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NOT IN MY BACKYARD: *STATE V. QUIDAY* AND WARRANTLESS AERIAL POLICE SURVEILLANCE

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WHEN IS A SEARCH A "SEARCH"? The United States Supreme Court established a general answer to this question in the seminal Fourth Amendment case *Katz v. United States*.[1] Justice Harlan's concurring opinion in *Katz* held that in most situations, police intrusion becomes a search when it invades a person's "reasonable expectation of privacy."[2] Justice Harlan's analysis was later adopted by a majority of the Court in *California v. Ciraolo*.[3] This formula was open to much interpretation, and later courts bore the burden of applying it to a myriad of situations—including the unique air law issue of aerial police surveillance of individuals' homes and "curtilage," or the area immediately surrounding the home.[4] Current Supreme Court precedent holds that warrantless aerial police surveillance of a person's fenced backyard and curtilage is generally permissible so long as the police officers are legally in the airspace and aircraft are not exceptionally rare in the area.[5] This may come as a surprise to many homeowners around the country, who presumably believe they manifest a clear expectation of privacy in their backyards by erecting fences—structures intended to exclude wandering eyes. The Supreme Court of Hawai'i recently considered the concerns of such homeowners when it correctly ruled that warrantless aerial police surveillance of backyards and curti-

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1 389 U.S. 347 (1967).

2 Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

3 *See* 476 U.S. 207, 211 (1986).

4 *Id.* at 221.

5 *See* Florida v. Riley, 488 U.S. 445, 452 (1989); *Ciraolo*, 476 U.S. at 213–14.

lage is impermissible under the Hawai'ian state constitution.[6] The Hawai'ian high court interpreted the state constitution using the same reasonable expectation of privacy test employed by the U.S. Supreme Court in construing the Federal Constitution.[7] The U.S. Supreme Court should reverse course on this important and timely air law issue and follow *Quiday*'s reasoning; the Supreme Court's recent Fourth Amendment jurisprudence suggests that it may be willing to do so.

In *Quiday*, the Hawai'i Supreme Court correctly held that targeted aerial surveillance of an individual's home and curtilage is a search under the Hawai'ian constitution and therefore presumptively unreasonable without a warrant.[8] Importantly, the *Quiday* court employed Justice Harlan's *Katz* test—the same test used by the U.S. Supreme Court to analyze Fourth Amendment search cases.[9] The Hawai'i court utilized its power as the ultimate interpreter of its state constitution to provide "broader privacy protection than that given by the federal constitution" and in doing so substituted a sensible, liberty-oriented application of the test for the overly-technical analysis of current U.S. Supreme Court jurisprudence on this issue.[10]

I. FACTUAL BACKGROUND

Quiday, the defendant in the Hawai'ian case, resided in Waipahu, Hawai'i, when a Honolulu Police Department (HPD) officer received a complaint in October 2012 that there were marijuana plants growing in the backyard of Quiday's home.[11] In response, the officer performed aerial surveillance by helicopter and observed plants in the backyard that looked like marijuana and were not contained in a structure or otherwise covered.[12] The officer subsequently visited the home on foot and was unable to observe any of these plants from the street, so he conducted two more aerial surveillance trips, seeing the same plants each time.[13] During the surveillance, the officer's helicopter hovered above the defendant's home at about 420 feet.[14]

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[6] *See* State v. Quiday, 405 P.3d 552, 562 (Haw. 2017).
[7] *Id.* at 558.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 556 (quoting State v. Detroy, 72 P.3d 485, 494 (Haw. 2003)).
[11] *Id.* at 554.
[12] *Id.*
[13] *Id.*
[14] *Id.*

Based largely on information gleaned from this warrantless aerial surveillance, the HPD obtained a search warrant, and Quiday was ultimately arrested after a search uncovered marijuana plants and other drug paraphernalia.[15]

II. PROCEDURAL HISTORY

Quiday moved to suppress the evidence found as a result of the officer's warrantless aerial surveillance, but the trial court denied the motion.[16] Quiday then successfully filed an interlocutory appeal, and the case came before the Intermediate Court of Appeals of Hawai'i (ICA). The ICA overturned the trial court and granted the motion because the surveillance constituted a search under the Hawai'ian constitution, even if it did not constitute a search under the Federal Constitution.[17] The ICA emphasized that the officer's aerial surveillance was "targeted" and intruded on the curtilage of Quiday's home.[18] Specifically, the ICA held the trial court erred in its conclusion that Quiday had no reasonable expectation of privacy in relation to the type of aerial surveillance performed.[19]

On appeal, the Hawai'i Supreme Court affirmed the ICA's ruling.[20] The court rejected the ICA's suggestion that a multifactor test was necessary to determine whether aerial surveillance of a person's home and curtilage was a search, opting instead to simply ask the two questions posed by Justice Harlan in his *Katz* concurrence: (1) did the individual exhibit an "actual, subjective expectation of privacy"; and (2) is that expectation one that "society would recognize as objectively reasonable"?[21] Because Quiday placed his plants out of the view of the ground-level public, and people generally do not expect to be subject to "intensive spying by police officers" from above, the court found both of these questions were answered in the affirmative.[22] Furthermore, the court rejected the argument that warrantless aerial surveillance is not a search because any member of the public could make similar observations when flying over an indi-

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[15] *Id.* at 554–55.
[16] *Id.* at 555.
[17] *Id.* at 556–57.
[18] *Id.* at 557.
[19] *Id.*
[20] *Id.* at 562.
[21] *Id.* at 558.
[22] *Id.* at 562.

vidual's property.[23] The court distinguished targeted reconnaissance "with the purpose of detecting criminal activity" from happenstance or inadvertent observation.[24] Aligning itself with the reasoning of a similarly-decided California case, the *Quiday* court held such "purposeful police surveillance" of an individual's home violates its state's citizens' reasonable expectations of privacy and is thus unconstitutional, at least at the state level.[25]

The Hawai'i Supreme Court considered the constitutionality of warrantless aerial surveillance twice before its decision in *Quiday*.[26] In one case, the court considered the legality of aerial surveillance of a marijuana patch located behind a rural house.[27] In the other, it considered whether officers could aerially surveil a couple's greenhouse, which was located forty-five feet away from the couple's house.[28] In both cases, the court held the warrantless aerial surveillance was permissible;[29] however, the *Quiday* court quickly distinguished both of those cases, explaining that neither case concerned surveillance of a home or curtilage, and the defendants "did not shield the observed premises from the public eye . . . by any type of fencing or other barrier."[30] Therefore, the court treated the curtilage-related issue in *Quiday* as a matter of first impression.[31]

III. *QUIDAY*'S PLACE IN WIDER AERIAL SURVEILLANCE JURISPRUDENCE

While *Quiday* only interpreted the search and seizure protection in the Hawai'ian constitution, the court's reasoning was a direct departure from current U.S. Supreme Court analysis of the Federal Constitution, which generally permits warrantless aerial police surveillance of homes and curtilage so long as it is done from publicly navigable airspace and there is no significant physical intrusion or disruption of the property.[32] This general rule applies to warrantless aerial surveillance of commercial

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[23] *Id.*

[24] *Id.*

[25] *Id.* at 561 (quoting People v. Cook, 710 P.2d 299, 305 (Cal. 1985)).

[26] *Id.* at 556–57.

[27] State v. Stachler, 570 P.2d 1323, 1325 (Haw. 1977).

[28] State v. Knight, 621 P.2d 370, 372 (Haw. 1980).

[29] *See id.* at 373; *Stachler*, 570 P.2d at 1328–29.

[30] *Quiday*, 405 P.3d at 559–60.

[31] *Id.* at 560.

[32] *See* Florida v. Riley, 488 U.S. 445, 451–52 (1989); California v. Ciraolo, 476 U.S. 207, 213–15 (1986).

properties as well.[33] The *Quiday* court's holding echoed Justice Powell's dissent in *California v. Ciraolo*, which argued that allowing warrantless aerial surveillance of people's homes and curtilage misconstrues Justice Harlan's reasonable expectation of privacy test.[34] While the *Quiday* court did not explicitly cite Justice Powell's dissent in its reasoning, it clearly shared his opinion that the *Ciraolo* majority (and by extension, the *Riley* and *Dow Chemical* majorities) misapplied Justice Harlan's *Katz* test when it used public capability to aerially surveil as a justification for allowing law enforcement officers to do so without a warrant.[35]

Recent Supreme Court jurisprudence demonstrates that the Court is willing to adapt existing Fourth Amendment rules in response to changing times.[36] In *United States v. Jones*,[37] three Justices joined Justice Alito's concurrence, which emphasized that the nature of modern technological investigative techniques could violate the Fourth Amendment in some situations.[38] Justice Sotomayor did not join Justice Alito's concurrence and instead wrote separately.[39] She did, however, agree with Justice Alito's concerns about technology and long-term monitoring, demonstrating that a majority of the Court deemed these concerns to be significant.[40] In *Riley v. California*,[41] the Supreme Court removed cell phones from the search-incident-to-arrest exception to the warrant requirement largely because phones constitute "technology nearly inconceivable just a few decades ago[.]"[42] Most recently, the Court held that warrantless police review of a phone's cell-site location data invades a phone owner's reasonable expectation of privacy, in part because the

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[33] *See* Dow Chemical Co. v. United States, 476 U.S. 227, 239 (1986).

[34] *See Quiday*, 405 P.3d at 562; *Ciraolo*, 476 U.S. at 216 (Powell, J., dissenting).

[35] *See Quiday*, 405 P.3d at 562.

[36] Of note, even as early as the *Katz* case, the Supreme Court held that the trespass doctrine was "no longer [ ] controlling" in the face of technological developments. Katz v. United States, 389 U.S. 347, 353 (1967). This opened the door for the Court to consider how new technology may impact the expectation of privacy and how law enforcement may use technology to do their jobs, especially when using it to surveil individuals.

[37] 565 U.S. 400 (2012).

[38] *Id.* at 419 (Alito, J., concurring).

[39] *Id.* at 414–15 (Sotomayor, J., concurring).

[40] *Id.*

[41] 573 U.S. 373 (2014).

[42] *Id.* at 385.

location data "provides an intimate window into a person's life."[43]

IV. ANALYSIS

Viewed on its own and in light of recent U.S. Supreme Court Fourth Amendment jurisprudence, the Hawai'i court's holding in *Quiday* offers both a compelling counterpoint to the Supreme Court's decades-old precedent on warrantless aerial police surveillance and a potential blueprint for change. The Hawai'i Supreme Court correctly decided *Quiday* for three main reasons: (1) people manifest a subjective and reasonable expectation of privacy in activities they conduct in their fenced backyards; (2) the home and curtilage are generally provided greater privacy protection than other areas; and (3) requiring a warrant to conduct aerial surveillance of homes and curtilage is the best way forward in an age of rapid technological advancement.

The *Quiday* court correctly decided the case because it opted for a straightforward, commonsense reading of *Katz* and Justice Harlan's influential two-prong test to determine whether a search occurred. The test asks: (1) did the individual manifest a subjective expectation of privacy; and (2) was that expectation objectively reasonable?[44] The threshold question of whether Quiday manifested a subjective expectation of privacy in the curtilage of his home is easily answered because the curtilage enjoys special protection from government intrusion and is generally regarded as part of the home.[45] This general rule is acknowledged not only in *Quiday* but also in all three major U.S. Supreme Court cases that address warrantless aerial surveillance.[46] This protection reflects reality, especially when a homeowner erects a fence. There is arguably no purpose for a fence around a residential backyard besides preventing neighbors or passersby from peering into the yard—an area that the Court in *Dow Chemical* acknowledged may often be the site of "intimate activity . . . and the privacies of life."[47] The U.S. Supreme Court has

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[43] Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

[44] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[45] *See* State v. Quiday, 405 P.3d 552, 558 (Haw. 2017).

[46] *See, e.g.*, Florida v. Riley, 488 U.S. 445, 696–97 (1989); California v. Ciraolo, 476 U.S. 207, 212–13 (1986); Dow Chemical Co. v. United States, 476 U.S. 227, 235 (1986).

[47] *Dow Chemical Co.*, 476 U.S. at 236.

recently emphasized that intimate, private activity is a quintessential candidate for Fourth Amendment protection.[48]

Where *Quiday* properly departs from U.S. Supreme Court analysis is in its answer to Justice Harlan's second inquiry: whether the person's expectation of privacy is objectively reasonable. The Hawai'i Supreme Court correctly answered "yes" to this question because it focused not on an overly technical analysis of what the public could theoretically do but instead on the reasonable expectation of the person searched—a focus that Justice Harlan's *Katz* test requires. After all, as the *Katz* Court pointed out, the intent behind proscribing unreasonable searches is to "protect[ ] people, not places[.]"[49] The Hawai'i high court put this axiom into practice by acknowledging that when a person encloses his backyard with a fence, he does not do so with the expectation that the government can nevertheless aerially surveil his yard to uncover potentially criminal activity.[50] In holding otherwise, the U.S. Supreme Court placed great emphasis on the notion that any passenger on a commercial flight could peer down and observe the goings-on in a person's backyard.[51] This reasoning defies reality; commercial flights gain altitude very quickly, and a passenger's window-gazing during takeoff or landing is simply not equivalent to a police officer hovering above a home at 420 feet or conducting a flyover at 1,000 feet. *Quiday*'s rejection of this argument is wise and reflects a commonsense and realistic application of Justice Harlan's *Katz* test.

Furthermore, even if public capability to observe a person's backyard weighs in favor of allowing warrantless aerial surveillance, *Quiday* was still correctly decided because the home and curtilage are rightfully provided special privacy protection. The Hawai'i Supreme Court correctly framed the question before it not as whether any person may legally look in another's backyard, but rather as whether law enforcement officers may conduct targeted surveillance of a person's backyard in order to obtain investigative information.[52] The U.S. Supreme Court ignores the difference between these two questions in its warrantless aerial surveillance cases but highlights law enforcement

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[48] *See Carpenter*, 138 S. Ct. at 2217–18; United States v. Jones, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring).

[49] *Katz*, 389 U.S. at 351.

[50] *See Quiday*, 405 P.3d at 562.

[51] *See Ciraolo*, 476 U.S. at 213–14.

[52] *See Quiday*, 405 P.3d at 562.

intent in other Fourth Amendment cases. For example, in *Jones*, Justice Scalia began his opinion by stating: "It is important to be clear about what occurred in this case: The Government physically occupied private property *for the purpose of obtaining information*."[53] Justice Alito's concurrence in that case reasons that, under *Katz*, warrantless "long-term monitoring" of a suspect may violate the Fourth Amendment even when law enforcement uses means permissible in the short term, highlighting that the nature and intent of law enforcement behavior is an important factor to consider.[54]

The *Quiday* court recognized that, even if there is no physical intrusion or actual trespass onto an individual's property, warrantless aerial surveillance of a protected area, like the curtilage, for the purpose of obtaining information is unreasonable.[55] In the very case that birthed the reasonable expectation of privacy test employed by *Quiday*, the U.S. Supreme Court stated that "the reach of [the Fourth Amendment] cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[56] Thus, the publicly-navigable airspace argument advanced by the U.S. Supreme Court in allowing warrantless aerial surveillance of curtilage—a protected area—is unpersuasive; the only real question is whether homeowners have a reasonable expectation of privacy from such surveillance. As discussed above and as *Quiday* correctly holds, they clearly do.

While the Hawai'i Supreme Court did not consider in *Quiday* any surveillance technology other than the police helicopter used in that case, its holding represents the best way forward in an age of rapid technological change. The introduction of drone surveillance as a possible law enforcement technique challenges the basis of U.S. Supreme Court precedent allowing warrantless aerial surveillance.[57] *Ciraolo* and *Riley* rest on two major assumptions about aerial police surveillance, namely that: (1) it consists of "simple visual observations" by a human being; and (2) it necessarily must be performed from a high altitude and thus does not technically intrude into a person's home or

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[53] *Jones*, 565 U.S. at 404 (emphasis added).

[54] *Id.* at 429–30 (Alito, J., concurring).

[55] *Quiday*, 405 P.3d at 562.

[56] Katz v. United States, 389 U.S. 347, 353 (1967).

[57] *See* Dr. Saby Ghoshray, *Domestic Surveillance via Drones: Looking Through the Lens of the Fourth Amendment*, 33 N. ILL. U. L. REV. 579, 593–94 (2013).

curtilage.[58] Drone capabilities undermine both of these assumptions. Many drones feature innovative cameras and zoom lenses, the type of "highly sophisticated surveillance equipment" that Justice Burger suggested may give rise to a warrant requirement in *Dow Chemical*.[59]

Quiday's bright line rule, though established in response to surveillance by helicopter, prevents law enforcement from using drones and other aerial surveillance technology to invade the curtilage of homes. In recent cases, the U.S. Supreme Court acknowledged that modern technology presents a unique threat to privacy and took steps to mitigate its impact.[60] In *Carpenter*, the Court instituted a warrant requirement for police to access cellular location data, in part, because such data could reveal, to a greater extent than human observation, a person's "familial, political, professional, religious, and sexual associations."[61] If this can be said about geographical data extracted from a person's cell phone, surely it can be said about aerial surveillance of a person's backyard, an area in which those associations often actually take place.

V. CONCLUSION

The Hawai'i Supreme Court's holding in *State v. Quiday* is a simple, commonsense application of Justice Harlan's "reasonable expectation of privacy" test and rightly protects individuals' homes and curtilage from warrantless aerial police surveillance. *Quiday* correctly places considerable weight on people's privacy interests rather than engaging in a law enforcement-friendly analysis that strains the meaning of previous Fourth Amendment case law. The correct focus of the Fourth Amendment is on protecting people, and people clearly expect that activities in their fenced backyards will be free from targeted surveillance. Hawai'i's high court recognized this expectation and, in doing so, ensured that their state constitution did what it was designed to do: protect the rights of Hawai'i's citizens. Given the U.S. Supreme Court's recent willingness to alter existing Fourth Amendment doctrines, *Quiday* may serve as persuasive authority

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[58] *See* Florida v. Riley, 488 U.S. 445, 452 (1989); California v. Ciraolo, 476 U.S. 207, 214–15 (1986).

[59] Dow Chemical Co. v. United States, 476 U.S. 227, 238 (1986).

[60] *See* Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018); Riley v. California, 573 U.S. 373, 403 (2014).

[61] *Carpenter*, 138 S. Ct. at 2217 (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

if the question of warrantless aerial surveillance comes before the Court again. If it does, the Supreme Court would be wise to adopt *Quiday*'s reasoning, as it represents not only a correct reading of Justice Harlan's long-standing *Katz* test but also a logical response to new surveillance technologies and their effect on air law.