MEMORANDUM OF LAW IN SUPPORT OF CONSTITUTIONALITY OF USE OF WIDE AREA MOTION IMAGERY

This case involves photographs taken from a manned aircraft flying within publicly navigable airspace. The photographic surveillance is being utilized by law enforcement in support of a warrant. The photographic surveillance does not constitute a search or violate the Fourth Amendment of the Constitution under United States Supreme Court precedent.

The United States Supreme Court has developed a "relatively straightforward" test for determining what expectations of privacy are protected by the Fourth Amendment. United States v Karo, 468 U.S. 705, 730 (1984). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."' United States v Karo, 468 U.S. 705, 730 (1984) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)). Under the familiar Katz test, the defendant's ability to challenge a search turns on two inquires: (1) whether he had an actual, subjective expectation of privacy in the premises searched; and (2) whether this subjective expectation is one that society is prepared to recognize as reasonable. Katz, 389 U.S. at 361 (Harlan, J., concurring). "The touchstone of search and seizure analysis is whether a person has a constitutionally recognized expectation of privacy." California v. Ciraolo, 476 U.S. 207, 211 (1986).

In California v Ciraolo, the Supreme Court considered whether a naked eye aerial observation of the defendant's backyard was a Fourth Amendment violation. The police had received an anonymous tip that defendant was growing marijuana in his backyard, but the police were unable to confirm this tip from driving by his residence. Ciraolo, 476 U.S. at 209. The officers secured a private plane and flew over the area at 1,000 feet within navigable airspace. From that height the officers, who were trained in marijuana identification, could readily identify marijuana growing in the yard. Id. They subsequently secured a warrant and seized marijuana plants. Id.

There was no dispute that the defendant had manifested a subjective intent to maintain the privacy of his backyard from any street-level views because the defendant erected a 6-foot outer fence and a 10-foot inner fence completely enclosing his yard. Id. at 209, 211. Thus, the case turned on whether or not society was prepared to recognize this expectation as reasonable. The Court concluded that the intrusion was not unconstitutional:

> The observations by [the officers] in this case took place within **public navigable airspace . . . in a physically nonintrusive manner**; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observations from aircraft were directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. **Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.** On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

Id. at 213-14 (emphasis added).

Further, "[i]n an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet." Id. at 215. "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant to order to observe what is visible to the naked eye."

The same conclusion was reached in Dow Chemical Co. v. United States, 476 U.S. 227 (1986). In that case, the EPA contracted with a commercial aerial photographer to provide images of the Dow Chemical manufacturing facility from altitudes of 1200, 3000, and 12,000 feet. Id. at 229. Dow Chemical filed suit, alleging the surveillance amounted to a search in violation of the Fourth Amendment. The district court found in favor of Dow Chemical, but the Sixth Circuit disagreed, concluding the aerial images did not constitute a Fourth Amendment search. Id. at 230.

The United States Supreme Court accepted certiorari, and affirmed the Sixth Circuit's decision. Id. at 239. The Court held that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment." Id. In so holding, the Court reasoned, "any person with an airplane and an aerial camera could readily duplicate" the photographs at issue. Id. at 231.

Three years later, the Court decided Florida v. Riley, 488 U.S. 445 (1989). In Riley, the sheriff's office received an anonymous tip that marijuana was being grown on the respondent's property. The respondent lived in a mobile home on five acres of rural property. Id. at 448. A greenhouse was located ten to twenty feet behind the home and two sides of it were enclosed. The other two sides were not enclosed but were obscured from view by surrounding trees and shrubs. The roof of the greenhouse was covered with corrugated panels, some of which were translucent and some that were opaque. Two of these panels, comprising approximately ten percent of the roof were missing.

The respondent had a wire fence enclosing his property with a "DO NOT ENTER" sign posted. Id. The investigating officer realized he could not confirm the anonymous tip from the road and twice circled the property in a helicopter at the height of 400 feet. Id. With his naked eye, he was able to see through the openings in the greenhouse and observe what he thought was marijuana growing inside. He sought and procured a search warrant based on these observations and marijuana plants were seized. Id. at 449.

The Court found that respondent's actions evinced his intent that his property would not be open to public inspection from the road. However, because the greenhouse roof was partially exposed, its contents were subject to aerial viewing. Id. at 450. Thus, under Ciraolo, the respondents "could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet or, as the Florida Supreme Court seemed to recognize, at an altitude of 500 feet, the lower limit of the navigable airspace for such an aircraft." Id. The fact that the helicopter was flying at 400 feet did not change the analysis because "helicopters are not bound by the lower limits of the navigable airspace allowed to other craft" and any member of the public could have legally flown over the property at that altitude and observed the marijuana. Id. at 451. Moreover, there was no indication that "intimate details" of respondent's property or curtilage were observed or that there was "undue" noise, dust, or threat of injury. Id. at 452.

Here, like in Ciraolo, Dow Chemical, and Riley, the photographs taken from a manned aircraft flying within publicly navigable airspace do not constitute a search, and do not run afoul of the Constitution. Particularly, the photographs were obtained by wide area airborne surveillance by manned aircraft operating in publicly navigable airspace at 3,000 to 12,000 feet altitude. The cameras are available to, and routinely used by members of the public. The cameras capture images visible to the naked eye. No infrared, telephoto, or zoom lenses are utilized. The photographs do not reveal intimate details of private life. Thus, in utilizing the photographs, law enforcement did not violate any reasonable expectations of privacy. They are simply observing what can be seen from public space. Like in Ciraolo, Dow Chemical, and Riley, the photographic surveillance is constitutionally permissible.