah, it's interesting. Rule 16 doesn't seem
13 to contemplate notice for anything but trial purposes, but
14 certainly, Ms. Crail, fairness demands that you have an
15 opportunity to meet the evidence if it's expert testimony, so
16 the way to solve that may be to go ahead and --
17 MS. CRAIL: Right.
18 THE COURT: -- take the testimony and --
19 MS. CRAIL: Yeah, I don't need to have Mr. Mathews --
20 well, he might need to come back anyway, depending on how it
21 goes, but I would certainly, before I do cross-examination,
22 like to have an opportunity to find out the basis of his --
23 understand the basis of opinion --
24 THE COURT: Right.
25 MS. CRAIL: -- run it by -- I mean, I don't have any, you

1 know, knowledge of Mr. Mathews one way or the other, but that's
2 part of the problem. If I did, then it might have been
3 something I could have stipulated to, but since I don't, at the
4 moment, I have no idea what's going on.
5 THE COURT: Right. Okay. So shouldn't be a big deal.
6 Mr. Mathews appears to the court to be an expert in this area.
7 Mr. John can go ahead and go through his expertise, lay the
8 foundation for him being qualified as an expert. Otherwise,
9 really, he can't testify to what he's talking about. It's
10 certainly way outside of a lay person's knowledge. But he
11 sounds like an expert to me. And then, Ms. Crail, you can voir
12 dire however you want to do it and then if you want additional
13 time before crossing him, that's fine.
14 MS. CRAIL: Okay. Thank you.
15 THE COURT: Okay. So, Mr. Mathews, this is all lawyer
16 talk, but the long and short of it is you appear to have
17 specialized knowledge about this area that certainly I don't
18 have and I think most people don't. So you're what's called an
19 expert witness. So Mr. John will be asking you about your
20 training and education in this area in order for you to
21 continue testifying. Ms. Crail may some just background
22 questions for you today.
23 A Sure.
24 THE COURT: But we may need to recall you as a witness
25 later so that she can do some independent research about this

1 area before she questions you.
2 A Sure.
3 THE COURT: Okay. All right. Go ahead, Mr. John.
4 DIRECT EXAMINATION CONTINUED
5 BY MR. JOHN:
6 Q Okay. Mr. Mathews, as far as the -- your background in
7 ascertaining elevation, could you go through some of the
8 training and the experience you have prior to my asking
9 you to do this?
10 A Yes, sir. Well, GPS -- GPS grade receivers came into
11 being really in the eighties and I first went to a
12 Trimble training on these in California in 1995 before --
13 before going over to Russia to lay out a pipeline route.
14 GPS works completely off of satellites. And at that
15 time, there weren't very many satellites and the training
16 was such that we had had to sometimes get up in the
17 middle of the night in order to be able to get enough
18 satellites to do the training stuff we were on.
19 Now, they're all over the place. There's our
20 satellites. There's Russian satellites. There's all
21 kinds. The -- what -- what it -- what it is, is distance
22 ranging. These satellites are going over in a -- in an
23 elliptical orbit that is extremely well-known after how
24 many -- how many thousands of orbits, and it's putting
25 out a signal. And there are lots of them. In this

particular case, we were interrogating eleven satellites. When this thing began and when I turned it off three hours later, we were interrogating nine satellites.

There was the -- the -- the receiver is set to record that information coming from the satellites every five seconds, and it's called an epoch, e-p-o-c-h. So at five-second epochs, these are all coming in and being stored on a compla -- compact flash memory disk card inside the receiver. That data is then downloaded and it can be utilized in conjunction with data from other receiver. If you're doing something like a big subdivision and you want -- you're trying to establish control and you don't have line of sight to use optical instruments, then GPS is the right tool.

And so it's -- it's a -- it's a means of getting a -- a very accurate data without having to see from one place to another. There's a little bit of a downside to it, in that when you're doing subdivision work this way, you can go out and do like these Alaska la -- state land surveys with GPS, and the guy that buys the property doesn't have a line cut between them, because we didn't need it with a GPS. And oftentimes, we'll be called back to cut line so he knows where his property lines are.

In this case, we're doing a single -- an observation at a single location, not for purposes of latitude and

longitude or -- or horizontal coordinates, but for the purpose of establishing what is known as, in this case, orthometric height, the exact elevation. On this -- on this sheet of paper, you'll see under reference frame about halfway down, and it says NAD83, X, Y, and Z. These are -- these are coordinates, X coordinate, Y coordinate, and Z is elevation coordinate.

The little number that's after that is the relation -- the -- the relative accuracy of what you get, The standard deviation of the -- of the data. In this case, in X, we had .011 meter.

MS. CRAIL: Judge, I'm sorry, before we get into the details on the case, I think --

Q Okay. Mr. Ma --

MS. CRAIL: -- we're still working on the --

MR. JOHN: Yeah.

MS. CRAIL: -- expert --

Q Before we get into the details --

THE COURT: Correct. Sustained.

Q -- in the course of doing your surveying work, how many times have you done this kind of activity looking -- gathering this kind of data?

A A dozen, I'd say.

Q Okay.

A All relatively recently, because I've only owned my GPS

receivers, my own receivers, here for about three -- three years now, three, four years.

Q Okay.

A Expensive tools.

Q Okay. And then -- and how expensive are they?

A Well, they're about $4,000 apiece for used receivers. I have four. It's between five and six thousand for the software for the -- from Leica at least for being able to deal with the data.

Q Okay.

A Then there's -- the rest of it is, of course, tripods and --

Q Yeah.

A -- all that.

Q And you use this data as a surveyor. Who employs you to do these things? Various entities or the state or could you indicate who you all work for or some --

A Well, I suppose an example recently, we're doing a state land survey down near Tok Junction, Tanacross, and we've used all the receivers quite a lot, and we're still in the process. That will be finished up sometime this summer when the bureaucrats decide where they want the monuments to be.

Q Okay.

A It's a standard tool. The GPS is a -- is a -- now is a

standard tool in -- in surveying. And with thi -- this kind of stuff is -- is survey-grade GPS, which is different than navigation GPS.

Q Okay. So in the surveying profession, it's a commonly-used tool?

A Yes, it is.

Q Okay. And you use it commonly in your practice?

A That's correct.

Q Okay.

MR. JOHN: I'd like to certify Mr. Mathews as an expert in using these types of tools to ascertain elevation and other data.

THE COURT: An expert in using GPS to ascertain elevation?

MR. JOHN: Yes.

THE COURT: Any objection?

MS. CRAIL: Could I voir dire just briefly, Your Honor?

THE COURT: Yes, you can.

VOIR DIRE BY MS. CRAIL:

Q So I'm just a little bit confused, sir, because it looks like you've been a surveyor for a couple of decades plus.

A Yes, ma'am.

Q And -- but you've only -- you said you've only done this kind of specific work maybe a dozen times or so?

A Strictly for elevation. The -- what it comes out --

primarily, this stuff is used for lat, long, and elevation.

Q Uh-huh.

A When you specifically call out for it, specifically for elevation, it's pretty much limited, then, to flood plain kinds of projects, ele -- elevation certificates.

Q So you said that your training initially was about 15 years ago, though?

A Yes, that was at the Trimble school when they --

Q Right.

A -- first came out. That's correct.

Q Okay. So it sounds like, though -- because you're saying if -- for the bulk of the stuff, doing it in Alaska, there weren't the satellites available to do that back at that point, initially?

A Well, they were there, but they were -- they were short windows.

Q Sure.

A That's what -- what we were doing in 1995 when we first started working with the GPS was a survey of a whole -- about a 30-mile portion of the Haul Road up near Wiseman.

Q Uh-huh.

A And -- and it was a touchy deal whether or not the GPS was going to give us the data that met the specifications, especially vertically, just because we

didn't have enough satellites sometimes to get good data.
Q Okay.
A That's certainly no longer the case. There's --
Q But more recently, certainly more. But so from '95 until now, 2015, though, if you've only done that about a dozen times, it sounds like most of it must have been in fairly recent years, then --
A It has been.
Q -- is that fair to say? Okay.
A It has been, yeah. In the last three years for the stuff that -- for --
Q All --
A -- the stuff I own, yes.
Q Okay. And then with your -- we're not using the GPS, is that more the old traditional surveyor with the known elevation and then your line of sight thing that we all see in movies and stuff?
A Pro --
Q I mean, I'm just guessing.
A Probably.
Q Yeah.
A The older ones would have been transits. The newer ones now are called total stations, which are doing what I think you mean to describe, which is turning angles and shooting distances with infrared wavelength light --

Q Uh-huh.
A -- as opposed to chaining distances.
Q Okay. But that would have -- was that what you would have originally trained on doing or is that -- was that ki -- like --
A I --
Q -- how it worked?
A I've -- I've been trained on probably most of -- most of it from -- from chaining techniques back, you know, at the University of Alaska in the early sixties on -- on through to a lot more high-tech stuff now, like this is kind of way high-tech compared to using theodolites and using a total station.
Q Okay. So -- but let me understand this, then. I mean, you said that this is generally used, to the best of your knowledge, in the field of surveying presently, these kinds of instruments?
A Yes, that's correct.
Q But --
A That's what I only have experience in using these for. They are used -- the GPS equipment is used for a great number of things: archeological sites. It's used -- it's used in almost every aircraft now and, in particular, military applications, artillery applications. It's -- GPS is pretty much into everything now.

Q Right. So let me ask you this. The -- what you're talking about, those specifically with relation to elevation as opposed to mapping locations via the satellite --

A Uh-huh.

Q -- the satellites and photography, is a distance-ranging method, if I understand what you're saying?

A Yes.

Q So you're --

A GPS itself is a distance-ranging method completely. It's -- it's picking up so much data from so many satellites for some period of time, and then in a case like -- anytime you're doing an OPUS solution, you're also getting all of the data from three other continuously operating receivers run by the government. So you're -- you're getting kind of the best of all the worlds in order to get the most accuracy.

Q Okay. So what -- so explain to me what these receivers are that you're referring to?

A Okay. They're called CORS stations, Continuously Operating Receiver Stations.

Q Uh-huh.

A They're operated by the National Geodetic Survey. And in the case of the three --

Q But what do they do, I guess is the question?

A They -- they -- they just -- they just sit in one place and collect data.

Q For -- but -- I guess from that perspective, I could say that my phone sits here and collects data. So what -- I mean, I -- what are they actually collecting? I mean --

A Okay.

Q -- because they're certainly not collecting just random things like how many squirrels ran across the --

A Nope.

Q -- lawn or something, yeah.

A They're collecting -- they're collecting the -- the signals from all the satellites that are within their interrogation range, which will be from approximately 15 degrees above the horizon --

Q Uh-huh.

A -- and one as they come into view and -- and fall below 15 degrees above the horizon behind you.

Q Okay.

A During that time, they're collecting all of the -- all of what's being put out by that satellite. And they're doing this for as many satellites as they can see. So in this case, say 11 satellites. So it's a -- a -- absolutely massive amount of data. This whole thing couldn't even happen without the -- without the data manipulating skills of computers now.

Q Okay. So I guess what I'm confused about is, is that there's such a variety of satellites, some of them are communication satellites. Some of them are, you know, for photography. Some of them -- so --

A Yes.

Q -- are you saying that, for instance, the satellite that's going -- that's dealing with satellite phones or the -- or internet bounce-back, would be collecting every single piece of data that's coming to and from that satellite for --

A No.

Q -- all of the different computers, you know, that are running up?

A No, not at all. These -- these are dedicated satellites strictly for this purpose. They were originally Department of Defense --

Q Uh-huh.

A -- and got into being able to be utilized by civilians in -- in the seventies and eighties.

Q Okay. So these are just GPS satellites then?

A Absolutely.

Q All right. So not just any old satellite.

A Right.

Q It's just limited type.

A Yeah.

Q All right.
A No, they're -- they're completely --
Q That clarifies.
A -- dedicated to just this.
Q Okay. So what they're doing, then, is not necessarily dealing with random communications or something. It's purely for GPS purposes. And what you're talking about is distance ranging?
A Correct.
Q Okay. Do they -- so they're -- that's even different then, than like satellite photography where they're -- that you might use to map your GPS. This is purely just to the distance ranging?
A That's correct. They are different from -- from -- from GP -- from photography, yes.
Q And if a person has a GPS receiver --
A Uh-huh.
Q -- is that bouncing off the satellites directly or off one of these stations?
A It's picking up satellite directly. The difference is in a hand-held receiver --
Q Uh-huh.
A -- is, is that it is a single-frequency, what is called the carrier frequency alone. And that's why when you have a hand-held receiver, you can -- you can only get to

a position that's about plus or minus 20 feet with that unit.

Q Okay.

A It's not -- it's not something that's survey grade. It's navigation. We call it a nav receiver, a navigation receiver.

Q Okay.

A Or -- used extensively in marine applications, aircraft applications, light aircraft applications; I'm not sure what they have on some of these big boys.

Q Okay. So they -- but purely for the -- for the surveying purpose, the GPS -- so the GPS data that's bouncing off these satellites isn't necessarily going to tell you what any given one of those hand-held devices is doing?

A Oh, no.

Q This is more of a ping kind of a situation --

A Well --

Q -- bouncing off the ground or --

A -- it's putting -- it's putting out a signal, and that signal can be picked up by anything that can pick it up.

Q Uh-huh.

A The -- the -- the difference in the receiver like -- like I'm using here or any surveyor is using, is called a dual-frequency receiver, L1 and L2. They may -- they may even have a note on here about that; not sure. But

it's -- you're -- you're -- you're utilizing two different -- two different frequencies, a carrier frequency, the L1, and then the L2 frequency. And you need them both in order to get the accuracy that we require in -- in GPS work for surveying.

Q Okay. Is that -- now, that's just with the two channels you're talking about bouncing off the satellites directly?

A They're not bouncing. They're just simply being transmitted --

Q Or --

A -- from the satellite.

Q Okay. So receiving --

A And we're picking --

Q -- the data from the satellite?

A -- it up with the receiver, yes.

Q Okay. But if you're surveying then, are you saying that the satellite already knows how far it is from that given location on the earth?

A No. It's just putting out its signal.

Q Okay.

A The receiver is picking that signal up and as a satellite goes over, it's going to be picking up a shorter, shorter, shorter, shorter, and then a longer, longer, longer signal the whole way. Then you add up -- when

you're picking this up from a whole bunch of other satellites, also, you come -- you come -- you can come to the conclusion as to where this receiver is. And that's what it's about is -- is --

Q Okay. So this comes from -- let me see --

A -- a distance or a -- a definition of a position.

Q Okay. So this is from a known -- from each individual satellite's known orbital height, what, above sea level or what?

A Well, I don't know the exact -- the exact orbits of these satellites by any means, but it's definitely an elliptical orbit that is extremely well-mapped and known.

Q Uh-huh.

THE COURT: We're going to need to break off. I'm about to address Mr. Simikin's matter.

MS. CRAIL: Right.

Q I'm still trying to figure out what all this entails and how you -- you know, how the accuracy is determined, so I -- yeah, I have a few more questions definitely.

THE COURT: Yeah, well, I think he's going to have to come back anyway --

MS. CRAIL: All right.

THE COURT: -- Ms. Crail. Madam clerk, did we hear from Mr. Michaels? Is he on his way? Because if so, we could try to get through voir dire at least.

THE CLERK: (Indiscernible - away from microphone)

THE COURT: No one has.

THE CLERK: (Indiscernible - away from microphone)

THE COURT: Let's do that.

MR. JOHN: Your Honor, if we got to the substance of Mr. Mathew's testimony and Ms. Crail doesn't really disagree with the substance of it, then maybe she won't -- we won't need to have him come back. I mean, it -- it's kind of --

THE COURT: We're going to have to come -- have him come back, because I need to take up Mr. Simikin's hearing.

MR. JOHN: Okay. So should we break for the day and reschedule then?

THE COURT: I think we should.

MR. JOHN: Okay.

THE COURT: Going to break for the day. We'll reschedule around Mr. Mathew's availability as well as counsel.

(The clerk places call re: other matters)

MR. JOHN: I'm pretty good next week, Your Honor.

THE COURT: Okay. 1:30 on February 4th?

MR. JOHN: That works for me.

MS. CRAIL: Let me check my calendar, Judge.

MR. JOHN: Is that -- Mr. Mathews, do you know if that works for you or do you need to check your calendar?

A Right now, my wife and I are waiting on an -- on a schedule for an operation on her thumb in Anchorage and I

1 don't know when -- when they're going to fit us in yet.
2 But when we get that, we'd better take it.
3 THE COURT: Yeah, you better.
4 MR. JOHN: Okay. For some reason, something comes up and
5 he has to leave, well, we'll just reschedule on the 4th then if
6 that's --
7 MS. CRAIL: That's fine with the state, Judge. Yeah.
8 A And I'll -- Robert, I'll -- I'll let you know the --
9 immediately as soon as I know. We're waiting on a call
10 from these people in Anchorage to --
11 MR. JOHN: Okay.
12 A -- to know when this is.
13 THE COURT: We're not going to disrupt your wife's
14 medical procedure, so --
15 A Oh.
16 MS. CRAIL: And that's fine.
17 THE COURT: We're going to shoot for Wednesday, February
18 4th at 1:30.
19 MS. CRAIL: Oh, Judge, Wednesday at 1:30 is calendar call
20 time.
21 THE COURT: Okay. Thursday, I have from 1:30 to 2:45.
22 MS. CRAIL: That would be far better for us. It's just
23 that's our calendar call. Having -- I'm always having to --
24 MR. JOHN: Thursday, 1:30 to 2:45.
25 THE COURT: Thursday, February 5th, 1:30 to 2:45. If Mr.

Mathews needs to be away for his wife's procedure, he'll let Mr. John know and we will use that time to reschedule.

MR. JOHN: Okay.

THE COURT: Okay. Thank you. We'll be off record.

MS. CRAIL: Tuesday, February -- or Thursday, February 5th.

THE COURT: Thursday, February 5th, 1:30 to 2:40 --

(Off record)

THE CLERK: Back on record.

THE COURT: Okay, we're going to be back on record, Ms. Crail.

MS. CRAIL: I apologize, Your Honor.

THE COURT: That's okay.

MS. CRAIL: As soon as we got that locked down, Sergeant Moore let me know that he's not available the 5th through the 11th and he is my case officer, so I need him.

THE COURT: I understand. Okay. Friday, February 20th, 1:30 till when? How much more do we need?

MR. JOHN: Well, depending on -- quick -- I probably a half hour with Mr. McKelvey, and I don't know how long we're going to be with Mr. Mathews. I figure we can argue it and then the court can decide it or take it under advisement as it --

THE COURT: So should I go 1:30 to 3:30 or are we going to need the whole afternoon?

1 MR. JOHN: I think 1:30 to 3:30 should -- I don't know --
2 I mean --
3 MS. CRAIL: Judge, based on prior experience, I'm going
4 to say let's take the whole afternoon if the court has
5 additional time, I'm sure the court can find something else to
6 do that afternoon.
7 THE COURT: I'm sure I can. Okay. We're going to have
8 the whole afternoon --
9 MS. CRAIL: I'd like to finish this.
10 THE COURT: -- 1:30 to 4:30, and that's going to be
11 again, Friday, February 20th, 1:30. So, Mr. McKelvey -- or Mr.
12 Mathews -- sorry. Mr. Mathews, Friday, February 20th at 1:30
13 unless that's the time that your wife --
14 A Yes, ma'am.
15 Q -- or something else in your personal affairs. Okay.
16 Thank you. We'll be off record.
17 THE CLERK: Off record.
18 4:22:29
19 (Off record)
20 * * * * * *
21
22
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25

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5 EVIDENTIARY HEARING RE: MOTION TO SUPPRESS - CONTINUED
BEFORE THE HONORABLE BETHANY HARBISON
6 Superior Court Judge
7 Fairbanks, Alaska
February 20, 2015
8 1:51 p.m.
9 APPEARANCES:
10 FOR THE PLAINTIFF: ELIZABETH F. CRAIL
District Attorney's Office
11 455 Third Avenue
Suite 150
12 Fairbanks, Alaska 99701
13 FOR THE DEFENDANT: ROBERT JOHN
Attorney at Law
14 PO Box 73570
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18
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20
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25

P R O C E E D I N G S

1:51:16

THE CLERK: On record.

THE COURT: We're on record, State of Alaska versus John McKelvey, 4FA-14-40. We're here for continued evidentiary hearing. Mr. McKelvey is present in custody represented by Mr. John who is here. Ms. Crail is here for the state. And we had heard from Lieutenant Rodgers. I think there was some question about calling new witnesses this time, right?

MR. JOHN: We were with Mr. Mathews last time and Ms. Crail was examining him. Seemed like we were pretty much still doing voir dire relating to his being an expert.

THE COURT: Oh, okay.

MR. JOHN: And we had scheduled this at this time for everyone's schedules including Mr. Mathews and his wife. And I spoke with him on Wednesday, and as it turned out -- I talked to him Wednesday evening -- he had to go down there with her Wednesday for her operation.

But I spoke with Ms. Crail subsequently and indicated where exactly we were trying to go with Mr. Mathews' testimony, which was basically to show the elevation at Mr. McKelvey's property versus the elevation in the Chena River floor that the trooper was talking about. And my understanding is we will stipulate that the elevation at Mr. McKelvey's property is 150 to 160 feet higher, and then we can be done with that issue and

move forward. Is that correct?

THE COURT: Okay. So the parties' stipulation is the elevation at the McKelvey property is 150 feet to 160 feet above the elevation at the Chena River.

MR. JOHN: Yes.

MS. CRAIL: Well, I guess not Chena River floor; I think the Fairbanks International Airport --

MR. JOHN: Fairbanks International Airport.

MS. CRAIL: -- which is what the -- which is what Lieutenant Rodgers had specified that -- was his starting point --

MR. JOHN: They --

MS. CRAIL: -- for assuming elevation.

THE COURT: All right. Higher than the airport.

MS. CRAIL: Right.

MR. JOHN: Yes.

MS. CRAIL: I think he testified already to the elevation of the airport, but I just want to make sure that that's in our argument as well.

THE COURT: He might have done it; I don't recall.

MR. JOHN: Yeah, I believe he testified.

THE COURT: Okay. So Mr. Mathews --

MR. JOHN: Yeah.

THE COURT: -- won't be called anymore as a witness, but the parties have stipulated to this fact on the record and the

court accepts the stipulation of the parties. Okay. What else?

MR. JOHN: I call Mr. McKelvey, then, to the stand.

THE COURT: Okay. Mr. McKelvey, can you make your way to the witness box? Mr. John, I'm going to go ahead and return, then, the Mathews' e-mail --

MR. JOHN: Yeah, we won't --

THE COURT: -- to you.

MR. JOHN: -- need to put that into evidence.

THE COURT: Yeah. There you go. Okay. Madam clerk will administer the oath.

(Oath administered)

MR. MCKELVEY: I do.

THE CLERK: Thank you. You may be seated.

JOHN MCKELVEY

called on his own behalf, testified as follows on:

DIRECT EXAMINATION

THE CLERK: And for the record, would you please state your full name and spell first and last.

A John William McKelvey III, J-o-h-n M-c-K-e-l-v-e-y.

THE CLERK: Thank you.

THE COURT: All right. Mr. John, you may inquire.

BY MR. JOHN:

Q Mr. McKelvey, you've been present here when we presented a number of photographs and the like of your property,

have you not?

A Yes.

Q Have you had a chance to personally review all those photographs?

A Yes, I have.

Q Okay. Now, referring to the photographs we presented earlier about the various signs on your property, could you tell us about those and the purpose?

A About the signs?

Q Yeah.

A Yeah. Basically -- I mean, basically, I live out of town. I -- I got private property signs all the way around my house, but I can't see any of my neighbors. I just -- I like my privacy. There are signs posted on all four corners and throughout the woods. And, basically, I have them going down the driveway, also Beware-of-Dog signs; I have two Akitas.

And when I'm gone for any long periods of time or whatever, a gate on my driveway. And they've all been there since I moved in. The gate, a couple years after, but, yeah, I've always been a very private person. I mean, I -- a hot tub in my yard and a sauna house. I don't know. I just enjoy my privacy. I mean, it's one reason I live out of town.

Q Now, if someone were to drive down your driveway to your

1 front door, would they be able to see any of these items
2 in the backyard that we see in this picture here?
3 A No. The -- no, you can't see the shop, my greenhouse.
4 Basically, even if there's -- or three vehicles back
5 there, you couldn't see them if you drove down the
6 driveway.
7 Q Okay. Now, I'm going to hand you what's previously
8 admitted as Exhibit G. So you have in front of you
9 Exhibit G. Can you identify what that appears to be?
10 A This is my property.
11 Q Okay. So the pho -- one of the photographs that the
12 troopers took from the air?
13 A Yeah.
14 Q Okay. So on the day in question, where were you?
15 A I was inside the shop.
16 Q Okay.
17 A And the shop would be the building right there in front
18 of my car.
19 Q Okay.
20 MR. JOHN: Does the court have a one of the exhibit --
21 photos of it -- with it -- that they can or does it need one?
22 THE COURT: I may be able to follow along. Let's see.
23 MR. JOHN: I -- I mean, I can give you one of my copies
24 of it. I don't know if I have an extra copy of that one, but
25 (indiscernible). I can give you my copy. Basically, it's --

THE COURT: I've got G.

MR. JOHN: You got G. Okay.

Q So when you're talking about the shop, is that the brown building with the car in front of it?

A Yeah.

Q Okay. What were you doing in the shop?

A I was getting a battery charger out so I could jump my vehicle.

Q Okay. Is that why we see the hood of your vehicle up?

A Yeah.

Q Okay. Okay. And where were you in the shop?

A Basically, I would have been inside on the -- if you look at the picture, it would be the left-hand side of the building.

Q Okay. And describe to us what you heard when you were in the building there?

A I heard -- heard a very loud engine, and I immediately assumed it was a plane. I mean, it was -- it was very loud. I didn't know if it was landing on Grange Hall or Chena Hot Springs. I'd, you know, never heard a plane that loud flying over my house. I knew it was very close. I immediately came out and looked and kind of the only thing I seen was the tail end of the plane kind of over where Grange Hall Road would have been on the right side of the picture.

Q Okay. And that was just a brief glimpse of the plane?
A Yeah.
Q Okay. And then what did you do after that?
A I went back inside.
Q Okay. And then what happened?
A I don't know, it was two, three minutes, later, maybe, it came back through and I came back out into the entryway, and as I was stepping out through the entryway, I looked up and there was a plane right there, right above the yard.
Q Okay. And you indicated in your affidavit about how high you thought it was.
A Yeah. I estimated it was three, four hundred feet maybe.
Q Okay.
A You know, a couple times the -- the height of the trees.
Q Okay. And how about --
A It wasn't --
Q -- the noise of it? Was it --
A Oh, it -- it was very loud.
Q Okay.
A It -- it startled me inside. That's why I came running out the first time. Yeah, I'd never heard a plane that loud flying over.
Q Okay. Okay. Now, we've heard some testimony about there being an airport a mile or more away. Do -- are you

familiar with that airport at all or --

A I know there's one down at the end of the road. I don't ever get any planes flying over from it. There are -- is some air traffic there, but I'm assuming that's out to the hot springs and they are several times higher than -- than what this plane was flying over.

Q Okay. And they're not flying over your property?

A No, no.

Q Okay. So it -- was what you observed on the day in question unprecedented?

A Yeah, that's the first time I've ever seen a plane that low.

Q Okay. Okay.

A Even a microlight at that -- at that, you know. I'd never seen even a microlight that low.

MR. JOHN: I have no further questions of Mr. McKelvey.

THE COURT: Ms. Crail?

MS. CRAIL: Thank you, Your Honor.

JOHN MCKELVEY

testified as follows on:

CROSS-EXAMINATION

BY MS. CRAIL:

Q So, Mr. McKelvey, this property you're talking about, you're actually a renter, is that correct?

A I rent on -- on the property, that is correct.

Q Yeah. And do I understand correctly, there's more than one residence on the property -- parcel?
A There -- there's one cabin and a -- and a small shop.
Q Okay. And then there's your -- separate from your property or separate from the one that you rent?
A No.
Q So you're talking about just your little patch there; you're saying there isn't --
A Everything you see --
Q -- anything else that's on that parcel?
A -- in -- oh, excuse me. Everything you see in picture G here, is -- is what I rent.
Q Right. No, I'm talking about something else on the -- that parcel of land, not in the picture.
A I don't understand what you're asking, ma'am.
Q Okay. The property you rent is on a piece of land belonging to somebody else, correct?
A Correct.
Q And that piece of land belonging to somebody else besides the buildings that you are renting there, there is also a separate cabin or other residence elsewhere on the -- on that parcel of land; that's what I'm talking about.
A No. I have the cabin I live in here and the shop. And there's no other buildings. Just a small sauna house.
Q All right. Never mind. What -- you wrote an affidavit

with respect to this case back when the motion was filed, is that correct?

A Yes, ma'am.

Q And you signed that under oath?

A Yes.

Q In that affidavit, you never did say that you saw a plane fly over more than once, correct?

A I don't recall.

Q You described it only as a dark-colored plane.

A Yes, ma'am.

Q Did not identify any trooper markings on it.

A I don't have very good eyesight, ma'am.

Q Do you wear glasses?

A I have corrective lenses. I have them in right now.

Q Okay. What's your prescription?

A I don't recall what my exact prescription is.

Q Right, but you should have an idea of what -- you're presumably saying you're not 20/20; you should have a rough idea of what your 20 over what is.

MR. JOHN: If you know. Don't --

A I don't -- I don't know what it is, ma'am.

Q No idea?

A I don't know what my prescription is.

Q So you're telling us that this -- that that day, you were not wearing corrective lenses, right?

A I -- I was.
Q Okay. But you just said you don't have very good eyesight, which is why you didn't -- so the corrective lenses don't work that well?
A Not in my left eye, no. I had -- when I was younger, I left my contacts in for eight or nine months and I have corneal ulcers, so my eyesight is constantly changing.
Q Uh-huh.
A And it's been a long time, probably six years, since I've had an eye exam.
Q Okay. I guess, well, I -- that's what I'm trying to clarify, though, is you said -- so you did not -- you were not able to recognize any trooper markings on the plane, because you have poor eyesight is what you're saying?
A The only -- the only thing I seen of the plane was a -- a face in the mirror -- or face in the window. And, I mean, I was looking at the face and not really the plane. I noticed the dark plane.
Q Now, you're saying that this second time that you're saying that you saw a plane come over your house, it was flying back over your house, then, back from the direction that you thought that you saw the tail disappearing into?
A Yeah, yeah. Roughly0 the same path, I'm guessing.

Q And so this was coming -- would have been coming back the other opposite direction?
A Yes, ma'am.
Q Back toward Fairbanks, presumably?
A Yes.
Q And you said originally, at the time that you observed this, that you had saw it from the doorway of your shop?
A Yes.
Q But now just today, you said that you were -- that you walked outside and looked.
A I caught the tail when I walked outside the first time.
Q Okay. And --
A And the second time was in the doorway, yes, right -- right outside my shop.
Q So did you come out or didn't you?
A I don't think I stepped outside of the shop the second time. I mean, it was -- it was right there right above my -- my property.
Q So you were standing in the doorway?
A In the doorway, that's correct.
Q Which doorway on that picture?
A There's a cabinet right in front of my car. If you look at the cabinet, it would be right to the left-hand side of the cabinet there.
Q Uh-huh.

A I would have had to step around the cabinet there to see the -- it go by the first time.

Q Uh-huh. And so right there, you're saying that you're standing there should be visible from the photo, is what you're saying.

A Pardon me?

Q You're saying you should be visible from the photograph.

A I'm under the understanding that these were taken on the way past the first time as to the picture layouts.

Q Okay. So you're saying that you have no idea where they flew over, though, the first time?

A I'm assuming --

Q Because you only saw it -- you only saw the tail disappearing over Grange Hall Road when you came out on that one?

A Yeah, it was the same path it came back through.

Q And you don't think they took any pictures on the way back?

A I don't know.

MR. JOHN: Objection; asks for speculation.

MS. CRAIL: I'm trying to find out what's -- what he's trying to testify to here. He says that you don't see --

THE COURT: Overruled.

MS. CRAIL: -- him in the picture, because --

THE COURT: He can answer.

Q -- this was the first time through, right?

THE COURT: If he doesn't know, he can say so. If he knows, he can say so.

Q That's what you're saying is you're not visible on the picture because these were taken over the first flyover, right?

A That's what I'm assuming.

Q You didn't suggest that you could identify the person's face that you say you saw in the plane?

A I couldn't identify the fa -- face, no.

Q All right. Did you take note of what day that was?

A I didn't -- I know it was the 24th, that day -- around that day. I didn't take special note of it, no.

Q So why do you know that it's the 24th?

A Why do I know?

Q Uh-huh.

A Well, I was looking at paperwork that you guys have given me and, I mean, you know, I know it was right before the search warrant thing happened.

Q Did you pay attention to that when you got the search warrant?

A Pardon me?

Q Did you go back and think about that when the search warrant was served on you?

A Not when it was served; afterwards, yes.

Q How much after?
A You know, it would -- would have been that night. You know, I didn't have a whole lot of time to reflect on things while I just was being served.
Q Uh-huh.
A I didn't put two and two together, no.
Q Okay. So when did you put two and two together?
A Like I say, it would have been later that evening, the next day, maybe.
Q You weren't arrested in this case on that day, is that right?
A Yes, I was.
Q For -- not for these charges, though?
A No.
Q Okay. For something else?
A FASAP requirements.
Q Uh-huh.
MS. CRAIL: I think that's all I've got, Judge.
THE COURT: Mr. John?

JOHN MCKELVEY

testified as follows on:

REDIRECT EXAMINATION

BY MR. JOHN:
Q So you were aware of the plane flying over your property, correct, Mr. McKelvey?

A Oh, yeah. That's -- that day, yeah.

Q When was the first time you were aware it actually took photographs of your property? Were you aware before this case was filed against you?

A No, no. Not until --

Q Sometime thereafter?

A Yeah.

Q Okay. Okay.

MR. JOHN: No further questions of Mr. McKelvey.

THE COURT: Ms. Crail, anything from that?

MS. CRAIL: No, Judge.

THE COURT: Thank you, Mr. McKelvey. You're excused as a witness. Mr. John, any other witnesses?

MR. JOHN: That is my last witness, Your Honor. Give the exhibit back to madam clerk.

THE COURT: Thank you. Ms. Crail?

MS. CRAIL: Your Honor, I'd like very briefly to recall Lieutenant Rodgers just to clarify the stuff based on the stipulation regarding the height of the property.

THE COURT: Okay.

MS. CRAIL: Judge, I don't see him, but I know he just stepped out. I think the only likely place for him to be is a place I can't really look.

THE COURT: Right. Let's take a 10-minute break.

MS. CRAIL: Okay.

1 THE COURT: And then we'll have him back at, what,
2 2:25 --
3 MR. JOHN: Yeah.
4 THE COURT: -- right around there.
5 MS. CRAIL: (Indiscernible - away from microphone)
6 THE CLERK: Off record.
7 (Off record)
8 THE CLERK: On record.
9 THE COURT: On record again for State versus Mr.
10 McKelvey, 4FA-14-40. Lieutenant Rodgers, you can go ahead and
11 have a seat. You've already been sworn, sir. I'll just remind
12 you, you're still under oath. You're being recalled, now, as a
13 witness. And, Ms. Crail, you may inquire.
14 MS. CRAIL: Thank you, Your Honor.
15 JUSTIN RODGERS
16 previously sworn, testified as follows on:
17 REDIRECT EXAMINATION
18 BY MS. CRAIL:
19 Q Lieutenant Rodgers, did you get a chance to be made aware
20 of the stipulation issue with respect to the relative
21 height of the defendant's property --
22 A The elevation --
23 Q -- compared to the airport before coming back in here
24 today?
25 A Yes.

Q And I just needed you, given that piece of information, putting the property, I guess, about 150 to 160 feet above the airport property, whether that would make any difference in your assessment of your height above his property when you were doing this flyover?

A It does not.

Q Were you below 500 feet at any point, to the best of your ability?

A I -- I -- to the best of my recollection, I did not need to operate within 500 feet of any people or property on the ground that day other than taking off and landing, so --

Q Now, just so we're clear, I just wanted to be extra especially clear, because your previous testimony has suggested that the -- there was not a great deal of difference; you were not estimating a great deal of difference between the airport property and this property when you were doing your height estimations, is that correct?

A Yes, that's correct.

Q And when you say a great deal of difference, were you referring to something that -- within a couple hundred feet or were you referring to smaller or larger --

A I would -- I mean, several hundred feet. You know, on the maps I look at routinely, they show contour lines to

show differences in elevation and I didn't see any change in contour lines between Fairbanks airport and the Chena River Valley near -- Pleasant Valley Store is named on there, for example.

Q Now, would you take into count that several miles of river flowing would require some raise in elevation regardless?

A That's certainly natural, yes, that -- that the elevation raises gradually the further you typically get from valleys -- you know, valley floors, so I don't have any reason to dispute it's slightly higher, though, or whatever, 250 feet higher.

Q Based on your -- and I think you testified previously that you had many years of experience as a pilot, is that correct?

A Yes.

Q Would you have a pretty good sense of how close you are to the ground regardless of an altimeter?

A I -- I think pretty good, yes.

Q Okay. I mean, are you -- were you going to -- if your altimeter was off, are you -- I mean -- or wasn't working or something like that, would you have an idea of whether you were too close to the ground?

A Yes, I would. I mean, I think I would recognize -- I'm not going to tell you that I know the difference between

499 and 500 or 501 feet, but my recollection of that flight is, I was able to complete it, you know, well -- well above, you know. And I think I testified that I'm confident. I was at least 1,000 feet the whole flight and, you know, other than departure and takeoff. And as we've already beat to a dead horse, I do not remember, specifically, my altitude and did not note it, but my recollection is I -- I was taking my cues, as you know, from Sergeant Moore, and I specifically remember recalling, you know, is this a good altitude; oh, yeah, it's just fine. And I remember noting that, jeez, we didn't even need to be low to do this, you know. So that's -- that's what -- that's what sticks in my mind.

Q Lieutenant Rodgers, I just had one other question for you. To my recollection, your earlier testimony, you talked about flying over the two pieces of property and then back to Fairbanks. Is that roughly correct?

A Roughly, yes.

Q Did you fly over either of the properties more than once?

A Well, I don't think so. I think we went right by and -- you know, went by one, maybe cha -- had a slight heading change to get to the second one. I've already told you, I don't remember which is which or never knew. And made a turn and went back to Fairbanks. I don't think we had anything else of interest to look at. And -- and I don't

remember -- sure don't remember flying back over either of those properties.

MS. CRAIL: I think that's all I've got, Judge.

THE COURT: Okay. Mr. John?

JUSTIN RODGERS

testified as follows on:

RECROSS EXAMINATION

BY MR. JOHN:

Q Yes, Sergeant Rodgers. You recall testifying previously, correct?

A I -- I know I've been here a couple times, sir.

Q Okay. Okay. Do you recall saying the following: "It's possible we turned around and flew over it again on the way back"?

A You know, the possibility exists. I -- I don't recall doing it, but I think that's what I was getting at.

Q Yeah. But then you were new to the area at that time, correct?

A Most certainly new to the area, yes, sir.

Q Okay. Okay. Do you also recall testifying, "my recollection was between 600 and 1,000 feet"?

A Of AGL, yeah, above the ground.

Q Right.

A Yeah.

Q That was -- that were your test --

A Not -- not MS -- I mean, we're kind of mixing the two elevations typ --
Q Right, right, right.
A Yeah. So that's what I -- you know, that's consistent --
Q Yeah.
A -- with what I've just said.
Q Right.
A I -- I'm confident, we didn't need to be --
Q Yeah.
A -- very close to do what -- what happened that day, but --
Q But if you take the 600 feet and knock off 150 feet, you're at 450, correct?
A I would -- well, yeah, but I'm talking 600 above the ground. It doesn't matter. You're -- you're conv -- you're -- you're mixing MSL and abo -- AGL, above ground level, mean sea level.
Q Yeah.
A So whether I'm 600 feet above ground level and the -- the overall elevation is 2,000 feet or 500 feet, it doesn't matter. You're still 600 above ground level.
Q You were basing your -- you testified, at least, that you were basing your estimates upon the Fairbanks International Airport.
A Okay. Here's what I recall. I know the Fairbanks

airport is 450 feet. And I know there's not, in my mind anyway, a significant difference as shown on an aviation sectional map between Fairbanks airport and Pleasant Valley.

And -- and I know that I used -- you're right in that I was assimilating something close to 450 feet to that part of the flight, no doubt about it. But if I refer to being 600 to 1,000 feet above the ground, it does not matter. That's what I mean, above the ground, not -- doesn't matter if the ground is 600, 400, 200, if -- if my altimeter said 600 feet, I mean, it -- in that location, I'd be at zero. I'd be running into the ground, right, and I would be at 1,000 and -- or 250 feet in Fairbanks, so that's -- that's not what I was talking about. Does that make sense?

Q Yes.

A Okay.

Q So if your altimeter said 1,050 feet, and you took off 450 for the Fairbanks airport, then you're 600 feet above the ground, correct?

A Yes.

Q Okay.

A Yeah.

Q But what I'm saying is, you were looking at --

THE COURT: No, you're 550.

A Okay. 550 doing the math quickly, but -- 1,050 minus 450 is --

THE COURT: Oh, 1,050 was the question?

A Isn't that six --

MR. JOHN: Because he used 1,050 as an example.

THE COURT: Oh.

A Yeah.

THE COURT: Yeah, you're right.

Q But if you take off --

THE COURT: Okay.

Q -- 450, that would put you at 600, correct?

THE COURT: Yeah.

Q And you were basing it looking on -- at your altimeter?

A I -- I remember looking at my altimeter during that flight, I mean, just as a reference, jeez, how high -- you know, how -- what's it say. You know, but I think when I'm talking between 600 and 1,000, I'm talking my perception of above ground level, you know, both visually and probably from my altimeter if -- is that what you're asking?

Q Well, you testified previously that you were looking at your altimeter to figure out how high you were above the ground based upon Fairbanks International Airport.

A I think I, yeah, said something like, I glanced at my altimeter a time or two during the flight just to

corroborate my --

Q Okay.

A But you understand that if I'm flying along with an altimeter at 600 feet, I'm in the dirt at that property --

Q Right.

A -- and I'm 150 --

Q Right.

A -- feet and so I don't think that's --

Q Right.

A -- an accurate --

Q Right, yeah.

A -- representation.

Q But if your altimeter read 1,050 --

A Yes.

Q -- and you're over Mr. McKelvey's property and his property is, say, 150 feet higher than Fairbanks International Airport --

A Yeah.

Q -- you would then be 450 feet over his property. Is that correct?

A That I -- I believe that to be true, yes, sir.

Q Okay. I --

A Yeah, I agree with that.

Q Okay. Okay.

MR. JOHN: No further questions.

THE COURT: Ms. Crail?

JUSTIN RODGERS

testified as follows on:

REDIRECT EXAMINATION

BY MS. CRAIL:

Q Just so we're clear, though, your testimony is, if I remember -- if I'm understanding what you just said, let me tell -- let me find out, that your basis for the 600 to 1,000 feet over the property was not based on your altimeter or it was?

A I think I -- I recall looking at that altimeter. I mean, we're talking a couple years ago, and -- but I'm also pretty acutely aware of judging my elevation from the ground. I would have used a combination of those two to assess how high I was over the ground.

Q Okay.

A And -- and without relistening to my testimony from whenever that first hearing or second hearing whenever was, the reason I don't -- when I'm talking 600 to 1,000, I guess I'd have to know exactly the context I was testifying at that time, since we've talked about both, but --

Q Both the AGL being above ground level --

A Sure.

Q -- and the --
A Yeah.
Q -- MSL being above mean sea level, right?
A Right, I mean --
Q Okay.
A -- you know, so for example, the airport is 450 feet above mean sea level. His property is 603 feet allegedly or stipulated to, above mean sea level. You don't set your -- you don't start at zero in an airplane at the airport. You start -- you know, it shows you're 450 feet and so -- anyway, I -- I don't know. I -- I guess, I -- I could listen to the testimony from before if I'm -- haven't been clear enough. I'm sorry.
Q Okay. I guess, just so we're clear for the record, though, what you're talking about above their prop -- his property, was estimated at 600 to 1,000 feet above ground level, not above mean sea level?
A I be -- yes, I believe that to be correct, because mean sea level, I'd have been in the freaking dirt. That doesn't make any sense to me. I don't think I ever said I was 600 feet MSL over his property. That doesn't make sense. That -- that make sense?
THE COURT: I would think it --
MR. JOHN: I don't think --
THE COURT: I have --

MR. JOHN: I don't think you said that either, because there'd be --

A Okay.

THE COURT: Yeah, I don't think he did. I haven't been --

MR. JOHN: Yeah, no. It was --

THE COURT: -- confused at all about what he's saying.

A All right.

MR. JOHN: I -- yeah. I -- we're -- I was -- I'm just talking about the difference in elevations between the two places.

A And I understand that difference, sir, and it makes sense what's been explained.

MR. JOHN: Okay.

THE COURT: Anything else for him, then?

MR. JOHN: No, Your Honor.

MS. CRAIL: I don't --

THE COURT: Okay. Ms. Crail, did you want to ask him more questions?

MS. CRAIL: Nope, I'm good.

THE COURT: Okay. Thank you. You're excused.

A Might I be recalled?

THE COURT: What's that?

A Might I be recalled or not?

MR. MOORE: Again.

THE COURT: No, we're not going to --

MR. JOHN: I think we're done with evidence for once.

MS. CRAIL: You know, Mr. Rodgers, I can't promise you anything at this point --

MR. JOHN: Right.

A Okay.

MS. CRAIL: -- but hopefully, we can excuse you, so thank you very much.

A I'll keep my cell phone handy or you won't be able to --

THE COURT: You're not being recalled today. I won't allow it.

A All right.

MS. CRAIL: That sounds good.

A Okay.

MR. JOHN: Thank you.

THE COURT: Thank you.

MS. CRAIL: Your Honor, and I had one other thing for -- from Sergeant Moore. We're waiting to -- the property -- where the -- basically, it relates to the property lines for that parcel of property and the -- you know, his looking into that and the angles determining where exactly he flew over. Some of his earlier testimony was very general. He suggested that based on his recollection of where he was and what he was assuming, that he had -- that he believed that he was over the neighbor's property. I believe he did testify to that. But

1 what I asked him to do, especially given the details of the
2 defense case, was to take a look at the actual borough database
3 and confirm where the property lines were and figure out what
4 the numbers would work out to. So I want an opportunity for
5 him to present that. And I believe he had looked up those
6 items in between.
7 MR. JOHN: Are the --
8 MS. CRAIL: It does make -- I think it does make a
9 difference with respect to the argument as far as where they
10 flew.
11 THE COURT: Mr. John?
12 MR. JOHN: Are these diagrams something I can look at or
13 what --
14 MS. CRAIL: I think --
15 MR. JOHN: -- do we have that we're testifying --
16 MR. MOORE: It's Google Earth and it's --
17 MR. JOHN: -- to?
18 MR. MOORE: -- borough property databases.
19 MR. JOHN: I mean, if the sergeant is testifying about
20 what he sees on Google Earth, that's hearsay, but I need to --
21 THE COURT: Sustained.
22 MS. CRAIL: Well, he's -- I think he's -- what he's
23 saying is he's used -- would use Google Earth to demonstrate
24 what he's talking about, so he's referencing what the -- like
25 this is the spot I'm referring to. This is the line I'm

1 referring to comparing it to the Borough database, that kind of
2 thing, not -- I think it's demonstrative. It's not the basis
3 of the testimony.
4 THE COURT: I'd be surprised, but we can try it that way.
5 MR. JOHN: Oh.
6 THE COURT: How am I going to keep the -- a record of
7 what he is showing me, though?
8 MS. CRAIL: He's going to snap a screenshot and e-mail
9 those screenshots and we'll print them for the record.
10 MR. JOHN: Well, I'd like to be able to see it when he's
11 testifying. It's kind of an awkward or difficult to not have
12 it (indiscernible) they're going to put it up in the courtroom
13 so everyone can see it to try and figure out what he's
14 testifying to and then look at it later. It's --
15 THE COURT: We can do that, I guess. It would take a
16 minute.
17 MR. JOHN: I mean --
18 MS. CRAIL: Ju -- I mean, we can do it. We can take a
19 few minutes. I just need to get the -- get a projector over
20 here, but we can do that.
21 MR. JOHN: I'd like to get done today. I mean, I think
22 we're basically ready to argue it --
23 MS. CRAIL: So we're -- that's why we said all afternoon
24 just in case.
25 MR. JOHN: -- other than --

THE COURT: And we have -- it does seem like we have plenty of time.

MR. JOHN: Other than how long it's going --

THE COURT: Shall we take 20 minutes, then, and just --

MS. CRAIL: I don't -- I'm not sure it will take 20, but --

THE COURT: Okay.

MS. CRAIL: -- but sure, 15 maybe, 20 to --

MR. JOHN: Let -- shorter is proba --

MS. CRAIL: -- give Mr. John enough time.

MR. JOHN: Yeah.

THE COURT: If we say 20, then also Mr. McKelvey could go downstairs and he could not have to sit here in the courtroom which might be nicer for him.

MS. CRAIL: That's fine, Judge. And if for some reason, we think we need the court back earlier or that we're all ready --

THE COURT: Yeah.

MS. CRAIL: -- to go and it's much sooner, maybe we can just tell madam clerk.

THE COURT: Okay. So we'll get that set up.

MR. JOHN: And he can -- he'll -- can get brought back up real quickly, then, so we're not -- that's not going to be a problem?

THE COURT: I'm sure he can. We'll go back on record at

3:00 o'clock.

MR. JOHN: Okay.

THE COURT: We do this all the time. I don't think it's a big deal.

MR. JOHN: Okay.

THE COURT: Okay. We're off record.

THE CLERK: Off record

(Off record)

THE CLERK: On record.

THE COURT: On record, State versus McKelvey, 4FA-14-40. Mr. McKelvey is here in custody. Mr. John is here, Ms. Crail, and we are ready to hear from Sergeant Moore. We seem to have the overhead projector working. So --

MS. CRAIL: We had to swap to another computer, because the one that was all set up, unfortunately, is out of juice.

THE COURT: Oh.

MS. CRAIL: So --

THE COURT: We're just switching it around now, okay.

THE CLERK: (Indiscernible - simultaneous speech and away from microphone)

MR. MOORE: We have some of our photos, I thought, in evidence or in the -- didn't we already go over some of this, you know, as far as lining out the property line and where it was, you know (indiscernible - simultaneous speech).

MS. CRAIL: We did some sketches I know.

THE CLERK: I have no state exhibits.

MS. CRAIL: Why don't you ask -- I thought that maybe it was just -- I think that might have been just what was attached.

THE COURT: Let's pause the recording.

THE CLERK: Off record.

(Off record)

THE CLERK: On record.

THE COURT: On record again. Sergeant Moore, you're still under oath.

MR. MOORE: Yes, ma'am.

THE COURT: I'll just remind you of that. And, Ms. Crail, you may inquire.

MS. CRAIL: Thank you, Your Honor.

JOSHUA MOORE

previously sworn, testified as follows on:

REDIRECT EXAMINATION

BY MS. CRAIL:

Q Sergeant Moore, did you have an opportunity after basically hearing as -- at the -- that where the defense evidence was going and so forth, to do some research on the property lines and compare that to the photographic evidence that's already been presented that was taken by you on the day of --

A Yes, ma'am.

Q -- the flyover? And can you explain to the court what you did -- first of all, what did you look up? What were you trying to compare?

A Can I grab defense Exhibit G, the one that we were referencing before? So, Your Honor, basically what I did, is I pulled up a Google Earth image like we had before through the record. I think we've went over that --

MS. CRAIL: And, Your Honor, I believe that's the -- that was Exhibit 1 attached to the state's motion --

THE COURT: Yep, I see it.

MS. CRAIL: -- for the state's motion response. Okay.

THE COURT: Okay.

MS. CRAIL: So we're all talking about the same piece.

A And then I pulled up --

THE COURT: Or Exhibit 2, Ms. Crai -- 1?

MS. CRAIL: I think it's --

THE COURT: 1.

MS. CRAIL: Maybe it's 2. It's the --

THE COURT: 1 has a --

MS. CRAIL: It's the closeup.

THE COURT: -- yellow line, is that the one he's wanting to --

MS. CRAIL: No, it's the closeup, so I guess it's 2; I'm sorry.

1 THE COURT: 2. Okay. Mr. John, are you with us?
2 MR. JOHN: Yes, Exhibit 2.
3 THE COURT: Okay. Exhibit 2. Okay. Go ahead.
4 A So I kind of compared the borough property lines which
5 you can see up on the overhead projector with the --
6 essentially, what you'd consider like voids and what not
7 like that on the defendant's property. And the property
8 lines for the borough database pretty much match up
9 directly with all these cuts that are around through the
10 trees and what not, where you can see a void in the
11 trees. And then I --
12 Q Sergeant Moore, I'm sorry, just so we're clear, the one
13 you're referring to, you said up on the overhead. Where
14 did you get that from?
15 A This is from the Fairbanks North Star Borough.
16 Q And that's the -- is that the borough's property
17 database --
18 A Yeah.
19 Q -- that most people are familiar with?
20 A That's right.
21 THE COURT: Okay.
22 Q And so the piece that you're -- I just want to make sure
23 we're clear for the record. The piece that you pulled up
24 is at the property -- the borough property --
25 A Specifically, for 431 Grange Hall Road.

Q Okay. All right. Go ahead. And you said you were comparing that with -- against the visual, the satellite imagery?

A So, essentially, I was comparing that against the satellite imagery from Google Earth. And you can see that there's relatively clear property lines cut in which, give or take, should estimate a -- give a good -- pretty good estimate of -- excuse me, what -- where those property lines rest. And I think we referenced that in previous testimony concerning the flight path that we took.

Q And in this case, Sergeant Moore, what you're saying is that you actually took a look at the property database to match it up and just didn't guess that that's where it was. You were matching it up against the property database?

A Yes.

Q Okay.

A Using another reference as to determine those property lines.

Q Okay. So do we -- did that give you a size for the property?

A The borough -- the property database gives you a size for the property of a le -- it's a little over two acres, but in -- in retrospect, essentially, the size of the

1 property is somewhat inconsequential for the testimony.
2 Q Well --
3 A Just --
4 Q I mean, give what you got, in any event, and let the
5 court decide about the consequential, if you would.
6 A Well, it's -- they don't give in the borough property the
7 actual dimensions like 435 --
8 Q Uh-huh.
9 A -- fair -- square feet or -- they give an actual area
10 property. So if -- I think it's like 2.5 acres is what
11 the property is.
12 Q And it looks like it's just about a square, so the math
13 could be done on that as well. Is that fair to say?
14 A Yes, ma'am.
15 Q Okay.
16 THE COURT: That looks like a rectangle there, doesn't
17 it? It looks more like a square in the photo.
18 A It is more of a rectangle. It -- believe there's some
19 longer sides, so --
20 THE COURT: Okay. So the court's observation is, it
21 looks like a rectangle on the borough database one and --
22 MS. CRAIL: Now --
23 THE COURT: -- maybe more square in the Google Earth.
24 Q Sergeant Moore, let me just ask you --
25 MS. CRAIL: Well, Judge, I guess I will say if -- I might

ask the court to take a look at the computer screen as well, because I'm looking at this and that looks slightly elongated compared to the computer screen in my assessment. I'll have the court --

THE COURT: All right. Mr. John and I will come take a look.

MS. CRAIL: Yeah.

THE COURT: Mr. John (indiscernible - away from microphone).

MS. CRAIL: Yeah. I mean, to be fair, we should probably (indiscernible - simultaneous speech).

MR. JOHN: Oh, I can see on here, okay.

MS. CRAIL: Yeah.

THE COURT: Do you want to see, too?

MR. MCKELVEY: Yes, please.

THE COURT: Come on over.

MS. CRAIL: Because that does look longer up there than I think it does there, but the court (indiscernible - simultaneous speech).

THE COURT: That really does look different. Okay. Actually, that even looks different from here.

MR. JOHN: Uh-huh.

THE COURT: Okay. Thank you.

MR. JOHN: Okay.

MS. CRAIL: Actually, Judge, while you're down here, if I

1 may --
2 THE COURT: Yeah, yeah.
3 MS. CRAIL: -- I was going to ask Sergeant Moore --
4 Q -- if the measurement line at the bottom was there
5 originally on the borough's database or whether you added
6 it?
7 A The measurement line at the bottom?
8 Q The one that says 0138.
9 A That is from the borough.
10 Q Okay.
11 (Court discusses other matters with other parties in
12 courtroom)
13 THE COURT: Okay. It looks like a square standing where
14 counsel are. It looks like a square on the computer. From
15 where I sit, it looks like a rectangle. So it distorts from
16 the bench is the bottom line, and I've learned a good lesson
17 about that. It does look like a square from where you are, Ms.
18 Crail, and also on the computer.
19 MS. CRAIL: Okay. And I guess -- and, Your Honor, again,
20 for the record, we will screenshot and print the same piece. I
21 can screenshot it. I don't know if Sergeant Moore can, but I
22 know I can.
23 THE COURT: No, that's fine.
24 MS. CRAIL: I can screenshot different --
25 THE COURT: I just remember for things like this, I

really need to be where you are, because --

MR. JOHN: I'd like to get copy --

THE COURT: -- it looks really different from --

MR. JOHN: I'd like to get a copy of it, maybe put it in the record as --

THE COURT: Okay.

MR. JOHN: -- as a screenshot, too, because it's easier to look at for anyone else and it's in color and it's hard -- like, I can't even make out what it all says because of the various tax lots there from here.

MS. CRAIL: Right. And I think that's fair enough.

THE COURT: Okay.

MS. CRAIL: So I will make sure it's screenshotted, provided as an exhibit. I'll provide it right away.

Q But, in any event, Sergeant Moore -- okay, so your estimate was what they said, was about two-and-a-half acre lot and the measurement on there was something that's already on the borough database. Is that --

A Yes, ma'am.

Q -- presumably for reference. But, anyway, you didn't put it there?

A Yes, ma'am. I did not put it there.

Q So, Sergeant Moore, did you make some -- I mean, di -- well, let me ask this. Obviously, you're a state trooper. Do -- did you -- do you have basic mathematical

education?
A Yes, ma'am.
Q Okay. Can you do basic trigonometry with triangles?
A Yes, ma'am.
Q Okay. And did you do that in this case relating to the estimated angle or possible angles of the camera viewpoint toward the property against the potential heights above the property?
A Yes, ma'am.
Q Okay. So can you explain that to the court?
A Your Honor, may I approach?
THE COURT: Yes.
A So, Your Honor, what I did is I looked at defense Exhibit G in -- in regards to what the possible angle would be from where that camera lens was taken. And as I've testified before, I wasn't flying directly over the property, because that would be somewhat counterproductive to actually taking the photos. And so I basically estimated somewhere in between 30 and 60 degrees as that -- where I figured the a -- the camera angle was taken. And based on right triangles, you can find out just on some basic estimate -- estimations. So if we say for whatever reason we were below 500 feet flying -- say we're at 400 feet, and the -- the angle between the -- where the state trooper plane was flying

1 was -- and where the -- from the shop where the picture
2 was taken, you have a 30-degree angle, that would put
3 us -- put the state trooper plane 692 feet from the shop.
4 And then if you --
5 Q Sergeant Moore, just so we're clear, the 692 feet you're
6 referring to is ground distance?
7 A Ground distance.
8 Q Okay. Go ahead.
9 A Essentially, it would be the B squared of a right
10 triangle.
11 THE COURT: So you got -- the distance from the ground to
12 the aircraft you're saying is how far?
13 A Several -- let me find my marker.
14 Q Here you go. Sergeant Moore, I think you left it back
15 here.
16 A So this would be the ground distance.
17 THE COURT: Right.
18 A And if you drew a line straight down from the aircraft
19 and make it a right triangle, that made -- would make
20 that distance 692 feet --
21 Q Sergeant Moore --
22 A -- from the shop.
23 Q Sergeant Moore, I think what she was asking for is, what
24 are you assuming the height of the aircraft to be for
25 that example?

A For this -- for this measurement, I assume the height of the aircraft is 400 feet.

THE COURT: Okay. So you -- and then what did you assume --

A For the second triangle --

THE COURT: -- C squared to be?

A C squared?

THE COURT: Yeah, C, anyway.

A The -- the C squared would be the hypotenuse --

THE COURT: Right.

A -- and that's really somewhat irrelevant for the --

THE COURT: But if you're doing A squared plus B squared equals C squared --

A Well, C squared would be the distance from the shop, line of sight directly to the aircraft, which doesn't tell us how high the aircraft was. Now, the A squared would tell us how high the airplane was and I'd put in a value of 400 for that.

MS. CRAIL: Your Honor, I'm sorry if I think -- what I think --

THE COURT: I don't understand how a known value of 400 gets us to 680 whatever.

MS. CRAIL: He's not using the Pythagorean Theorem, Your Honor. He's --

THE COURT: Oh.

MS. CRAIL: -- the angle plus the --

MR. JOHN: Based on assumptions of angle, which we don't know the angle.

MS. CRAIL: Correct. But he's giving -- I think he's about to give the court various --

MR. JOHN: I guess I'm objecting --

THE COURT: I thought he said A squared plus B squared equals C squared. Isn't that the Pythagorean Theorem?

A Well, it's just more of a --

MS. CRAIL: It is a right triangle.

A -- a right triangle that she's putting --

MR. JOHN: Yeah, I just -- I'm objecting as to the relevance of this, because it's all spec --

THE COURT: I don't even understand his math.

MR. JOHN: It's all speculation, Your Honor. That's the problem.

THE COURT: Well, it's not if it's the Pythagorean Theorem, but I don't understand what he's saying.

MR. JOHN: Well, it's -- we don't know --

THE COURT: Overruled. Please explain better, Sergeant Moore.

MS. CRAIL: But if I may explain this --

THE COURT: Have a seat. Ms. Crail, please inquire.

MS. CRAIL: Okay.

Q Sergeant Moore, are --

A Grab my phone.
Q Okay. I was going to say, are you doing the math using --
A I'm doing the math --
Q -- the angles or the estimated angles --
A It's using angles, essentially.
Q -- rather than the two known distances?
THE COURT: Okay. So if he's assuming a 30-degree angle there, he's assuming a 60 --
A 60-degree angle for the corner.
THE COURT: -- degree angle up there and --
A And a 90-degree angle.
THE COURT: Right.
A So based -- based on special right triangles, you can say that X is this, and then you can determine this distance based on the 30-degree angle right here by X times the square root of three.
THE COURT: Okay. And that's where you got it?
A And that's where I got it.
THE COURT: All right
MS. CRAIL: Okay. I know the -- I sympathize with the court. I haven't done trigonometry since high school either.
MS. CRAIL: I've been doing a lot lately. I have a 13-year old.
MS. CRAIL: There we go. Okay.

MS. CRAIL: So not -- so just so we're clear, we're using the angles rather than the straight theorems?

THE COURT: That's fine. I understand.

MS. CRAIL: Okay.

Q So what are your other examples there, Sergeant Moore?

A The other example would be a 60-degree angle, basically kind of flipping the triangle to where this distance right here was 400 feet, and this distance here along the ground -- I'm sorry, I could lift the --

THE COURT: I'm okay.

A -- would be 200 -- that would make that 230 feet. And then this -- this is for -- and then this is based off of 500 feet, with the right angle here being a 30-degree angle here, and that makes this 288 feet.

Q And, Sergeant Moore, realistically, you're not necessarily saying that this is a -- that your angle for the photograph was, in fact, a 30-degree or 60-degree angle; it's just giving a range of potential angles given the angle --

A It gives a range of potential angle -- angles and I believe that I was somewhere in between 30 and 60 degrees, because if it was -- I was flying over his -- or near his property at a 60-degree angle, I wouldn't be able to take the picture. It would be somewhat awkward and you would be seeing a -- more of a perpendicular

1 approach to the ground in the photograph rather than a --
2 you know, panoramic where you're able to look in the
3 doors and the such.
4 THE COURT: Okay.
5 MR. JOHN: I'm objecting as to the relevance, Your Honor.
6 If we're -- what we're -- this isn't really going to show how
7 high the plane was flying.
8 THE COURT: No, it's to impeach your client, I think, on
9 the testimony that the plane was right overhead, as I
10 understand it.
11 MS. CRAIL: Correct. It is important, Your Honor.
12 MR. JOHN: Well, but Mr. McKelvey testified to the plane
13 being overhead on the way back and that's why this isn't
14 really -- he didn't testify that the plane -- he saw the tail
15 end of the plane as he was -- it -- the first time when they
16 were taking the pictures, he didn't really see the plane much
17 when they were taking the pictures. He saw the plane when it
18 came back, so I don't see how this is relevant to impeach him,
19 because he didn't testify about the --
20 THE COURT: So it's undisputed testimony.
21 MR. JOHN: I mean, I don't know that --
22 THE COURT: Did you intend for that to cast any kind of
23 question as to the previous testimony about where they were? I
24 thought that was the reason you called Mr. McKelvey was to call
25 into question, the trooper's assertions about where they

were --

MR. JOHN: About how --

THE COURT: -- but if that's uncontroverted testimony, I guess we can move on, right?

MR. JOHN: I was calling him to show -- was to testify how high he perceived them to be flying, because that's one of the issues is how high they were flying. This isn't really refuting that. I don't know what this is really going to. But as I recall, his testimony was, the first time he came out of the shop and just saw the tail end of the plane as it was going away. And it -- the second time he came out and he -- they passed overhead. But -- well, we don't have photos of the second time to compare to his testimony, so I don't see how we're getting anywhere with this testimony.

THE COURT: I'm happy to accept the testimony as uncontroverted with regard to what occurred on the first flight if that's what you're saying.

MR. JOHN: Uncontroverted as to what? I mean, he testified how high he thought the plane was when it passed over his property.

THE COURT: Who did?

MR. JOHN: Mr. McKelvey did.

THE COURT: When it -- the first time or the second time?

MR. JOHN: Well, I mean, I don't know if we --

THE COURT: Yeah. Overruled. Go ahead. It's relevant.

1 MS. CRAIL: Judge, I actually have a second reason to
2 present this evidence. In any event, it relates to the
3 different stages of argument and --
4 MR. JOHN: I mean, Mr. McKelvey's testimony was related
5 to how high the plane was on the way back. I mean, you can
6 infer from that it flew at the same height on the way there,
7 but we can't use the pictures -- unless they had pictures from
8 the second -- from the time back, I don't see how they can talk
9 about anything here.
10 THE COURT: Overruled. They can talk about the -- where
11 the --
12 (Whispered conversation between Mr. John and defendant)
13 THE COURT: -- where the photos were taken and where the
14 plane may have been. It's completely relevant.
15 Q Okay. So, Sergeant Moore, basically, the -- would
16 this -- what you have is outer limits of the angles that
17 you are estimating here, correct?
18 A Yes, ma'am.
19 Q And rough estimates at the low end of the estimated
20 height above the property?
21 A Yes, ma'am.
22 Q Okay. And that's 400, if going by Mr. McKelvey's
23 statement, and 500 at the lowest basically --
24 A At the lowest --
25 Q Right.

A -- for --
Q I think we --
A -- Lieutenant Rodgers.
Q -- actually had --
A We believe --
Q -- 600 to 1,000, but --
A We'll assert that it was higher.
Q -- supposing it was only 500. Okay.
A Yes, ma'am.
Q And so based on that, where would that put you having flown compared to the property line?
A It would have put us south of the property line, not on -- not over Mr. McKelvey's property.
Q Okay. So basically over the -- if I'm reading this correctly, TL3353, property segments, just below the pink --
A Yes, ma'am.
Q Okay.
A Below the highlighted one on the projector.
Q Okay. And to your recollection from having done the flight, and having made the observations from behind the camera, would these numbers be approximately correct based on your recollection of the evidence?
A It would be approximately, correct.
Q Okay. And when I say these numbers, I guess I'm not

1 referring to the height question. I'm referring to the
2 distance from the property line.
3 A Well, distance from the -- the shed or the -- the garage
4 or whatever you want to call it, where Mr. McKel -- the
5 shop where Mr. McKelvey said he was standing.
6 Q Okay. So did you believe you were over the neighbor's
7 property when you were flying?
8 A Yes, ma'am.
9 Q Two last brief questions: Sergeant Moore -- or -- do you
10 know anything about this parcel of property having been
11 out there for the warrant as far as what kind of -- if
12 there's any other buildings on the property?
13 A Well, if you look at -- let's -- if you look at the
14 Google Earth -- Your Honor, may I approach again?
15 THE COURT: Yes.
16 Q And that -- we're back Exhibit 2, I believe.
17 A Back to the defense motion.
18 MR. JOHN: Is that this one?
19 MS. CRAIL: Unh-huh. No, it's the --
20 THE COURT: You can approach, too, Mr. John.
21 MR. JOHN: Yeah, okay. Yeah, okay, because I had the --
22 that other exhibit the state sent me.
23 MS. CRAIL: This is the one that was attached to the
24 motion.
25 A So as I was saying before, you can see the property lines

here.

MR. JOHN: Uh-huh.

A And this building is well within those property lines.

So there's two structures on the same property.

Q Rather -- you mean two sets of --

A Two sets of stru -- structures. So there's -- this is

Mr. McKelvey's property down here, and then this is the

second property or a second residence, so to say.

THE COURT: Is that gray line on the top there the road?

A Yes, I believe it is.

THE COURT: Well, isn't there another parcel between the

road and the property anyway?

A The --

MS. CRAIL: Which par -- which road are we talking about?

Could you specify which road, Your Honor, you're asking?

THE COURT: Oh --

MR. JOHN: Yeah, that's one --

THE COURT: Isn't that just a different piece of property

anyway?

MR. JOHN: Yes, I think that's not the correct property.

MS. CRAIL: I'm sorry, which road are you talking about?

THE COURT: If -- well, if --

A It's my --

THE COURT: -- this is oriented the same as that is,

there's --

MS. CRAIL: Uh-huh.

A It's --

THE COURT: -- that's the gray thing and this is that other parcel, isn't it?

MR. JOHN: Yeah, I think --

THE COURT: Somebody else's land.

MR. JOHN: Right. The court is correct.

MS. CRAIL: Well, hang on a second. Well, I'm still confused about what you're referring to. Which -- are you talking about this road, the Grange Hall Road here or are you talking about --

THE COURT: No, I'm saying if --

MS. CRAIL: -- this line up here?

THE COURT: -- that is this and we are oriented the same way --

MS. CRAIL: Uh-huh.

A You're talking about this -- this road right here, Your Honor --

THE COURT: No.

A -- the Grange Hall Road or --

THE COURT: Whatever is that gray thing going across. Is that not this property line right there, with the road or whatever it is?

MS. CRAIL: You mean the gray thing going across -- do you mean the piece that says h --

A This -- this -- this piece right here?

MS. CRAIL: You mean the http line up there co.Fairbanks?

THE COURT: I can't see what it is, because I'm --

A Because you're --

THE COURT: -- completely sideways to your --

MS. CRAIL: Are you talking about this?

THE COURT: All I know is, there's another piece of property right there on your -- on -- right there. Do you see above the red? Yes.

MS. CRAIL: Here?

THE COURT: Then go -- or to the right of it.

MS. CRAIL: Here?

THE COURT: No, you're skipping a piece of property.

MS. CRAIL: I'm sorry. This is the one -- this is the main one.

THE COURT: Yes. Now, go right above it.

MS. CRAIL: Uh-huh.

THE COURT: Right -- keep going. Oh, that piece of property; that's what I'm talking about. Isn't that where the house is, the other house?

A No, I don't think so.

MS. CRAIL: I don't think that's what he's saying.

THE COURT: Okay. So that's what I'm asking. Tell me about that.

MS. CRAIL: Okay.

Q Can you com -- just compare what's on there with what's the case here?

THE COURT: That's what it looked like to me.

MS. CRAIL: Okay.

THE COURT: It looks like that's what's going on.

A There is -- there would be our -- basically, the way I see the property, Your Honor, is there would be a residence or another structure right here, and then there would be another structure over here. And then there would be a structure right here, which is on the same property that I was pointing out before.

THE COURT: Okay. I can't --

A And then -- and then the defendant's property would have been right here. Does that make sense now, Your Honor?

MS. CRAIL: Can you show it on the map?

THE COURT: I -- it could be that way for sure. Mr. John, do you understand what they're saying? I understand.

MR. JOHN: I -- well, I guess one more time I guess was on that.

MS. CRAIL: Okay.

MR. JOHN: I was just --

MS. CRAIL: Right. He's referring to one, two, three, four --

MR. JOHN: I see.

MS. CRAIL: -- five, six.

Q So, Sergeant Moore, can you do those one, two, three, four pieces again?

A So based on what I'm seeing on the map, you'd have the defendant's property right here. You have another residence on the same property right here. Then you have what you were seeing above the defendant's pro -- or the defendant's property, the rental property. There would be another one up here and then there would be another one over here.

MR. JOHN: Okay. I see what you're saying; got it.

THE COURT: I understand. I understand.

A That's my understanding of it.

MR. JOHN: Okay, got it.

MS. CRAIL: Actually, I should leave this here, so --

Q So I guess that was the other one you were referring to that's on the same parcel?

A Yes, ma'am.

Q Okay. And then the last question, Sergeant Moore, is just to confirm, you were more familiar with the area that you were flying over than Lieutenant Rodgers at that time, was that --

A Yes, ma'am.

Q Okay. And were you -- and you were the one directing this?

A Yes, ma'am.

Q Did you fly over the -- that parcel of land more than once?
A I don't believe we did.
Q When you were on the way back from the other -- you said -- I think you said earlier, this was the first one you looked at, right?
A Yes, ma'am.
Q And then you went -- you flew over the other one and then flew back to town?
A Yes, ma'am.
Q When you flew back, did you fly low or did -- or where did you fly?
A I don't recall how high we were flying. If my memory serves me correctly, I believe we were on the other side of the road.
Q You mean -- which road?
A Chena Hot Springs Road.
Q So to the north of the property?
A Yes, ma'am.
Q Okay. But would you have been flying low so that you could see anything in particular? Were you trying to see other things?
A No, we weren't trying to see other things. After the -- after this property and the other property, there was nothing else that we were looking around -- looking for.

Q Just headed back?
A Yes, ma'am.
MS. CRAIL: That's all I have, Your Honor.
THE COURT: Mr. John?
MR. JOHN: Yes.

JOSHUA MOORE

testified as follows on:

RECROSS EXAMINATION

BY MR. JOHN:
Q So you -- this says 431 Grange Hall Road, is that what you were -- you got from the borough or what?
A Yes, I believe so, sir.
Q Okay.
MR. JOHN: No further questions, Your Honor.
THE COURT: Okay. Thank you. I assume nothing from that, Ms. Crail?
MS. CRAIL: There's nothing from that, Your Honor.
THE COURT: Okay.
MR. JOHN: Could we keep that up there for a second, you know --
MS. CRAIL: And that's fine. I was just trying to make sure that I was saving it.
THE COURT: Thank you, you're excused.
A Thank you, Your Honor.
THE COURT: Are you admitting the demonstrative exhibit,

moving for that?

MS. CRAIL: I think we should do that, Your Honor, since it was --

THE COURT: Any objection to the demonstrative exhibit, the --

MS. CRAIL: That makes it 4.

THE COURT: -- triangle?

MR. JOHN: No, Your Honor.

THE COURT: Okay. So what are we calling it?

MS. CRAIL: 4, Your Honor, because --

THE COURT: 4.

MS. CRAIL: -- I'll count the first three as the ones attached to the motion.

THE COURT: Okay. Plaintiff's 4, then, is admitted, and that's the triangles.

(Plaintiff's Exhibit 4 admitted)

A That's -- we have these marked as 1 and 2 if you want to (indiscernible).

UNIDENTIFIED SPEAKER: (Indiscernible - away from microphone).

THE COURT: Yeah.

UNIDENTIFIED SPEAKER: Thank you, Judge.

THE COURT: The triangles.

UNIDENTIFIED SPEAKERS: (Indiscernible - away from microphone).

THE COURT: Okay. That's all then, Ms. Crail?

MS. CRAIL: That's all the additional evidence, Your Honor. I just -- I was simply --

MR. JOHN: I --

MS. CRAIL: -- making 100 percent sure here --

MR. JOHN: I have some --

MS. CRAIL: -- but I was saving these.

MR. JOHN: -- brief rebuttal. I want to call Mr. McKelvey for a minute, perhaps.

THE COURT: You can do that.

MR. JOHN: Okay.

THE COURT: That's fine.

MR. JOHN: Okay. Let's do that.

THE COURT: Mr. McKelvey, why don't you go ahead and come forward.

MR. JOHN: Keep that up there so I can have him look at it.

THE COURT: You don't need to be sworn again. You're still under oath, Mr. McKelvey.

MR. MCKELVEY: Okay.

THE COURT: Are you going to be using the exhibit?

MR. JOHN: I'm going to have him refer --

THE COURT: You are?

MR. JOHN: I was going to ask him about that --

THE COURT: So we'll leave the lights down.

MR. JOHN: -- what's up there. Ms. Crail can just keep it up. It's just a couple questions.

THE COURT: Yep, we're going to keep it up and we'll keep the lights down so that he can --

MS. CRAIL: And, Your Honor, just for the record, that's the same thing I just did, but on the screen, parties can see I've just turned it into a JPEG image --

MR. JOHN: Okay.

MS. CRAIL: -- on the screen so that can be --

THE COURT: He can still --

MS. CRAIL: -- provided, yeah.

THE COURT: Yeah, that's fine.

MS. CRAIL: I'm -- and I'm sorry. I did that because that will be what we print and provide to the court for --

THE COURT: That's great. Okay, Mr. John, go ahead, please.

MR. JOHN: Okay.

JOHN MCKELVEY

previously sworn, testified as follows on:

REDIRECT EXAMINATION

BY MR. JOHN:

Q Mr. McKelvey, what is your address?

A My address is 397 Grange Hall Road.

Q Okay. So is that brown highlighted thing there your property?

A No, my property is -- is the property just below it.

Q Okay.

MR. JOHN: No further questions, Your Honor.

THE COURT: Anything from that, Ms. Crail?

MS. CRAIL: Not for him, Judge.

THE COURT: Okay. Thank you, Mr. McKelvey. You're excused.

UNIDENTIFIED SPEAKERS: (Indiscernible - away from microphone).

MS. CRAIL: I didn't --

THE COURT: Okay. Did counsel need a minute before we do argument?

MS. CRAIL: Judge, we just wanted to -- I mean, I think we can make the same argument from the same piece there looking at it. But I think it's reasonable to ask him to -- well, I don't know as it makes any difference. It's personal property right below it. The court can make the same estimations based the similar size of the property.

MR. JOHN: Well, I -- you know, I don't know that we have all that information, but, you know the state can make its argument, but unless it has some more evidence, we should just go to argument. I'm prepared to argue right away.

THE COURT: I need just a minute. Let's pause the recording, please.

THE CLERK: Off record.

(Off record)

THE CLERK: On record.

THE COURT: Okay. We're on record. Mr. McKelvey is here with counsel. Ms. Crail is here, and we're ready to go, yes?

MS. CRAIL: Yes, Your Honor.

THE COURT: Okay.

MS. CRAIL: Basically, given the different address, because that's the first we've heard that, I would like the opportunity for Sergeant Moore to come back and just give -- as to that different address very briefly. Shouldn't be more than two minutes.

THE COURT: Absolutely.

MS. CRAIL: Okay. Sergeant Moore?

THE COURT: Sergeant Moore, you're still under oath.

JOSHUA MOORE

previously sworn, testified as follows on:

REDIRECT EXAMINATION

A Yes.

THE COURT: Ms. Crail?

A Yes, Your Honor.

MS. CRAIL: Thank you, Your Honor.

BY MS. CRAIL:

Q Sergeant Moore, during the break, did you have a chance to take a look and do a -- well, first of all, did you have a chance to do a Google Earth check against the

1 defendant's given address?
2 A Yes, ma'am.
3 Q Does it come back to the satellite image that you have
4 there in Exhibit 2?
5 A Yes, ma'am.
6 Q Okay. Based on your personal recollection of the
7 property, is that his property also?
8 A Yes, ma'am.
9 Q So either way, whether it's Google Earth saying it is
10 or -- and whether it doesn't matter, that's what you
11 remember it to be?
12 A Yes, ma'am.
13 Q Okay. So that picture is correct?
14 A This picture is correct.
15 Q Now, as to the property database, did you look up that
16 address --
17 A I did.
18 Q -- the 397 one? And the image that's up there right now,
19 is that what you got?
20 A Yes, ma'am.
21 Q Okay. And so that one is highlighted now as opposed to
22 the one, I guess, to above it?
23 THE COURT: That's what Mr. McKelvey said before, too.
24 Q Correct. Okay. Just so we're clear, though, the -- it
25 looks like the property parcels are approximately the

same size. Is that fair to say?

A Based on what I'm seeing up there, yes.

Q Okay. And just for the record, it looks like that -- the little measurement to the bottom of this particular database run is a zero to 202-foot --

A Yes, ma'am.

Q -- thumbnail? Okay. So anyone can do the math based on that, fair enough?

A Yes, ma'am.

Q Now again, based on -- well, never mind. We've already done --

MS. CRAIL: Good. We're done.

THE COURT: Okay. Mr. John?

JOSHUA MOORE

previously sworn, testified as follows on:

RECROSS EXAMINATION

BY MR. JOHN:

Q So you're saying it's all the same. Now, your triangulation thing, you didn't do a calculation for a 1,000 feet which is where you said you were flying, correct?

A No.

Q Okay. I just --

MR. JOHN: No further questions of --

THE COURT: Okay.

MR. JOHN: -- Sergeant Moore.

THE COURT: Anything else for him?

MS. CRAIL: Not from that, Judge.

THE COURT: Thank you, you're excused. Any other witnesses from either side?

MS. CRAIL: No. No, Your Honor.

MR. JOHN: No, Your Honor. We're going to rest as well.

THE COURT: Okay. All right, then. Let's have argument. Mr. John, are you ready to go?

MR. JOHN: I am ready to go, Your Honor.

THE COURT: Okay. I'm ready to listen. Go ahead, please.

MR. JOHN: Okay. We filed the motion to suppress, Your Honor. There's, you know, there's Fourth Amendment theories. There's state constitutional law theories. The court ultimately has to decide which order it wants to decide them in, but I'll start with the Fourth Amendment one first just because there's a little more law on it. And we have a series of Supreme Court cases there and I was reading, you know -- and there's some -- lot of state -- number of state cases, too, but these cases all talk about naked-eye observations and things like that. So all these cases that have -- uphold flyovers and the Supreme Court even, you know, in the Ciraolo case and depending on exactly how you say it, no, it said this is a case of a naked-eye observation flyover. And that's -- the thing is

that's not what we have here. So this case is distinguishable from all those other cases.

The only case where the U.S. Supreme Court allowed an enhanced observation camera photos was of a factory, and the court in that case, made a very specific note, the Dow Chemical case that, you know, this is not the curtilage of someone's house, which is what he have in Mr. McKelvey's case here. He testified about his property. There's pictures of it. He testified as to the privacy interests. Those are clearly established.

The question is just under these Fourth Amendment precedents, the reasonableness of them. And Sergeant Moore's testimony was he really made no naked-eye observations, at least any that were conveyed in the purposes of getting a search warrant. The search warrant was based upon the photos he took with his camera. Of course, that makes sense when you're looking through your camera, you're looking through your camera. So all we have is the enhanced camera shot of 10 times. And you can probably zoom in more with a camera even in that and look at it, but that's what we have. So I think under Fourth Amendment jurisprudence there, we have a problem.

Now, Mr. McKelvey said they flew over his property and whatever height they were flying at, maybe his -- even assuming he's not correct in his estimation of height, they flew over his property and they caused him a disturbance. They're flying

low enough, it's an intrusion upon his privacy. He comes running -- he comes out of his building the first time moving through the building and coming out, because he thinks there's something wrong. Is something landing on my property, the road, wherever? So that is part further of the disturbance of property. They're on the way back; he says they're closer.

So under the Fourth Amendment jurisprudence, I think even without the enhancement, it's an invasion of his privacy. It would be great if we had some digital data and we didn't -- most of this (indiscernible) has really been taken up with the issue of how high the plane was flying. We could have dealt with the rest of the issues probably rather quickly if we had data from a GPS; that would have been really nice, and then we could have saved an awful lot of time here. And I think the court should take into account that the state did not have that data when it could have preserved that data and saved all this in weighing the heights and go with Mr. McKelvey on that. But, ultimately, because the troopers didn't make a naked-eye observation, but instead, did enhanced observation with a camera, we have a Fourth Amendment violation period.

So that much being said, let's look at the Alaska Constitution. The Alaska Constitution, we have our greater protections of privacy here. I've cited a few state court cases that apply their own constitutions. We have the Bryant case from Vermont, and we have the more recent case from the

1 New Mexico Court of Appeals, the Davis case. And I think the
2 Davis case has a very good way of analyzing it. They, you
3 know, talk about really, if the -- and this is kind of a
4 dissent concept in Ciraolo. It's like you have a -- and I
5 think Alaska would follow the dissent in Ciraolo -- is
6 basically, you have a reasonable expectation. People that may
7 be passing over your property ordinarily are just passing over.
8 They're not going to see, and they're certainly not -- you
9 know, they're passing over in a commercial airline. They're
10 not sitting there with cameras zooming down on your property to
11 see it.
12 So I think we would follow the dissent in Ciraolo on a
13 state constitutional basis and we should win on that grounds,
14 because if Mr. McKelvey were in front of the dissent in Ciraolo
15 they would have said, well, it doesn't really matter where you
16 were. You had this expectation that people are not going to be
17 flying over your property and looking down and seeing these
18 things at -- certainly at these levels, and certainly in an
19 enhanced format.
20 But what the New Mexico Court of Appeals does, is they
21 say, well, what -- it matters in part what the purpose is,
22 because if you're flying over just randomly or -- and you
23 happen to glance down there, that may be okay, and that's fine.
24 But when you're flying over for the purpose of peering over
25 onto someone's property, it's that purpose coupled with that

elevation, whether it's 500, 1,000, or really, the elevation is somewhat irrelevant if the police are flying over your property. And, you know, you can go to higher elevations, but you're not going to see anything from higher elevations without enhancement.

So you have that combination right here, too. It's -- they really -- they have to fly pretty low without using technology. Once they get technology, they can stay a little higher, but then they're using the technology, so your privacy is the same in either event, and it should be protected.

And they talk about, you know, an inadvertent observation would be okay. But that's the thing. We don't have an inadvertent observation here. We have the police consciously flying over Mr. McKelvey's property and the state may be -- there may be some dispute. It's like, did they actually, physically go over the border extended of his property or not. And that's really, in a sense, irrelevant, because you can't really parcel it down that much, because under that theory, someone who had a piece of property that was 50 by 50 would have no privacy at all. But someone who had a bigger piece of property, a millionaire with lots of acreage would have all this privacy, because they have all this property. What the privacy is, is really the privacy from the observation from that level, from the police flying above with the purpose of looking down upon the individual.

1 And I was trying to think of -- you know, we do interpret
2 our constitution more broadly in privacy aspects, and there's a
3 load of cases on that. And that's why I think we certainly
4 follow that. But is there any other analogy in Alaska law I
5 could think of, and I was thinking about -- I was reading the
6 case of Reeves versus State, and it talks about the plain view
7 doctrine in Alaska. And we have actually more stringent plain
8 view doctrine, and it's consistent with what I'm arguing here,
9 because one of the requirements of the plain view in Alaska is
10 that it be inadvertent. And this was clearly not an
11 inadvertent observation of Mr. McKelvey's greenhouse.
12 So that -- the whole thinking of the Reeves' case -- and
13 I -- it's 599 P.2nd 727 -- is consistent here with that
14 protection of privacy with this being a search. Because
15 they're trying to see something that they can't see from any
16 other vantage point. They certainly can't see from the road.
17 They can't see from going up to Mr. McKelvey's door. Any type
18 of intrusion that would have been legitimate would not have
19 given them this abil -- this information. It's only by flying
20 over and flying over with a high-powered camera with the
21 purpose of trying to see what was on Mr. McKelvey's property
22 that they gathered what they did.
23 That's really all I have to say, Your Honor. I think
24 it's fairly simple if you analyze it those ways. If we don't
25 win under the United States Constitution, I think under the

1 Alaska Constitution, Mr. McKelvey plainly should prevail.
2 Thank you.
3 THE COURT: Thank you, Mr. John. Ms. Crail?
4 MS. CRAIL: Your Honor, basically, there's -- the state
5 disagrees with Mr. John across the board, of course. But there
6 are basically two primary points on which we believe that the
7 state prevails in this case.
8 The first is with respect to the plain view observations
9 and the height question. The controlling law -- as we pointed
10 out, there's nothing in Alaska, at this point. Both parties
11 agreed with that. So that brings us back to U.S. Supreme Court
12 decisions, which are, in fact, directly on point. That's the
13 Ciraolo case and the Riley case, both within three years of
14 each other. The earlier of the two cases, the Ciraolo case,
15 being in 1986, is almost 30 years old, and the other one only
16 slightly more recent.
17 And there's been no change in those since then, despite,
18 incidentally, quite a number of changes in technology advances
19 in the numbers of aircraft and the accessibility of people to
20 smaller and various different types of aircraft and so forth
21 over those years. But the -- nothing has changed on that.
22 And both of those cases are very consistent in saying
23 that law enforcement can fly over private property as long as
24 they remain in navigable air space. And they can make
25 observations from that navigable air space and use those

1 observations, those plain view observations to get search
2 warrants or otherwise.
3 I disagree with Mr. John's argument that plain view
4 somehow requires that the -- that it be inadvertent. It
5 doesn't. Plain view simply requires that the police be in a
6 place that they're entitled to be when they made those
7 observations. And in this case, they were in a place they were
8 entitled to be, which is to say navigable air space when they
9 made the observations.
10 We should be clear, the testimony -- the only thing that
11 suggests that they would have been less than 500 feet is Mr.
12 McKelvey's statements. Mr. McKelvey -- everything from the
13 troopers is clear that they were -- I mean, you've got two
14 pilots, one very experienced, one newer pilot, but who is very
15 familiar with the area. Both of them are flying over the
16 property and both of them have confirmed that they're basing it
17 on above-ground-level level. They were within navigable air
18 space, which is to say, above 500 feet. The best estimate was
19 anywhere between 600 and 1,000 feet above ground level, not
20 mean sea level, which makes the difference. So that's the
21 testimony you've got.
22 The difficulty with Mr. McKelvey's testimony is two-fold.
23 Number one, the -- he's alleging that there were two flyovers.
24 He's the only one who suggested there was two flyovers. But
25 even if you assume for a moment -- let's say for a moment,

assume that they actually did happen to pass over his property on the way back, even based on the defendant's statements, they gleaned no evidence from this purported second flyover. Everything is based on the photographs taken during this purportedly first flyover, which the troopers agree was the only flyover.

That one, Mr. McKelvey can't testify as to where the troopers were. All he says is that he heard a noisy airplane and when he got out there, he saw a tail disappearing over Grange Hall Road. So that doesn't tell us how high it was based on Mr. McKelvey's statement. Doesn't tell us whether it went actually over his property or next to his property or anything else.

So it simply does not even contradict the troopers' testimony, which says, we didn't. We were within navigable air space, we took the photographs, and we moved on. So even if you assume the second, it doesn't matter. They didn't glean any evidence from it. It's not a -- it -- then it -- there's nothing to suppress from.

The -- Mr. John suggests earlier -- I know he didn't argue this, but he commented on it earlier in court, suggesting that the court could infer that they flew at the same height on the way back as they did on the way there. There's absolutely no evidence to suggest that. And why would the court infer that an airplane was flying at the exact same height on one

1 direction versus the other when it's this kind of a flyover,
2 when it's this kind of a thing?
3 Secondly, there would be absolutely nothing to suggest
4 that they would have flown on exactly the same flight path. I
5 mean, it's not like there's a road that they're going to say,
6 well, we're going to fly exactly this way on the way out and
7 then turn around and fly exactly that way on the way back. The
8 inference given isn't even a reasonable one. So even if we
9 assumed that he was correct about his statement about the
10 second flyover, it's totally irrelevant to any matter that
11 relates to this motion.
12 Quite frankly, we're probably, honestly talking about
13 separate airplanes. It's notable that the defendant is --
14 say -- is able to say that he believes he saw a face in the
15 airplane, but as the court may recollect from earlier
16 testimony, the troopers' badge on the plane is far bigger than
17 a face. It says State Troopers on the plane. The defendant
18 couldn't even say that he saw any of those things on the -- on
19 this plane that he purportedly saw going over. What the
20 probable answer is, is that it wasn't a State Trooper plane
21 that he's talking about. But, again, even assuming it were, it
22 doesn't matter because this purported second flyover that he's
23 talking about that he saw gleans no evidence; there's nothing
24 to suppress from it.
25 The second point is that's easily confirmed because he

1 says that where he was standing, he was outside of this door
2 which is clearly visible on the picture and we can't see
3 anybody on there, so it's patently obvious also, and he hasn't
4 suggested otherwise, that he was not standing outside or able
5 to observe when these pictures were taken.
6 So therefore, as to the question about the legitimacy of
7 the flyover, the law is clear; they can fly over as long as
8 they stay in navigable air space and they can use the
9 observations that they take from that.
10 The defendant's subjective expectation of privacy is not
11 controlling per cer -- per the Ciraolo case, which is the
12 original one and was simply approved and further actually
13 expanded by the Riley case. The question is simply whether
14 they were in navigable air space when they did it.
15 The second area that I want to talk about is that the
16 defendant has cited no law to suggest that he has any right of
17 privacy over somebody flying over the neighbor's property and
18 making observations from a vantage point from the neighbor's
19 property. He cited absolutely no case whatsoever with respect
20 to that and it's pretty standard --
21 THE COURT: Well, it actually wasn't on the neighbor's
22 property.
23 MS. CRAIL: What's that?
24 THE COURT: The airplane was not on the neighbor's --
25 MS. CRAIL: It wasn't on the neighbor's property. It was

clearly over the neighbor's property. That's the point, and that was the whole point of the whole last seven --

THE COURT: Well, it's not on any -- it's in the air. It's not anyone's property, is it?

MS. CRAIL: Well, correct. But, I mean, if we're looking at -- I mean, the question, Judge, is whether -- the argument is, is that a person has a reasonable expectation of privacy over their air space is basically what they're arguing.

THE COURT: No, the argument is on what you can see from the air so that you can't peek at them --

MS. CRAIL: Correct. But --

THE COURT: -- from the air.

MS. CRAIL: -- the thing is, is that -- if, for instance, your neighbor wishes to pin a hot air balloon, as an example, on his property and sit up there, and do whatever he wants to do, he is in his own air space, right? But he can't put his --

THE COURT: But if a police officer did it in order to take photographs, that would be --

MS. CRAIL: The court --

THE COURT: -- a different question, wouldn't it?

MS. CRAIL: I don't think it would, because if the neighbor says, sure --

THE COURT: You think it really goes by the -- what the --

MS. CRAIL: Uh-huh.

1 THE COURT: -- air is above the property lines on the
2 ground?
3 MS. CRAIL: Sure. Because if -- because if the neighbor
4 says, sure, police, you're welcome to be here and make
5 observations from my property, that's consent. They're
6 right -- they're sitting on the neighbor's property. They've
7 tethered their balloon, as an example, on the neighbor's
8 property. They're making observations from the neighbor's
9 property. I give that as a an example.
10 THE COURT: I completely disagree with that.
11 MS. CRAIL: I give that as an example, Judge. But the
12 fact remains if -- you know, it's -- let's take a more specific
13 example. Supposing you're talking about apartment buildings.
14 If the police want to take observations from apartment X to see
15 apartment Y, all they have to do is get permission from the
16 ten -- the landlord or tenant for apartment X to be in there,
17 their legitimate property, and make those observations from
18 that neighbor's property.
19 THE COURT: I think it's apples and oranges. I don't
20 think it has anything to do with this case at all.
21 MS. CRAIL: What's that?
22 THE COURT: I don't think that has anything to do with
23 this case at all, given that this is photographs from an
24 airplane, not an apartment.
25 MS. CRAIL: Correct. But my point is, is that he can't

1 really express a legitimate expectation of privacy over his
2 neighbor's air space, only over his own. That's what I'm
3 trying to point out.
4 THE COURT: I don't think he has any -- it's the air
5 space.
6 MS. CRAIL: Correct.
7 THE COURT: I don't --
8 MS. CRAIL: But he doesn't --
9 THE COURT: Well, I'm not going to argue, Ms. Crail.
10 MS. CRAIL: Yeah.
11 THE COURT: But to this court's mind, there's no carving
12 out of air space based on ground property lines. I'm quite
13 confident of that, but you may continue.
14 MS. CRAIL: Well, I guess, then, the question would be is
15 if it's not marked by property lines, then how does the
16 defendant have any right of expectation of privacy in air
17 space?
18 THE COURT: He doesn't. He has an expectation of privacy
19 on what he's doing on his property.
20 MS. CRAIL: Right. But if you can see it from a public
21 area, which is to say --
22 THE COURT: That's what we're talking about.
23 MS. CRAIL: -- navigable air space.
24 THE COURT: That's the question.
25 MS. CRAIL: Right. If you can see it from a public area,

which is to say navigable air space, then it doesn't really matter. And I guess my point is, is that if your -- I mean, supposing you're in a tree on the neighbor's property, does it -- I mean, I'm -- I don't think that what I'm -- I guess I'm getting at is, if you're on the neighbor's property and you can see it and the neighbor is okay with that, as an example, I mean, that -- but otherwise, he can't -- in any event, he can't argue that -- argue the neighbor's expectation of privacy. The neighbor might have an issue with the police being on the property; that's a separate issue. But any defendant can't say, you violated my neighbor's privacy rights, and so, therefore, I get my evidence suppressed. That's not how it works, so --

THE COURT: I just am unaware of any court case that thinks that the property line on the ground has any relevance to what is happening up in the air.

MS. CRAIL: That's pretty much what the Ciraolo and Riley cases are talking about. Only those cases, they're talking about actually flying directly over the property, and they're talking about the expectation of privacy in one's own air space, which is to say, the space above one's own property --

THE COURT: In any event, car --

MS. CRAIL: -- in case law I'm referring to. But in any event, that was the -- one of the points on this, was that they're flying over the neighbor's property, not over his

1 property. If they're making observations from over the
2 neighbor's property, it really doesn't matter how high they
3 were for -- from the ground, because the -- that has nothing to
4 do with his expectation of privacy. They're on -- they're over
5 the neighbor's property, not over his property. That's my --
6 that was my point on that.
7 But in any event, the last area that I needed to talk
8 about was the naked -- was Mr. John's comments about that they
9 could only do it with the naked eye. That -- that's patently
10 not true. And he has cited, again, no case to say that you can
11 only use the naked eye, that you cannot use binoculars or a
12 flashlight otherwise. Controlling case law, which would be
13 Alaska case law, I cited Anderson versus State on page 6 of my
14 motion here, referenced how completely clear the law was on
15 that from U.S. Supreme Court and otherwise. This is Alaska
16 Supreme Court, 1976, pointing out that flashlight observations,
17 binocular observations are all entirely legitimate as a fair
18 assistance to the naked eye.
19 Where they tend to draw the lines are things that is not
20 simply an enhancement of -- an ordinary enhancement of what the
21 naked eye can do. So, for instance, thermal imaging, that's
22 that Kyoto ((ph) case, has been disapproved of. That's because
23 thermal imaging works at things that are beyond what a person
24 can see with a normal eye or a normal enhancement.
25 What they've said throughout, and this goes back so

1 many -- obviously, so many years, 40-plus years, is the police
2 can use a flashlight and see something in plain view. Even
3 though it's dark, they can light it up with a flashlight, they
4 can see that. They have said that's -- that was the
5 circumstance in Anderson. The binoculars: they can use
6 binoculars. They -- I mean, we're not talking about a Hubble
7 telescope here. We're talking about binoc -- basically, a
8 binocular type of thing.
9 The evidence is, is that this is an ordinary camera with
10 a -- with an ordinary telephoto lens, which is readily
11 accessible to the public just like binoculars are, and
12 basically equivalent to using binoculars to view the property.
13 Again, case law is clear, they can use cameras to record what
14 they're observing. There's nothing stopping that from
15 happening either.
16 All of these things mean that this naked-eye argument is,
17 frankly, irrelevant. The troopers did not use some sort of
18 special imaging. They used a camera with an ordinary telephoto
19 lens to make their -- to take their pictures and move on, and
20 they're entitled to do that as long as they are within
21 navigable air space, or, as I said -- my argument remains that
22 they could be over the neighbor's property legitimately.
23 And I don't really want to make a big deal of the
24 neighbor's property issue, Judge, but -- because I think the
25 evidence is clear, the troopers were not below the 500-foot

1 limit. And defendant's testimony has not disagreed with that,
2 not on the one where they gleaned any evidence.
3 Finally, I did want to make two last area comments, Your
4 Honor, one of which is Mr. John seems to rely heavily on the
5 dissent in the -- I think it was in the Ciraolo case.
6 THE COURT: Uh-huh.
7 MS. CRAIL: But the dissent is not the law. The law is
8 what the majority decided, and nobody since then has changed
9 that and gone along with the def -- the dissent in almost
10 those -- in that almost 30 years.
11 The other last point is Mr. John suggesting that somebody
12 with a smaller piece of property has -- you know, shouldn't be
13 considered to have less expectation of privacy than somebody
14 with a bigger piece of property. But that's patently not true.
15 If a person lives on a 50 by 50 plot of land, then his
16 neighbors are right on top of him, and, yeah, you know that if
17 you go outside in your underwear, that your neighbor is going
18 to see you. I mean, that's the nature of things. That the --
19 yes, the millionaire who has 50 acres can probably walk around
20 naked in his own little wooded patch without every worrying
21 about his neighbors being able to see him. Definitely agreed
22 to. And the guy with the 50-foot property can't do that. I
23 mean, that's just the nature of -- of the -- the nature of life
24 and the way it is. So the size of the property isn't the
25 issue.

1 And, frankly, his direct expectation of privacy is not
2 the issue. The issue is whether the police were in a place
3 that they were entitled to be, navigable air space, when they
4 made their observations. And I think the evidence is clear
5 that they were.
6 THE COURT: Thank you. Anything else then, Mr. John?
7 MR. JOHN: Just briefly, Your Honor
8 (Court discusses other matters with other parties in
9 courtroom)
10 MR. JOHN: Just briefly, Your Honor. The plain view
11 thing I was talking about, it says in the Reeve's case, 599
12 P.2d at page 738, discovery of the evidence must have been
13 inadvertent. That's what the Alaska Supreme Court says is one
14 of the requirements under our constitution, so I wasn't --
15 THE COURT: For plain view?
16 MR. JOHN: For plain view, yeah.
17 THE COURT: Plain view, but this is different.
18 MR. JOHN: Well, it says the state is claiming they can
19 plainly see it from up above, and therefore it --
20 THE COURT: No, I get why you'd want to add that to this.
21 MR. JOHN: Yeah.
22 THE COURT: But --
23 MR. JOHN: Now --
24 THE COURT: -- it's not -- it's different.
25 MR. JOHN: And maybe none of the cases that the -- the

1 two U.S. Supreme Court cases do not involve any type --
2 anything but naked-eye observation, and the court points that
3 out. And that's -- and they point that out to the -- you know,
4 in the Dow case that doesn't involve it. They point out it
5 doesn't involve a curtilage.
6 So we have -- we -- if you look at those cases, the two
7 U.S. Supreme Court cases say this is only for naked-eye
8 observation, and Dow says the enhanced observation is only when
9 it's not the curtilage. So that's why I'm saying this case --
10 it is important in this case, because most of these other cases
11 I've even been citing are naked-eye observation cases. I
12 believe both of the -- I'd have to reread them for sure, but
13 the New Mexico case and the Bryant case from Vermont are both
14 naked-eye observation cases that found in favor of the rights
15 of the person.
16 And what those courts are doing is they were applying
17 basically the Ciraolo dissent and saying, yes, we're going to
18 give you an expectation of privacy, because as I pointed out at
19 pages 10 and 11 of my reply, according to Professor LaFave, he
20 explains why Ciraolo was just wrongly decided. It's not a
21 legitimate way of really looking at privacy, and certainly not
22 the way we'd want to look at it under the Alaska Constitution,
23 because it ultimately says the court fails to acknowledge the
24 quality or difference between police surveillance and other
25 uses made of the air space.

So, yeah, Mr. McKelvey doesn't have a reasonable expectation that somebody flying by in a passenger plane wouldn't look down and see what they'd fly by in a passenger plane. But that's not what the police did. They flew over with a high-powered camera specifically looking for something. So that's --

THE COURT: But you acknowledged Ciraolo is the Fourth Amendment rule. What the Alaska Supreme Court might or might not do is what I've got to try to figure out, right?

MR. JOHN: Right, right. But even under the Fourth Amendment rule, because of the enhanced observation, I think the court could rule in Mr. McKelvey's favor based upon that. But the Alaska Supreme Court, I believe, would apply Ciraolo, so even without the enhanced observation in this case, Mr. McKelvey would win.

But when you couple the Ciraolo rule and what the Alaska Supreme Court would do with the fact that we have the high-powered camera that's really providing the observation in this case, I would think under the Alaska Constitution, this would plainly be something, and the court wouldn't have to necessarily even decide what would be the rule in a naked-eye observation case. The court can decide this case under the Alaska Constitution and say, well, under the Alaska Constitution, we'd probably follow Ciraolo. But certainly the fact that is added to this case are the observations being made

with a high-powered camera, would find this to be an invasion of privacy under the Alaska Constitution.

You know, it was loud, and it certainly was loud enough to get Mr. McKelvey out of his house. I don't think one can dispute that he was there, because you don't see cars sitting in driveways with doors and hoods open unless someone is there. So I think that's pretty obvious that he was there that day, and he was doing what he said. You know, the court can determine the accuracy or not of his estimate of the height.

Lieutenant Rodgers did -- said he couldn't say for sure that they didn't fly back over the property. You know, it passed over quickly. My argument about the property size was basically addressing Ms. Crail's argument about the boundary. I mean, the court appears to be rejecting that, and I was just saying how ridiculous that boundary argument would be, because if you had someone with a very small piece of property even if they otherwise had privacy, they'd have no privacy, because you could -- the boundary would go straight up and the police could fly over the edge of the boundary and a foot away and look down. But someone with a big property, they'd have to stay further away. So just kind of demonstrating the ludicrous of that argument.

But also, Your Honor, I think you can rule in our favor on the Fourth Amendment, because of the camera clearly, but certainly under the Alaska Constitution, Mr. McKelvey must

prevail. Thank you.

THE COURT: Thank you. Okay. I'll take this under advisement. It looks like we have calendar call on April 1st, so I'll certainly get something out well in advance of that so that everyone will know what is what at trial.

Anything else today?

MR. JOHN: No, Your Honor.

MS. CRAIL: I'll just -- I will file the additional --

THE COURT: Right, so we --

MS. CRAIL: -- items.

THE COURT: -- can just have a good, clean record. That would be great. Ms. Crail, that was -- we were calling -- let's see. The one we did admit was 4. What number are we giving to the --

MS. CRAIL: I will attach it as --

THE COURT: 5, I guess?

MS. CRAIL: I guess -- well, I'm going to attach both since we talked about both, just so the record is clear.

THE COURT: Just make this 5 and 6.

MS. CRAIL: 5 and 6.

THE COURT: Okay.

MS. CRAIL: 5 the first one, 6 the second.

THE COURT: So we'll be looking for that to come in from the DA's office with service on Mr. John.

MS. CRAIL: Right.

(Plaintiff's Exhibits 5 and 6 admitted)

THE COURT: Okay. Thank you. We're off record.

MR. JOHN: Thank you, Your Honor.

THE COURT: They are admitted. 5 and 6 are admitted into this.

THE CLERK: Off record

4:17:04

(Off record)

* * * * * *

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA,	)
Plaintiff,	)
vs.	)
JOHN WILLIAM McKELVEY, III,	)
Defendant.	)

Case No. 4FA-14-40 CR

ORDER DENYING MOTION TO SUPPRESS EVIDENCE

On August 15, 2014, the defendant, John McKelvey ("McKelvey"), filed a Motion to Suppress Evidence, alleging that the primary evidence used as foundation for probable cause to issue a search warrant was obtained through warrantless aerial police surveillance, in violation of the 4th Amendment of the U.S. Constitution and Article I sections 14 and 22 of the Alaska State Constitution. The State filed its Opposition on September 3, 2014 and McKelvey replied on September 26, 2014. The matter came before the court for evidentiary hearings on December 11, 2014, January 27, 2015, and February 20, 2015. The court now DENIES the defendant's motion.

I. Facts

In August 2012, Investigator Joshua Moore ("Moore") of the Alaska State Troopers asked Alaska Wildlife Trooper Justin Rodgers ("Rodgers") to fly him over McKelvey's property on Grange Road near Two Rivers, Alaska. The purpose of the flight was to corroborate

information reported to Moore by a confidential informant, who stated that they saw a marijuana grow operation on McKelvey's property a few days prior.

Although no flight data was recorded, Moore estimated that the AK Wildlife Trooper Super Cub airplane was approximately 600-800 feet in altitude during the flyover, while Rodgers estimates that he conducted the flight between 600 and 1,000 feet. McKelvey testified that he believed the plane to be 300-400 feet above his property. The court finds that the airplane never flew below 600 feet above McKelvey's property.

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.

While flying near and photographing the property, Moore observed two greenhouses, one of which was partially see-through due to a frosted clear plastic covering on the structure. He could only discern that there appeared to be plants contained in five gallon buckets within the semi-opaque greenhouse, but he could not discern what type of plants they were. This partially corroborated the informant's statement that there were marijuana plants contained in five gallon buckets on the property. Although Moore stated in his affidavit in support of the search warrant application that he saw the door to a shop on the property was open, he reported that he did not see any individuals during the flight or in the photos taken with the telephoto camera. McKelvey testified during the evidentiary hearing on February 20, 2014 that he heard the airplane fly over his property and saw it during a second flyover. He did not, however, see Moore taking

photographs of the property. Based on this flyover and the resulting photographs taken by Moore, a warrant was issued to search McKelvey's Grange Road home, vehicles, greenhouses, and curtilage.

II. Issues Presented

1. How should the court apply the Alaska Constitution's search and seizure and privacy protections?
2. Did McKelvey have a constitutionally protected privacy interest in his greenhouse?

III. Discussion

1. How should the court apply the Alaska Constitution's search and seizure and privacy protections?

In Alaska, both state and federal constitutional law govern protection of a person's right to be free from unreasonable search and seizure.[1] The Alaska Constitution, with its specific provision for protection of "other property," contains "an even broader guarantee against unreasonable search and seizures than does the fourth amendment to the Constitution of the United States."[2] Not only is the Alaska constitution's search and seizure provision more protective of individual rights than that contained in the federal constitutional,[3] the citizens of

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[1] Art. I, § 14 of the Alaska Constitution provides: "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." The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV.

[2] *Woods & Rohde, Inc. v. State, Dep't of Labor*, 565 P.2d 138, 148 (Alaska 1977).

[3] *See, e.g. State v. Avery*, 211 P.3d 1154, 1158 (Alaska Ct. App. 2009)("The Alaska Constitution's search and seizure provision (article I, section 14) is more protective than the Fourth Amendment to the United States Constitution.").

Alaska also have a constitutionally enumerated right of privacy in their homes,[4] and these additional protections must be considered when discussing alleged searches by law enforcement in Alaska.

The Alaska Supreme Court has observed that the privacy amendment, while "powerful as a constitutional statement of citizens' rights, contains no guidelines for its application."[5] According to the Alaska Supreme Court:

> The meaning of privacy of necessity must vary depending on the factual context and the often competing interests of society and the individual. The protection has been defined, for example, as the right "to be let alone," the right of persons "to determine for themselves when, how, and to what extent information about them is communicated to others," and the right which protects "the individual's interest in preserving his essential dignity as a human being." Our conclusion is consistent with these concepts and with the test of privacy articulated by Justice Harlan in *Katz*...adopted by this court.[6]

The cases cited by McKelvey in his briefing involve "surreptitious photography or video-taping" of private activities,[7] and warrantless administrative searches of business premises.[8]

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[4] Article I, § 22 of the Alaska Constitution provides: "The right of the people to privacy is recognized and shall not be infringed."; *Woods & Rohde, Inc. v. State, Dep't of Labor*, 565 P.2d 138, 148 (Alaska 1977) ("Also of significance to our decision in the case at bar is the fact that Alaska's Constitution, unlike the federal Constitution, contains an explicit guarantee of privacy."); *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975)("we conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution"); *see also Reeves v. State*, 599 P.2d 727, 734 (Alaska 1979)("As we have frequently noted, the Alaska constitutional guarantee against unreasonable searches and seizures is broader in scope than fourth amendment guarantees under the United States Constitution, at least in part because of the more extensive right of privacy guaranteed Alaskan citizens by article I, section 22 of our state constitution.").

[5] *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1129 (Alaska 1989).

[6] *State v. Glass*, 583 P.2d 872, 879-80 (Alaska 1978) *on reh'g*, 596 P.2d 10 (Alaska 1979) holding modified by City & Borough of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984).

[7] *State v. Glass*, 583 P.2d 872, 879-80 (Alaska 1978) *on reh'g*, 596 P.2d 10 (Alaska 1979) holding modified by City & Borough of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984); *State v. Page*, 911 P.2d 513, 517 (Alaska Ct. App. 1996).

[8] *Woods & Rohde, Inc. v. Department of Labor*, 565 P.2d 138, 151 (Alaska 1977).

Defendant only explains the application of Alaska's privacy amendment to these specific factual scenarios, rather than advancing an objective standard that can be applied to all government activities which allegedly violate an individual's right to privacy. Because the Alaska Supreme Court has never ruled on the precise issue of whether an aerial viewing of private property constitutes a "search," McKelvey advises the court to look to other jurisdictions where a state constitutional right to privacy has been interpreted as prohibiting aerial surveillance of private property by law enforcement.[9] However, Alaska's constitutional right to privacy is different in wording and character from those in other states, and the court will first look to any clarifications in Alaska law before attempting to analogize case law in other states to Alaska.

The Alaska Supreme Court has recognized that "[b]ecause this [constitutionally enumerated] right to privacy is explicit, its protections are necessarily more robust and 'broader in scope' than those of the implied federal right to privacy."[10] However, this does not mean that § 22's privacy protections create an independent ground for suppressing evidence.[11] Instead, Alaska case law "establishes that suppression is always predicated on the search and seizure provisions of art. 1 §14, and that §22 is merely used as a justification for giving §14 a liberal interpretation."[12] Therefore, the Alaska Supreme Court has determined that "where a search is

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[9] See Memorandum in Support of Motion to Suppress, 13-14 (explaining that Vermont and New Mexico appellate courts have read those state's constitutional privacy protections as amounting to a protection from aerial surveillance by police).

[10] *Beltz v. State*, 221 P.3d 328, 335 (Alaska 2009).

[11] *Municipality of Anchorage v. Ray*, 854 P.2d 740, 750-51 (Alaska Ct. App. 1993); *see also, State v. Gibson*, 267 P.3d 645, 659 (Alaska 2012).

[12] *Municipality of Anchorage v. Ray*, 854 P.2d 740, 750-51 (Alaska Ct. App. 1993); *see also, State v. Gibson*, 267 P.3d 645, 659 (Alaska 2012) ("Although the State accurately observes that article I, section 22, does not create an independent ground for suppressing evidence, Alaska courts have used section 22's right to privacy to give section 14's protection against unreasonable searches and seizures 'a liberal interpretation.'").

alleged to be unconstitutional, section 14's standards for a proper search and seizure are 'inexorably entwined' with section 22's privacy protections."[13] Because the two Alaska Constitutional amendments are so closely connected, the Alaska Court of Appeals in one case determined that because a challenged statute did not violate the search and seizure clause of the Alaska constitution, the court was also able to dispose of the plaintiff's corresponding privacy challenge.[14]

According to the Alaska Supreme Court, "[t]he test for determining whether a person's right to privacy has been invaded under article I, section 22 is two-fold: (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?"[15] This is the same two-prong test used by courts to analyze whether state and federal constitutional protections against unreasonable search and seizure apply to claims of unlawful government intrusion.[16] Therefore, even though Alaska's Constitution places separate emphasis on the right to privacy, the test used to determine whether

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[13] *Beltz v. State*, 221 P.3d 328, 335 (Alaska 2009) (The Court, giving examples of relevant decisions, noted: "We have invoked the privacy amendment in opinions: barring the state from surreptitiously recording conversations in certain circumstances; prohibiting warrantless administrative inspections of certain business premises; and preventing police from opening closed luggage during an inventory search of a vehicle.").

[14] *Municipality of Anchorage v. Ray*, 854 P.2d 740, 750-51 (Alaska Ct. App. 1993)("However, the right to privacy granted by Article I, Section 22 does not create a separate, independent right to seek exclusion of evidence... a review of Alaska Supreme Court decisions reflects no intent to create an independent ground of exclusion. A close reading of the cases establishes that suppression is always predicated on the search and seizure provisions of art. 1, § 14, and that § 22 is merely used as a justification for giving § 14 a liberal interpretation. Thus, our ruling that AS 28.35.035(a) does not violate the search and seizure clause of the Alaska constitution disposes of Ray's privacy challenge as well.")(internal citations and quotations omitted).

[15] *City & Borough of Juneau v. Quinto*, 684 P.2d 127, 129 (Alaska 1984).

[16] This test was first adopted in *Katz v. United States*, 389 U.S. 347, 361 (1967)("there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"); see also *Smith v. State*, 510 P.2d 793, 797 (Alaska 1973)(adopting *Katz v. US*'s two-step expectation of privacy test in Alaska).

this right has been invaded is the same test used to analyze an individual's expectation of privacy in search and seizure cases—further evidence for the proposition that Article I, section 22 and section 14 are indeed "inexorably entwined."

The two-prong expectation of privacy test "defines the scope of Alaska's right to be free from unreasonable governmental intrusion."[17] Therefore, before even applying Article I, section 22 and section 14—Alaska's heightened constitutional protections for individual privacy—a reviewing court must first ensure that an individual's expectation of privacy was actually demonstrated (subjective) and one that society is willing to accept as reasonable (objective).[18] If a person can meet both prongs of this test, that person is then entitled to constitutional protection.[19]

The second prong—whether McKelvey's expectation of privacy was objectively reasonable—is the prong which is contested here. Therefore, this court must focus on whether McKelvey' subjective expectation of privacy in his yard and greenhouses was in fact objectively reasonable. For this analysis, the court will consider the nature of the observation, and will consider what expectation of privacy is reasonable for the type of area allegedly "searched."

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[17] *State v. Boceski*, 53 P.3d 622, 624 (Alaska Ct. App. 2002).

[18] *State v. Glass*, 583 P.2d 872 (Alaska 1978)(" Where a person exhibits an actual, or subjective, expectation of privacy and where that expectation is one that society is prepared to recognize as reasonable, person is entitled to Fourth Amendment protection.")*on reh'g,* 596 P.2d 10 (Alaska 1979) *holding modified by City & Borough of Juneau v. Quinto*, 684 P.2d 127 (Alaska 1984).

[19] *State v. Glass*, 583 P.2d 872 (Alaska 1978) *on reh'g,* 596 P.2d 10 (Alaska 1979) *holding modified by City & Borough of Juneau v. Quinto*, 684 P.2d 127 (Alaska 1984).

2. Did McKelvey have a protected privacy interest in his greenhouse?

The location in question, namely the semi-opaque greenhouse and other outbuildings on the McKelvey property, are a part of McKelvey's "curtilage"—the area immediately surrounding and intimately associated with his home, which is a classification that traditionally enjoys a similar expectation of privacy as the home itself. In determining the size of the curtilage, the court applies the traditional definition:

> A piece of ground commonly used with the dwelling house. A small piece of land, not necessarily inclosed [sic], around the dwelling house, and generally includes the buildings used for domestic purposes in the conduct of family affairs. A courtyard or the space of ground adjoining the dwelling house necessary and convenient and habitually used for family purposes and the carrying on of domestic employments. A piece of ground within the common inclosure [sic] belonging to a dwelling house, and enjoyed with it, for its more convenient occupation.[20]

Along with these considerations, any questions regarding the extent of curtilage in Alaska is resolved by applying four factors: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."[21] Although combining these factors does not produce a "finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions,"[22] these factors are useful to consider "whether the area in question is so intimately

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[20] *Hakala v. Atxam Corp.*, 753 P.2d 1144, 1149 (Alaska 1988) (citing *Black's Law Dictionary* 346 (5th ed. 1979)).
[21] *Neuharth v. State*, 2007 WL 2745156, at *4 (Alaska Ct. App. Sept. 19, 2007) (adopting the test first applied by the U.S. Supreme Court in *United States v. Dunn*, 480 U.S. 294, 301 (1987)).
[22] *United States v. Dunn*, 480 U.S. 294, 301 (1987).

tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."[23]

Here, Mr. McKelvey's greenhouse is approximately 10-15 feet behind his home,[24] is a part of the property that is surrounded by a natural sight-barrier of tall woods,[25] was used for the cultivation of marijuana plants, and was protected from ground-level observation by placement of the building away from the front of his home and placement of "KEEP OUT" and "NO TRESPASSING" signs all throughout the barrier to the property.[26] Here, although the greenhouse seems to have been used for activities not traditionally associated with domestic living, the other three factors weigh in favor of a finding that the greenhouse, due to its close proximity to the home, location in the designated area of the home, and steps taken to protect it from observation, is in fact a part of Mr. McKelvey's curtilage.[27] Therefore, the court now finds 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.

Ultimately, however, whether or not Mr. McKelvey's semi-opaque greenhouse was located in the curtilage is irrelevant. This is because there can be no reasonable expectation of privacy in items or locations held open to the public, and so any governmental viewing or inspection of these places fails the "objective" prong of the reasonableness test and does not

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[23] *United States v. Dunn*, 480 U.S. 294, 301 (1987).
[24] *See* Defendant's Exhibit C, McKelvey Property Aerial Photos.
[25] *See* Defendant's Exhibit C, McKelvey Property Aerial Photos.
[26] *See* Affidavit of John William McKelvey III, paragraph 4.
[27] Note, also, that the Alaska Court of Appeals has determined that metal sheds on a property were within the curtilage of a home. *See, e.g. Stuart v. State, 698 P.2d 1218, 1221 (Alaska App.1985) (metal sheds on a property were within the curtilage of the home); Ingram v. State, 703 P.2d 415, 427 (Alaska App.1985) (a storage shed connected to a four-plex was within the curtilage of the four-plex)).*

constitute a "search" subject to constitutional protection.[28] This provision, first articulated by the U.S. Supreme Court in *U.S. v. Katz*, was affirmed by the Alaska Supreme Court in 2001, when it agreed that "[a]ctivities that are open to public observation are not generally protected by the Fourth Amendment."[29] Therefore, even if an individual exhibits an actual (subjective) expectation that he or she will be free from government intrusion, this expectation of privacy is not one that society is willing to accept as reasonable when the information in question is something that can be seen from a public space. This is true even if the items or information exposed to the public are contained in a person's home, which typically receives the highest level of scrutiny and protection.[30]

This subjective expectation of privacy that is nonetheless *objectively* unreasonable is the exact situation at work in the present case. Here, although Mr. McKelvey very obviously did not wish for passersby to view his greenhouse or its contents, the fact that both the greenhouse and what it contained were visible from public airspace overcomes his subjective expectation of privacy. There is no doubt that navigable airspace is open to the public at large, and this is particularly true in a state such as Alaska, where air travel by all manner of commercial and

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[28] *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *see also Cowles v. State*, 23 P.3d 1168, 1171 (Alaska 2001)("Activities that are open to public observation are not generally protected by the Fourth Amendment.").

[29] *Cowles v. State*, 23 P.3d 1168, 1171 (Alaska 2001)(" Activities that are open to public observation are not generally protected by the Fourth Amendment. 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection.'").

[30] *Anderson v. State*, 555 P.2d 251, 256 (Alaska 1976) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *see also Martin v. State*, 297 P.3d 896, 900 (Alaska Ct. App. 2013) (concluding that State trooper's conduct in standing in a public vantage point when he looked through gaps in the blinds of a personal residence and saw methamphetamine supplies did not violate State constitutional guarantees) *cert. denied,* 135 S. Ct. 280, 190 L. Ed. 2d 206 (2014) (Alaska App. 2013).

private aircraft is essential to the Alaskan way of life and central to Alaska's tourism economy. Federal aviation standards permit fixed-wing aircraft to fly as low as 500 feet, and rotary wing aircraft are permitted to fly even lower.[31] In fact, there is a private airstrip within a short distance of McKelvey's property.

The Alaska Supreme Court has concluded that "the mere observation of items which are in plain view or which are open and apparent, it not a search. Consequently, evidence based on such observations is admissible so long as the observing officer was legally in the position where the observations were made."[32] Additionally, "[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."[33] The AST airplane was flying above 500 feet in altitude during the incident in question. Therefore, because Moore was legally in the position where the observations were made, his observation of the greenhouse and its contents from the air were not a "search" and not subject to Fourth Amendment protection. The fact that McKelvey took measures to restrict views of his curtilage and outbuildings from other public areas (i.e. the road or surrounding property) does not preclude the fact that law enforcement officers were able to easily view evidence of criminal activity from public airspace. "The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible."[34]

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[31] *See Florida v. Riley*, 488 U.S. 445, 445-46 (1989) (discussing federal aviation altitude limits for fixed-wing craft and helicopters).
[32] *Klockenbrink v. State*, 472 P.2d 958, 961 (Alaska 1970).
[33] *Anderson v. State*, 555 P.2d 251, 257 (Alaska 1976).
[34] *California v. Ciraolo*, 476 U.S. 207, 207-08 (1986).

In 2001, the Alaska Supreme Court held that law enforcement videotaping of a defendant's publicly observable unlawful conduct did not violate her right to privacy under the Alaska Constitution. The Supreme Court concluded that "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)."[35] Here, 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. Therefore, McKelvey's expectation of privacy in his greenhouse and its contents fails the "objective prong" of the test articulated in *Katz v. U.S.*, as adopted by the Alaska Supreme Court.

It is important to note that Moore's specific intent to view McKelvey's property for the purpose of looking for evidence of drug crimes does not invalidate the lawfulness of his observation. It is true that "inadvertence" is a precondition to a valid seizure of evidence under the plain view exception.[36] But "the kind of plain view to which the inadvertence requirement applies only takes place after there has been an initial search or intrusion."[37] Thus, "[t]he inadvertence requirement of the plain view doctrine has never been thought to apply where the observation precedes the intrusion. It does not prevent police officers who are lawfully positioned in a public area from intentionally looking for suspects or incriminating evidence

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[35] *Cowles v. State*, 23 P.3d 1168, 1172 (Alaska 2001).
[36] *Reeves v. State*, 599 P.2d 727, 739 (Alaska 1979).
[37] *Sumdum v. State*, 612 P.2d 1018, 1022 (Alaska 1980).

freely visible within the confines of a constitutionally protected area."[38] Had Moore attempted to use his observation of the greenhouse from the air as reason to immediately land the plane and enter McKelvey's property to seize the marijuana plants, this would have been manifestly unconstitutional.[39] However, Moore only used his observations as probable cause to obtain a search warrant.[40]

McKelvey also contends that Moore's use of "sense-enhancing technology" to view the contents of his greenhouse constituted a warrantless search of his property. Here, the sense-enhancing technology that McKelvey refers to is a Canon camera with a 280mm lens that Moore used to magnify and photograph McKelvey's property from the air. According to McKelvey, the use of this camera rises above the allowable threshold alluded to in the *Ciraolo* case by Justice Burger, who noted: "The State acknowledges that aerial observations of 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."[41] However, based on the facts in this case, it is not apparent that the sense-enhancing device used to view McKelvey's property rises to the level of intrusiveness that existed in the Ciraolo case.

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[38] *Sumdum v. State*, 612 P.2d 1018, 1022 (Alaska 1980).
[39] *Young v. State*, 72 P.3d 1250, 1252 (Alaska Ct. App. 2003) ("even though an officer may lawfully look through the window of a residence and observe contraband, the plain view doctrine does not justify the officer's entry into the residence to seize the contraband—because the police may not enter a residence without a warrant").
[40] *State v. Spietz*, 531 P.2d 521, 523 (Alaska 1975) ("Plain view alone will not justify an entry into a private residence because plain view is not in itself an exception to the warrant requirement. Plain view of evidence of a crime merely furnishes probable cause to believe that a crime has been committed. Probable cause in itself does not justify a warrantless search and seizure of evidence, since absent exigent circumstances a search warrant must first be obtained from an impartial judicial officer.").
[41] *California v. Ciraolo*, 476 U.S. 207, 215 n.3 (1986).

Here, the most accurate way to characterize Moore's use of a telephoto lens to see objects on McKelvey's property more clearly is as an assisted plain view observation. Because Moore was lawfully located in a space accessible to the public (airspace above 500 ft.), his observations from this public vantage point were acceptable.[42]

McKelvey incorrectly asserts that this case is similar to *Kyllo v. U.S.*, where law enforcement used thermal imaging of a home to detect criminal activity.[43] *Kyllo* is distinguishable from the case at hand because the court in *Kyllo* specifically limited its holding to circumstances where "the technology in question is not in general public use."[44] Here, the Canon telephoto camera was neither used to peer inside the interior of McKelvey's home, nor is it a device that a member of the general public could not easily purchase. In its reply to Defendant's Motion to Suppress, the state correctly analogizes the telephoto lens used to get a better view of McKelvey's greenhouse with other devices that give a clearer picture of what someone may already be able to view with their natural senses, such as binoculars. This contention seems manifestly more reasonable than the argument that a telephoto lens is similar to a thermal imaging device that essentially allows its user to see through walls.

The use of sense-enhancing devices by a law enforcement officer when looking for items in plain view from a lawful vantage point has not been the subject of substantial discussion in Alaska. However, federal courts have concluded that "[p]ermissible techniques of surveillance

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[42] *Martin v. State*, 297 P.3d 896, 900 (Alaska Ct. App. 2013) ("Because Ingram was standing in a public vantage point (the deck or walkway directly adjacent to the apartment) when he looked through the window, his observation of the methamphetamine supplies inside the apartment was obtained lawfully.") *cert. denied,* 135 S. Ct. 280, 190 L. Ed. 2d 206 (2014).
[43] *Kyllo v. United States*, 533 U.S. 27, 34 (2001).
[44] *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case."[45]

The only appellate case law in Alaska that is directly relevant to the case at hand is the Alaska Supreme Court's conclusion in *Anderson v. State* that "as with flashlight observations, courts have had little difficulty sustaining warrantless seizure of items observed in plain view with the assistance of binoculars."[46] In undertaking this remark in *Anderson*, the Alaska Supreme Court cited several examples of federal and state authorities permitting the use of these sense-enhancing devices, including a federal case specifically delineating that the use of devices like binoculars or telescopes by law enforcement are not prohibited by the Constitution.[47] Based on *Anderson*, the court concludes that plain view observations by law enforcement that are made with the assistance of a visual-enhancement device are lawful under Alaska law. Here, Moore used the Canon telephoto camera to magnify the object of his vision from a public vantage

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[45] *United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978); *see also On Lee v. United States*, 343 U.S. 747, 754, 72 S. Ct. 967, 972, 96 L. Ed. 1270 (1952) ("The 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."); *United States v. Allen*, 633 F.2d 1282, 1290-91 (9th Cir. 1980)("This circuit has held that the use of aids to the senses such as binoculars does *1291 not convert unobjectionable surveillance into a prohibited search. See Dubrofsky, supra, 581 F.2d at 211; Solis, supra, 536 F.2d at 882. Surveillance of the open fields on the ranch from the hill observation site and use of binoculars violated no reasonable expectation of privacy of the defendants.").

[46] *Anderson v. State*, 555 P.2d 251, 258 n. 30 (Alaska 1976).

[47] *See United States v. Lee*, 274 U.S. 559, 563 (1927) (Explaining that "use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution."); *see also On Lee v. United States*, 343 U.S. 747, 754, 72 S. Ct. 967, 972, 96 L. Ed. 1270 (1952)(" The 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.").

point.[48] Unlike the law enforcement in *Kyllo*, Moore did not use this sense-enhancing device as a substitute for a search. Rather, he used it as a tool to obtain evidence of probable cause, and he obtained a search warrant before undertaking any physical invasion of a constitutionally-protected area.

It is also relevant to the court's analysis that 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 Alaskan 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 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. Additionally, although McKelvey avers that small aircraft flying at lower altitudes

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[48] *See also, Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986) (Explaining that police officers flying in helicopters do not need a warrant for using a specialized camera that is available to the public, the Court stated that "[t]he mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems."); *United States v. Knotts*, 460 U.S. 276, 282-83 (1983) ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case. In *United States v. Lee*... the Court said: 'But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motor boat was boarded. Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution.'").

do not characterize the nature of airplane travel near his property, there is at least one private airstrip within a mile of his property.

Because the officer's location at the time of the purported intrusion was in a public area outside the curtilage of McKelvey's residence and because the observations were made with the assistance of a publicly-available camera, rather than sophisticated surveillance technology not generally available to the public, the court now determines that Moore's use of the telephoto lens does not turn his aerial observations into a "search" for state or federal constitutional purposes. McKelvey's subjective expectation of privacy from the kind of conduct at issue here is not objectively reasonable.

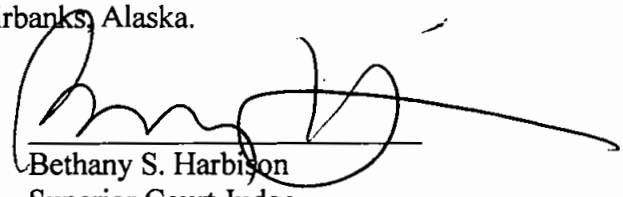
IV. Conclusion

Although McKelvey certainly intended his property to be free from view of the public and government agents, as evidenced by his ground-level attempts to shield his home and curtilage from onlookers, the translucent nature and open doors of the greenhouse rendered its contents viewable from public space. Flying within legal altitude limits and using only a publicly-available magnification device, Moore was able to see into the greenhouse in his attempt to gather probable cause evidence for a search warrant. An individual has no objectively reasonable expectation of privacy in that which he exposes to the public. Additionally, because of the frequency and necessity of overflight by small aircraft at lower altitudes, Alaskans living within one mile of a private airstrip have no objectively reasonable expectation of privacy when it comes to views of their property and curtilage from the air, as long as these views are obtained from those lawfully within regulated public airspace. Therefore, because McKelvey's

expectation of privacy was unreasonable, neither the 4th Amendment to the U.S. Constitution, nor Alaska Constitution Article I sections 22 or 14 apply to Moore's conduct, and the trooper flyover and observations do not constitute a warrantless search.

The Motion to Suppress Evidence shall be and hereby is DENIED.

Dated this 3 day of April, 2015, at Fairbanks, Alaska.



Bethany S. Harbison
Superior Court Judge

I certify that on 4/8/15
copies of this form were sent to:
Clerk: DA Atty: John AGO

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6 STIPULATED FACTS COURT TRIAL & CHANGE OF PLEA
BEFORE THE HONORABLE BETHANY HARBISON
7 Superior Court Judge
8 Fairbanks, Alaska
September 17, 2015
9 3:32 p.m.
10APPEARANCES:
10 FOR THE PLAINTIFF: ELIZABETH F. CRAIL
District Attorney's Office
11 455 Third Avenue
Suite 150
12 Fairbanks, Alaska 99701
13 FOR THE DEFENDANT: ROBERT JOHN
Attorney at Law
14 PO Box 73570
Fairbanks, Alaska 99707
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1 P R O C E E D I N G S
2 3:32:12
3 THE CLERK: On record.
4 THE COURT: We're on record in State of Alaska versus
5 John McKelvey, 4FA-14-40 and 14-921. Mr. McKelvey is here in
6 custody represented by Mr. John who is here. Ms. Crail is here
7 for the state. We're here for stipulated facts trial, I think
8 in the felony and change of plea in the misdemeanor, and I
9 assume Rule 11 sentencing.
10 Who wants to lay out the agreement?
11 MS. CRAIL: Your Honor, we've agreed to stipulated facts
12 trial. We've provided the court with a copy of the stipulated
13 facts. I think the -- certainly, the court can consider what
14 was previously presented in the evidentiary hearing. I did ask
15 Sergeant Moore to be here just in case. I thought we covered
16 everything in the stipulated facts, but it was occurring to me,
17 just in an abundance of caution in case there was any point
18 that needed clarification, that he would be here and
19 potentially able to add a brief testimony.
20 My understanding of the Dow decision related, basically,
21 just to Cooksey pleas such that a stipulated facts trial is
22 essentially the pre-Cooksey method. So I don't think that that
23 would cause any issues. The advantage -- and I'm sure that's
24 Mr. John's preference as well -- is that it means that all
25 issues are up for grabs for appeal. It's not merely

1 dispositive issues. And the state understands that, and we're
2 all proceeding on that understanding that he can appeal
3 anything. The only issue, of course, is, is that if he won
4 anything on appeal that was not, per se, dispositive, then it
5 would be shifted back to this court to presumably have a
6 retrial of some nature.
7 THE COURT: Okay.
8 MS. CRAIL: So that's -- we do have a Rule 11 with
9 respect to sentencing. I guess that -- obviously, that means
10 the parties are presuming that the court is going to make
11 findings, but --
12 THE COURT: Right.
13 MS. CRAIL: -- we have talked about. We have the waiver
14 of right to jury trial, the written version of that for the
15 court, as well as the stipulated facts. And I -- this was -- I
16 think technically we probably should not present the Rule 11
17 sentencing agreement until after the court has made the --
18 THE COURT: Okay. Well, I'm familiar with the stipulated
19 facts, because I saw them just a moment ago for the state.
20 McKelvey brought in -- Mr. John provided a copy of the same
21 order, so I've reviewed those and find guilty on a reasonable
22 doubt. As I understand, it's going to be on Counts II and III,
23 both B felonies, right?
24 MS. CRAIL: Correct. MIW II and MICS III for
25 methamphetamine, yes, Your Honor.

THE COURT: Okay. Well, wait a minute. Make sure I've got the right ones.

MS. CRAIL: I just want to make sure I'm looking at the right ones.

THE COURT: Count II --

MS. CRAIL: Count II was for methamphetamine, that's correct, Your Honor. And --

THE COURT: Count III --

MS. CRAIL: -- Count III was the possession of the firearm in furtherance, so that's the Count III, yes.

THE COURT: Okay.

MS. CRAIL: Those two.

THE COURT: All right I find guilty beyond a reasonable doubt with regard to Counts II and III. My understanding is the state is not pursuing and presenting evidence with regard to I, IV, V --

MS. CRAIL: That is correct. We're dismissing those as part of the Rule 11.

THE COURT: -- VI and VII. So those are dismissed now by the state, 43(a) pursuant to this court's finding of guilt, and Mr. McKelvey's agreement now to enter into a Rule 11 plea agreement. But before we can go forward, I have to verify that Mr. McKelvey wants me to do this without having a jury trial. So let me go through this with him just to verify.

Mr. McKelvey, you understand if we go forward, I would

find that you were guilty beyond a reasonable doubt based on the stipulated facts that have been presented in writing? You understand?

MR. MCKELVEY: (No audible response).

THE COURT: Okay. Let me just get the microphone near you so you can answer out loud for the record.

MR. MCKELVEY: Yeah.

THE COURT: Okay. And you understand you could have had a jury trial if you'd wanted to, and instead, what you're asking me to do is to find -- make a decision about whether you're guilty or not guilty based on the written stipulation, and you're giving up your right to have a trial by jury. Do you understand?

MR. MCKELVEY: Yes, ma'am.

THE COURT: Okay. If you'd had a jury trial, 12 people would have heard the evidence that you presented and also that the prosecutor presented. And the state would have had to prove that you were guilty beyond a reasonable doubt before you could have been convicted. And, in fact, the 12 people would have had to have been unanimous in concluding beyond a reasonable doubt that you were guilty before you could have been convicted. So if there's even one holdout, you wouldn't have been convicted. You understand?

MR. MCKELVEY: Yes.

THE COURT: Okay. And if you go ahead and go forward and

waive your right to trial by jury, your guilt will be decided by me and not by a jury, and you're further agreeing that I wouldn't hear the evidence in the courtroom. Instead, I would make the decision based on facts that you and the state have agreed to. Do you understand?

MR. MCKELVEY: Yes.

THE COURT: Okay. And do you understand the nature of the charges against you?

MR. MCKELVEY: Yes, I do.

THE COURT: So the two charges for which there are stipulated facts are misconduct involving a controlled substance in the third degree alleging -- as charged in Count II of the indictment.

THE CLERK: May I have the CTNs, Your Honor?

THE COURT: Yes, which is Count II, CTN 001, third degree misconduct involving a controlled substance, alleging that on or about August 24th, you possessed with intent to deliver methamphetamine. Do you understand?

MR. MCKELVEY: Yes, ma'am.

THE COURT: Okay. And then as far as the nature of Count III, which is CTN --

MS. CRAIL: 004.

THE COURT: -- 004, that alleges that on or about August 24th, at or near Fairbanks, you possessed a firearm during the commission of the possession with intent to deliver the

methamphetamine.

MR. MCKELVEY: Yes, ma'am.

THE COURT: Okay. And do you understand the nature of these charges, then?

MR. MCKELVEY: Yeah.

THE COURT: Okay. And taking into consideration your right to a trial by jury and the nature of the charges against you, do you want to go ahead and waive your right to trial by jury?

MR. MCKELVEY: Yes.

THE COURT: Okay. Has anyone promised you anything other than the dismissal of the charges and probably the Rule 11 agreement I'm about to hear about -- have there been any other promises made to you to get you to do this?

MR. MCKELVEY: No.

THE COURT: Are you being threatened, forced, or coerced?

MR. MCKELVEY: No.

THE COURT: Have you had enough time to talk to your lawyer about this?

MR. MCKELVEY: Yeah.

THE COURT: Okay. And are you satisfied with how he's represented you in this case?

MR. MCKELVEY: Yes.

THE COURT: Okay. Are you under the influence of anything today that would make it hard for you to understand

what's happening in court?

MR. MCKELVEY: No.

THE COURT: And you understand the effect of this is you'll be able to appeal anything that's happened up till now --

MR. MCKELVEY: Yes.

THE COURT: -- including the denial of the suppression issue?

MR. MCKELVEY: Yes.

THE COURT: Okay. All right. I find, then, that Mr. McKelvey is making a knowing and voluntary waiver of his right to trial by jury. He's had the advice of his lawyer and I can understand the reason why he's making this decision. So I'm going to go ahead now and make the finding that I've personally inquired of him in open court. I guess I should inquire of Mr. John as well. Mr. John, have you provided advice to Mr. McKelvey about this?

MR. JOHN: Yes, Your Honor, I've discussed --

THE COURT: All right.

MR. JOHN: -- it thoroughly with him.

THE COURT: Okay. So I'll make the finding now this 17th day of September, 2015, that Mr. McKelvey has waived his right to trial by jury. I find guilty beyond a reasonable doubt based on the stipulated facts. Remaining counts are now dismissed. Sentencing will be pursuant to Rule 11. And what

is the agreement?

MS. CRAIL: I just forgot one piece (indiscernible - away from microphone), Your Honor.

MR. JOHN: Okay. That's fine.

MS. CRAIL: So, Judge, what we had said was on the two B felonies, he's four to seven presumptive. It was four years flat on each count, but concurrent with each other, so it's just four years effective. And as to the VCOR, we had agreed to six months with all six months suspended for two years, open-court probation.

THE COURT: That's 14-921?

MS. CRAIL: Yes, Your Honor.

MR. JOHN: And dismissing the license revoca --

THE COURT: And he'd be pleading no contest to violating conditions of release; the state would dismiss the DWLS?

MS. CRAIL: That is correct, Your Honor.

THE COURT: Okay. And that's six months, all suspended?

MS. CRAIL: Yes, Your Honor.

THE COURT: How many --

MS. CRAIL: And it's open-court probation on that.

THE COURT: For one or two years?

MS. CRAIL: What did I say on this?

MR. JOHN: Two years; two years.

MS. CRAIL: Two years.

THE COURT: Two years, okay.

1 MS. CRAIL: And we further agreed that he would forfeit
2 everything seized. We did clarify, however, that the
3 forfeiture is -- well, as to -- would it be held pending the
4 results of the appeal, so that if he won on appeal, the only
5 things that would be forfeited presumably if he -- I mean, if
6 he won completely, would be the mandatory or the pre -- or not
7 presumptive, the -- basically, the mandatory forfeiture of
8 drugs, which is pursuant to statute. But that assuming that
9 he lost it on appeal, that he's agreeing that everything is
10 forfeited.
11 THE COURT: Okay.
12 MS. CRAIL: So -- and I believe that was it.
13 MR. JOHN: Yes, that's my understanding, Your Honor, so
14 if Mr. McKelvey didn't win his appeal on the suppression issue,
15 certainly, he'd get his money back and everything but the
16 contraband.
17 MS. CRAIL: Right, right. I mean, obviously, we wouldn't
18 have a basis to proceed with that. Well -- so essentially, the
19 forfeiture is agreed to, but it simply -- but it's contingent
20 just as the whole thing is contingent on going up on appeal,
21 so --
22 THE COURT: I think the best way to proceed is to
23 consider it stayed pending appeal.
24 MS. CRAIL: Right. Stayed pending appeal is --
25 THE COURT: The forfeiture part of the sentence is --

MS. CRAIL: Yes.

THE COURT: -- stayed pending appeal. But I think I should authorize DPS to dispose of the drugs if they haven't already, because I don't see any reason to have that all hanging around in some evidence room.

MS. CRAIL: Well, but the only thing is, is they have to --

THE COURT: Oh, trial.

MS. CRAIL: --- hold onto it until the appeal is over with anyways, so --

THE COURT: You're right. In case you need to try it.

MS. CRAIL: Yeah, yeah.

THE COURT: All right. Never mind then. Mr. McKelvey, do you understand the agreement?

MS. CRAIL: However, Your Honor -- well, never mind. That takes care of it, doesn't it, as everything.

THE COURT: Okay, Mr. McKelvey, do you understand the agreement?

MR. MCKELVEY: Yes, I do.

THE COURT: Okay. Let me just make sure that you and I are on the same page. So for the two charges that you were just convicted of by me based on the stipulated facts, those are both Class B felony crimes. Each one has a maximum penalty of 10 years in jail and/or $100,000 fine. I assume you were aware of that before I found you guilty, but let me just verify

that you knew that.

MR. MCKELVEY: Yes.

THE COURT: Okay. And if for some reason you didn't know that, I would take back the guilty finding right now. So do you want me to take it back or do you still --

MR. MCKELVEY: No.

THE COURT: Okay. All right. So that's the maximum penalty. Because you apparently have a prior felony conviction, the presumptive range is between four and seven years, and as I understand your agreement with the state, you've agreed that you should serve the lower end of that, the four years, and that -- that would be for each of the two charges, but I would run them concurrent with each other, such that they would overlap rather than be one after the other, so you'd essentially be done in the four years. And if you're eligible, you'd get a good-time credit. Understand?

MR. MCKELVEY: Yes, I do.

THE COURT: Okay. And then we've already talked about the other counts in that case would be dismissed. There are a couple of surcharges that I'd have to impose, total of $200. Do you understand?

MR. MCKELVEY: Yeah.

THE COURT: Okay. And then you would forfeit anything that was seized in that case, so the -- what I'm aware of is at least one weapon, maybe others, drugs, paraphernalia, and some

other things; potentially probably money, I don't know.

MR. MCKELVEY: That's fine.

THE COURT: But whatever it was, you'll never get it back. But I would stay the forfeiture while the appeal is pending so that if, ultimately, you win on appeal, everything is still being held by the police and could be returned to you except whatever -- people don't get drugs back anyway, so -- understand?

MR. MCKELVEY: I understand.

THE COURT: Okay. Okay. And then for the misdemeanor charge, which is 4FA-15-921, you were charged in Count I with violating conditions of release, a Class A misdemeanor crime with a maximum penalty of one year in jail and/or a $10,000 fine. My understanding is you're going to plead guilty to that and the state is going to dismiss the Count II driving with a cancelled, suspended, or revoked license. And you're agreeing that I would impose six months sentence, but suspend all six months. So you would never have to serve it unless you violated probation in that case.

MR. JOHN: It would be a non-contest plea, Your Honor, we've agreed to.

THE COURT: Oh, I'm sorry. I didn't realize --

MS. CRAIL: And that's -- and actually that -- under the circumstances, that's fine in this case, Your Honor. And it's a -- just a basic obey-all-laws condition, open-court

probation.

THE COURT: Okay. So your plea will be no contest. In other words, you're not admitting that you're guilty; you're just agreeing to be convicted based on the evidence the state has.

MR. MCKELVEY: Yes.

THE COURT: Okay. And then it would be six months with all six suspended. I'd place you on probation for two years, but it wouldn't be supervised by a probation officer. It's what they call open-court probation. In other words, I'm telling you not to violate any laws. You're supposed to not violate any criminal laws such that you might be incarcerated. You wouldn't violate probation with a traffic ticket, but anything that could lead to incarceration would be a violation of probation. That would be the condition. You understand?

MR. MCKELVEY: Yes.

THE COURT: Okay.

MR. MCKELVEY: I understand.

THE COURT: And if there was any seizures -- I don't think there was in the misdemeanor -- things are forfeited if they were seized, and, again, stayed pending appeal. Do you have any questions about the agreement?

MR. MCKELVEY: No, ma'am.

THE COURT: Do you want to go forward with this agreement today?

MR. MCKELVEY: Yes, please.

THE COURT: Okay. And do you understand you have the right if you'd wanted to on the misdemeanor just like you would have on the felony, you would have had the right to have a trial?

MR. MCKELVEY: Yeah.

THE COURT: At the trial, you'd be presumed innocent. The state would have the entire burden of proving that you're guilty beyond a reasonable doubt. You would have had the right to confront and cross-examine all the state's witnesses. You could have testified yourself at the trial or you could have remained silent. Your silence wouldn't be held against you, and you could have brought your own witnesses to testify at the trial. And if they didn't want to come to court, Mr. John would have helped you. You could have used the subpoena power of the court, which would make people come to court and testify even if they didn't want to do that. Do you understand?

MR. MCKELVEY: Yeah.

THE COURT: Okay. If you've been convicted after a trial, you could have appealed to a higher court and, in fact, this preserves -- I guess it doesn't. For the misdemeanor, it doesn't preserve your appellate right. That is, you're never going to be able to appeal the violating conditions of release. You're only going to be able to appeal the issues in the felony. Do you understand?

1 MR. MCKELVEY: That's fine.
2 THE COURT: Okay. And then in neither case will you be
3 able to appeal the sentence, because you're agreeing to the
4 sentence. So if the convictions stand, so does the sentence.
5 Understand?
6 MR. MCKELVEY: Yes.
7 THE COURT: Okay. Have you had enough time to talk to
8 Mr. John about all this?
9 MR. MCKELVEY: Yes, I have.
10 THE COURT: And you continue to be satisfied with how
11 he's representing you in this case?
12 MR. MCKELVEY: Yes.
13 THE COURT: And aside from what we've discussed in court,
14 has anyone promised you anything to get you to do this?
15 MR. MCKELVEY: No.
16 THE COURT: Are you being threatened, forced, or coerced?
17 MR. MCKELVEY: No.
18 THE COURT: Do you understand that being convicted of a
19 crime can have the consequences, if you're not a U.S. citizen,
20 of deportation, exclusion from admission, or denial of
21 naturalization?
22 MR. MCKELVEY: Oh -- yes.
23 THE COURT: Probably don't care, because you're a U.S.
24 citizen, but just so you know.
25 MR. MCKELVEY: Right.

THE COURT: Okay. All right. Let me ask you then, officially for the court record, to the charge in Count I in case number 4FA-14-921, the charge of violating conditions of release, a Class A misdemeanor crime, what is your plea today?

MR. MCKELVEY: No contest.

THE COURT: I accept the plea. I find it knowingly and voluntarily entered. He's had the advice of his lawyer. And I'll enter judgment of conviction accordingly. Sentencing now will be pursuant in both cases to Criminal Rule 11. Any remarks, Ms. Crail?

MS. CRAIL: Your Honor, this -- the court is fully aware of all of the -- or most of the details of the case already and the circumstances. I think this is a reasonable resolution. It takes into account the concerns of both parties. I think it is -- it also deals with the gravamen the offenses here. It really relates to the -- and I don't know whether one drug versus another is more important, but I think that methamphetamine being a particularly serious drug, and that one being probably the most obvious one here, again, that goes to the gravamen of the case. And the additional gravamen being the grave concern about that loaded AK47 in the entryway when they were coming in. So I think the combination is fair.

It is a -- it's the low end of the presumptive, but on the other hand, it takes into account the fact that Mr. McKelvey obviously has his own concerns about the case as well.

1 And it's within the range of fair sentences for this court, I
2 think. And the court can also take into account that this is a
3 composite sentence, so it actually, technically is four years
4 and six months with that extra six months suspended with the
5 VCOR charge. And so I think that also helps show the composite
6 fairness of the sentence.
7 I urge the court to accept the plea agreement.
8 THE COURT: Thank you. Mr. John?
9 MR. JOHN: Yes, Your Honor, may it please the court, I
10 believe in -- considering all the circumstances of this case,
11 this is a fair and just resolution where each party has a
12 little bit of give and take. It addresses the concerns. Mr.
13 McKelvey has an incentive not to get in trouble again with the
14 time hanging over his head and then we can move forward with
15 these issues and find out answers to one or more of those --
16 the questions that were presented to the court. So I believe
17 the court should accept the agreement as fair and just.
18 THE COURT: Thank you, Mr. John. Mr. McKelvey, is there
19 anything you want to tell me before I impose sentences?
20 MR. MCKELVEY: No, ma'am.
21 THE COURT: Okay. Thank you. I agree with counsel.
22 This is a fair resolution of this matter. It is on the lower
23 end of what would be fair, but it's a compromise, and it's good
24 administration of justice under these circumstances. There is
25 some time suspended that can be imposed if there's a violation

of law. And it's certainly sufficiently deterrent for Mr. McKelvey and others given the four years flat on each count.

So I'll impose the parties' Rule 11 agreement finding that it comports to the Chaney criteria. The focus of the felony sentence is appropriately on isolation and deterrence, but there's a rehabilitative component because of the misdemeanor and I'm -- the court, as Ms. Crail points out, is considering the composite nature of this.

So for case number 4FA-14-40, Counts I and II, I will impose for each one, four years to serve; it's to be served now. Credit for time already served. The sentences are concurrent with another, and the remaining counts are all dismissed. And that's for Counts II and III. Counts I, IV, V, VI -- is there a VII?

MR. JOHN: Yes.

THE COURT: I, IV, V, VI, and VII are dismissed, 43(a) by the state at this time. There's a $100 surcharge due in 10 days, a $100 jail surcharge due in 30 days. As a requirement of the sentence, I must order DNA testing and I will do that as well. There's no probation, so no terms of probation need to be ordered.

For the misdemeanor 14-921, Count I, there was a no-contest plea. The court now imposes six months and suspends all six for a period of two years of probation conditioned on good behavior; that is no jailable offenses. No DNA testing is

required as a condition of that judgment. Count II is dismissed by the state, 43(a). There's a $50 surcharge due in 10 days. A $50 jail surcharge is imposed and due within 30 days.

MS. CRAIL: And did the court include the forfeiture --

THE COURT: Oh, thanks.

MS. CRAIL: -- as part of the --

THE COURT: I did forget that. $50 is also imposed, due in 30 days of the $100 jail surcharge, suspended for the 14-921 case. For both cases, the court overlooked and now imposes a forfeiture of all items that were seized, and the forfeitures are stayed pending appeal, and will be effective if the convictions are upheld. Anything else, then, that I may have overlooked?

MS. CRAIL: I don't think we missed anything at this point.

THE COURT: Okay. Good luck, Mr. McKelvey. And we'll be off record.

MS. CRAIL: Your Honor, actually, one last thing. Just for -- so it's really clear for the record. The property is released sub -- to the troopers, at this point, to be forfeited to the state, but stayed. However, if for some reason that comes back and would have to be returned to Mr. McKelvey, all the things seized pursuant to the search warrant are officially released by the court one way or the other, at this point, so

that it would either go to the forfeiture to the state or be returned to Mr. McKelvey, whichever version would -- we're told that the troopers can't return property to an owner that was seized pursuant to a search warrant without a court's approval, because it officially belongs to the court.

THE COURT: Oh.

MS. CRAIL: So we've been filing motions in various cases to do that, but cases like this where it's resolved, I think most instances, it's kind of obvious, but I figure there's a lot of stuff here I'd rather just have it clear for the record.

THE COURT: Okay. So the judgment will -- well, do I have to put it in the judgment or can I just say it in the courtroom?

MS. CRAIL: I think as long as it's clear for the record. I think --

THE COURT: Okay.

MS. CRAIL: -- that the forfeiture me -- at this point, means that the court has released the property, but since this is kind of a --

THE COURT: Yeah.

MS. CRAIL: -- a state forfeiture --

THE COURT: The court releases --

MS. CRAIL: -- I just want to be clear.

THE COURT: -- its control over the property to DPS at this time, and then it can be returned to Mr. McKelvey without

further court order if that -- it's appropriate. We're doing fingerprinting for the record.

UNIDENTIFIED SPEAKERS: (Indiscernible - simultaneous speech).

MR. JOHN: If you retire, you've got to pass this on.

MS. CRAIL: Yeah. I just want to make it clear for the record.

THE COURT: No. Thanks. It's probably saved us all some --

MS. CRAIL: Yeah.

THE COURT: -- effort down the road. Okay. So Mr. McKelvey is filling out the fingerprinting forms.

THE CLERK: (Indiscernible - away from microphone).

THE COURT: What's that?

THE CLERK: (Indiscernible - away from microphone).

THE COURT: Yes. You were absolutely right (indiscernible). Actually, no, this one is wrong, though.

THE CLERK: Oh, okay.

THE COURT: The misdemeanor should say, no contest.

THE CLERK: Thank you.

THE COURT: Yeah, you're welcome. Okay. And Mr. McKelvey has now affixed his thumb prints to the documents, so at this point, the fingerprinting has been completed on the record, and we are able to go off record. We're off record.

THE CLERK: Off record.

3:54:40

(Off record)

(END OF REQUESTED PORTION)

IN THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

STATE OF ALASKA	)
	)
Plaintiff,	)
	)
vs.	)
	)
JOHN WILLIAM McKELVEY III,	)
	)
Defendant.	)
	)

FILED IN OPEN COURT
DATE 9/17/15
BY cm
Deputy Clerk

Case No. 4FA-14-00040 CR

STIPULATED FACTS

VRA Certification
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in A.S. 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The parties agree that the Court may consider the evidence previously presented during the evidentiary hearings held in this case. In addition, the parties agree to the following facts:

In August of 2012, Alaska State Trooper Investigator Joshua Moore (Investigator Moore) flew in a small airplane over the property where John William McKelvey III (McKelvey) was residing at the time. 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. Investigator Moore thus sought and obtained Search Warrant No. 4FA-12-352 SW (the search warrant).

D

Law enforcement executed the search warrant toward the end of August, 2012. When law enforcement executed the search warrant, McKelvey was the only person on the premises and McKelvey stated that it was his residence and that he lived there by himself.

Law enforcement encountered McKelvey in a shop on the premises. Directly inside the arctic entryway to the shop, law enforcement located and seized an AK-47 rifle. The rifle was loaded and was hanging in the arctic entryway.

Among the controlled substances discovered and seized by law enforcement in the shop was methamphetamine. Some of the methamphetamine was located on a scale right next to McKelvey and some was located on the dining table in front of McKelvey.

In addition, during the execution of the search warrant in the shop where McKelvey, the AK-47, and the methamphetamine were located, law enforcement discovered packaging materials commonly used in the distribution of controlled substances. Among the packaging materials were small Ziploc baggies typically used for methamphetamine, but not typically used for marijuana. Law enforcement also discovered three other scales and over $18,000 in U.S. Currency located in close proximity to the methamphetamine. A K-9 certified to detect controlled substances was later placed in a clean room with the cash and indicated a positive odor of controlled substances on the cash.

McKelvey was previously convicted of a felony in 4FA-09-00905Cr.

CRAIG RICHARDS
ATTORNEY GENERAL

DATED: 17 Sept 2015

By: _____
Elizabeth F. Crail
ABA No. 0211057
Assistant District Attorney

LAW OFFICE OF ROBERT JOHN

DATED: September 17, 2015

By: _____
Robert John
ABA No. 8911069
Counsel for Defendant

Screen for VRA

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

State of Alaska,
Plaintiff,
vs.
John William McKelvey III,
Defendant.

CASE NO: 4FA-14-00040CR

JUDGMENT AND ORDER OF COMMITMENT

DOB: 08/29/1973
APSIN: 6975247 DL/ID: 6959058
ATN: 112600773 ST: AK ☐ CDL

The defendant came before the court on September 17, 2015 with counsel, Robert John, and Elizabeth Crail, Assistant District Attorney, present and pursuant to a Court verdict of guilty, was convicted of the following offenses:

CTN	Offense	Date of Offense	DV Offense per AS 18.66.990(3) & (5) (Yes or No)
001	AS11.71.030(a)(1): MICS 3-Deliver/Poss w/Intent IIA, IIIA	08/24/2012	No
004	AS11.61.195(a)(1): Misconduct w/ Weapons 2 - Re Drug Crime	08/24/2012	No

The following charges were dismissed by the State:

CTN	Offense	Date of Offense
003	AS11.71.020(a)(1): Cntrld Substc 2- Manuf/Deliv IA	08/24/2012
002	AS11.71.040(a)(3)(G): Cntrld Subs 4-Poss 25+ Plants Cannabis	08/24/2012
005	AS11.71.040(a)(2): Cntrld Subs 4- Deliv 1+ Oz VIA	08/24/2012
006	AS11.71.040(a)(3)(F): Cntrld Subs 4-Possess 4+ Oz VIA	08/24/2012
007	AS11.71.040(a)(5): Cntrld Subs 4-Bldg/Veh To Distribute	08/24/2012

Defendant was sentenced based on the agreement of the parties and pursuant to Alaska Criminal Rule 11(e).

Any appearance or performance bond in this case is exonerated.

SENTENCE

JAIL: IT IS ORDERED that the defendant is hereby committed to the care and custody of the Commissioner of the Department of Corrections to serve:

CTN	Period
001	Four (4) years flat, to be served now. Defendant is to be credited for time already served in this case.
004	Four (4) years flat, to be served now, concurrent to the time in CTN 001. Defendant is to be credited for time already served in this case.

POLICE TRAINING SURCHARGE: IT IS ORDERED that defendant pay to the court the following surcharge pursuant to AS 12.55.039 within 10 days: CTN 001: $100 (Felony) and CTN 004: $100 (Felony).

JAIL SURCHARGE. Defendant was arrested and taken to a correctional facility or is being ordered to serve a term of imprisonment. Therefore, IT IS ORDERED that defendant pay within 30 days a correctional facilities surcharge of $100 per case to the Department of Law Collections Unit, 1031 W. 4th Ave., Suite 200, Anchorage, AK 99501. AS 12.55.041(b)(1).

DNA IDENTIFICATION. If this conviction is for a "crime against a person" as defined in AS 44.41.035(j), or a felony under AS 11 or AS 28.35, the defendant is ordered to provide samples for the DNA Registration System when requested to do so by a health care professional acting on behalf of the state, and to provide oral samples when requested by a correctional, probation, parole, or peace officer. AS 12.55.015(h).

IT IS FURTHER ORDERED that the Court imposes forfeiture of all items that were seized in this matter and in 4FA-14-921CR. This forfeiture is STAYED pending Appeal, and will be effective if the convictions are upheld.

September 17, 2015
Effective Date

Clerk: rm

Judge Bethany Harbison

I certify that on _____ a copy of this judgment was sent to:

☐ DA
☐ Defense Atty: _____

Clerk: _____

I certify that on 9-24-15 a copy of this judgment was sent to:

☒ DA
☒ Def Atty R. JOHN
☐ Def thru _____
☒ Police/AST
☒ Jail
☐ DMV by mail to 1300 W. Benson Blvd, Suite 100, Anchorage, AK 99503
☐ with surrendered license/ID # _____

☐ Exhibit Clerk
☐ Adult Probation
☐ DPS - R & I - Anchorage
☒ DPS - Fingerprint Section

☐ VPSO/Village Council at _____
☐ Collections Unit (for cost of imprisonment/restitution)
☐ _____ ☐ _____

Clerk: V. Hawtrey

No VRA Screening Necessary

FINGERPRINT VERIFICATION ATTACHMENT TO JUDGMENT

CASE NO: 4FA-14-00040CR

☐ District Court ☒ Superior Court at Fairbanks, Alaska

Plaintiff: State of Alaska

Defendant: John William McKelvey III

DOB: 08/29/1973

ATN: 112600773

DOV: 08/24/2012

APSIN: 6975247

DLN/State: 6959058 AK ☐ CDL

Send original along with a copy of the judgment to:

Department of Public Safety
Alaska Automated Fingerprint Identification Section
5700 E. Tudor Road
Anchorage, AK 99507

Keep copy in court file.

LEFT THUMB	RIGHT THUMB

John W McKelvey
Defendant's Signature

Mailing Address

City State ZIP

9-17-15
Date

Raymond Nom CSO
Witness
(Signature and Title)

CR490 (8/09)(cs)
AS 12.55.147

NOTICE

The text of this opinion can be corrected before the opinion is published in the Pacific Reporter. Readers are encouraged to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts:

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E-mail: corrections@akcourts.us

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN WILLIAM MCKELVEY III, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12419 Trial Court No. 4FA-14-00040 CR O P I N I O N No. 2675 — September 4, 2020

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Bethany Harbison, Judge.

Appearances: Robert John, Law Office of Robert John, Fairbanks, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Wollenberg, Judge, and Mannheimer, Senior Judge.[*]

Judge WOLLENBERG.

This case involves an issue of first impression in Alaska: Must the police obtain a search warrant before conducting targeted aerial surveillance of a residential backyard, using a telephoto lens to discern objects that would not otherwise be visible

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

from that height, when the property owner has taken steps to protect the ground-level privacy of the yard?

For the reasons explained in this opinion, we conclude that, under such circumstances, the aerial surveillance constitutes a search under the search and seizure clause of the Alaska Constitution. Accordingly, absent an applicable exception to the warrant requirement, the police must obtain a search warrant before engaging in this type of aerial surveillance.

Background facts and prior proceedings

On August 22, 2012, Alaska State Trooper Joshua Moore received a tip from an informant who reported observing a marijuana grow at the residence of John William McKelvey III. The informant stated that McKelvey had approximately thirty marijuana plants growing in his yard, that the marijuana was planted in five-gallon buckets, and that McKelvey would move the plants into his greenhouse at night.

McKelvey lived in a sparsely populated area approximately twenty miles from Fairbanks. He had posted numerous "No Trespassing" and "Keep Out" signs along his driveway and elsewhere on his property. The greenhouse area where the marijuana plants were located was about ten to fifteen feet behind his house, and it was surrounded by a sight barrier of tall woods.

Trooper Moore, hoping to confirm the informant's tip through aerial surveillance, had a wildlife trooper fly him near the property at an altitude of at least 600 feet. During this flyover, Moore passed by McKelvey's property twice, and he took photographs of the property using a camera equipped with a 280-millimeter zoom lens.

Moore did not see any plants or five-gallon buckets sitting in McKelvey's yard, but, through the lens of his camera, he could see "what appeared to be plants potted

inside five-gallon buckets" through the walls of a "partially see-through" greenhouse. Moore could not discern whether these plants were marijuana.

Based on the informant's tip, and based on the results of this aerial surveillance, Moore applied for a warrant to search McKelvey's property.

When the state troopers executed this search warrant, they discovered a marijuana grow (as well as methamphetamine, scales, plastic bags used for packaging, a loaded firearm, and over $18,000 in cash). A grand jury subsequently indicted McKelvey on six counts of misconduct involving a controlled substance and one count of second-degree weapons misconduct (for possessing a firearm during the commission of a felony drug offense).[1]

Prior to trial, McKelvey asked the superior court to suppress the evidence seized from his property during the execution of the search warrant. McKelvey argued that Moore's aerial surveillance of his yard constituted an illegal warrantless search in violation of the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Alaska Constitution. McKelvey further argued that, because this surveillance was a critical part of Moore's application for the search warrant, all evidence seized from his property under that warrant should be suppressed.

The court held an evidentiary hearing on McKelvey's motion. At this hearing, Moore explained that he was only able to see the buckets in the greenhouse by using the telephoto lens of his camera.

Following this hearing, the superior court denied McKelvey's motion. The court agreed with McKelvey that the greenhouse was part of the curtilage of his residence, and the court accepted McKelvey's contention that he had a subjective

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[1] Former AS 11.71.020(a)(1) (2012), former AS 11.71.030(a)(1) (2012), former AS 11.71.040(a)(2), (a)(3)(F), (a)(3)(G), & (a)(5) (2012), and AS 11.61.195(a)(1), respectively.

expectation of privacy in the semi-opaque greenhouse. Nevertheless, the court concluded that McKelvey's expectation of privacy in his greenhouse was objectively unreasonable. The court found that the contents of the greenhouse were open to public view from the navigable airspace above McKelvey's residence, and the court further found that McKelvey could not reasonably have believed that no one would fly over his property. The court noted that air travel (in both commercial and private aircraft) is an essential feature of Alaskan life, and that a private airstrip was located a short distance from McKelvey's property.

The court also rejected McKelvey's argument that Moore's use of a telephoto lens to enhance his view of McKelvey's property transformed the aerial surveillance into an unconstitutional search.

After the court denied this suppression motion, McKelvey waived his right to a jury trial and proceeded to a bench trial based on stipulated facts. The court found him guilty of one count of second-degree weapons misconduct and one count of third-degree misconduct involving a controlled substance (possession of methamphetamine with the intent to distribute).[2] The State dismissed the remaining charges.

This appeal followed.

Our analysis of McKelvey's claims

Both the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Alaska Constitution prohibit unreasonable searches by the

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[2] AS 11.61.195(a)(1) and former AS 11.71.030(a)(1) (2012), respectively.

government. This includes both physical intrusions into constitutionally protected spaces and non-physical intrusions made possible through the use of technology.[3]

On appeal, McKelvey argues that the warrantless aerial surveillance of his greenhouse using a telephoto lens was constitutionally impermissible. To address this claim, the key question we must answer is whether the aerial surveillance constituted a "search" for constitutional purposes. If it did, then the surveillance was presumptively unreasonable absent a search warrant.

Under both federal and state law, when a person claims that the government's invasion of their property constitutes a "search," courts must engage in a two-part analysis: Did the person manifest a subjective expectation of privacy in the property? And if so, is society willing to recognize that person's expectation of privacy as objectively reasonable?[4] If both prongs are met — *i.e.*, if the government's action intruded upon an individual's reasonable expectation of privacy — then the government's action constitutes a search for constitutional purposes, and it must be supported by a warrant or by a recognized exception to the warrant requirement.

The first part of this two-part inquiry — the subjective prong — is undisputed in this case. Courts have generally treated the erection of walls, fences, or gates, or the posting of signage, as manifesting an intent to protect a person's privacy in

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[3] *Cowles v. State*, 23 P.3d 1168, 1170 (Alaska 2001).

[4] *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), and *Smith v. Maryland*, 442 U.S. 735, 740 (1979)); *State v. Glass*, 583 P.2d 872, 875 (Alaska 1978) (citing *Smith v. State*, 510 P.2d 793, 797 (Alaska 1973)) (recognizing Alaska's adoption of the two-part expectation-of-privacy test first set forth in Justice Harlan's concurrence in *Katz*); *Pearce v. State*, 45 P.3d 679, 682 (Alaska App. 2002) (same).

the curtilage of their home.[5] Here, the superior court found that McKelvey's greenhouse was located a short distance (approximately ten to fifteen feet) behind his house, in an area "surrounded by a natural sight-barrier of tall woods." The court further found that the greenhouse could not be seen from the ground by anyone who approached McKelvey's front door by normal means, and who otherwise heeded the "No Trespassing" and "Keep Out" signs that were posted throughout the barrier to the property. Based on these facts, the court found that "McKelvey very obviously did not wish for passersby to view his greenhouse or its contents." The State does not contest this conclusion, and the record supports it.[6]

McKelvey's case therefore hinges on the second prong — the objective prong — of the test: Was it reasonable for McKelvey to expect that his greenhouse

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[5] *See Florida v. Riley*, 488 U.S. 445, 450 (1989) ("Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation."); *State v. Quiday*, 405 P.3d 552, 558 (Haw. 2017) ("Quiday's placement of the plants in his backyard, the activities in which were not capable of observation by members of the public at ground-level, was 'indicative of [his] subjective intent to avoid the public gaze' into the curtilage of his home." (alteration in original) (quoting *State v. Kaaheena*, 575 P.2d 462, 467 (Haw. 1978))); *State v. Davis*, 627 P.2d 492, 494 (Or. App. 1981) ("[D]efendant did display to some extent a subjective expectation of privacy, evidenced by the posting of 'no trespassing' signs and the use of a locked gate across the driveway to the secluded property."); *State v. Bryant*, 950 A.2d 467, 473 (Vt. 2008) ("Fences, gates, and no-trespassing signs generally suffice to apprise a person that the area is private." (citation omitted)); *see also State v. Davis*, 360 P.3d 1161, 1180 (N.M. 2015) (Chávez, J., concurring) ("If an individual has taken steps to ward off inspection *from the ground*, the individual has also manifested an expectation that the visibility of his or her property that he or she sought to block off from the ground *should also be private when seen from the air*. This is because members of the general public generally do not intently scrutinize other peoples' curtilages, even when they do fly over private property." (emphasis in original) (citing *Riley*, 488 U.S. at 460) (Brennan, J., dissenting)).

[6] *See Pearce*, 45 P.3d at 682-83 (reviewing the trial court's finding that the defendant lacked a subjective expectation of privacy for clear error).

would not be subjected to aerial surveillance that was enhanced by image-magnifying technology?

McKelvey argues that both the federal and state constitutions support the conclusion that his expectation of privacy from this type of police surveillance was reasonable. But the United States Supreme Court has twice rejected Fourth Amendment challenges to warrantless aerial observation of the curtilage of a home when the curtilage was open to observation from the air, even though the homeowner had taken steps to block ground-level observation of the property. Although neither of these cases involved observations that were enhanced by technological means, and even though the Supreme Court has never directly addressed the use of a telephoto lens to surveil the curtilage of a home, the Supreme Court's case law in this area gives little reason to believe that the Fourth Amendment would protect McKelvey from the type of surveillance that occurred in this case.

We need not resolve this issue of federal law, however, because we conclude that, given Alaska's explicit constitutional protection of privacy, as well as Alaska law's heightened protection for the privacy of residences, McKelvey could reasonably expect that his home and backyard would not be subjected to the type of aerial surveillance that occurred in this case.

We therefore rely solely on the Alaska Constitution to decide McKelvey's case. However, it is useful, in the first instance, to examine the major federal cases addressing this question — in order to explain why we find these cases insufficiently protective of Alaskans' right to privacy.

Why we conclude that McKelvey would be unlikely to prevail on his claim under federal law pertaining to aerial surveillance by law enforcement

The United States Supreme Court first considered the constitutionality of warrantless aerial surveillance by law enforcement in *California v. Ciraolo*.[7] In *Ciraolo*, as in McKelvey's case, the police received a tip that the defendant was growing marijuana in his backyard. Because two fences completely enclosed Ciraolo's yard, rendering ground-level observation impossible, the police attempted to corroborate the informant's tip by flying a plane over Ciraolo's house at an altitude of 1,000 feet. From the air, the police identified marijuana plants growing in Ciraolo's yard, and they photographed these plants using a standard 35mm camera lens.[8] Based on this evidence, the police obtained a search warrant to seize the marijuana plants.[9]

In a 5-to-4 decision, the Supreme Court concluded that this aerial surveillance did not constitute a search under the Fourth Amendment, and that therefore no warrant was required.[10]

To determine whether this surveillance constituted a search, the Court applied the two-part "reasonable expectation of privacy" test.[11] The Court ultimately concluded that Ciraolo's expectation of privacy from aerial surveillance was not reasonable.[12]

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[7] *California v. Ciraolo*, 476 U.S. 207 (1986).

[8] *Id.* at 209.

[9] *Id.* at 209-10.

[10] *Id.* at 214-15.

[11] *Id.* at 211 (citing *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), and *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

[12] *Id.* at 214.

In reaching this conclusion, the Court acknowledged that Ciraolo's yard was within the curtilage of his home[13] — *i.e.*, "the land immediately surrounding and associated with the home" in which a resident retains a reasonable expectation of privacy.[14] As the Court explained, "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[15]

But the Court noted that the federal constitution does not prohibit police observation of an area simply because that area is within the curtilage, if the police make the observation from a place where they are entitled to be. The Court likened the sky to a "public thoroughfare," and declared that "the mere fact that an individual has taken measures to restrict *some* views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."[16]

The Court noted that the aerial observations by the police officers in Ciraolo's case were made "within public navigable airspace in a physically nonintrusive manner," and that these observations revealed "plants readily discernible to the naked eye as marijuana."[17] Given the fact that "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed," the

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[13] *Id.* at 212-13.

[14] *Oliver v. United States*, 466 U.S. 170, 180 (1984); *see also Kelley v. State*, 347 P.3d 1012, 1014-15 (Alaska App. 2015) (recognizing that the protection against unreasonable searches "extends to the curtilage of the home — those areas immediately surrounding the home in which the resident retains a reasonable expectation of privacy").

[15] *Ciraolo*, 476 U.S. at 212-13.

[16] *Id.* at 213 (emphasis added) (citation omitted).

[17] *Id.*

Court concluded that any expectation that Ciraolo's yard would be protected from aerial observation was unreasonable.[18] Accordingly, the Court held that no search had occurred, and thus no warrant was required.[19]

Justice Powell, joined by three other members of the Court, dissented from this holding. The dissenters argued that, under normal circumstances, "the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent [because] [t]ravelers 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."[20] Thus, according to the dissenters, "[t]he risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial [for a homeowner] to protect against."[21] In contrast, in Ciraolo's case, the "police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant."[22] For these reasons, the dissenters concluded, Ciraolo's expectation of privacy was reasonable, and the warrantless aerial surveillance of his yard constituted a search.[23]

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[18] *Id.* at 213-14.

[19] *Id.* at 214-15.

[20] *Ciraolo*, 476 U.S. at 223 (Powell, J., dissenting).

[21] *Id.* at 223-24.

[22] *Id.* at 224-25.

[23] *Id.* at 225.

The result in *Ciraolo* — if not its rationale — was reaffirmed three years later when the Court decided *Florida v. Riley*.[24] Riley lived in a mobile home on five acres of rural property, and a partially enclosed greenhouse was located ten to twenty feet behind his mobile home. The police received a tip that Riley was growing marijuana on his property. When an investigating officer was unable to see the contents of Riley's greenhouse from the road, the officer flew over Riley's property — this time, in a helicopter at a height of only 400 feet. With his naked eye, the officer was able to see what he believed to be marijuana growing in the greenhouse.[25] The officer obtained a search warrant based on these observations, and the subsequent search uncovered marijuana growing in the greenhouse.[26]

Riley argued that the helicopter flight over his property was an illegal warrantless search that violated the Fourth Amendment. In a divided decision with no majority opinion, the Supreme Court rejected this argument.[27] A four-member plurality concluded that Riley's case was controlled by *Ciraolo*.[28] The plurality noted that the helicopter was being lawfully operated within the Federal Aviation Administration's (FAA) altitude restrictions for helicopters, and that therefore "[a]ny member of the public could legally have been flying over Riley's property [in the same manner as the police officer] and could have observed Riley's greenhouse."[29]

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[24] *Florida v. Riley*, 488 U.S. 445 (1989).

[25] *Id.* at 448.

[26] *Id.* at 448-49.

[27] *Id.* at 449-52.

[28] *Id.* at 449.

[29] *Id.* at 451. Helicopters are generally permitted to fly at any altitude "[i]f the operation (continued...)

The plurality declined to say "[whether] an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law."[30] However, the plurality noted that 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."[31] There was similarly no suggestion that the helicopter interfered with Riley's use of his greenhouse or other parts of his curtilage.[32]

Justice O'Connor concurred in the Court's resolution of the case, but she wrote separately to explain her different rationale for reaching this result. In her view, "the plurality's approach rest[ed] the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect [Fourth Amendment rights]."[33] According to Justice O'Connor, the question was "not whether the helicopter was where it had a right to be under FAA regulations," but rather "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not 'one that society is prepared to recognize as "reasonable."' "[34]

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[29] (...continued)
[of the helicopter] is conducted without hazard to persons or property on the surface." 14 C.F.R. § 91.119(d).

[30] *Riley*, 488 U.S. at 451.

[31] *Id.* at 451-52.

[32] *Id.* at 452.

[33] *Id.* (O'Connor, J., concurring).

[34] *Id.* at 454 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., (continued...)

Justice O'Connor then concluded that Riley had the burden of proving that his expectation of privacy was reasonable — *i.e.*, that public use of airspace at altitudes of 400 feet was rare.[35] Because Riley did not present any evidence on this point, Justice O'Connor agreed with the plurality that he had failed to show that his Fourth Amendment rights were violated.[36]

Justice Brennan, in a dissenting opinion joined by Justices Marshall and Stevens, criticized the plurality for "undertak[ing] no inquiry into whether low-level helicopter surveillance by the police of activities in an enclosed backyard is consistent with the 'aims of a free and open society,'" and instead relying on the fact that any member of the public could have observed Riley's greenhouse from the air.[37] These dissenting justices, plus Justice Blackmun in a separate dissent,[38] agreed with Justice O'Connor that "the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet."[39] But they diverged from Justice O'Connor on the question of which party bore the burden of proof on this issue.[40]

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[34] (...continued)
concurring)).

[35] *Id.* at 455.

[36] *Id.*

[37] *Riley*, 488 U.S. at 456-57 (Brennan, J., dissenting) (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 403 (1974)).

[38] *Id.* at 467 (Blackmun, J., dissenting).

[39] *Id.* at 464-65 (Brennan, J., dissenting).

[40] *Id.* at 465-66 (Brennan, J., dissenting) ("Because the State has greater access to
(continued...)

Turning to the facts of McKelvey's case, there is no dispute that Trooper Moore was flying in airspace where he had a legal right to be under FAA regulations.[41] But to the extent that *Ciraolo* relies on the legality of the police overflight as the benchmark for assessing a person's reasonable expectation of privacy, the concurrence and the two dissents in *Riley* call this analysis into question. A majority of the *Riley* court (the four dissenters and the one concurring justice) agreed that the case turned, not on whether FAA regulations permitted an overflight at that altitude, but instead on whether the target of the surveillance could reasonably expect aerial privacy, given the frequency of air travel at the relevant altitude.[42]

Here, McKelvey testified that low-altitude flights were uncommon near his property, and that the trooper's flyover was notable. He testified that he heard the plane overhead, and he stepped outside to see the plane's tail end passing by, only to see it

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[40] (...continued)
information concerning customary flight patterns and because the coercive power of the State ought not be brought to bear in cases in which it is unclear whether the prosecution is a product of an unconstitutional, warrantless search, . . . the burden of proof properly rests with the State and not with the individual defendant." (internal citation omitted)); *Id.* at 468 (Blackmun, J., dissenting) (concluding that the State should bear the burden of proof "for any helicopter surveillance case in which the flight occurred below 1,000 feet — in other words, for any aerial surveillance case not governed by the Court's decision in *California v. Ciraolo*").

[41] *See* 14 C.F.R. § 91.119(b) & (c) (providing that a fixed-wing aircraft may not operate, over congested areas, below "an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft" and, over non-congested areas, below "[a]n 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.").

[42] *Riley*, 488 U.S. at 455 (O'Connor, J., concurring), 464-65 (Brennan, J., dissenting), & 467 (Blackmun, J., dissenting); *see* 1 Wayne R. LaFave, *Search and Seizure* § 2.1(d), at 592 (5th ed. 2012).

return several minutes later. McKelvey acknowledged that there was a private airstrip a mile away, but he said that the only air traffic he had ever observed was "several times higher" and that this flyover was "the first time [he had] ever seen a plane that low" or heard engine noise so loud over his house.

The superior court found McKelvey's testimony on this point 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. But there was no specific evidence presented about the frequency of air travel at 600 feet in the vicinity of McKelvey's residence, or the frequency of flights from the nearby airstrip. Conceivably, the question of which party bears the burden of proof as to flight frequency could matter to McKelvey's claim under the federal constitution.

McKelvey does not brief this question. Instead, he focuses on a different distinction between his case and the facts of *Ciraolo* and *Riley*. Both *Ciraolo* and *Riley* involved naked-eye observations. In *Ciraolo*, the police documented their observations by taking photographs with a standard 35mm camera, but there was no claim that this camera enhanced the officers' view of the yard.[43] And in *Riley*, the police made observations without any technological assistance.[44] In McKelvey's case, by contrast, the police used a camera equipped with a magnifying lens.

This use of telephoto technology could potentially affect McKelvey's claim under the federal constitution. The final sentence of *Ciraolo*, for instance, states that "[t]he Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible *to the naked*

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[43] *California v. Ciraolo*, 476 U.S. 207, 209, 212-13 (1986).

[44] *Riley*, 488 U.S. at 448 (plurality opinion).

eye."[45] Then, in a footnote, the Court pointed out that the State had acknowledged that "[a]erial observation of 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."[46]

Relying on these statements from *Ciraolo*, McKelvey asserts that the telephoto lens used in his case allowed the trooper to observe things that were not otherwise visible to the naked eye, and he argues that this turned an otherwise permissible police surveillance into a search requiring a warrant.

But the language McKelvey relies on from *Ciraolo* indicates only that the police do not need a warrant to observe what is visible to the naked eye. This does not necessarily imply that, under the Fourth Amendment, the police *do* need a warrant if they intend to use commonly available technological enhancements to observe what is *not* visible to the naked eye.

McKelvey also relies on the Supreme Court's decision in *Kyllo v. United States*.[47] In *Kyllo*, the Court considered "whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment."[48] The Court held that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical

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[45] *Ciraolo*, 476 U.S. at 215 (emphasis added).

[46] *Id.* at 215 n.3 (alteration in original).

[47] *Kyllo v. United States*, 533 U.S. 27 (2001).

[48] *Id.* at 29.

intrusion into a constitutionally protected area constitutes a search — at least where . . . the technology in question is not in general public use."[49]

But this passage from *Kyllo* does not answer the question presented in McKelvey's case, since the trial court explicitly found that the type of telephoto lens used to view McKelvey's greenhouse was indeed in general public use, and McKelvey does not challenge this finding.

We therefore think it 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.

Why we conclude that the Alaska Constitution requires a warrant for the type of aerial surveillance in this case

As we noted earlier, Alaska has adopted the two-part reasonable-expectation-of-privacy test for determining whether a search has occurred for purposes of Article I, Section 14 of the Alaska Constitution.[50] Although this is seemingly the same test that the federal courts employ under the Fourth Amendment, the application of this test is somewhat different under Alaska law.

First, the Alaska Supreme Court has recognized that "the explicit protection of privacy set out in article I, section 22 of the Alaska Constitution necessarily . . . increases the likelihood that a person's expectation of privacy . . . can be deemed

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[49] *Id.* at 34 (citation and internal quotations omitted).

[50] *See State v. Glass*, 583 P.2d 872, 875 (Alaska 1978) (citing *Smith v. State*, 510 P.2d 793, 797 (Alaska 1973)) (recognizing Alaska's adoption of the two-part expectation-of-privacy test set forth in Justice Harlan's concurrence in *Katz*); *Pearce v. State*, 45 P.3d 679, 682 (Alaska App. 2002) (same).

objectively reasonable."[51] Thus, although we apply the same analytical framework as the federal courts to determine whether governmental scrutiny constitutes a search for constitutional purposes, Alaska law is more likely to recognize that an expectation of privacy is reasonable, given our express constitutional protection for the right of privacy.[52]

Second, Alaska courts have applied the reasonable-expectation-of-privacy test in a manner more consistent with its constitutional underpinnings, while commentators have criticized the United States Supreme Court's application of the two-part test as having become unmoored from its original purpose.

The Supreme Court's decisions in *Ciraolo* and *Riley* are paradigmatic of this problem. In both of these decisions, the objective reasonableness of a person's expectation of privacy was treated as a question of fact rather than as a question of constitutional law, with members of the Court suggesting that the answer turned on whether "a single member of the public could conceivably position herself to see into the area in question without doing anything illegal."[53]

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[51] *Beltz v. State*, 221 P.3d 328, 334 (Alaska 2009). Article I, section 22 of the Alaska Constitution provides in relevant part: "The right of the people to privacy is recognized and shall not be infringed."

[52] *See, e.g.*, *Beltz*, 221 P.3d at 332-35 (concluding, contrary to federal law, *California v. Greenwood*, 486 U.S. 35 (1988), that Alaskans have some reasonable expectation of privacy in garbage set out for routine collection on or adjacent to a public street); *see also State v. Gibson*, 267 P.3d 645, 659 (Alaska 2012) ("Alaska courts have used section 22's right to privacy to give section 14's protection against unreasonable searches and seizures 'a liberal interpretation.'" (quoting *Anchorage v. Ray*, 854 P.2d 740, 750 (Alaska App. 1993))).

[53] *Florida v. Riley*, 488 U.S. 445, 457 (1989) (Brennan, J., dissenting).

Professor LaFave has criticized this approach in his treatise on the law of search and seizure:

> [W]hile "privacy may have been a promising theory of the Fourth Amendment at one time, it has now lost much of its luster and utility" because of two serious mistakes by the Court in post-*Katz* cases: the Court (1) "has interpreted privacy to be a question of fact rather than a constitutional value" and (2) is apparently "out of touch with society's true expectations of privacy."[54]

In contrast, Professor LaFave suggests that the question of whether the second prong of the reasonable expectation test is satisfied under a particular set of facts should be viewed as an issue of law, and that the answer entails "a value judgment": The "ultimate question" is "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 [scope] inconsistent with the aims of a free and open society."[55]

The Alaska Supreme Court has expressly adopted this value-based, question-of-law approach endorsed by Professor LaFave.[56] Thus, Alaska law gives a broader reading to the second prong of the reasonable expectation test.

With this legal background, we now turn to the question presented in this case: If our state constitution does not regulate the type of technologically enhanced aerial government surveillance of a person's residential curtilage that occurred in this

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[54] 1 Wayne R. LaFave, *Search and Seizure* § 2.1(d), at 590-92 (5th ed. 2012) (quoting Erik G. Luna, *Sovereignty and Suspicion*, 48 Duke L.J. 787, 825, 827 (1999)).

[55] *Id.* § 2.1(d), at 590 (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 403 (1974)).

[56] *Cowles v. State*, 23 P.3d 1168, 1171 (Alaska 2001).

case, would the amount of privacy remaining to Alaska citizens be diminished to an extent inconsistent with the aims of a free and open society?

We start with the foundational principle that the right to privacy is at its pinnacle when the government's conduct implicates Alaskans' right to be left undisturbed in their homes. As the Alaska Supreme Court said in 1975 in *Ravin v. State*, "If there is any area of human activity to which a right to privacy pertains more than any other, it is the home."[57] The supreme court continued:

> The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our . . . state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.[58]

The area immediately surrounding and associated with the home — the "curtilage" of a person's home — merits the same heightened constitutional protection.[59] This is the area "to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life."[60]

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[57] *Ravin v. State*, 537 P.2d 494, 503 (Alaska 1975).

[58] *Id.* at 503-04.

[59] *See Oliver v. United States*, 466 U.S. 170, 180 (1984); *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 State v. Bryant*, 950 A.2d 467, 473 (Vt. 2008) ("A home's curtilage—the area outside the physical confines of a house into which the privacies of life may extend—merits the same constitutional protection from unreasonable searches and seizures as the home itself." (citations and internal quotation marks omitted)).

[60] *Oliver*, 466 U.S. at 180 (citation and internal quotations omitted). The Supreme Court (continued...)

The mere fact that a police aircraft is operated in compliance with FAA regulations is not a suitable standard for assessing whether the police have violated a person's reasonable expectation of privacy in their residential curtilage.[61] FAA regulations are primarily designed to ensure air safety, not protect privacy.[62] And even if these regulations were in part designed to protect privacy, we would still have an independent duty to ensure that those protections were no less than those guaranteed by the Alaska Constitution.

Moreover, as the *Ciraolo* dissenters noted, there is a qualitative difference between the observations that a pilot, crew member, or passenger might make during typical air travel and the observations that a police officer might make when engaged in "an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at

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[60] (...continued)
has defined the curtilage by reference to four factors: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301 (1987) (citations omitted).

[61] *Bryant*, 950 A.2d at 478 (recognizing that simply "abiding by the law in occupying a particular spot in the public airspace" is not "an adequate test of whether government surveillance from that same spot is constitutional"); *see also Florida v. Riley*, 488 U.S. 445, 453 (1989) (O'Connor, J., concurring) ("[T]here is no reason to assume that compliance with FAA regulations alone determines whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." (citation and internal quotations omitted)); *State v. Davis*, 360 P.3d 1161, 1182 (N.M. 2015) (Chávez, J., concurring) (declining to rely on an aircraft's altitude to evaluate the constitutionality of government aerial surveillance).

[62] *See Riley*, 488 U.S. at 452 (O'Connor, J., concurring) (recognizing that the purpose of FAA regulations is to promote air safety, not to protect Fourth Amendment rights).

ground level without a warrant."[63] The views afforded by commercial and private flights are normally "fleeting, anonymous, and nondiscriminating," and the "risk that [someone on the] plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against."[64] Thus, a person's failure to completely hide their curtilage from aerial observation should not defeat their expectation of privacy.[65]

Ultimately, we agree with the Vermont Supreme Court that there is a fundamental flaw in the United States Supreme Court's approach to aerial surveillance

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[63] *California v. Ciraolo*, 476 U.S. 207, 224-25 (1986) (Powell, J., dissenting). We acknowledge that, under Alaska constitutional law, the fact that a person's activities were "actually observed for the purpose of detecting misconduct does not affect the results of [our] analysis." *Cowles v. State*, 23 P.3d 1168, 1173 (Alaska 2001). There is a distinction, however, between purpose and conduct. Although the dissenters in *Ciraolo* mentioned the law enforcement purpose of the surveillance, we view this as a means to explain how the police *conduct* — low-altitude surveillance targeted at a specific location — was qualitatively different, for the sake of determining whether Ciraolo had a reasonable expectation of privacy, from the conduct (*i.e.*, passing glimpses) of commercial air travelers.

[64] *Ciraolo*, 476 U.S. at 223-24 (Powell, J., dissenting).

[65] *See* 1 Wayne R. LaFave, *Search and Seizure* § 2.3(g), at 799-800 (5th ed. 2012) (citing *Ciraolo*, 476 U.S. at 223-24 (Powell, J., dissenting)); *see also State v. Quiday*, 405 P.3d 552, 562 (Haw. 2017) (holding warrantless overflights unconstitutional even though people "may unavoidably be exposed to casual glances from passing aircraft" (quoting *People v. Cook*, 710 P.2d 299, 304 (Cal. 1985)); Brian J. Sear, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 Minn. L. Rev. 583, 615-16 (1989) ("When government agents . . . have identified a backyard as belonging to a particular individual, and consciously glide, fly, or hover over that curtilage to monitor activities occurring there, those agents have intruded on privacy expectations to a far greater degree than those few uncaring members of the public to whom sunbathers have 'knowingly' exposed a quick glimpse of an unidentifiable person.").

in *Ciraolo*: it fails to take sufficient account of the heightened significance of the home and its curtilage as places of privacy under our state constitution.[66]

On appeal, the State acknowledges that the federal test developed by the United States Supreme Court fails to sufficiently protect Alaskans' privacy rights, and the State asks us to impose a more demanding test under the Alaska Constitution.

The State's proposed test would rest on several factors. The first two of these factors would be (1) whether the police overflight was conducted in accordance with FAA regulations, and (2) whether the overflight took place in a geographic area where overflights could be expected. However, the State acknowledges that these first two factors do not, by themselves, provide sufficient safeguards for privacy, "particularly in the case of aircraft such as helicopters and drones." Thus, the State proposes that we adopt — and place more emphasis on — two other elements: "the intrusiveness of the overflight," and whether the overflight "was conducted in a manner that did not violate reasonable expectations of privacy."

We agree in general with the proposition that aerial surveillance must not be conducted in a manner that violates a person's reasonable expectation of privacy. But we disagree with the State about what this concept means.

The State suggests that the aerial surveillance in McKelvey's case was minimally intrusive and that it did not violate any reasonable expectation of privacy that

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[66] *See State v. Bryant*, 950 A.2d 467, 475 (Vt. 2008) ("[W]e find the Court's analysis in *Ciraolo* to lack the consideration for the significance of the home and its curtilage as 'repositor[ies] of heightened privacy expectations' that our [state constitutional] jurisprudence demands.") (quoting *State v. Geraw*, 795 A.2d 1219, 1221 (Vt. 2002)); *see also Ciraolo*, 476 U.S. at 219 (Powell, J., dissenting) (asserting that the majority's decision in *Ciraolo* was "curiously at odds" with its own reaffirmation of the curtilage doctrine, both in *Ciraolo* itself and in a second opinion issued that same day, *Dow Chemical Co. v. United States*, 476 U.S. 227, 235 (1986)).

McKelvey may have had. Alternatively, the State suggests that the aerial surveillance only violated McKelvey's reasonable expectation of privacy to a slight degree — a degree that might require the surveillance to be supported by reasonable suspicion, but that would not require a search warrant based on probable cause.[67]

But we disagree with the State's proposed analysis in two major respects, and we conclude that the State's proposed test fails to adequately protect Alaskans' heightened expectation of privacy in their homes.

First, under the State's proposed test, it appears that, in most instances, police aerial surveillance would only constitute a search if it affirmatively caused a disturbance or created a risk of harm to persons or property on the ground. This approach has characterized the analyses of many state courts,[68] but we conclude that this

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[67] *See Beltz v. State*, 221 P.3d 328 (Alaska 2009) (requiring the police to have reasonable suspicion before they search through garbage that the owner has set out for collection).

[68] *See, e.g.*, *People v. Pollack*, 796 P.2d 63, 64-65 (Colo. App. 1990) (holding that defendant had a reasonable expectation of privacy from helicopter surveillance because of (1) "the infrequency of helicopter flights at 200 feet," and (2) "the excessive noise created by the helicopter as it circled the area"); *Davis*, 360 P.3d at 1171-72 (holding that warrantless aerial surveillance of the defendant's greenhouse amounted to an unconstitutional search, given the "prolonged hovering" by the helicopter "close enough to the ground to cause interference" with Davis's property: "[W]hen low-flying aerial activity leads to more than just observation and actually causes an unreasonable intrusion on the ground . . . then at some point courts are compelled to step in and require a warrant before law enforcement engages in such activity."); *Commonwealth v. Oglialoro*, 579 A.2d 1288, 1292-94 (Pa. 1990) (holding that, in general, FAA regulations provide a useful reference in determining legality of aerial surveillance, but concluding that helicopter's presence at 50 feet for 15 seconds created a risk of harm and was therefore impermissible); *State v. Wilson*, 988 P.2d 463, 465 (Wash. App. 1999) ("Aerial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude. But aerial surveillance may be intrusive and require a warrant if the vantage point is unlawful or the method of viewing is intrusive." (internal citations omitted)).

approach is flawed.

The primary purpose of Alaska's constitutional guarantee against unreasonable searches and seizures is to protect "personal privacy and dignity against unwarranted intrusion by the State."[69] The amount of noise, wind, and dust created by a police overflight is not an appropriate measure of whether the overflight infringed on these protections.

In his dissent in *Riley*, Justice Brennan specifically took issue with the plurality's reliance on the fact that the helicopter surveillance created "no undue noise, and no wind, dust, or threat of injury."[70] Justice Brennan responded to this argument with a prescient hypothetical:

> Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all — and, for good measure, without posing any threat of injury. Suppose the police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. Suppose, finally, that the FAA regulations remained unchanged, so that the police were undeniably "where they had a right to be." Would today's plurality continue to assert that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was not infringed by such surveillance? Yet that is the logical consequence of the plurality's rule that, so long as the police are where they have a right to be under air traffic regulations, the Fourth Amendment is offended only if the aerial surveillance interferes with the use of the backyard as a

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[69] *Weltz v. State*, 431 P.2d 502, 506 (Alaska 1967) (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966)).

[70] *Riley*, 488 U.S. at 461 (Brennan, J., dissenting) (quoting the plurality opinion).

> garden spot. Nor is there anything in the plurality's opinion to suggest that any different rule would apply were the police looking from their helicopter, not into the open curtilage, but through an open window into a room viewable only from the air.[71]

Three decades ago, Justice Brennan might properly call such technology "miraculous." But today we would call it commonplace. Remote-controlled drones and lightweight, high-resolution video cameras are readily available to the public and the police alike. We agree with Justice Brennan that, in light of this technology, an approach that focuses on the amount of disruption or disturbance caused by the police surveillance is fundamentally inadequate to protect the rights guaranteed to Alaska's citizens by our constitution.[72]

This brings us to our second area of disagreement with the State's analysis. We reject the State's assertion that the police aerial surveillance in this case constituted, at most, a minor infringement of McKelvey's reasonable expectation of privacy.

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 of their house and residential curtilage if the aerial surveillance is conducted for the purpose of detecting criminal activity.[73] Both of these courts acknowledged that a person's yard "may unavoidably be exposed to casual

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[71] *Id.* at 462-63.

[72] The Alaska Legislature, acting upon these same privacy concerns, recently passed a law regulating the use of unmanned aircraft systems (*i.e.*, drones) in criminal investigations. AS 18.65.902; SLA 2014, ch. 105, § 2. The legislature's concern about the protection of privacy in the face of advancing technology underscores the importance of adhering to Alaska's strong preference for warrants under these circumstances.

[73] *People v. Cook*, 710 P.2d 299, 305-08 (Cal. 1985); *State v. Quiday*, 405 P.3d 552, 562 (Haw. 2017).

glances from passing aircraft," but these courts concluded that residents should be able to "reasonably assume" that their curtilage will "not be intently examined by government agents who are flying over it for the specific purpose of detecting criminal activity therein."[74] As the California Supreme Court stated in *Cook*:

> A society where individuals are required to erect opaque cocoons within which to carry on any affairs they wish to conduct in private, and the concomitant chill such a requirement would place on lawful outdoor activity, would be inimical to the vision of legitimate privacy which underlies our state Constitution.[75]

Accordingly, both the California and the Hawaii supreme courts have held that government aerial surveillance of an individual's residence and curtilage, conducted for the purpose of criminal investigation, qualifies as a "search" under their respective state constitutions and requires a search warrant (unless there is an applicable exception to the warrant requirement).[76]

This approach to police overflights finds strong support in Alaska law: Article I, Section 22 of the Alaska Constitution expressly guarantees a right of privacy;

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[74] *Quiday*, 405 P.3d at 562 (quoting *Cook*, 710 P.2d at 304).

[75] *Cook*, 710 P.2d at 302.

[76] The California Supreme Court's decision in *Cook* predated the United States Supreme Court's decision in *Ciraolo*, but the California Supreme Court reaffirmed the holding of *Cook* in a post-*Ciraolo* decision. *See People v. Mayoff*, 729 P.2d 166, 171-72 (Cal. 1986). Although the state constitutional ruling in *Cook* remains valid law, California residents later voted to amend the California Constitution to eliminate the application of the exclusionary rule to relevant evidence gathered in violation of the California Constitution. *See* Cal. Const. art I, § 28(f)(2); *see Mayoff*, 729 P.2d at 178 (Lucas, J., concurring) ("Only because this case and *Cook* arose *prior* to the adoption of Proposition 8 must we consider whether the searches conducted in those cases violated state constitutional requirements." (emphasis in original)); Diana Friedland, *27 Years of "Truth-in-Evidence": The Expectations and Consequences of Proposition 8's Most Controversial Provision*, 14 Berkeley J. Crim. L. 1 (2009).

Alaska law has a strong preference for requiring a warrant before the police conduct searches of people's residences;[77] and the Alaska Supreme Court has adopted the "value judgment," question-of-law approach to the second prong of the reasonable expectation test.[78]

Moreover, it is easy to see why Alaskans' sense of security might be severely compromised if our constitution did not regulate purposeful aerial surveillance of people's houses by law enforcement officers. "[E]ven individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas."[79] And a person's right to privacy should not hinge on whether that person has the financial means to undertake the extraordinary measures that would be required to shield their curtilage from all aerial view.[80]

But we need not decide whether to adopt the same broad rule adopted in California and Hawaii because, in McKelvey's case, there is one more factor to consider: Trooper Moore did not make his observations of McKelvey's backyard and greenhouse with his unaided naked eye; rather, he used a telephoto lens to enhance his view of the contents of the greenhouse. And as we explained earlier, when Moore testified at the

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[77] *See State v. Jones*, 706 P.2d 317, 323 (Alaska 1985); *Reeves v. State*, 599 P.2d 727, 735 (Alaska 1979).

[78] *Cowles v. State*, 23 P.3d 1168, 1171 (Alaska 2001).

[79] *State v. Davis*, 360 P.3d 1161, 1181 (N.M. 2015) (Chávez, J., concurring) (emphasis removed) (quoting *Florida v. Riley*, 488 U.S. 445, 454 (1989) (O'Connor, J., concurring)).

[80] *Id.* at 1182; *see also Cook*, 710 P.2d at 305; 1 Wayne R. LaFave, *Search and Seizure* § 2.6(c), at 898-99 (5th ed. 2012) ("It would be a perversion of *Katz* to interpret it as extending protection only to those who resort to extraordinary means to keep information regarding their personal lives out of the hands of the police.").

evidentiary hearing in the superior court, he acknowledged that he was only able to see the buckets in the greenhouse by using this telephoto lens. Thus, this technological enhancement of Moore's vision was a significant factor in his ability to observe McKelvey's property.

We acknowledge that many courts have concluded that a police officer's use of a commercially available camera — even one with a telephoto lens — does not convert an otherwise permissible police observation into a "search."[81] But we conclude that commercial availability should not be the determinative factor when analyzing whether a particular form of technology transforms state action into a search. Rather, 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.

While we agree with the State that the telephoto lens used in this case did not reveal the same level of detail that a person could discern if they were physically present on the property, the lens did reveal a critical detail that Moore was apparently

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[81] *See, e.g.*, *Sundheim v. Bd. of Cty. Comm'rs*, 904 P.2d 1337, 1351 (Colo. App. 1995); *State v. Vogel*, 428 N.W.2d 272, 275 (S.D. 1988); *State v. Lange*, 463 N.W.2d 390, 394-95 (Wis. App. 1990). Other cases that have upheld aerial surveillance have specified that the surveillance was done without technological enhancement, without deciding whether the use of technological enhancement would have altered the outcome. *See, e.g.*, *State v. Rodal*, 985 P.2d 863, 866 (Or. App. 1999) (finding it unnecessary to decide whether use of a telephoto lens during aerial surveillance of defendant's yard was sufficiently intrusive so as to violate protected privacy interests because the trial court found that the police "positively identified the marijuana plants on defendant's property with no visual aids other than his eyeglasses *before* using the telephoto lens to document his discovery" (emphasis in original)); *State v. Wilson*, 988 P.2d 463, 465 (Wash. App. 1999) ("Aerial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude. But aerial surveillance may be intrusive and require a warrant if the vantage point is unlawful or the method of viewing is intrusive." (internal citations omitted)).

unable to discern with his naked eye — the existence of the five-gallon buckets in the greenhouse.[82] McKelvey could reasonably expect that, in the absence of a warrant, the police would not invade the airspace above his residential property and view his intimate activities using such a lens.[83]

Both the Alaska Supreme Court and this Court have repeatedly interpreted Article I, Section 14 of the Alaska Constitution to provide greater protection to Alaskans

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[82] The State attached to its brief a sample series of nine photographs (unconnected to this case), each displaying a view from an increasing focal length, from 18mm to 300mm. These photographs (obtained from the Nikon website) show that the difference in detail between 35mm and 200-300mm is significant. *See* Diane Berkenfeld et al., *Understanding Focal Length*, Nikon, https://www.nikonusa.com/en/learn-and-explore/a/tips-and-techniques/understanding-focal-length.html (photographs by Dave Black) (last visited Aug. 31, 2020).

[83] *See State v. Knight*, 621 P.2d 370, 373-74 (Haw. 1980) (holding that the police's use of binoculars to view the contents of the defendant's greenhouse was constitutionally impermissible where the property was located in a remote area, and the greenhouse was surrounded by vegetation and covered by materials that made it impossible for the naked eye to view the contents); *Commonwealth v. Lemanski*, 529 A.2d 1085, 1092-93 (Pa. Super. Ct. 1987) (holding that the police violated the defendant's reasonable expectation of privacy when they found an opening in the shrubbery outside the defendant's rural home, and used binoculars and a telephoto lens to peer into a greenhouse attached to the home); *Wheeler v. State*, 659 S.W.2d 381, 390 (Tex. Crim. App. 1982) (holding that the use of a 600mm telescope to peer through five-inch louvered opening in opaque greenhouse from a neighboring property about 100 yards away constituted a search where defendant lived in remote, rural area and police made "concerted effort to view what had tenaciously been protected as private"); *cf. United States v. Taborda*, 635 F.2d 131, 139 (2d Cir. 1980) ("We conclude that observation of objects and activities inside a person's home by unenhanced vision from a location where the observer may properly be does not impair a legitimate expectation of privacy. However, any enhanced viewing of the interior of a home does impair a legitimate expectation of privacy and encounters the Fourth Amendment's warrant requirement, unless circumstances create a traditional exception to that requirement."). *But see State v. Citta*, 625 A.2d 1162, 1163 (N.J. Super. Ct. 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.").

than the corresponding provisions of the Fourth Amendment.[84] As we explained in *Brown v. State*, Alaska courts have given a broader interpretation to our state's search and seizure clause "when we were convinced that the United States Supreme Court's interpretation of the Fourth Amendment 'fails to adequately safeguard our citizens' right to privacy, . . . fails to adequately protect citizens from unwarranted government intrusion, and . . . unjustifiably reduces the incentive of police officers to honor citizens' constitutional rights.'"[85] This is one of those situations.

Accordingly, we now hold that when 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

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[84] *Brown v. State*, 182 P.3d 624, 633 & n.13 (Alaska App. 2008) (collecting cases); *see, e.g.*, *Beltz v. State*, 221 P.3d 328, 332-35 (Alaska 2009) (concluding, contrary to federal law, that Alaskans have some reasonable expectation of privacy in garbage set out for routine collection on or adjacent to a public street); *State v. Daniel*, 589 P.2d 408, 417 (Alaska 1979) (holding that while the police may, upon impounding a vehicle, conduct an inventory to catalog all articles of value in the vehicle, "a warrantless inventory search of [any] closed, locked or sealed luggage, containers, or packages contained within a vehicle is unreasonable and thus an unconstitutional search" under Article I, Section 14 of the Alaska Constitution); *State v. Glass*, 583 P.2d 872, 879 (Alaska 1978) (holding that "Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant"); *Zehrung v. State*, 569 P.2d 189, 199-200 (Alaska 1977) (concluding that, in contrast to federal law, "a warrantless search incident to an arrest, other than for weapons, is unreasonable and therefore violative of the Alaska Constitution if the charge on which the arrest is made is not one [for which] evidence . . . could be concealed on the person"), *modified on reh'g*, 573 P.2d 858 (Alaska 1978); *Joseph v. State*, 145 P.3d 595, 596, 605 (Alaska App. 2006) (refusing to follow *California v. Hodari D.*, 499 U.S. 621 (1991), where the Supreme Court held that the exclusionary rule does not apply to evidence obtained by police "while a person is fleeing from an impending unlawful detention").

[85] *Brown*, 182 P.3d at 633 (alterations in original) (quoting *Joseph*, 145 P.3d at 605).

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 applicable exception to the warrant requirement.

Because McKelvey had taken reasonable measures to protect the privacy of his residential curtilage from ground-level observation, and because Trooper Moore used a telephoto lens during his aerial surveillance of McKelvey's property to obtain an enhanced view of the greenhouse located within McKelvey's curtilage, the trooper's investigative overflight was a search that required a warrant. Here, there was no warrant, and there was no applicable exception to the warrant requirement. Thus, the superior court should have granted McKelvey's motion to suppress.

Conclusion

The judgment of the superior court is REVERSED.