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Thermal Imaging and the ‘Fourth’

The Fourth Amendment of the U.S. Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”

Thermal imaging technology is often used by law enforcement to discover “hot spots,” or the heat created from the fluorescent lamps used to cultivate marijuana indoors. In these cases the results of the thermal scan help establish probable cause for a warrant to search the premises. However, defendants often move to suppress the seized evidence, claiming thermal images were obtained in violation of their Fourth Amendment rights.

A number of U.S. Courts of Appeals, including the 5th, 7th, 8th, 9th, and 11th Circuits, have held that use of a thermal imaging device on the exterior of a residence and outside the curtilage [the enclosed land surrounding a house or dwelling] does not amount to a search of that property. To date, the U.S. Supreme Court has not ruled on whether the use of thermal imaging scans on a residence constitutes a search, but it has recently granted review in the 9th Circuit case, *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999). Briefing is underway, and the case should be decided by July 2001.

In the lower courts, the majority rationale is that a thermal imaging scan is not a search, either because the defendants do not possess a reasonable expectation of privacy in the heat escaping from their homes or the scans do not reveal the interior, or “intimate details,” of the defendant’s private life. However, the case law has caused some confusion over which legal reasoning to apply.

Following are summaries of several key cases that held the use of thermal imaging devices by law enforcement to be constitutional and not a search within the meaning of the Fourth Amendment.

United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994): The 8th Circuit held that the police did not violate the Fourth Amendment when they used thermal imaging technology to detect marijuana cultivation without a search warrant. The 8th Circuit applied the “reasonable expectation of privacy test,” concluding that even if a

defendant had an actual or subjective expectation of privacy, society would not recognize it as reasonable. In addition, the court held that the thermal image scan did not reveal any of the intimate details of the home.

United States v. Kyllo, 194 F.3d 1041 (9th Cir. 1999), cert. granted, 2000 WL 267066 (Sept. 26, 2000): [Note that the court withdrew an earlier opinion that held a Fourth Amendment violation existed; see *Kyllo*, 184 F.3d 1059 (9th Cir. 1998).] This particular case is well known and often cited by other courts for its discussion on the general theory of and uses for thermal imaging technology. In *Kyllo*, the 9th Circuit agreed with four other circuit courts and held that the use of a thermal imager to examine the exterior of a residence for evidence of an indoor marijuana grow did not violate the defendant’s Fourth Amendment rights.

After careful consideration of the facts, the court, citing *Dow Chemical Co. v. United States*, 476 U.S. 227, 238-39 (1986), found that the use of thermal imagery in *Kyllo* did not reveal intimate details of the residence’s interior such that it would raise Fourth Amendment concerns. However, the court made a clear warning that thermal image technology might become so advanced in the future that its use might be considered a search.

United States v. Depew, 210 F.3d 1061 (9th Cir. 2000): The defendant, Depew, appealed a lower court decision that held that the use of thermal imaging technology by police did not violate his Fourth Amendment right to expectation of privacy and thus did not require a search warrant for its use.

In *Depew*, the court ruled that police use of the thermal imager showed a large amount of heat escaping from the chimney and vents of Depew’s house. Even though the thermal imager picked up the exterior wall studs and cross beams, it did not reveal interior details of the home, such as interior walls, doors, personal activities, or objects. Thus, the court upheld the lower court’s decision that the content of the thermal imager’s scan did not in itself violate the defendant’s Fourth Amendment right because it did not reveal interior details of the defendant’s home.

However, the case was remanded in part to determine the factual dispute as to whether the agents were within the constitutionally protected curtilage of the defendant's house when they used the thermal imager. If the officers were found to be within the curtilage, then evidence of the scan may not be considered in the determination of probable cause for the warrant. It was also determined that the lower court did not abuse its discretion for not authorizing an expert witness to testify at government expense on the capabilities of the thermal imager.

United States v. Myers, 46 F.3d 668 (7th Cir. 1995): The 7th Circuit similarly held that police use of a thermal imager on the defendant's residence did not constitute a search for purposes of the Fourth Amendment. The court held that society would not recognize the defendant's expectation of privacy as reasonable. The court found that the defendant's privacy interests in the home were not threatened or damaged by the employment of a thermal imager.

United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995): The 5th Circuit determined that the crucial inquiry in search and seizure cases was whether the technology revealed "intimate details." This court found that warrantless use of a thermal imager did not violate the Fourth Amendment because it detected only heat. Intimate details were not ascertainable within the structure. This court similarly warned that as technology becomes more advanced, there will be a greater likelihood that its use will constitute a search in violation of the Fourth Amendment.

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Many courts remain undecided or have concluded that a thermal image scan is a search and requires a warrant to be performed legally. Some courts have stated their belief that as the technology becomes more advanced, it could allow law enforcement to reveal intimate detail. See *Commonwealth v. Gindlesperger*, 743 A.2d 898 (Pa. 1999), in which the Pennsylvania Supreme Court held that warrantless use of the thermal imaging device constituted a search. Also see *State v. Young*, 867 P.2d 593 (Wash. 1994).

Pending a decision from the U.S. Supreme Court, the safer course would be to obtain a warrant based on an affidavit that contains sufficient evidence to establish probable cause without the thermal imaging evidence. The thermal imaging information can be included in the warrant affidavit, but the United States would then be in a position to argue that the thermal imaging evidence, if eventually held to be the product of an illegal search, was not necessary to a determination of probable cause.



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