

Searches and Seizures As Applied to Changing Digital Technologies: A Look at Pole Camera Surveillance

Tiffany M. Russo, Esq.[†]

I. Introduction	115
II. Background	118
A. Historical Overview of Fourth Amendment Searches	118
B. The Fourth Amendment as Applied to Technological Advancements in Surveillance Methods	120
1. Telephonic Surveillance.....	120
2. Aerial Surveillance.....	121
3. Thermal Imaging Surveillance	122
4. Global Positioning System (“GPS”) Surveillance and Electronic Tracking	123
C. Relevant Federal Wiretap Statutes Which are Applicable Only to Oral, Wire, and Electronic Communications	124
III. Current State of the Law	126
A. Fourth Amendment Concerns – Interpreting California v. Ciraolo	126
1. The Fifth Circuit	126
2. The Tenth Circuit	127
B. Statutory Concerns – The Federal Wiretap Statute (“Title III”)	128
IV. Analysis	132
A. California v. Ciraolo Must be Broadly Interpreted in Order to Comport with Fourth Amendment Protections	132

[†] J.D., Seton Hall University School of Law, 2015; B.A., *summa cum laude*, Fairleigh Dickinson University, 2012. I would like to thank Assistant Prosecutor David V. Calviello of the Bergen County Prosecutor’s Office, for the inspiration to write about this topic. Words could never express my gratitude for his guidance and support.

B. The Federal Wiretap Act (“Title III”) Must be Amended to Encompass Video Surveillance.....	135
C. Future Concerns with New Surveillance Methods and Other Technological Advancements	136
V. Conclusion	137

I. INTRODUCTION

New technologies and methods of surveillance widely change the impact of constitutional rights in society. First, the United States Supreme Court addressed telephonic surveillance.¹ Then, the Supreme Court addressed the developments of technologies such as airplane surveillance,² thermal imaging,³ and global positioning system (GPS) surveillance.⁴ Now, there is video and pole camera surveillance.

Video surveillance does not ordinarily present constitutional or statutory problems. It is a longstanding principle that a reasonable expectation of privacy does not exist when there is voluntary exposure of a defendant’s actions to third parties.⁵ But, issues with video surveillance typically arise where there is a “reasonable expectation of privacy” attached to the area being monitored.

The Supreme Court has not been completely silent as to the general topic of video surveillance. In *United States v. Katz*, the Court developed a non-statutory analysis to govern recording electronic surveillance.⁶ The relevant federal statutes that govern the interception of wire, oral, and electronic communication are silent as to video-only⁷ camera

¹ *Katz v. United States*, 389 U.S. 347 (1967).

² *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

³ *Kyllo v. United States*, 533 U.S. 27 (2001).

⁴ *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

⁵ *See Smith v. Maryland*, 442 U.S. 735, 742 (1979) (finding no privacy interest in telephone numbers dialed); *United States v. White*, 401 U.S. 745, 753–54 (1971) (finding no privacy interest in what someone voluntarily reveals to a false friend).

⁶ *Katz*, 389 U.S. at 361–62; *see also* *United States v. Falls*, 34 F.3d 674 (8th Cir. 1994) (discussing an apartment interior); *United States v. Koyomejian*, 970 F.2d 536 (9th Cir. 1992) (en banc) (discussing a business office interior); *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990) (discussing a warehouse-like building interior); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987) (discussing a backyard); *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (discussing a private business office); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (discussing a terrorist safehouse); *Cf. United States v. Williams*, 124 F.3d 411 (3rd Cir. 1997) (discussing an office interior).

⁷ M. Wesley Clark, *Pole Cameras and Surreptitious Surveillance*, FBI LAW ENFORCEMENT BULLETIN, Nov. 2009, at 23.

surveillance.⁸ Therefore, the critical question in the analysis is whether a person has a constitutionally protected reasonable expectation of privacy.⁹

If a reasonable expectation of privacy is found to exist, then the Fourth Amendment typically requires law enforcement to obtain a warrant unless an exception applies.¹⁰ Conversely, if a reasonable expectation of privacy is not found to exist, then the Fourth Amendment does not apply.¹¹ In general, law enforcement's observations of a person's "comings and goings," occurring outside of a dwelling or within a curtilage, do not amount to a Fourth Amendment search or seizure.¹²

One of the most common types of video surveillance methods is the pole camera. Law enforcement utilizes pole cameras in circumstances when it is operationally impractical to conduct physical surveillance or where suspects engage in counter-surveillance.¹³ The view from a pole camera is arguably "nothing more than a utility worker would have if he was performing job-related duties atop the pole."¹⁴ Law enforcement can affix pole cameras with the consent of the utility company and without a court order permitting installation to monitor a specific area, also known as an "installation or authorizing monitoring order."¹⁵

Provisions of the Federal Wiretap Act provide statutory guidance for certain types of communications. Specifically, Title III provides the statutory framework that governs real-time electronic surveillance of the contents of communications.¹⁶ Title III is currently inapplicable to video surveillance.¹⁷ Nevertheless, a majority of the federal circuit courts have construed some of the Title III requirements to apply to video surveillance warrants.¹⁸ But, there needs to be consistent uniformity throughout the Circuit Courts of Appeals with a constitutional issue of this magnitude.

In *California v. Ciraolo*, the Supreme Court confronted the question of whether the Fourth Amendment was violated by a warrantless aerial observation from an altitude of 1,000 feet of a fenced-in backyard within

⁸ See 18 U.S.C. § 2510 *et seq.* (2015); 50 U.S.C. §1801 *et seq.* (2015).

⁹ Clark, *supra*, note 7, at 24.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Dow Chemical v. United States*, 476 U.S. 227, 235–36 (1986) (noting that Fourth Amendment protection can and do reach commercial establishments).

¹³ Clark, *supra*, note 7, at 23.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 18 U.S.C. § 2510 *et seq.*; 50 U.S.C. § 1801 *et seq.*

¹⁷ *United States v. Koyomejian*, 970 F.2d 536, 539 (9th Cir. 1992); *United States v. Torres*, 751 F.2d 875, 885 (7th Cir. 1984).

¹⁸ *United States v. Falls*, 34 F.3d 674 (8th Cir. 1994); *Koyomejian*, 970 F.2d at 542; *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987); *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986; *Torres*, 751 F.2d 875; *Cf.* *United States v. Williams*, 124 F.3d 411 (3rd Cir. 1997).

the curtilage of a home.¹⁹ The Court ultimately held that the Fourth Amendment was not violated because the defendant held an expectation of privacy that society was unwilling to recognize.²⁰ As a result, the Circuit Courts of Appeals have interpreted *Ciraolo* differently in determining whether a search warrant is required to conduct pole camera surveillance in the vicinity of a defendant's residence.

The Fifth Circuit has examined the issue of pole camera surveillance of backyards as a matter of first impression.²¹ The Fifth Circuit narrowly applied *Ciraolo*, holding that curtilage, deliberately protected from observation by ordinary passersby, requires a warrant for video surveillance.²² Although not directly opposing the Fifth Circuit's stance, the Tenth Circuit has held that warrantless pole camera surveillance from a pole camera does not violate the Fourth Amendment where there is no reasonable expectation of privacy, since the cameras are capable of observing what any passerby would easily be able to observe.²³

It is necessary for the courts to broadly interpret *Ciraolo* when applying the decision to video surveillance. This Comment suggests that a broad interpretation of *Ciraolo* not only comports with the analysis of similar technological advancements, but also produces the same result under both trespass and privacy theories. The consensus among various circuit courts is that video surveillance does not violate the Fourth Amendment as long as law enforcement follows the four requirements of Title III, as well as the ordinary requirement of a finding of probable cause, despite the fact that Title III does not explicitly cover video surveillance. Additionally, the legislature should amend Title III to encompass video surveillance, thereby providing a more definitive analysis and creating uniformity within the federal circuit courts. If, however, the legislature does not amend Title III, a majority of the circuit courts holdings suggest that the Fourth Amendment analysis should be applied.

In developing this argument, Part II of this Comment sets forth an overview of Fourth Amendment searches, as well as the relationship between the Fourth Amendment and video surveillance. Part III examines the current state of the law with regard to video surveillance. Part IV analyzes constitutional and statutory concerns, as well as policy considerations. Finally, Part V reiterates why the broad interpretation of

¹⁹ *California v. Ciraolo*, 476 U.S. 207 (1985).

²⁰ *Id.* at 212–14.

²¹ *Cuevas-Sanchez*, 821 F.2d at 250–52.

²² *Id.*

²³ *United States v. Jackson*, 213 F.3d 1269, 1281 (10th Cir. 2000), *vacated on other grounds*, 531 U.S. 1033 (2000).

Ciraolo must be followed and why Title III must be amended to produce consistency within the lower courts.

II. BACKGROUND

A. Historical Overview of Fourth Amendment Searches

While the text of the Fourth Amendment has remained the same, technologies have progressed beyond the Founding Fathers' wildest dreams. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."²⁴ Probable cause is necessary for a warrant to be issued, and it must be "supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."²⁵ Case law has clarified that warrantless searches are *per se* unreasonable under the Fourth Amendment, unless a specific exception, such as exigent circumstances or consent, applies.²⁶

The Founding Fathers created the Fourth Amendment as a response to British search and seizure practices, in particular the use of writs of assistance, which allotted broad latitude to customs officials to search houses, shops, cellars, warehouses, and other places for smuggled items.²⁷ Early Americans challenged this practice as "plac[ing] the liberty of every man in the hands of every petty officer."²⁸ Additionally, early Americans were concerned with the privacy of the home and the possibility of abuse by government officials, which would result in oppression.²⁹

The Supreme Court established some guidelines in order to clarify one's "reasonable expectation of privacy" in *Katz v. United States*.³⁰ The two-part inquiry established in *Katz* examines (1) whether the individual manifested a subjective expectation of privacy in the object of the challenged scope and (2) whether society is willing to recognize that expectation as reasonable.³¹ Therefore, "what a person knowingly exposes to the public, even in his own home or office" does not trigger Fourth

²⁴ U.S. CONST. amend. VI.

²⁵ *Id.*

²⁶ *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

²⁷ M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave it Birth*, 85 N.Y.U. L. REV. 905, 907–09 (2010).

²⁸ *Boyd v. United States*, 116 U.S. 616, 625 (1886).

²⁹ *Id.*

³⁰ *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Katz*, 389 U.S. at 360 (Harlan, J., concurring)).

³¹ *Id.* at 361.

Amendment protection.³² Furthermore, it is permissible for law enforcement to utilize its resources to conduct surveillance where it has a legal right to occupy without a warrant.³³

There are three categorical areas examined when confronted with Fourth Amendment issues. These areas include the home, curtilage, and open fields.³⁴ The sanctity of the home is expressly protected within the text of the Fourth Amendment and has been repeatedly recognized in case law.³⁵ The Supreme Court has defined curtilage as the area that immediately surrounds or is adjacent to the home, which the activity of the home life extends.³⁶ The Court has afforded curtilage similar protection to the home since it is “sufficiently intimate” that it is related and protected as if it were part of a person’s residence.³⁷ In determining whether surrounding property is “sufficiently intimate,” the Court identified four factors to be considered, which include (1) the closeness of the area in question to the home; (2) whether this area is within an enclosure surrounding the dwelling; (3) the manner in which the area is used; and (4) the steps taken by the resident to protect the area from observation by passersby.³⁸ The Court noted that no one factor is determinative, and not all four factors have to be present before a person is able to conclude that an area under consideration is to be considered curtilage.³⁹

Lastly, there is the area of open fields, which is the area that extends beyond the curtilage. Fourth Amendment protection does not extend to open fields areas. Unlike the home, open fields “do not provide the setting for those intimate activities” that the Fourth Amendment protects.⁴⁰ Thus, there is no legitimate expectation of privacy that attaches to open fields.⁴¹

Notwithstanding the three categorical areas, the Fourth Amendment does not prohibit law enforcement from “augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and

³² Katz, 389 U.S. at 361–62.

³³ Florida v. Riley, 488 U.S. 445, 449 (1989) (quoting *Ciraolo*, 476 U.S. at 213) (“[T]he police may see what may be seen ‘from a public vantage point where [they have] a right to be[.]’”); United States v. Dubrofsky, 581 F.2d 208, 211 (9th Cir. 1978) (“Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities.”).

³⁴ United States v. Dunn, 480 U.S. 294, 301 (1987).

³⁵ See, e.g., Oliver v. United States, 466 U.S. 170, 178 (1984) (citing Payton v. New York, 455 U.S. 573, 601 (1980)); Silverman v. United States, 365 U.S. 505, 511 (1961); United States v. United States District Court, 407 U.S. 297, 313 (1972).

³⁶ This is prototypically the backyard or porch area.

³⁷ Dunn, 480 U.S. at 301.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Oliver, 466 U.S. 170, 179 (1984).

⁴¹ *Id.*

technology afforded them.”⁴² In applying this concept, the Ninth Circuit has permitted law enforcement to use photographic equipment to gather evidence.⁴³ Notably, the Ninth Circuit characterized the technique as “a prudent and efficient use of modern technology.”⁴⁴ As will further be discussed later in this Section, there are parameters to this type of surveillance.⁴⁵

B. The Fourth Amendment as Applied to Technological Advancements in Surveillance Methods

Over the years, the Supreme Court has confronted technological advancements with regard to law enforcement surveillance methods. The Court clarified the “right to privacy” and defined a “search” under the Fourth Amendment in *Katz v. United States*.⁴⁶ In the years following *Katz*, the Court discussed other methods of surveillance, such as aerial surveillance, thermal imaging surveillance, global positioning system (“GPS”) surveillance, and electronic tracking.⁴⁷ The Court undoubtedly needs to address other technological advancements, such as drones used by law enforcement for surveillance purposes, in the future.

1. Telephonic Surveillance

In *Katz*, the Supreme Court addressed the concept of the “right to privacy” and what constituted a “search” under the Fourth Amendment.⁴⁸ The FBI utilized an electronic eavesdropping device to record the defendant’s phone calls made via a public pay phone.⁴⁹ The nature of defendant’s calls involved transmitting illegal gambling wagers.⁵⁰ The Court ultimately found that the government’s activities in electronically listening to and recording the defendant violated his reasonable expectation of privacy and constituted a search under the Fourth Amendment.⁵¹

⁴² *United States v. Knotts*, 460 U.S. 276, 282 (1983).

⁴³ *United States v. McIver*, 186 F.3d 1119, 1125 (9th Cir. 1999).

⁴⁴ *Id.*

⁴⁵ *See* *Kyllo v. United States*, 533 U.S. 27 (2001) (prohibiting the use of thermal imaging surveillance without a warrant).

⁴⁶ *Katz v. United States*, 389 U.S. 347 (1967).

⁴⁷ *California v. Ciraolo*, 476 U.S. 207 (1986) (discussing aerial surveillance); *Florida v. Riley*, 488 U.S. 445 (1989) (discussing aerial surveillance); *Kyllo*, 533 U.S. 27 (discussing thermal imaging surveillance); *United States v. Jones*, 132 S. Ct. 945 (2012) (discussing GPS surveillance).

⁴⁸ *Katz*, 389 U.S. 347.

⁴⁹ *Id.* at 348.

⁵⁰ *Id.*

⁵¹ *Id.* at 359.

Importantly, the Court abandoned the trespass theory and adopted the privacy theory in *Katz*. Justice Harlan, writing for the concurrence, established a two-part test, with the underlying theory that “the Fourth Amendment protects *people* not places.”⁵² The two-part test for determining whether a reasonable expectation of privacy exists includes examining whether (1) the individual “has exhibited an actual expectation of privacy,” and (2) whether society is prepared to recognize that this expectation is reasonable.⁵³ Thus, this analysis is both subjective and objective.

2. Aerial Surveillance

In *California v. Ciraolo*, the Supreme Court addressed the question of whether naked-eye aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home was permissible under the United States Constitution.⁵⁴ Police utilized an airplane from an altitude of 1,000 feet to observe a fenced-in backyard within the curtilage of defendant’s home.⁵⁵ The police did not use sensory enhancing technology, but instead, their own eyes.⁵⁶ Ultimately, the Court held that this type of naked-eye aerial observation did not violate the Fourth Amendment.⁵⁷

The Court engaged in the two-part *Katz* analysis, and noted that the fence served the purpose of concealing the marijuana crop because the “defendant took normal precautions to maintain his privacy,” specifically by using “a six-foot outer fence and a ten-foot inner fence.”⁵⁸ The Court found that it was inconclusive whether defendant manifested a “subjective expectation of privacy from *all* observations of his backyard” or “whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits”⁵⁹ Furthermore, the Court noted that the ten foot fence “might not [have] shield[ed] these plants from the eyes of a citizen or policeman perched on top of a truck or a two-level bus.”⁶⁰

As to the second part of the analysis under *Katz*, the Court concluded that defendant’s expectation that his marijuana garden was protected from such observation was not recognized by society as a reasonable

⁵² *Id.* at 361–62 (emphasis added).

⁵³ *Id.*

⁵⁴ *California v. Ciraolo*, 476 U.S. 207, 207 (1986).

⁵⁵ *Id.* at 209.

⁵⁶ *Id.*

⁵⁷ *Id.* at 213–15.

⁵⁸ *Id.* at 209–211.

⁵⁹ *Id.* at 211–12.

⁶⁰ *Ciraolo*, 476 U.S. at 211–12.

expectation of privacy.⁶¹ Specifically, the Court emphasized that the Fourth Amendment does not require police to obtain a warrant “in order to observe what is visible to the naked eye.”⁶²

Shortly after *Ciraolo* was decided, the Court again addressed the question of aerial surveillance in *Florida v. Riley*.⁶³ In *Riley*, the Court considered whether observation of the interior of a greenhouse within the curtilage of a residence from a helicopter 400 feet above was a search that required a warrant.⁶⁴ While the overhead flight observation in *Riley* was more intrusive compared to *Ciraolo*, and surely less stealthy, a plurality of the Court held that the surveillance did not violate defendant’s Fourth Amendment rights because the helicopter complied with aviation regulations.⁶⁵ The Court noted that “intimate details” which were connected with the use of the home or the curtilage were not observed.⁶⁶ Because members of the public could have legally taken the exact helicopter ride 400 feet above the defendant’s home and witness defendant’s “illegal horticultural display,” the police were also permitted to do so.⁶⁷

But the use of an airplane or helicopter to surveil suspects is not necessarily a “free pass” for law enforcement. The Court has recently clarified that visual observation of the home from public navigable airspace must be “done in a physically nonintrusive manner.”⁶⁸ In *Florida v. Jardines*, the Court distinguished a physically intrusive dog sniff search from visual aerial surveillance.⁶⁹ Thus, the concern seems to be regarding investigative methods that are physically intrusive, rather than easily observable.

3. Thermal Imaging Surveillance

In *Kyllo v. United States*, the Supreme Court held that the warrantless use of a thermal imaging device to reveal the relative amount of heat released from the various rooms of a defendant’s home amounted to search that violated the Fourth Amendment.⁷⁰ The Court held that the surveillance rose to the level of a “search.”⁷¹ The Court found that this

⁶¹ *Id.* at 213–15.

⁶² *Id.* at 215.

⁶³ *Florida v. Riley*, 488 U.S. 445.

⁶⁴ *Riley*, 488 U.S. at 447–49.

⁶⁵ *Id.* at 450–52.

⁶⁶ *Id.* at 452.

⁶⁷ *Id.* at 451; *see also* Clark, *supra*, note 7 at 28.

⁶⁸ *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013) (citation omitted).

⁶⁹ *Id.* at 1415–17.

⁷⁰ *Kyllo v. United States*, 533 U.S. 27 (2001).

⁷¹ *Id.* at 34–35.

type of search is presumptively unreasonable without a warrant where law enforcement explores intimate details of the home, which could be determined without a physical intrusion via a device that is not in general public use.⁷²

Whether a technology falls within the scope of the *Kyllo* rule depends on at least two factors. First, in order for the *Kyllo* rule to apply, the technology must not be in “general public use.”⁷³ In addition, the *Kyllo* rule applies to the technology that reveals information about the *interior* of the home.⁷⁴

Defendants have attempted to invoke the *Kyllo* rule in cases where the government used cell tower information or an electronic device to locate a cell phone.⁷⁵ Specifically, a district court in the Seventh Circuit rejected a *Kyllo* challenge to the use of an electronic device to locate a cell phone because cell phones transmit signals to parties outside a home.⁷⁶ The district court reasoned that the cell phone signals were knowingly exposed to the third-party cell phone company.⁷⁷ Under federal law, there is no expectation of privacy in pieces of data that are voluntarily disclosed to a third party.⁷⁸

4. Global Positioning System (“GPS”) Surveillance and Electronic Tracking

The Supreme Court has held that the Fourth Amendment is not violated when law enforcement monitors a beeper without a warrant, revealing information that could have been obtained through visual surveillance.⁷⁹ But the recent decision in *United States v. Jones* has altered the landscape for electronic tracking. In *Jones*, federal law enforcement officers attached a GPS device to a suspect’s vehicle, without a valid warrant, and pinpointed the vehicle’s movements to within fifty to one

⁷² *Id.* at 40.

⁷³ *Id.*

⁷⁴ *Id.* (“We have said that the Fourth Amendment draws a firm line at the entrance to the house.” (emphasis added) (quoting *Payton v. New York*, 455 U.S. 573, 590 (1980) (internal quotation marks omitted)).

⁷⁵ U.S. Dep’t of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 15 (2009).

⁷⁶ *United States v. Bermudez*, 2006 WL 3197181 (S.D. Ind. June 30, 2006), *aff’d* 509 F.3d 820 (7th Cir. 2007).

⁷⁷ *Id.*

⁷⁸ *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (finding no privacy interest in telephone numbers dialed).

⁷⁹ Compare *United States v. Knotts*, 460 U.S. 276 (1983) (monitoring of a beeper does not violate the Fourth Amendment when it reveals no information that could not have been obtained through visual surveillance) with *United States v. Karo*, 468 U.S. 705 (1984) (monitoring of a beeper violates the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance, and a warrant is required).

hundred feet for approximately one month.⁸⁰ The Court held that the physical intrusion of a GPS device on a vehicle constituted a Fourth Amendment search and thus required a search warrant.⁸¹

The parties argued solely on privacy theory grounds, as opposed to trespass theory, because it simply was not utilized since *Katz* in 1967. While the Court unanimously agreed that a search occurred, the Court was divided over analyzing the case under trespass and privacy theories.⁸² The prevailing concern was that if law enforcement monitored a person over a long period of time, non-criminal information could be learned about them.⁸³ Justice Scalia, writing for the Court, based the opinion on trespass grounds, and distinguished law enforcement's actions here with attaching a listening device to a phone booth.⁸⁴ Justice Scalia reasoned that in order to attach the GPS device to the undercarriage of the vehicle, law enforcement must invade the physicality of the vehicle, thus obviously resulting in a physical intrusion.⁸⁵

C. Relevant Federal Wiretap Statutes Which are Applicable Only to Oral, Wire, and Electronic Communications

Federal wiretap statutes govern three kinds of communications – wire, oral, and electronic.⁸⁶ Wire communications are defined as:

[A]ny aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.⁸⁷

The most important requirement is the human voice.⁸⁸ If a human voice is not contained within a communication, then it is not considered to be a wire communication.⁸⁹ Oral communications are defined as “any oral

⁸⁰ *United States v. Jones*, 132 S.Ct. 945, 948 (2012).

⁸¹ *Id.* at 949.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 950.

⁸⁵ *Id.* at 949.

⁸⁶ 18 U.S.C. § 2510 *et seq.*

⁸⁷ 18 U.S.C. § 2510(1).

⁸⁸ *Judish, supra*, note 69, at 162; *see also* § 2510(18) (defining “aural transfer” as a “transfer containing the human voice any point between and including the point of origin and the point of reception”).

⁸⁹ *Id.* at 162–63.

communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.”⁹⁰

Lastly, electronic communications are defined in a “broad, catch-all” category, as:

[A]ny transfer of signs, signals, writing, images, sound, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include – (A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device . . . or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.⁹¹

Obtaining electronic communication data and electronic surveillance in general raise the most legal issues. Two statutes primarily govern real-time electronic surveillance in federal criminal investigations. The Wiretap Statute (“Title III”)⁹² and the Pen Registers and Trap and Trace Devices statute (“Pen/Trap”)⁹³ regulate access to different types of information. Title III permits the government to obtain the contents of wire and electronic communications in transmission.⁹⁴ The questions that agents and prosecutors must ask to ensure compliance with Title III are relatively straightforward:

- (1) Is the communication to be monitored one of the protected communications defined in 18 U.S.C. §2510?
- (2) Will the proposed surveillance lead to an “interception” of the communications?
- (3) If the answer to the first two questions is “yes,” does a statutory exception apply that permits the interception?⁹⁵

In contrast, the Pen/Trap Statute is concerned with the real-time collection of addressing and other non-content information relating to

⁹⁰ 18 U.S.C. § 2510(2).

⁹¹ 18 U.S.C. § 2510(12).

⁹² 18 U.S.C. § 2510 *et seq.*

⁹³ 18 U.S.C. § 3121 (2015).

⁹⁴ 18 U.S.C. § 2513 (2015).

⁹⁵ Jewish, *supra*, note 69, at 161–62.

those communications.⁹⁶ The Pen/Trap Statute is inapplicable to this Comment.

III. CURRENT STATE OF THE LAW

A. *Fourth Amendment Concerns – Interpreting California v. Ciraolo*

1. The Fifth Circuit

In *United States v. Cuevas-Sanchez*, law enforcement suspected that drug traffickers were using the defendant's property.⁹⁷ Based upon their suspicions, federal law enforcement officers obtained a court order before installing a pole camera on defendant's property.⁹⁸ The pole camera enabled law enforcement to "peer over" a ten-foot high fence at the back of the defendant's yard within the curtilage.⁹⁹ The court order relied upon an "extensive affidavit," and the application "explained that conventional law enforcement techniques, although attempted, had failed to uncover enough evidence to convict the drug traffickers."¹⁰⁰ The order limited the initial surveillance period to thirty days, mandated minimization, and directed law enforcement to discontinue the surveillance when the suspected participants were not on the premises.¹⁰¹

The Fifth Circuit held that the defendant had exhibited a subjective expectation of privacy by virtue of the fence that "screen[ed] the activity from casual observers."¹⁰² The court also noted that the area which the pole camera surveilled amounted to "the curtilage of his home an area protected by traditional Fourth Amendment analysis."¹⁰³ The Fifth Circuit characterized pole camera surveillance as "provok[ing] an immediate negative visceral reaction" after viewing it as "indiscriminate video surveillance that raises the spectre of an Orwellian state."¹⁰⁴

The Fifth Circuit distinguished *Ciraolo*, noting that the intrusion was not minimal, or a "one-time overhead flight or glance over the fence by a

⁹⁶ See 18 U.S.C. § 2511(2)(h)(i) (stating that usage of pen registers or trap and trace devices does not violate Title III); see generally *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 453–54 (D.C. Cir. 2000) (contrasting pen registers and Title III intercept devices); *Brown v. Waddell*, 50 F.3d 285, 289–94 (4th Cir. 1995) (contrasting pen registers and Title III intercept devices).

⁹⁷ *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987).

⁹⁸ *Id.* at 250.

⁹⁹ *Id.* at 251.

¹⁰⁰ *Id.* at 250.

¹⁰¹ *Id.* at 249–50.

¹⁰² *Id.* at 251.

¹⁰³ *Cuevas-Sanchez*, 821 F.2d at 251.

¹⁰⁴ *Id.*

passerby.”¹⁰⁵ Instead, the pole camera at issue allowed law enforcement to record “all activity” in the defendant’s backyard.¹⁰⁶ Accordingly, the court interpreted *Ciraolo* as not “authorizing any type of surveillance whatever just because one type of minimally intrusive aerial observation is possible.”¹⁰⁷

The Fifth Circuit established that certain prerequisites were necessary for a video surveillance order in “circumstances where a reasonable expectation of privacy is implicated.”¹⁰⁸ The prerequisites include:

- (1) the judge issuing the warrant must find that ‘normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous,’
- (2) the warrant must contain a ‘particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates,’
- (3) the warrant must not allow the period of interception to be ‘longer than is necessary to achieve the objective of the authorization . . . or in any event longer than thirty days’ (though extensions are possible, and
- (4) the warrant must require that the interception ‘be connected in such a way as to minimize the interception of communications not otherwise subject to interception under [Title III].’¹⁰⁹

Essentially, these prerequisites mirror the federal statute governing electronic surveillance and follow the approach set out by the Second, Seventh, Eighth, and Ninth Circuits, respectively.¹¹⁰ Ultimately, the defendant’s attempt to exclude the pole camera surveillance was successful since the government did not follow the above requirements.¹¹¹

2. The Tenth Circuit

In *United States v. Jackson*, law enforcement suspected the defendants of being involved in a crack distribution ring.¹¹² To confirm their suspicions, the FBI and local police set up pole cameras to surveil the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 252.

¹⁰⁹ *Cuevas-Sanchez*, 821 F.2d at 252. (internal citations omitted); *see also* 18 U.S.C. §§ 2510–2522.

¹¹⁰ *Cuevas-Sanchez*, 821 F.2d at 252.

¹¹¹ *Id.*

¹¹² *United States v. Jackson*, 213 F.3d 1269 (10th Cir. 2000), *vacated on other grounds*, 531 U.S. 1033 (2000).

defendants' residential properties.¹¹³ Law enforcement had the capability to adjust the pole cameras from the police station, even so far as to zoom in close enough to read a license plate.¹¹⁴ But the pole cameras could not record audio, and did not have the ability to view the interior of the properties.¹¹⁵

Unlike the Fifth Circuit in *Cuevas-Sanchez*, the Tenth Circuit interpreted *Ciraolo* broadly. The Tenth Circuit found that the camera investigation did not require a search warrant because the defendants did not have a reasonable expectation of privacy.¹¹⁶ Here, however, the pole cameras observed only what any passerby would easily observe.¹¹⁷

The Tenth Circuit distinguished previous decisions that the defendants relied on. Specifically, the court noted that *United States v. Mesa-Rincon*¹¹⁸ and *United States v. Torres*¹¹⁹ were inapplicable because "reasonable expectations of privacy were implicated in each."¹²⁰ In making its decision, the court relied upon the proposition that "aerial observation of a fenced-in backyard within the curtilage of a home without a warrant, does not violate the Fourth Amendment," and aligned itself with the analysis established by the Supreme Court in *Ciraolo*.¹²¹

B. *Statutory Concerns* – The Federal Wiretap Statute ("Title III")

Currently, Title III is inapplicable to video surveillance.¹²² Nevertheless, a majority of the circuits have applied some of the higher constitutional standards of Title III to video surveillance warrants, such as necessity and minimization.¹²³ Title III instructs law enforcement to "conduct the surveillance in such a manner as to 'minimize' the

¹¹³ *Id.* at 1276.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1280–81.

¹¹⁷ *Id.* at 1280.

¹¹⁸ *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990).

¹¹⁹ *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984).

¹²⁰ *Jackson*, 213 F.3d at 1280; *Mesa-Rincon*, *supra*, 911 F.2d at 1438 (discussing a warehouse-like building interior); *Torres*, *supra*, 751 F.2d at 876-878 (discussing a terrorist safehouse).

¹²¹ *Jackson*, 213 F.3d at 1280–81.

¹²² 18 U.S.C. § 2510 *et seq.*; 50 U.S.C. § 1801 *et seq.*

¹²³ *United States v. Falls*, 34 F.3d 674 (8th Cir. 1994) (discussing an apartment interior); *United States v. Koyomejian*, 970 F.2d 536 (9th Cir. 1992) (en banc) (discussing a business office interior); *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990) (discussing a warehouse-like building interior); *United States v. Cuevas-Sanchez* (5th Cir. 1987) (discussing a backyard); *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (discussing a private business office); *Torres*, *supra*, 751 F.2d 875 (discussing a terrorist safehouse); *cf. United States v. Williams*, 124 F.3d 411 (3d Cir. 1997) (discussing an office interior).

interception” of non-relevant conversations.¹²⁴ Thus, minimization is a question of reasonableness and depends on the facts and circumstances of each case.¹²⁵

In *United States v. Koyomejian*, law enforcement filed applications, supported by proper affidavits, in the district court to install hidden microphones and silent closed circuit television cameras (“CCTVs”) inside one of the defendant’s offices.¹²⁶ The district court granted the government’s applications and the surveillance produced silent videotapes of multiple defendants “receiving, counting, and packaging large amounts of cash.”¹²⁷ The Ninth Circuit confronted the question of what effect Title III¹²⁸ and the Foreign Intelligence Act (“FISA”) had on silent video surveillance conducted for purely domestic purposes.¹²⁹ The Ninth Circuit found that, by the plain meaning of the words in Title III, as well as prior case law and legislative history, their definitions did not apply to silent video surveillance.¹³⁰ The district court recognized that the FISA includes a broad provision for “electronic surveillance,” but stated that it does not apply to “surveillance conducted for purely domestic purposes.”¹³¹

While the Ninth Circuit found that Title III and FISA did not regulate or prohibit silent video surveillance undertaken for domestic purposes, it noted that the Fourth Amendment governs such surveillance.¹³² The court concluded that Rule 41(b) of the Federal Rules of Criminal Procedure authorizes a district court to issue warrants for silent video surveillance.¹³³ The court further noted that, following other circuits that have ruled on this issue, it was necessary to look to Title III for guidance in “implementing the Fourth Amendment in an area that Title III does not specifically cover.”¹³⁴

Along with the requirement of a finding of probable cause, the Ninth Circuit was confident that a defendant’s Fourth Amendment rights were protected by adopting the following requirements from Title III:

¹²⁴ *United States v. Apodaca*, 820 F.2d 348, 350 (10th Cir. 1987); *see also* *Scott v. United States*, 436 U.S. 128, 139–140 (1978).

¹²⁵ *Id.*

¹²⁶ *Koyomejian*, 970 F.2d at 538.

¹²⁷ *Id.*

¹²⁸ At the time, Title III was known as its predecessor, Title I.

¹²⁹ *Koyomejian*, 970 F.2d at 538.

¹³⁰ *Id.*

¹³¹ *Id.* at 540.

¹³² *Id.* at 541–42.

¹³³ *Id.* at 542; *see also* *United States v. Mesa-Rincon*, 911 F.2d 1433, 1436 (10th Cir. 1990) (“Rule 41 is sufficiently flexible to include within its scope electronic intrusions authorized upon a finding of probable cause.”) (quoting *New York Tel. Co.*, 434 U.S. 159, 169 (1977)); *United States v. Biasucci*, 786 F.2d 504, 509 (2d Cir. 1986); *United States v. Torres*, 751 F.2d 875, 877–78 (7th Cir. 1984).

¹³⁴ *Koyomejian*, 970 F.2d at 542.

(1) the judge issuing the warrant must find that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; (2) the warrant must contain “a particular description of the type of [activity] sought to be [videotaped], and a statement of the particular offense to which it relates; (3) the warrant must not allow the period of [surveillance] to be “longer than is necessary to achieve the objective of authorization, or in any event longer than thirty days” (though extensions are possible); and (4) the warrant must require that the [surveillance] “be conducted in such a way as to minimize the [videotaping] of [activity] not otherwise subject to [surveillance]”¹³⁵

The Eighth Circuit addressed a similar issue in *United States v. Falls*.¹³⁶ Similar to *Koyomejian*, law enforcement filed applications in the district court, supported by proper affidavits, to authorize silent CCTV surveillance of portions of the interior of one of the defendants’ apartments, as well as for a traditional “bug” to intercept oral communications.¹³⁷ The court granted the application and the government subsequently engaged in both electronic oral surveillance and silent video surveillance of the defendant’s apartment.¹³⁸

The Eighth Circuit concluded that district courts “have the power to authorize silent video surveillance” where there is compliance with the Fourth Amendment.¹³⁹ Similar to the Ninth Circuit, the Eighth Circuit adopted the “same standard of review for an application to engage in non-audio video surveillance as we apply to wiretap applications [as set forth in Title III], which is the same standard that we apply to conventional warrants.”¹⁴⁰ The court noted that it was “clear that silent video surveillance . . . results in a very serious, some say Orwellian, invasion of privacy.”¹⁴¹

In alignment with the Eighth and Ninth Circuits, the Third Circuit came to a similar finding when confronted with video surveillance.¹⁴² In *United States v. Williams*, defendants were involved in a decades long gambling operation.¹⁴³ The government initially conducted investigations

¹³⁵ *Id.* (citing *United States v. Cuevas-Sanchez*, 821 F.2d 248, 252 (5th Cir. 1987); *see also* 18 U.S.C. §§ 2510–2522.

¹³⁶ *United States v. Falls*, 34 F.3d 674 (8th Cir. 1994).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 683.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 683; *see also* *United States v. Torres*, 751 F.2d 875, 882 (1984).

¹⁴² *United States v. Williams*, 124 F.3d 411 (3d Cir. 1997).

¹⁴³ *Id.* at 414–15.

using a confidential informant and physical surveillance.¹⁴⁴ Defendants did not challenge Title III or the relevant state wiretapping statute, but instead argued that the video surveillance violated the Fourth Amendment and the resulting video evidence should have been suppressed.¹⁴⁵

The defendants contended that the video surveillance was “unreasonable” because of the nature of the crimes under investigation.¹⁴⁶ The Third Circuit noted that other circuit courts that have addressed video surveillance have held that “video surveillance conforming to the standards set out in Title III is constitutional.”¹⁴⁷ The court found no case suggesting that the application of these standards depends upon the nature of the crimes under investigation.¹⁴⁸ As a result, the Third Circuit flatly rejected defendants’ argument.¹⁴⁹

The defendants further argued that the video surveillance “failed to meet Title III’s requirement that ‘normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or are too dangerous.’”¹⁵⁰ The Third Circuit noted that the courts have consistently held in Title III cases that the government is not required to exhaust all other investigative procedures, but rather it is sufficient that there is evidence that “normal investigative techniques . . . reasonably appear to be unlucky to succeed.”¹⁵¹ The government is only required to lay a “factual predicate sufficient to inform the judge why other methods of investigation are not sufficient.”¹⁵² In determining whether this has been satisfied, a court “may properly take into account affirmations which are founded in part upon the experience of specially trained agents.”¹⁵³

The Third Circuit found no reason as to why the rules developed in previous video surveillance cases should not be applied in that case as well.¹⁵⁴ The court reviewed *Falls* and *Mesa-Rincon*, and concluded that “audio surveillance alone was not likely to disclose the identities of all of the participants and what they were doing.”¹⁵⁵ The Third Circuit noted that while it would not be advisable to use the application as a model in

¹⁴⁴ *Id.* at 416–18.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 417.

¹⁴⁸ Williams, 124 F.3d at 417–18.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 418.

¹⁵¹ *Id.*

¹⁵² *Id.* at 418–20.

¹⁵³ *Id.*

¹⁵⁴ Williams, 124 F.3d at 418–20.

¹⁵⁵ *Id.*

future cases, it still satisfied constitutional requirements under the Fourth Amendment.¹⁵⁶

IV. ANALYSIS

A. California v. Ciraolo Must be Broadly Interpreted in Order to Comport with Fourth Amendment Protections

The Fifth Circuit and the Tenth Circuit have applied *Ciraolo* differently in video surveillance cases.¹⁵⁷ But the Tenth Circuit's broad interpretation of *Ciraolo* best comports with constitutional and policy concerns. Additionally, the broad interpretation of *Ciraolo* produces the same result under both trespass and privacy theories.

The Fifth Circuit has distinguished *Ciraolo* and has viewed video surveillance differently than aerial surveillance.¹⁵⁸ Specifically, the Fifth Circuit opined that video surveillance is not a minimal intrusion or a "one-time overhead flight or a glance over the fence by a passerby."¹⁵⁹ Accordingly, the court interpreted *Ciraolo* as not permitting any type of surveillance solely because "one type of minimally intrusive aerial observation is possible."¹⁶⁰ This interpretation of *Ciraolo* is too narrow, and seems to disregard how the Supreme Court has historically addressed different types of technological advancements in the past.¹⁶¹

To contrast, the Tenth Circuit takes a more practical approach by broadly interpreting *Ciraolo*.¹⁶² The Tenth Circuit posited that "the Fourth Amendment protection has never extended to require law enforcement to shield their eyes when passing by a home on public thoroughfares."¹⁶³ This also aligns itself with the Supreme Court's approach in cases subsequent to *Ciraolo*. For example, this approach comports with the Supreme Court's approaches in *Florida v. Riley* and *Florida v. Jardines*.¹⁶⁴ Therefore, looking to the cases that followed and clarified *Ciraolo*, video surveillance would be permissible as long as "intimate details" which were connected with the use of the home or curtilage were not observed and as long as the video surveillance was not "physically intrusive."¹⁶⁵

¹⁵⁶ *Id.* at 420.

¹⁵⁷ *United States v. Jackson*, 213 F.3d 1269 (10th Cir. 2000), *vacated on other grounds*, 531 U.S. 1033 (2000); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987).

¹⁵⁸ *Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See supra*, Point II.

¹⁶² *Jackson*, 213 F.2d 1269.

¹⁶³ *Id.* at 280–81 (citing *California v. Ciraolo*, 476 U.S. 207 (1985)).

¹⁶⁴ *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Florida v. Riley*, 488 U.S. 445 (1989).

¹⁶⁵ *Jackson*, 213 F.2d at 280–81.

Moreover, the Supreme Court should adopt the Tenth Circuit's broad interpretation of *Ciraolo*. While video surveillance is similar to aerial observation, it is a less intrusive method than flying an airplane or helicopter over an individual's home. This broad interpretation of *Ciraolo* lends itself to a better constitutional analysis. This interpretation of *Ciraolo* is also in alignment with past Supreme Court rulings regarding other technological advancements.¹⁶⁶

Additionally, the same results are produced regardless of whether the trespass or privacy theory is applied to video surveillance. Prior to its decision in *Katz*, the Supreme Court analyzed Fourth Amendment issues solely under the trespass theory.¹⁶⁷ The trespass theory examines "the presence or absence of a physical intrusion into any given enclosure."¹⁶⁸ For example, it is permissible for the government to place a listening device that would allow audio surveillance of a suspect, as long as the government did not physically intrude on the suspect's apartment, under the trespass theory.¹⁶⁹ There is no problem for law enforcement if there is no trespass.¹⁷⁰ This reasoning is akin to the false friend concept – where someone that you know and trust, unbeknownst to you, is cooperating with the government or is wired in some way.¹⁷¹ The Supreme Court has held that information revealed from a false friend relationship is consensual, and thus non-trespassory.¹⁷²

As technology advanced, it became less necessary for law enforcement to physically intrude with regard to investigative techniques. The trespass theory, coupled with new technology, no longer supported the Founding Fathers' visions. Due to underlying discomfort with the trespass theory, the Supreme Court adopted the privacy theory in *Katz*. The privacy theory encompasses the two-part *Katz* test, with the underlying theory being that "the Fourth Amendment protects *people* not places."¹⁷³ Even under *Katz*, the "false friend" relationship is still permissible. There is no distinction between a "tattletale" and a "transistor," and it is not reasonable to expect privacy when you voluntarily tell a third party.¹⁷⁴

Technology continued to advance in a post 9/11 reality, which have impacted an individual's "reasonable expectation of privacy." The

¹⁶⁶ See *supra*, Point II.

¹⁶⁷ *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹⁶⁸ *Id.*; *Silverman v. United States*, 365 U.S. 505, 511 (1961).

¹⁶⁹ *Katz*, 389 U.S. at 351.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *United States v. White*, 401 U.S. 745 (1971).

¹⁷³ *Katz*, 389 U.S. at 351 (emphasis added).

¹⁷⁴ *Id.*; *White*, 401 U.S. 745 (1971).

privacy theory remained the prevailing standard until *United States v. Jones*.¹⁷⁵ For the first time since 1967, the trespass theory prevailed.¹⁷⁶ Justice Scalia proposed the trespass theory as an alternative theory, instead of a replacement for the privacy theory, with the belief that it would breathe life back into the Fourth Amendment.¹⁷⁷

In the following year in *Florida v. Jardines*, Justice Scalia cemented his support of the trespass theory, where he reiterated that society expects visitors to come up to your door as part of implied license.¹⁷⁸ Importantly, what the police officer did in *Jardines* exceeded the scope of that license because he was accompanied with a drug sniffing dog to investigate an unverified anonymous tip.¹⁷⁹ The fact that trespass has returned in recent years does not eradicate the privacy theory. *California v. Ciraolo* and *Florida v. Riley* are prime examples of this. Since trespass was not found in either case, aerial surveillance without a warrant was permissible under the Fourth Amendment.

Looking first to the privacy theory, courts must examine the two-part *Katz* test. The Supreme Court has emphasized that “people not places” are protected.¹⁸⁰ Thus, courts would not afford backyards such protections since a backyard is obviously not a person. The courts will need to determine the first prong on a case-by-case basis, depending on what an individual did to “shield” her backyard from passersby.¹⁸¹ Clearly, a six-foot outer fence and a ten-foot inner fence and a greenhouse were not enough to satisfy the *Katz* test.¹⁸² Consequently, a defendant would have to do something fairly extreme to assert that she manifested a subjective expectation of privacy. Significantly, the second prong of the *Katz* test will consistently fail with regard to video and pole camera surveillance. There can be no expectation of privacy found in an area that an individual voluntarily exposes to the public.

Looking next to the trespass theory, the answer is even clearer. Video surveillance does not constitute a physical intrusion upon an individual or her property. Law enforcement never physically intrudes upon a defendant’s property, but rather the video cameras are installed outside of the residence. The video cameras only provide police with a “better view.” It is well settled that the Fourth Amendment does not

¹⁷⁵ *United States v. Jones*, 132 S.Ct. 945, 949 (2012).

¹⁷⁶ This was the only time in which the Supreme Court ever discussed the trespass theory since *Katz*.

¹⁷⁷ *United States v. Jones*, 132 S.Ct. 945, 949 (2012).

¹⁷⁸ *Florida v. Jardines*, 133 S.Ct. 1409 (2013).

¹⁷⁹ *Id.*

¹⁸⁰ *Katz*, 389 U.S. at 351.

¹⁸¹ *Id.*

¹⁸² *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1985).

prohibit law enforcement from “augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them.”¹⁸³ A video camera is arguably less intrusive than an airplane flying at an altitude of 1,000 feet or a helicopter flying at an altitude of 400 feet.¹⁸⁴ This is clearly distinguishable from attaching a GPS device to the undercarriage of a vehicle, where there is an actual invasion of the physicality of the vehicle.¹⁸⁵ Thus, video surveillance is permissible under both the trespass and privacy theory approaches.

B. The Federal Wiretap Act (“Title III”) Must be Amended to Encompass Video Surveillance

For consistency in case law and to produce guidelines for law enforcement to abide by, the legislature should amend Title III to specifically encompass video surveillance. Presently, Title III only governs wire, oral, and electronic surveillance methods.¹⁸⁶ Title III is silent as to video surveillance, and thus inapplicable. While the majority of the circuit courts have already adopted some of the requirements of Title III into case law, it is not enough.

The legislature should amend Title III to include video surveillance, so that the Title III analysis and Fourth Amendment analysis can be conflated into one category. The analysis should not automatically be void and go directly to the Fourth Amendment analysis. Currently, the circuit courts agree that while Title III is inapplicable to silent video camera surveillance, some of the guidelines under Title III apply to the Fourth Amendment analysis of such surveillance.¹⁸⁷ Specifically, the circuits seem to agree that the certain requirements of Title III should apply. First, the judge issuing the warrant is required to find that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.”¹⁸⁸ Next, the warrant must contain “a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates.”¹⁸⁹ The warrant also must not permit the period of surveillance to be “longer than is necessary to achieve the objective of the authorization, or in any event longer than thirty days.”¹⁹⁰ However, extensions for a

¹⁸³ United States v. Knotts, 460 U.S. 276, 282 (1983).

¹⁸⁴ Florida v. Riley, 488 U.S. 445 (1989); Ciraolo, 476 U.S. 207 (1985).

¹⁸⁵ United States v. Jones, 132 S.Ct. 945, 949 (2012).

¹⁸⁶ 18 U.S.C. §2510 *et seq.*

¹⁸⁷ United States v. Falls, 34 F.3d 674 (8th Cir. 1994); United States v. Koyomejian, 970 F.2d 536 (9th Cir. 1992) (en banc).

¹⁸⁸ 18 U.S.C. § 2518(3)(c).

¹⁸⁹ 18 U.S.C. § 2518(4)(c).

¹⁹⁰ 18 U.S.C. § 2518(5).

longer period of surveillance may be permitted under certain circumstances.¹⁹¹ Finally, the warrant must require that the surveillance “be conducted in such a way as to minimize the interception of communications not otherwise subject to interception” under Title III.¹⁹²

Specific guidelines would also minimize challenges made by defendants. Since Title III does not currently address video surveillance, there is room for interpretation. If video surveillance is explicitly mentioned within Title III, courts will easily be able to apply the analysis that they have essentially been construing to be applicable regardless. Even if Title III is not amended, case law clearly suggests that analysis under the Fourth Amendment will produce a nearly identical inquiry.

C. Future Concerns with New Surveillance Methods and Other Technological Advancements

Various methods of surveillance have undergone dramatic technological advancements and these methods will continue to develop in the future. In particular, drones are quickly emerging as a new surveillance technology. A drone, also known as an unmanned aerial system (“UAS”), is an unmanned aircraft with “all of the associated support equipment, control station, data links, telemetry, and communications and navigation equipment” necessary to operate the unmanned aircraft.¹⁹³ The unmanned aircraft is the flying portion of the system, flown by a pilot via a ground control system or by an on-board computer.¹⁹⁴ A UAS can range from as large as a Boeing 737 to as small as a radio-controlled model airplane.¹⁹⁵

By virtue of its definition, a drone is an extension of aerial surveillance conducted by large airplanes. The view from a drone is similar to that of an airplane overhead or arguably, the view from a pole camera. Drones are certainly an example of when the courts will need to set certain parameters for permissible use by law enforcement.

Legislation regarding drone usage by law enforcement has been limited on the federal level. Currently, there is a ban on commercial drone flights.¹⁹⁶ But certain public entities such as publically funded universities, law enforcement agencies, fire departments, and other

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Unmanned Aircraft Systems (UAS) Frequently Asked Questions*, FED. AVIATION ADMIN., <https://www.faa.gov/uas/faq/> (last modified July 24, 2015).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Public Entities, KNOW BEFORE YOU FLY*, <http://www.knowbeforeyoufly.org/for-public-entities/> (last visited Oct. 25, 2015).

government agencies, can apply to the Federal Aviation Administration (“FAA”) for a Certificate of Waiver or Authorization (“COA”) to utilize drones in public aircraft operations.¹⁹⁷ Public aircraft operations are permitted only for a government function.¹⁹⁸ COAs are issued for a specific timespan, which is typically two years, and include special provisions that are individualized to each proposal, such as the defined block of airspace and the time of day that the drone can be used.¹⁹⁹ While the average COA processing time is usually less than sixty days, expedited authorization is available in emergency and life-threatening situations.²⁰⁰

As drones continue to increase in popularity, they will undoubtedly become more prominent for use by law enforcement. Drones provide not only “real time situational awareness” but also help to increase officer safety.²⁰¹ Certain law enforcement agencies already utilize drones for uses that include, but are not limited to, tactical operations, fire investigations and assessments, criminal pursuits, forensics, accident investigations, crime scene investigations, gathering evidence, searches and rescues, narcotics investigations, and suspect and vehicle tracking.²⁰²

Due to the lack of clear regulations regarding drone usage, law enforcement agencies have little to no guidelines to follow. Since drones are akin to pole cameras and aerial surveillance methods, the same Fourth Amendment analysis should be followed. Therefore, it is essential to have a consistent and clear Fourth Amendment analysis for law enforcement to abide by.

V. CONCLUSION

While the text of the Fourth Amendment has remained the same, technologies continue to advance beyond the anticipated parameters of the original text. Although video surveillance does not typically present constitutional or statutory problems in most scenarios, it is essential to address the areas that clearly are not attached to a reasonable expectation of privacy. Notably, pole cameras do not allow law enforcement to observe anything more than a utility worker would observe if he was performing job-related duties atop a pole.²⁰³ This is significant because,

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ 5 *UAV Technologies for Police*, POLICEONE (Apr. 10, 2014), <http://www.policeone.com/police-products/investigation/video-surveillance/articles/7067279-5-UAV-technologies-for-police/>.

²⁰² *Remote Aerial Platform Tactical Reconnaissance Police UAV Drones*, POLICE UAV DRONES <http://www.policeuavdrones.com/> (last revised Sep. 30, 2015).

²⁰³ Clark, *supra*, note 7, at 23.

if a reasonable expectation of privacy does not exist, the Fourth Amendment does not apply.²⁰⁴

While the Supreme Court has not been completely silent as to the general topic of video surveillance, it needs to provide a clear framework that can be applied to emerging technologies and new methods of surveillance, while simultaneously complying with the Fourth Amendment. As such, the Court must adopt the broad interpretation of *Ciraolo*. This interpretation lends itself to comports with the analysis of similar technological advancements and produces the same result under both trespass and privacy theories.

Additionally, even though Title III provides the statutory framework that governs real-time electronic surveillance, it is currently inapplicable to video surveillance. Accordingly, Title III must be amended by the legislature to include video surveillance. Such an amendment would allow for consistency throughout the federal circuit courts. But even if the legislature does not amend Title III, case law clearly suggests that Fourth Amendment analysis should be applied regardless, producing the same result as if Title III was amended.

²⁰⁴ *Id.*