IN THE SUPREME COURT OF THE STATE OF ALASKA

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

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

CERTIFICATE OF SERVICE AND TYPEFACE

I, Londa Wright, state that I am employed by the Alaska Department of Law, Office of Criminal Appeals, and that on August 16, 2022, I emailed a copy of the State's REPLY BRIEF OF PETITIONER and this CERTIFICATE OF SERVICE AND TYPEFACE in the above-titled case to:

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PETITION FOR HEARING FROM THE COURT OF APPEALS

REPLY BRIEF OF PETITIONER

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Filed in the Supreme Court of the
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August _____, 2022

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United States Constitution, Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]

Alaska Constitution, article I, section 14 provides:

> **Searches and Seizures.**
>
> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated.

ARGUMENT

Trooper Joshua Moore's flight near John McKelvey's property and his photographing of McKelvey's exposed marijuana-growing greenhouse were not a search under either the Federal or the Alaska Constitutions. McKelvey, as well as the Public Defender Agency (PDA), which has joined as amicus curiae, support their positions primarily by attempting to distinguish opinions that support the State's position and by relying on dissents, cases that are not about aerial observations, and law review articles. McKelvey's and the PDA's arguments are unpersuasive, and their positions conflict with both the vast majority of precedent and sound public policy. Therefore, this Court should reverse the court of appeals' decision and reinstate the trial court's order denying McKelvey's motion to suppress.

I. MCKELVEY HAD NO REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT IN HIS GREENHOUSE EXPOSED TO AERIAL VIEWS

McKelvey grew his marijuana in a translucent greenhouse visible to anyone flying near his property. Because air travelers could observe the greenhouse's contents, McKelvey did not have a reasonable expectation of privacy in them. *See California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)) (stating that a Fourth Amendment analysis is "whether a person has a

'constitutionally protected reasonable expectation of privacy'"). From public airspace, Trooper Moore photographed the greenhouse with a publicly available camera, just as any citizen could have done. *See Dow Chemical Co. v. United States*, 476 U.S. 227. 229, 239 (1986) (permitting aerial photography with a sophisticated camera). Applying federal precedent, Trooper Moore's actions were not a search and, thus, did not require a warrant. [Pet. Br. 8-21]

In arguing otherwise, McKelvey draws unfounded legal conclusions from the three United States Supreme Court aerial observation cases discussed in the State's opening brief. McKelvey incorrectly contends that *Ciraolo*, *Dow Chemical*, and *Florida v. Riley*, 488 U.S. 445 (1989), required Trooper Moore to obtain a warrant to photograph the greenhouse. [Resp. Br. 11] But his analysis is flawed, as even the court of appeals did not reach this conclusion. *McKelvey*, 474 P.3d at 26 ("We think it is unlikely that McKelvey would prevail under the Fourth Amendment."). McKelvey supports his argument not by applying these cases but by trying to distinguish them and by supposing what they would have held under different facts or citing their dissents. *Ciraolo* permitted photography with a 35-millimeter camera, and *Riley* permitted observations by the unaided eye. *Riley*, 488 U.S. at 449; *Ciraolo* 476 U.S. at 209-10. It does not follow that these cases prohibited all aided observations, as McKelvey contends. [Resp. Br. 11] Similarly, *Dow Chemical* permitted photography with a sophisticated, commercially available

camera of an area not in a curtilage. 476 U.S. at 229, 239. It does not follow that it prohibited such photography within the curtilage, as McKelvey argues. [Resp. Br. 11] To the contrary, the numerous cases cited in the State's opening brief indicate multiple scenarios in which aided observations did not require a warrant. [Pet. Br. 17-21] And these determinations were made based on the totality of the circumstances including, among other things, the location of the observed area and the nature of the device being used to aid the observation.

McKelvey's reliance on Wayne LaFave and the dissent in *Ciraolo*—for the notion that passengers in airplanes are unlikely to observe activities "'within residential yards'"—is likewise unavailing for the simple reason that LaFave and the *Ciraolo* dissent do not account for the realities of Alaska. [Resp. Br. 23-24 (quoting 1 Wayne R. LaFave, *Search and Seizure*, § 2.3(g) at 839 (6th ed. 2020), and *Ciraolo*, 476 U.S. at 224 (Powell, J., dissenting))] As previously explained, travelers in small planes in Alaska fly much lower and slower than commercial airliners and routinely observe the ground. [Pet. Br. 27, 32] The very purpose of many flights in Alaska is to observe the ground, as, for example, anyone who has been on a flightseeing trip can attest. And McKelvey's is not a "residential yard" in some large city but rather is mostly undeveloped land intertwined with the Alaska wildland. google.com/maps (last visited July 27, 2022). Thus, in addition to not being the law, LaFave and the *Ciraolo* dissenters do not accurately represent air travel in Alaska.

The only federal cases that McKelvey discusses where the Court held that a warrant was necessary did not involve aerial observation, and they are readily distinguishable. For example, he discusses *Riley v. California*, which is in no way analogous to this case as it involved the search of the defendant's cell phone. [Resp. Br. 12-13 (citing *Riley*, 573 U.S. 373 (2014))] He also discusses *Kyllo v. United States*, which involved an equipment-aided ground observation. [Resp. Br. 10-11 (citing *Kyllo*, 533 U.S. 27 (2001))]. But, in *Kyllo* the Court prohibited the observation because the equipment—an infrared sensor—was "not in general public use," in contrast to the camera Trooper Moore used. 533 U.S. at 40. Additionally, the information obtained in *Kyllo* could not have been obtained "without physical intrusion," also in contrast to the not particularly detailed photos taken by the trooper here, which any private citizen could have taken flying well above McKelvey's greenhouse. *Id.*

Similarly, *Florida v. Jardines*, upon which McKelvey also relies, does not support his position—both because the case does not involve aerial photography and because it does not apply the reasonable expectation of privacy test. [Resp. Br. 11-12 (citing *Jardines*, 569 U.S. 1 (2013))]. Instead, *Jardines* rests on the crucial facts that the police physically intruded onto the defendant's curtilage (his porch) with a drug-detection dog. 569 U.S. at 3-4. The Supreme Court held that the officer's conduct was a search within the Fourth Amendment because the officers "physically enter[ed] and occup[ied]"

the curtilage of the house "to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* at 6.

The Court explained that visitors and solicitors routinely approach a front door in an attempt to contact the owner, and the law has accepted this implied license. *Jardines*, 569 U.S. at 8. Likewise, an officer without a warrant may approach a home and knock, "precisely because that is 'no more than any private citizen might do.'" *Id.* (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). Similarly, in McKelvey's case anyone was permitted to fly above McKelvey's property (because it is public airspace). Additionally, small planes necessarily fly at lower altitudes, and in Alaska civilians routinely photograph from small airplanes. Trooper Moore did "no more than any private citizen might do." Thus, *Jardines* actually supports the State's position.

Moreover, unlike the intrusion in *Jardines*, here Trooper Moore was never on (or even directly above) McKelvey's property. Rather, the trooper was a quarter to a half mile away, in public airspace, and at least 600 feet above ground when he took the photographs. [Exc. 70, 106, 119, 156] And, unlike the officers in *Jardines*, who employed a drug-detection dog (a "super-sensitive" "'device . . . not in general public use'"), Trooper Moore used only a publicly available camera to capture the images of the greenhouse. *Jardines*, 569 U.S. at 12, 14 (Kagan, J., concurring) (quoting *Kyllo*, 533 U.S. at 40). In short, the facts of *Jardines* and its holding—"The government's use of trained police dogs

to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment"—have virtually nothing in common with McKelvey's case. 569 U.S. at 11-12.

In his brief, McKelvey also attempts to distinguish the federal case law relied on by the State in its opening brief. [Pet. Br. 10-21] These arguments, too, are unpersuasive. For example, McKelvey claims that *United States v. Dunn* is inapposite because in *Dunn* the officers made their observations—into an area that the Court assumed was protected by the Fourth Amendment—while positioned in "open fields," which is a term of art for an area of private property not protected by the Fourth Amendment, such as fields outside the home's curtilage. [Resp. Br. 13 (citing *Dunn*, 480 U.S. 294, 303-05 (1987))] But *Dunn* is on point precisely because Trooper Moore, like the officers in *Dunn*, was outside the defendant's curtilage when he made his observations. 480 U.S. at 297-98.

McKelvey also argues that *United States v. Allen*, 675 F.2d 1371 (9th Cir. 1980), and *United States v. Van Damme*, 48 F.3d 461 (9th Cir. 1995), are distinguishable because they did not undertake a curtilage inquiry or because the items observed were outside the curtilage. [Resp. Br. 14-15] But, as the trial court found, this distinction is immaterial here. [Exc. 342 ("whether or not Mr. McKelvey's semi-opaque greenhouse was located in the curtilage is irrelevant")] The State does not dispute that the greenhouse was within the

curtilage of McKelvey's home and that the curtilage enjoys the same protections as the home. But it is not enough to simply place an item within one's curtilage to create a reasonable expectation of privacy. *See Ciraolo*, 476 U.S. at 213 ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.") For example, one does not have a reasonable expectation of privacy in an item placed by a window observable by a passerby. *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). To exhibit a reasonable expectation of privacy, one must shield the item from the view of others outside of the curtilage. McKelvey did not do so, making the cases discussed by the State applicable.

Notably, McKelvey does not cite a single federal case where the court required a warrant under analogous facts. Conversely, the federal case law discussed in the State's brief establishes that Trooper Moore's actions of photographing McKelvey's exposed greenhouse, with a publicly available camera from a location open to the public, was not a Fourth Amendment search.

II. MCKELVEY HAD NO REASONABLE EXPECTATION OF PRIVACY UNDER THE ALASKA CONSTITUTION IN HIS GREENHOUSE EXPOSED TO AERIAL VIEWS

Trooper Moore's photographing of McKelvey's marijuana in the exposed greenhouse was also permissible under the Alaska Constitution. As an initial matter, there is no requirement that this Court interpret the search and seizure provision of the Alaska Constitution more expansively than the Fourth Amendment. *Smith v. State*, 510 P.2d 793, 795 n.4 (Alaska 1973) (stating in a search and seizure case: "Although under *Baker v. Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970), we may interpret our own constitution more expansively than the comparable federal constitutional provision, we are not persuaded that such should be done in this case."). Regardless, the result is the same under both federal and Alaska law.

As explained in the State's opening brief, *Cowles v. State* provides applicable principles. [Pet. Br. 24-25 (discussing *Cowles*, 23 P.3d 1168 (Alaska 2001))] In *Cowles*, this Court held that an employee did not have a reasonable expectation of privacy in her work area because it was exposed to fellow employees and customers. 23 P.3d at 1171. McKelvey tries to distinguish *Cowles* on the grounds that, for example, Cowles's office was "'open to fellow employees and to the view of the public.'" [Resp. Br. 17, 19 (quoting *Cowles*, 23 P.3d at 1172)] But analogously in McKelvey's case, the skies above his property were open to the public, there were numerous airports and airstrips nearby,

and small airplane travel is common near McKelvey's property and in Alaska. [Exc. 71, 107-11, 128, 133, 330-31, 336-37; Pet. Br. 28] McKelvey's greenhouse was open to the view of anyone flying near his property. Despite the factual differences between *Cowles* and this case, its underlying principle applies with equal force here: the police may observe what is exposed to view from a public place.

McKelvey also argues that *Cowles* is distinguishable because Cowles was entrusted with her employer's money. [Resp. Br. 17, 21] But this Court held that this was a "relevant," not a crucial, factor, and the court of appeals had concluded that this was only a "'second basis'" for its decision. *Cowles*, 23 P.3d at 1173.

Further, McKelvey stresses that his case involves the curtilage, unlike the office in *Cowles*. [Resp. Br. 20] But, as explained above, this distinction is immaterial here because McKelvey exposed the contents of his greenhouse to air travelers. In *Cowles*, this Court explained that "[a]ctivities that are open to public observation are not generally protected by the Fourth Amendment" or by the Alaska Constitution. 23 P.3d at 1171. Therefore, "'[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of [constitutional] . . . protection.'" *Id.* (quoting *Katz*, 389 U.S. at 351); *accord Daygee v. State*, 514 P.2d 1159, 1162 (Alaska 1973) ("It 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.") Consequently, because McKelvey, like Cowles, made his activity visible from a public area, *Cowles* applies here and supports the trial court's ruling.

Both McKelvey and the PDA ignore that McKelvey did not grow his marijuana inside his house or another sheltered location, where it would have been shielded from aerial observation, but rather intentionally placed it in a translucent greenhouse under the open skies. When McKelvey exposed the marijuana to the sky for months, so that it could grow, this came with the concomitant, and utterly foreseeable, risk of exposing it to flying photographers, biologists, or troopers.[1] Relatedly, the PDA misleadingly asserts that McKelvey's conduct "took place at his home." [Amicus. Br. 9] It took place in a greenhouse observable by anyone flying near his property.

The marijuana's location in a greenhouse also means that the PDA's discussion concerning *State v. Glass* about matters revealed to other occupants of a room not being broadcast to other locations is inapposite. [*See* Amicus Br. 11 (discussing *Glass*, 583 P.2d 872 (Alaska 1978))] McKelvey revealed the

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[1] https://cleanleaf.com/the-stages-of-cannabis-growth.php#:~:text=It%20can%20take%20anywhere%20from,the%20lifecycle%20of%20your%20plants (last visited July 27, 2022) ("It can take anywhere from 4 to 8 months to grow a cannabis plant[.]"); https://homegrowncannabisco.com/grow-your-own-with-kyle-kushman/growing-stages/how-long-does-it-take-to-grow-cannabis/ (last visited Aug. 1, 2022) ("cannabis plants can take anywhere from 3 to 8 months to grow").

contents of his greenhouse to anyone flying close (or even a quarter to a half-mile away from) to his property.

The nature of McKelvey's property also made it likely that various plane travelers would observe the greenhouse. In suggesting otherwise, McKelvey asserts that tourists or hunters seek to view open public lands, not "an enclosed curtilage such as [his]." [Resp. Br. 22] But this argument fails for a number of reasons.

First, the record contradicts McKelvey's claim that his curtilage was enclosed; the trial court made no finding about an enclosure, and the photographs do not reveal one. [Pet. Br. Attachments 1, 2] Second, McKelvey's property is about twenty miles east of Fairbanks and is mostly undeveloped, as is the area surrounding his property. google.com/maps (last visited July 27, 2022). [Exc. 234] Thus, it is virtually certain to be home to wildlife that people seek to observe. Third, plane travelers may (and likely do) cross McKelvey's property or fly through airspace from which his property can be easily seen on their way to and from the various landing strips and airports in the area.

Indeed, Trooper Moore testified that he had previously flown in the vicinity several times, including having been at a nearby airstrip, "that there are several private airstrips all up and down Chena Hot Springs Road," which is the main road just north of McKelvey's property, and that planes fly low in the area. [Exc. 107-11, 128, 133] google.com/maps (last visited July 27, 2022).

The trial court itself found that at least one airstrip was located within a mile of McKelvey's property, and there was a second one nearby. *McKelvey*, 474 P.3d at 20. [Exc. 59, 61, 71, 110-11, 114-15, 331, 336-37] The court also implicitly rejected McKelvey's claim "that small aircraft flying at lower altitudes do not characterize the nature of plane travel near his property." [Exc. 336-37] Thus, it is reasonable that someone would look down at McKelvey's property from a relatively low altitude, and McKelvey's attempt to portray his property as one into which only the police would look is unpersuasive.

McKelvey also attempts to support his position by analogy to civil law concepts. Specifically, McKelvey quotes the restatement and this Court's decision in *Wal-Mart, Inc. v. Stewart* to argue that, had a private citizen done what Trooper Moore did, the citizen would be civilly liable. [Resp. Br. 22 (discussing *Stewart*, 990 P.2d 626 (Alaska 1999)); *see also* Amicus Br. 10 (quoting 28A Restatement (Second) of Torts, § 652B (1977) (updated Oct. 2021))] This contention is meritless.

The restatement prohibits only intrusions that are "highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977) (quoted in *Stewart*, 990 P.2d at 632). And, in *Stewart* the defendants were found liable for repeatedly searching an African-American employee's bag because of his race. 990 P.2d at 630. Trooper Moore did nothing of the sort: from far away, the trooper on one occasion took several photographs of McKelvey's

greenhouse. This conduct is not "highly offensive to a reasonable person," and, in fact, is similar to what the Fairbanks North Star Borough and Google Maps do. Restatement (Second) of Torts § 652B (1977). In short, the two civil sources *McKelvey* cites are inapplicable.

McKelvey's reliance on out-of-state cases is similarly unpersuasive. McKelvey attempts to defend *People v. Cook*, arguing that "if the people of California were to undo" their constitutional amendment, which precludes applying the exclusionary rule to evidence obtained in violation of the state constitution, *Cook* would allow suppressing evidence. [Resp. Br. 25 (discussing *Cook*, 710 P.2d 299 (Cal. 1985))] But the people of California have not repealed their amendment, despite having had four decades to do so, and there is absolutely no indication that they so intend. Thus, *Cook* remains without force in analyzing McKelvey's case. Likewise, McKelvey's assessment that "*Cook* was prophetic" is unfounded; as explained previously, no California court in the last three decades has cited *Cook* to reach a decision in an aerial observation case. [Resp. Br. 25; Pet. Br. 37]

Notably, neither McKelvey nor the PDA address in their briefs the State's discussion about the availability of detailed aerial photographs on the internet, such as those that appear on the websites for the Fairbanks North Star Borough and Google Maps, a topic that was raised at the evidentiary hearing in this case. [Exc. 109-14, 260-61, 265-67; Pet. Br. 45-46] For the

reasons explained in the State's opening brief, the availability of these aerial photographs undermines any argument by McKelvey that he had a reasonable expectation of privacy in what he exposed (for months) to aerial observation.

Rather than acknowledging this increasing availability of aerial photographs on the internet, McKelvey raises an immaterial issue: the specter of unregulated drone photography by law enforcement. [Resp. Br. 27-29] But this argument is misplaced in a case that does not involve drone photography, and it is an axiom of jurisprudence "that courts should not resolve abstract questions[.]" *Keller v. French*, 205 P.3d 299, 302 (Alaska 2009).

Perhaps for this reason (i.e., that courts should resolve only the question in front of them), the Supreme Court issued three decisions on aerial photography within three years on three different sets of facts: *Ciraolo* (fixed-wing aircraft, 1986), *Dow Chemical* (highly specialized camera, issued on the same day as *Ciraolo*), and *Riley* (helicopter, 1989). This Court should take the same approach and resolve only the issue before it. *E.g.*, *State v. Davis*, 360 P.3d 1161, 1172 (N.M. 2015) (stating in a helicopter observation case that it was "unnecessary to speculate about problems—and futuristic technology—that may or may not arise in the future," instead, "reserv[ing] judgment and await[ing] a proper case with a developed record").

Moreover, drone photography by law enforcement is already regulated by existing statutes. AS 18.65.900 ("Use of unmanned aircraft systems"); AS

18.65.901 ("Operational requirements for unmanned aircraft systems"); AS 18.65.902 ("Use of an unmanned aircraft system by a law enforcement agency"). In short, these statutes provide that the police may use drones to gather evidence in a criminal investigation only pursuant to a search warrant or when a warrant exception applies. AS 18.65.902(1). And, because drone surveillance is already severely limited by statute, McKelvey's emotionally-charged hyperbole "of an army of drones" is largely irrelevant here.[2] [Resp. Br. 29] If a case involving a drone arises in the future, this Court will have an opportunity to interpret the relevant statutes and attendant facts then.

Ultimately, McKelvey and the PDA suggest rules that both conflict with existing applicable case law and undermine sound public policy. McKelvey's proposal that law enforcement be permitted to observe from aircraft only with the naked eye would preclude them from using publicly available tools—like binoculars and telephoto lenses—for no sound reason and would simply encourage them to fly lower. [Resp. Br. 28] *See, e.g.*, *Dow*, 476 U.S. at 238 (permitting photographing with a highly sophisticated camera); *On*

[2] Although this discussion is unnecessary here, sound reasons exist to distinguish drones from manned airplanes. Drones are smaller, quieter, cheaper, able to hover, and not subject to the altitude restrictions of fixed-wing aircraft. They may be used surreptitiously and more extensively than manned airplanes, which informs whether their use violates a reasonable expectation of privacy.

Lee v. United States, 343 U.S. 747, 754 (1952) (stating that using a field glass or a telescope is not a search).

The PDA advocates for an even broader rule than that promulgated by the court of appeals, asking this Court to require a search warrant for all deliberate aerial observation. [Amicus Br. 1] This would lead to legally unsound results, such as requiring a warrant to observe (1) property adjacent to an airport, where the landowner lacks both a reasonable and a subjective expectation of privacy, and (2) lands outside the curtilage not protected by the Fourth Amendment. The PDA asserts that requiring a warrant would not prohibit an effective investigative method because the police could still conduct aerial observations if a warrant exception existed or the police obtained a warrant. [Amicus Br. 12 n.43] But much of the time no warrant exception applies. And if the police have probable cause to seek a warrant they may do so, but this case addresses a situation where police lacked probable cause. Thus, the PDA's argument inaccurately minimizes the consequences of its proposed rule. On the other hand, the State's position fairly balances legitimate law enforcement goals and legitimate means of investigation against the constitutional rights of individuals.

The PDA also contends that this Court must distinguish between deliberate aerial observations by law enforcement and unintended aerial observations by the public. [Amicus Br. 2] The PDA acknowledges that *Cowles*

"supports the state's contention that the open view doctrine applies to deliberate police surveillance." [Amicus Br. 8] But the PDA invites this Court to rescind the well-established open view doctrine discussed in the State's opening brief—under which the officer's intent is irrelevant. [Amicus Br. 9; Pet. Br. 24-25] This Court should reject both this invitation and the PDA's suggestion that this Court overrule *Cowles* because the PDA has provided no sound reason why this Court should depart from its long-standing precedent. [Amicus Br. 9] *See State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986) (quoting *State v. Souter*, 606 P.2d 399, 400 (Alaska 1980)) (stating a decision may be overruled only when the court is "'clearly convinced'" that the decision "'was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent'").

As this Court explained more than 40 years ago: "The inadvertence requirement of the plain view[3] 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 . . . incriminating evidence freely visible within the confines of a constitutionally

[3] As explained in the State's opening brief, the better term would have been "open view," to distinguish this scenario from a "plain view" observation. [Pet. Br. 24-25 & nn.4-5]

protected area." *Sumdum v. State*, 612 P.2d 1018, 1022 (Alaska 1980) (citing 1 W. LaFave, Search and Seizure § 2.2, at 242-43 (1978)). This remains the law.

In arguing for its proposed new rule, the PDA also incorrectly asserts that "[n]early all the cases on which the State relies for the application of the open view doctrine either do not implicate or do not address the distinction between deliberate surveillance and unintended observation[.]" [Amicus Br. 6-7] To the contrary, *Ciraolo*, *Riley*, and *Cowles* were very much about deliberate police observations. For example, in *Cowles*, this Court directly stated: "that the videotape surveillance was conducted for the purpose of recording illicit conduct [did not] violate Cowles's reasonable expectation of privacy." 23 P.3d at 1172, 1173 ("If a person's activities are open to view by the public, . . . that they are actually observed for the purpose of detecting misconduct does not affect the results of a Fourth Amendment analysis."); *see also Dunn*, 480 U.S. at 304-05 (citing *Ciraolo*, 476 U.S. at 213) (stating that in *Ciraolo* "we deemed it irrelevant that the police observation at issue was directed specifically at the identification of marijuana plants growing on an area protected by the Fourth Amendment"). In fact, virtually all of the cases on police observation that the State discussed in its opening brief deal with deliberate police observation. And, contrary to the PDA's assertion, even *Daygee* is an application of the open view doctrine because the officer intentionally observed the back seat of the defendant's car while standing on the road, i.e., in a place not protected by the

Fourth Amendment. 514 P.2d at 1161-62. [Amicus Br. 7] Likewise, the PDA's attempt at characterizing *Pistro v. State* as not involving a deliberate observation is also flawed because there the officer intentionally looked into the garage. [Amicus Br. 7 (citing *Pistro*, 590 P.2d 884 (Alaska 1979))]

McKelvey cites only a few cases that reached the conclusion he advocates, and all are distinguishable for the reasons explained here or in the opening brief. His, as well as the PDA's, discussion of federal and Alaska cases is primarily limited to attempting to distinguish the outcomes or to citing the dissents. [Amicus Br. 19] And some of their lengthier quotations are from law review articles, not judicial opinions. [Resp. Br. 12-13, 27-28; Amicus Br. 15 n.18, 17-18] In short, Alaska law and federal law, as well as the law of the majority of other states, contradict McKelvey's and the PDA's arguments.

III. ALL ALASKANS ARE TREATED EQUALLY UNDER THE STATE'S TEST FOR ANALYZING AN AERIAL VIEW

In advocating for its proposed new restrictions on aerial views, the PDA argues that the State's interpretation of the law disproportionally exposes less privileged Alaskans to governmental intrusion. [Amicus Br. 13] In reality, the totality of the circumstances test for analyzing aerial views used by many jurisdictions and proposed by the State treats all Alaskans equally. That said, the PDA's argument is waived because it was never raised previously. This issue was not argued or briefed below, no evidence was presented on it, and

the trial court made no findings regarding it. That is reason enough to reject it. *See Harvey v. Cook*, 172 P.3d 794, 802 (Alaska 2007) (footnote omitted) ("[A] party seeking to raise an issue on appeal must have raised it and offered evidence on it in the trial court. Therefore, issues not properly raised in the trial court will not ordinarily be considered on appeal."); *Pierce v. State*, 261 P.3d 428, 430-31 (Alaska App. 2011) ("[A] litigant is not entitled to pursue a claim on appeal unless that claim was presented to the lower court . . . [and] the lower court issued a ruling on the merits of that claim."). Similarly, a defendant may not posit a new theory on appeal for excluding evidence. *Williams v. State*, 629 P.2d 54, 62 (Alaska 1981) (quoting *State v. Brierly*, 509 P.2d 203, 205 (Ariz. 1973)) (alterations in *Williams*) ("(I)f (evidence) is not objectionable on the ground stated, it is not error for the court to admit it, even though there might be some other proper reason for its rejection not raised by objection as made."); *Linscott v. State*, 157 P.3d 1056, 1059 (Alaska App. 2007) ("[W]hen a defendant objects to the government's evidence on a particular ground, but the trial judge nevertheless admits the evidence, the defendant may not argue a different evidentiary objection on appeal.").

The PDA's socioeconomic argument is also without merit. The skies above a millionaire's mansion as well as above an indigent person's apartment are equally open to the public, and this openness is the crucial factor that makes McKelvey's expectation of privacy unreasonable. Indeed, the properties

of even those with virtually unlimited resources are exposed to aerial observation because there is nothing that effectively prevents them from being viewed from the air while at the same time permitting uncurtailed views of the sky. Neither the Fourth Amendment nor Article I, Section 14 of the Alaska Constitution has ever offered protection when the person deliberately exposes an activity, such as a marijuana grow, to aerial observation.

Moreover, when followed to its logical conclusion, the PDA's argument is also anathema to the principles of liberty and self-determination that McKelvey and the PDA espouse. [Resp. Br. 16, 24-25; Amicus Br. 2-3] The PDA's argument allegedly promoting equality distorts the law to support a predetermined anti-law enforcement position. In addition, the PDA's proposed rule is actually more likely to protect those with the means to own property rather than the indigent; the truly indigent are unlikely to be able to afford a house with a private curtilage that can be observed from the air.

The State acknowledges the harms of socioeconomic inequalities in our society. But the focus here is that the Fourth Amendment and Article I, Section 14 of the Alaska Constitution were never designed, nor are they suited, to address economic inequalities. To attempt to do so would be to misuse them and to abrogate the valid pursuit in their rightful avenues of greater socioeconomic opportunities for the indigent. This is a criminal case and needs to be resolved based on applicable principles.

The federal and Alaska search and seizure constitutional provisions were drafted to prevent indiscriminate searches. *E.g.*, *Payton v. New York*, 445 U.S. 573, 583 (1980) ("[I]ndiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."). The State's position applies them for this purpose equally to all Alaskans.

CONCLUSION

McKelvey grew marijuana in a greenhouse that anyone flying near his property could observe. Thus, even though the marijuana was in his home's curtilage, it was exposed to public views for potentially months. McKelvey had no reasonable expectation of privacy in the greenhouse's contents under either the Federal or Alaska Constitutions. Consequently, the trial court correctly concluded that Trooper Moore did not need a warrant to photograph the greenhouse from public airspace using a publicly available camera, as any private citizen could have done.

DATED August 16, 2022.

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