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IN THE SUPREME COURT OF THE STATE OF ALASKA

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

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

RESPONSE TO PETITION FOR HEARING

VRA Certification

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I. INTRODUCTION & OVERVIEW

While the Alaska Court of Appeals may have decided a significant question of Alaska constitutional law, the Court of Appeals' decision correctly construes the Alaska Constitution and provides ample guidance for law enforcement seeking to employ technology for aerial surveillance. Thus, there is no need for this Court to grant review, especially since warrantless technology-enhanced aerial surveillance of the curtilage is

illegal under the United States Constitution as well. If the State truly needs an even-clearer rule, then the Court should adopt the standards employed by the dissent in Ciraolo and by the California and Hawaii Supreme Courts which would prohibit any purposeful police aerial surveillance of the curtilage of one's home, whether that surveillance employs technology or not.

II. DISCUSSION

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

In California v. Ciraolo, while flying at an altitude of 1000 feet in public airspace, law enforcement was able to "observe plants readily discernable to the naked eye as marijuana" in the defendant's outdoor, uncovered, marijuana garden.[1] The Court determined that the garden was indeed within the curtilage of the defendant's home[2] but stated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"[3] and that law enforcement is not "required to shield their eyes when passing by a home on public thoroughfares."[4] The

[1] California v. Ciraolo, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).
[2] Persons and property within the curtilage of one's home are entitled to the same constitutional protection as though they were within the home itself. Florida v. Jardines, 569 U.S. 1, 5-6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).
[3] Ciraolo, 476 U.S. 213 (quotations and citations omitted).
[4] Id.

Court then determined that because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed," the defendant had not manifested an expectation of privacy that society was prepared to recognize as reasonable.[5] "The Fourth Amendment simply does not require the police traveling the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."[6]

The fact that the observations made by law enforcement were through the naked eye is key to the holding of Ciraolo. In his Opinion for the Court, Chief Justice Burger repeatedly states that the police observations were through the naked eye and also points out that the camera used by the police was "a standard 35mm camera."[7] Moreover, in concluding, Chief Justice Burger noted, "The State acknowledges that aerial observations of the curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens."[8]

The same day that the Court rendered its decision in Ciraolo, it also rendered its decision in Dow Chemical.[9] The Court's decision upholding the aerial surveillance in Dow

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[5] Id. at 213-14 (brackets added). Justice Powell, joined by Justices Brennan, Marshall, and Blackmun, filed a vigorous dissent. See Ciraolo, 476 U.S. at 215-26 (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).
[6] Id. at 215 (emphasis added).
[7] Id. at 209 (quotation and citation omitted).
[8] Id. at 215 n. 3 (quotation, citation, and brackets omitted).
[9] Dow Chemical Company v. United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).

Chemical is premised on the fact that although the flyover did involve technologically-enhanced photography, the photography was not of the curtilage of one's home but was rather of a 2000-acre industrial complex.[10] The Court expressly emphasized that the case did not concern the curtilage:

> We find it important to note that this is not an area immediately adjacent to a private home where privacy expectations are most heightened.[11]

Three years following Ciraolo and Dow Chemical, the Court considered another case of flyover surveillance in Florida v. Riley. In Riley, both the four-Justice plurality[12] and Justice O'Connor's concurrence[13] relied upon the fact that the police observations were performed with the naked eye, and the plurality concluded that because the police remained within the publicly-navigable airspace, the case was controlled by Ciraolo.[14]

Toward the beginning of this Millennium, the Court was presented in Kyllo v. United States with a case that did not involve aerial police observations but rather involved ground-level, public-street police observations using specialized technology not generally available to the public.[15] In rendering the Opinion of the Court, Justice Scalia was clear that "obtaining by sense-enhancing technology any information regarding the interior of

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[10] See Dow Chemical, 476 U.S. at 236-39.
[11] Id. at 237 n. 4 (emphasis in original).
[12] See Florida v. Riley, 488 U.S. 445, 448-49, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) (plurality opinion).
[13] See id. at 455 (O'Connor, J., concurring in the judgment).
[14] See id. at 449-52 (plurality opinion).
[15] See Kyllo v. United States, 533 U.S. 21, 29-30, 33-34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

the home that could not have been obtained without physical intrusion into a constitutionally protected area constitutes a search -- at least where. . . the technology in question is not in general public use."[16] The Kyllo Court thus ruled that the police use of thermal-image scanning of the defendant's home was a search, for which a warrant was required.[17] Furthermore, the Court in Kyllo reiterated that the "enhanced aerial photography" in Dow Chemical was upheld because it did not involve the curtilage.[18] And the Kyllo Court likewise emphasized that the Court's focus on Ciraolo was "upon otherwise-imperceptibility, which is precisely the principle we vindicate today."[19]

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

Even where police are otherwise authorized to intrude into the curtilage, Florida v. Jardines establishes that the purpose of the police intrusion does matter so that police may not intrude into the curtilage if the purpose of the intrusion is to engage in a search or to otherwise take actions not explicitly or implicitly authorized by the homeowner.[20] While

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[16] Id., 533 U.S. at 34 (quotation and citation omitted) (ellipsis added).
[17] Id. at 40.
[18] Id. at 33.
[19] Id. at 38 n. 5.
[20] Florida v. Jardines, 569 U.S. at 5-10; see Kelley v. State, 347 P.3d 1012, 1017 (Alaska App. 2015) (Mannheimer, C.J., concurring) (discussing Jardines).

Jardines does recognize that law enforcement officers do not need to shield their eyes when occupying public thorough fares and thus may engage in "visual observation of the home" from pubic airspace, Jardines relies upon the naked-eye observation approved in Ciraolo as the basis for its conclusion.[21] In this context "visual" essentially means "perceptible by the sense of sight."[22] Thus, Jardines implicitly supports the proposition that what is perceived from the air only through the use of technology is indeed a Fourth Amendment search.

More recently, the United States Supreme Court discussed the impact of developing technologies on Fourth Amendment safeguards is Riley v. California where the Court reasoned that the advent of technologies making far more information accessible to the police "does not make the information any less worthy of the protection for which the Founders fought."[23] The Court correspondingly held that searches of a person's cell phone are presumptively unreasonable unless conducted under the auspices of a search warrant.[24] As one commentator has explained:

> The principle of *Riley* is simple and logical: new technologies that augment the government's surveillance abilities justify changing or, at the very least, expanding existing Fourth Amendment doctrines to apply new circumstances to these new technologies.
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> Such an expansion could be done with the aerial surveillance doctrine of *Ciraolo*. Therefore the doctrine expressed in *Ciraolo* should be expanded to differentiate between aerial surveillance seen by the naked eye with [sic] the

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[21] Jardines, 569 U.S. at 7 (quoting Ciraolo, 476 U.S. at 213).
[22] www.dictionary.com/browse.visual.
[23] Riley v. California, 573 U.S. 373, 403, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).
[24] Id., 573 U.S. at 401.

surveillance observed via other technologies. This would not only be consistent with *Ciraolo*, but would build upon circumstances highlighted by the Court as key in adjudicating the case.[25]

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

Early in Alaska's history as a State, this Court declared: "To look only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities."[26] As Justice Connor noted in Baker v. City of Fairbanks, Alaska's appellate courts are "under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage."[27] In Breese v. Smith, the Court added that while some of the terms in the Alaska Constitution parallel those of the United States Constitution, "we have repeatedly held that this court is not obliged to interpret our constitution in the same manner as the Supreme Court of the United States has construed parallel provision of the United States

[25] J. Laperruque, "Preventing An Air Panopticon: A Proposal For Reasonable Legal Restrictions On Aerial Surveillance," 51 U. Rich. L Rev. 705, 723 (2017) ("Preventing An Air Panopticon").
[26] Roberts v. State, 458 P.2d 340, 342 (Alaska 1969).
[27] Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970).

Constitution."[28]

Alaska's right to privacy may be "one of the most well-known indicators of Alaska's judicial independence."[29] Those who proposed and advocated for Article I, §22 saw the constitutional amendment as a way to ensure "that we have a possible defense to invasion of privacy."[30] Article I, §22 advocates anticipated that "we are moving into an electronic age and this will give a measure of protection and would prevent excesses in this field."[31] Article I, §22 was proposed, passed, and adopted by the citizens of Alaska with the future interest of Alaskans in mind. The amendment serves as a pre-emptive check on the looming threat that advances in technology pose to Alaskans' sense of privacy.

This Court's decision in Cowles[32] compels affirmance of the Court of Appeals' decision. While the Cowles Court narrowly upheld warrantless overhead video recording of a public employee in her workplace, neither the three-Justice majority nor the two-Justice dissent in Cowles disputed the intrusiveness of the police recording visual images from an overhead vantage point.[33] Rather, the Court's decision in Cowles turned on the

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[28] Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972).
[29] Ronald L. Nelson, Welcome To The "Last Frontier," Professor Gardener: Alaska's Independent Approach to State Constitutional Interpretation, 12 Alaska L. Rev. 1, 17 (1995).
[30] R. 466 (Alaska House Judiciary Committee: Minutes of The Meeting, May 30, 1972).
[31] Id.
[32] Cowles v. State, 23 P.3d 1168 (Alaska 2001).
[33] Cf. State v. Page, 911 P.2d 513, 516-17 (Alaska App. 1996) (Alaska's Constitution protects Alaskans from warrantless "surreptitious photography or videotaping" of private activities because such governmental action has the same "corrosive impact on our sense of security" as the warrantless recording of conversations that was prohibited in State v.

essentially-public nature of her workspace, the presence of numerous passersby, and the fiduciary nature of her employment involving handling financial transactions so that one's reasonable privacy expectations were minimal if any at all.[34] In contrast, the overhead recording of visual images in McKelvey's case concerns the core of privacy -- the curtilage of one's home -- plus the visual images here were enhanced by the telescopic, zoom lens employed by the police.

Furthermore, in her Cowles dissent, Justice Fabe referred to a situation akin to that in McKelvey's case. Discussing People v. Romo,[35] Justice Fabe observed that one's right to privacy would be violated where law enforcement agents fly over a person's home "using electronic aids for observation."[36]

McKelvey testified that the police flyover of his property was unprecedented.[37] There is no evidence of previous similar flight activity over his property, and there is certainly no evidence that any tour operator offers "curtilage excursions." Rather, whether tourist or hunter, a person flying over the vast expanse of Alaska is seeking to view what are essentially open public lands -- the antithesis of an enclosed curtilage such as

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Glass, 583 P.2d 872 (Alaska 1978)), petition for hearing dismissed as improvidently granted, 832 P.2d 1297 (Alaska 1997).

[34] See Cowles, 23 P.3d at 1172-73.

[35] People v. Romo, 243 Cal. Rptr. 801 (Cal. App. 1988).

[36] Cowles, 23 P.3d at 1183 (Fabe, J., joined by Bryner, J., dissenting); cf. State v. Cord, 693 P.2d 81, 84 (Wash. 1985) (aerial surveillance from a lawful vantage point without visual enhancement devices is not a search under the Washington Constitution); State v. Wilson, 988 P.2d 463, 465-66 (Wash. App. 1999) (same).

[37] McKelvey, 474 P.3d at 25.

McKelvey's.

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

> [T]he most sensible way to apply the Katz justified-expectation-of-privacy test is to characterize police surveillance as a search unless it occurs from a "public vantage point" and uncovers what the person has not protected from scrutiny by the "curious passerby." Under that approach, the Ciraolo case should have come out the other way. The fact that the aircraft was in "public navigable airspace" does show that the surveillance occurred from a "public vantage point," but that is all. As the four Ciraolo dissenters correctly observed:
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>> the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities and might connect those activities with particular people, is simply too trivial to protect against. ***
>>
>> ***The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance. But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the air space. Members of the public use the air space for travel, business, or pleasure, not just for the purpose of observing activities taking place within residential yards.[38]

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[38] 2 Wayne R. LaFave Search and Seizure, §2.3(g) at 799-800 (5th ed. 2012) (footnote omitted, brackets added); see Catherine Hancock, "Justice Powell's Garden: The *Ciraolo* Dissent And Fourth Amendment Protection For Curtilage-Home Privacy," 44 San Diego L.Rev. 551 (2007).

In other words, the majority opinion in Ciraolo is a manifestation of what the Court of Appeals has referred to as the United States Supreme "Court's surreal and Orwellian view of personal security in contemporary America,"[39] while the dissenting Justices in Ciraolo embody the ordered liberty of The Last Frontier -- the Alaskan spirit and mindset manifested in Article I, §§14 and 22 of the Alaska Constitution.

In line with the Ciraolo dissent and with Alaska jurisprudence is the decision in People v. Cook, wherein the California Supreme Court determined that under the California Constitution "an individual has a reasonable expectation of privacy from purposeful police surveillance from the air."[40] Therefore, the Court held that "the warrantless aerial scrutiny of defendant's yard, for the purpose of detecting criminal activity by the occupants of the property, was forbidden by Article I, Section 13 of the California Constitution."[41]

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

Consistent with Cook is the decision in the Quiday case. There the Hawaii Supreme

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[39] Joseph v. State, 145 P.3d 595, 604 (Alaska App. 2006) (quotation and citation omitted).
[40] People v. Cook, 710 P.2d 299, 305, 221 Cal. Rptr. 499, 505 (Cal. 1985).
[41] Id., 710 P.2d at 307, 221 Cal. Rptr. at 507.

Court adopted the rule established by the California Supreme Court in Cook and held that "an individual has a reasonable expectation of privacy from government aerial surveillance of his or her curtilage and residence, when such aerial surveillance is conducted with the purpose of detecting criminal activity therein."[42] "Such purposeful aerial surveillance of an individual's residence and curtilage" constitutes a search under the Hawaii Constitution.[43] This Court should hold the same under the Alaska Constitution and thus require the police to obtain a warrant whenever they decide to peer -- with their eyes or their technologies -- into one's curtilage or home from the airspace overhead for the purpose of detecting criminal activity (as well as whenever they employ their technologies to peer into one's curtilage or home from the airspace overhead for any or no purpose at all).

One can choose the location of his or her property so as to minimize the ability of prying neighbors to observe one's curtilage; hence some cases have approved the use of viewing devices to observe the curtilage from points on neighbors' properties.[44] But there is no escaping the prying eye in a plane overhead. When that eye is just a naked one, there is an inherent limitation on the ability to intrude upon one's privacy. When that eye is allowed to be enhanced by or replaced by technology, even the castle on the hilltop becomes a fancy fishbowl. One generation's telephoto lens is the next generation's drone. And what will the coming generations bring? Without meaningful constraints to curtail

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[42] State v. Quiday, 405 P.3d 552, 562 (Hawaii 2017).
[43] Id.
[44] See McKelvey, 474 P.3d at 32 & nn.81, 83.

the warrantless use of technology in the airspace overhead, privacy will become but a word we use, spoken but not honored.

McKelvey's concerns are shared by the author of "Preventing An Air Panopticon." With drones bursting onto the scene and photo zoom and resolution technologies evolving at an exponential rate, we face the annihilation of privacy if we do not subject the aerial use of drones and other photo technologies to the warrant requirement.[45] As the author explains:

> Aerial surveillance possesses a number of unique features that create distinct risks to privacy as compared to other forms of government surveillance. First, aerial surveillance occurs from a vantage point that can view private property on a much larger scale than any form of traditional ground-level surveillance, more easily overcoming civilians' deliberate efforts to conceal private property. Second, aerial surveillance is mobile, presenting the ability to follow moving targets and easily redirect efforts to different targets in a way that stationary cameras, such as police "Blue Light" cameras and traffic cameras cannot. This enhanced mobility is augmented by the openness of airspace, giving aerial surveillance a higher degree of mobility than ground-level officers and vehicles, which are restrained by obstructions. Third, aerial surveillance is inconspicuous. Whereas individuals can regularly notice and develop comprehensive mapping of Blue Light cameras or even beat cops, aerial surveillance is a true panopticon, able to observe anywhere at any time without any notice or warning to those being monitored. Fourth, aerial surveillance can target a wide field, providing the ability to expand access and retain capabilities. While the ability to immediately monitor any point in a city requires an enormous allocation of manpower and technology, aerial surveillance encompasses an incredibly wide field of view with the capability to rapidly hone in on any area within it at a moment's notice.[46]

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[45] See "Preventing An Air Panopticon," 51 U. Rich. L. Rev. at 705-13.
[46] Id. at 714-15 (footnotes and citations omitted); see also "Anchorage Police Want to Start Using Drones," https://www.adn.com/alaska-news/anchorage/2017/11/15/anchorage-police-want-to-start-using-drones/.

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

> Here, the "Naked Eye Rule" would build upon *Ciraolo* in the following manner: *aerial surveillance cannot be used by law enforcement absent court approval, unless the surveillance is akin to the naked eye view of a human on the aircraft*. This would have two practical restrictions: first, it would limit unregulated aerial surveillance observations to those obtained at human eye resolution; and second, it would prohibit unregulated use of drones, and any observation that cannot be made by a human on an aircraft.[47]

McKelvey agrees that, at a minimum, the Naked Eye Rule is required under Article I, §§14 and 22 of the Alaska Constitution. For McKelvey to then prevail, the Court need go only so far as to apply it to the curtilage of McKelvey's home.

3. The State's Proposed Test Fails To Provide Meaningful Protection Against Police Privacy Invasions, Especially Those Occasioned Through The Use Of Surreptitious Technology.

The State makes several arguments to avoid or dilute the Naked Eye Rule as it would apply in McKelvey's case. For one, the State suggests that aerial surveillance be limited primarily under the auspices of trespass law with a focus on how intrusive the aerial surveillance appears to one on the ground. But the protections of privacy embedded in Article I, §§ 14 and 22 of the Alaska Constitution are not concerned merely with trespass or other aspects of the common law. Furthermore, the State's proposed test ignores the unseen prying eye, the unknown drone -- the privacy invasion occasioned by technology of which the homeowner is entirely unaware, yet which is perhaps the most dangerous

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

invasion of all.

The State also relies upon this Court's decisions in Myers[48] and Beltz[49] for the proposition that this Court should allow warrantless aerial surveillance based merely upon reasonable suspicion. But Myers involves the expectation of privacy in a commercial business premises after the doors are locked and the owner has gone home.[50] And Beltz concerns one's reasonable expectation of privacy in garbage placed outside the boundaries of the curtilage; the Court there did recognize some reasonable expectation of privacy in that circumstance and thus applied a reasonable-suspicion requirement under the Alaska Constitution, in contrast to the United States Supreme Court's determination that there is no Fourth Amendment privacy interest in such cases outside the curtilage.[51]

III. CONCLUSION

The decision of the Alaska Court of Appeals has enunciated a narrow and precise standard that correctly addresses the technology-based constitutional violation that occurred in McKelvey's case and that provides ample guidance for law enforcement's use of technology in future instances. There is no need and no reason for the Court to grant review. If the Court were to grant review, the Court should adopt the standards employed by the Ciraolo dissent and by the Supreme Courts of California and Hawaii.

RESPECTFULLY SUBMITTED this 16th day of December 2020.

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[48] State v. Myers, 601 P.2d 239 (Alaska 1979).
[49] Beltz v. State, 221 P.3d 328 (Alaska 2009).
[50] See Myers, 601 P.2d at 241-44.
[51] See Beltz, 221 P.3d at 332-39.

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